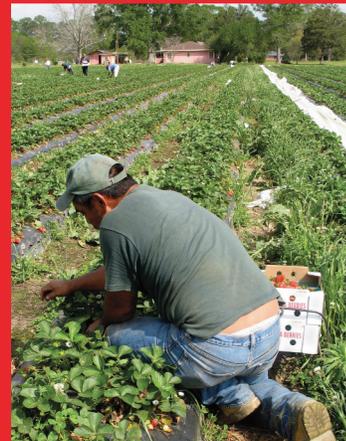


Vulnerable Workers and Precarious Work

FINAL REPORT

December 2012



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



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Vulnerable Workers and Precarious Work

FINAL REPORT
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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides support to the LCO. It is located in the Ignat Kaneff School Building, home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

LAW COMMISSION OF ONTARIO FINAL REPORTS

A Framework for the Law as It Affects Persons with Disabilities (September 2012)
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Joint and Several Liability under the Ontario *Business Corporations Act* (February 2011)
Division of Pensions upon Marriage Breakdown (December 2008)
Fees for Cashing Government Cheques (November 2008)

DISCLAIMER

The opinions or points of view expressed in our research, findings and recommendations do not necessarily represent the views of our funders, supporters, Project Advisory Group or contributors.

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FOREWORD

The Law Commission of Ontario is pleased to release this *Final Report on Vulnerable Workers and Precarious Work*.

This project had its genesis in several proposals for Law Commission projects, including those made at the Creative Symposium in November 2006 (which led to the creation of the Law Commission) as well as suggestions from the Labour and Feminist Legal Analysis Section of the Ontario Bar Association and, particularly from issues raised at the Racialization of Poverty Conference held in April 2008. The LCO's Board of Governors approved the Project in June 2008.

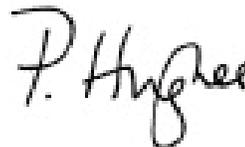
The Final Report is intended to focus on the challenges of insecure, low wage employment facing an increasing number of Ontarians resulting from economic, technological and global influences. We have highlighted major reports and research on the issues and presented 47 Recommendations for change, with a particular emphasis on the *Employment Standards Act* and the *Occupational Health and Safety Act*, along with related legislation, regulations, policies, processes, training and education. While the *Report* pays particular attention to the disproportionate numbers of women, racialized persons and immigrants undertaking precarious work, the Recommendations, if implemented, would benefit all workers in precarious jobs.

This *Report* has been distributed to relevant government ministries and to organizations and individuals with an interest in the issues. The LCO is pleased to contribute this *Report* to the ongoing body of work on the most effective ways to respond to the needs of vulnerable workers.

The Board of Governors approved this *Final Report* in December 2012. The Board's approval reflects its members' collective responsibility to manage and conduct the affairs of the Law Commission, and should not be considered an endorsement by individual members or by the organizations to which they belong or which they represent.



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Patricia Hughes, Executive Director

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The Law Commission of Ontario would like to extend its thanks to the numerous organizations and individuals who shaped this project through their involvement by way of consultations, submissions and feedback. A full list of contributing organizations and experts can be found in Appendix B.

The Law Commission of Ontario would also like to gratefully acknowledge Andrea Strom, Director, Miranda Gass-Donnelly, Crown Counsel, and the Ministry of the Attorney General for co-ordinating the invaluable government feedback we received to draft versions of this Report across multiple ministries.

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EXECUTIVE SUMMARY

I. Introduction

The nature of employment is evolving and the standard employment relationship based on full-time, continuous employment, where the worker has access to good wages and benefits, is no longer the predominant form of employment, to the extent it ever was. Today more work is precarious, with less job security, few if any benefits and minimal control over working conditions. Precarious work may be contract, part-time, self-employment or temporary work. While this change has affected all groups of workers, women, racialized persons and recent immigrants are more likely to be “vulnerable workers” engaged in precarious work. The LCO’s Vulnerable Workers/Precarious Work Project assesses the protections available to these workers in Ontario and coverage of this type of work under provincial legislation designed to protect workers, such as the *Employment Standards Act* and the *Occupational Health and Safety Act*.

II. Identifying Vulnerable Workers And Precarious Work

Factors such as increased reliance by employers on contract workers, the decline of the manufacturing industry, the information revolution, dramatic technological advances and the demand for higher educational levels have all played a part in the increased precariousness of work.

Precarious work is characterized by job instability, lack of benefits, low wages and degree of control over the process. It may also involve greater potential for injury. This Chapter provides more detailed information about the kinds of precarious work being considered in this Project, including the forms this work takes and the types of work that can often be described as precarious; examples can include, temporary agency work, self-employment, part-time, casual or temporary migrant work.

It is important to appreciate that “vulnerability” refers not to the workers themselves, but to the situation facing them because they are engaged in precarious work and because of other disadvantages related to gender, immigration, racial status and other characteristics. The increased movement of “guest workers” from other countries, a global phenomenon, is a factor in increasing the part vulnerable workers play in the economy. The Chapter explains why women and single parents, racialized persons, newcomers and established immigrants, temporary migrant workers, persons with disabilities, youth, Aboriginal persons and non-status workers may all be more likely than others to hold precarious positions.

Precarious work has an impact on areas of vulnerable workers’ lives other than employment itself. This work leads to a greater risk of injury and illness, stress and challenges to accessing entitlements to health care. It may affect family relationships and degree of community engagement. It may be difficult to find the time and energy to increase educational attainment or take training. Older persons who have undertaken this type of work all their lives will not have pensions and will not have been able to save. More generally, these workers and their families are likely to experience the intergenerational costs of poverty. Furthermore, it is not only vulnerable workers themselves and their families who are affected, but society at large.

The *Canadian Charter of Rights and Freedoms*, the *Ontario Human Rights Code*, domestic statutes and international law and policy initiatives are all relevant in considering precarious work.

III. Employment Standards Policy And Legislative Reform: The Employment Standards Act And Related Legislation

The *Employment Standards Act* (ESA) and related legislation, is the major statute affecting minimum standards in Ontario. The primary issues considered are enforcement of the ESA, policy considerations, establishing a broader floor of basic minimum rights and expanding knowledge of employee rights and employer obligations.

After reviewing reforms to the ESA, we recommend that *the Ontario government in consultation with stakeholders update, review and streamline the exemptions within the ESA and related regulations, including occupational specific exemptions and that the review develop and use principles with a view to ensuring that justifications for exemptions be balanced against the need to reduce precarious work and provide basic minimum standards to a broader sector of the working population.* (Recommendation 1)

We further recommend that *the ESA contain a broad policy statement relating to the commitment to basic minimum employment rights, supporting compliance and fostering public, employer and employee awareness and education.* (Recommendation 2)

Other recommendations include *a review of minimum wage issues, convening of the Committee to develop a process for reviewing minimum wage issues balancing the needs of business and employees, equal proportionate pay for part-time workers in equivalent positions, and an exploration of options for providing benefits for persons engaged in non-standard work.* (Recommendations 3, 4 and 5) We also recommended *a review of personal emergency leave provisions in the ESA with the objective of extending the benefits to workplaces with fewer than 50 employees.* (Recommendation 6)

We stress the importance of *ensuring that both workers and employers are aware of their rights and obligations* and make a recommendation regarding public education, outreach and the development of partnerships towards that goal. (Recommendation 7) This includes a recommendation that *employers provide the ESA information poster in handout format to all new employees (in the language of the employee, if possible) and provide all employees with written notice of their employment status and terms of their employment contract.* (Recommendations 8 and 9) Major concerns have been raised relating to enforcement of the ESA, including concerns with the existing primarily complaint-based and voluntary compliance model which, in our view, should place much greater emphasis on proactive enforcement and expanded investigations. We recommend *continuation of various methods of enforcement, with an increased emphasis on proactive enforcement and expanded investigations, particularly in high risk industries.* (Recommendations 10 and 16) One particular issue of the self-enforcement model that has been questioned is the requirement for employees to approach the employer to attempt resolution prior to making an ESA claim and the application of exemptions to the requirement; we recommend a *review of this policy and process to determine whether there are negative effects and, if so, whether the policy should be reversed. In any event, we recommend greater communication about available exemptions.* (Recommendations 11 and 12) We also recommend ways of *providing direct personal assistance to workers to assist them in the claims process.* (Recommendation 13) ESA compliance can be improved through indirect means: we support top-down mechanisms that encourage *companies to take a leadership role in addressing ESA compliance where subcontractors and temporary agency workers are associated with the company* (Recommendation 20) and we recommend the *creation of an Innovative Solutions for Precarious Work Advisory Council of relevant stakeholders to develop initiatives to improve compliance and the enforcement process.* (Recommendation 26)

Other recommendations in relation to enforcement include *providing for a discretionary time extension beyond the 6 month limit for making claims for wages under the ESA in special circumstances; an accessible third party complaints procedure with safeguards against unfounded complaints; and providing that employers in violation of the ESA be responsible for covering the costs of investigations and inspections.* We also recommend strengthening policy guidance to Employment Standards Officers for more deterrence against repeat violators and wilful non-compliance. (Recommendations 14, 15, 17 and 18)

We discuss work councils and recommend that the *Ministry of Labour explore the concept of utilizing the principles of work councils in non-unionized workplaces with high concentrations of vulnerable workers.* (Recommendation 19)

Temporary foreign workers in low skilled categories face many challenges, particularly, fear of repatriation. We recommend *changes that might help reduce the fear of repatriation or help workers in making claims such as additional education for migrant workers and employers, reprisal complaints hearings heard prior to repatriation, and an independent decision-making process for migrant workers prior to repatriation, as well as greater supports for migrant workers in making claims.* We also recommend *unions and community groups continue to develop and expand innovative services to support migrant workers to assert their legal rights.* (Recommendations 21, 22, 23 and 24)

Agricultural workers are exempted from the Ontario *Labour Relations Act* and their right to organize and make representations to their employer is covered instead by the *Agricultural Employees Protection Act, 2002* which has been held by the Supreme Court of Canada to be constitutional. In doing so, the Supreme Court read a requirement for bargaining in good faith into the statute and we recommend that *the Ontario government explicitly amend the AEPA by including the elements of bargaining in good faith identified by the Supreme Court of Canada.* (Recommendation 25)

Ontario has enacted the *Employment Protection for Foreign Nationals Act* but so far has applied it only to live-in caregivers, even though it contemplates coverage of other temporary foreign workers. We recommend it be extended to all temporary foreign workers. (Recommendation 27) We also recommend that *the Ontario government negotiate an information-sharing agreement with Human Resources and Skills Development Canada and Citizenship and Immigration Canada and co-ordinate with the federal government on worker protection policies with the goal of increasing protections for temporary foreign workers.* (Recommendation 28)

About 15 percent of Ontario's workforce is self-employed. This group includes both those who operate businesses and may employ others and those called "own-account self-employed workers" who may resemble employees more than self-employed entrepreneurs, for example. Women and members of visible minorities are more likely to be in the own-account category than in other forms of self-employment and part-time employment rates for own-account self-employed workers are high, particularly for women. Self-employed workers are not covered by the ESA and therefore the challenge is to determine whether a worker is self-employed or an employee. *We recommend that the Ministry of Labour undertake efforts (proactive enforcement, public education, policy development) to reduce misclassification and that the Ontario government consider extending some ESA protections to self-employed persons or identifying other forms of protection. We also recommend requiring employers or contractors to provide information about the status of their employment to workers and that standard forms be developed to support this process.* (Recommendations 29, 30 and 31)

IV. Health And Safety

In Chapter IV, we discuss the *Occupational Health and Safety Act (OHS Act)* and the *Workplace Safety and Insurance Act, 1997 (WSIA)* and their application to vulnerable workers. The OHS Act requires either the creation of a joint health and safety committee or the designation of an individual to address workplace safety concerns. We believe that it would be helpful if *enforcement of the OHS Act includes proactive inspections to ensure that the joint committees or individuals have been put in place.* (Recommendation 32) *We emphasize the importance of ensuring that stakeholder discussions between industry and government regarding health and safety include workers or their representatives.* (Recommendation 33)

We note that a number of the recommendations in the Dean Report resulting from the Advisory Panel on Occupational Health and Safety have been implemented or that implementation is underway. We build upon the work of the Dean Report in providing guidance for its implementation in ways that would provide the greatest benefit for vulnerable workers. While we agree with the intent of the Dean Report recommendation to increase proactive inspection and enforcement campaigns at workplaces and sectors where vulnerable workers are concentrated, we refine the recommendation to provide that *sectors where vulnerable workers are concentrated be identified as agriculture, hospitality and cleaning and that workplaces with temporary staffing agency workers and temporary foreign workers in all sectors be a priority for proactive OHS Act enforcement activities.* (Recommendation 34) To strengthen migrant workers' access to the expedited processes for OHS Act reprisal hearings, we recommend ensuring temporary foreign workers' complaints are heard prior to repatriation. (Recommendation 35) We specify areas that we believe should be a priority for the recently established Section 21 Vulnerable Workers Advisory Committee. (Recommendation 36)

Concerns have been raised about certain WSIB policies and practices such as the impact of the experience rating system on temporary agency workers where injuries and accidents are attributed to the temporary agency rather than the worksite where the incident occurs. We recommend that *the Ontario government and the WSIB review the impact of these policies and practices.* (Recommendation 37)

We discuss supply chain regulation relating to health and safety and the ESA and make a recommendation that the Ontario government develop policies that *consider vendors' health and safety performance in assessing work proposals for government procurement, including implementation of the Dean Report recommendations in this regard.* (Recommendation 38)

Our research indicated that temporary foreign workers may have difficulty accessing health care or WSIB benefits to which they are entitled or are repatriated before they are able to do so. We recommend that the *Ontario government implement a pilot mobile medical clinic for migrant workers to provide medical care and/or assistance in filing claims, preferably in the language of the migrant worker.* (Recommendation 39) We also recommend that the *Ontario government work together with municipal governments, employers, F.A.R.M.S (which performs an administrative role in relation to the seasonal agricultural workers program), and community and worker advocacy groups to provide various forms of support to migrant workers.* (Recommendation 40)

V. Training And Education

The disappearance of middle level jobs is one of the contributing factors to precarious work. Entry level jobs have increased, but they are no longer the path to better paying, more secure middle level positions that they were in the past; the increase in knowledge level jobs does not benefit those who do not have the appropriate training.

Employers appear to have less attachment to lower skilled workers, investing less in their training. Training and education is one of the key ways to reduce employment precarity as the modern labour market requires an adaptable workforce. The Canadian Manufacturers Association has emphasized the need for workplace learning and itself provides training in certain skills in association with Human Resources and Skills Development Canada and with the Canadian Labour Council to encourage increased participation in skills development. We recommend that Ontario build upon the mandate of the College of Trades to develop more flexible skills recognition criteria for a broader range of skills learned on the job and through short term contracts. (Recommendation 41) We recommend that Ontario evaluate training programs and expand those that demonstrate they can reduce precarity. (Recommendation 42) We recommend an increase in training opportunities, the development of government-employer partnerships consistent with labour market needs and taking into account the particular needs of women, racialized persons and recent immigrants. (Recommendations 43, 44, 45 and 46)

VI. A Comprehensive Provincial Strategy

The challenges arising from precarious work and affecting vulnerable workers and thus Ontario society at large are multidimensional and affect stakeholders from a broad range of sectors. We believe that an effective response requires a provincial strategy engaging multiple ministries and stakeholders in comprehensive, coordinated initiatives, following the principles of the Poverty Reduction Strategy. (Recommendation 47)

I. INTRODUCTION

The nature of employment is evolving. Evidence from Canada and other OECD countries indicates that the “standard employment” relationship based on full-time, continuous employment, where the worker has access to good wages and benefits, is no longer the predominant employment structure, to the extent it ever was.¹ More precarious forms of work have increasingly taken its place. These changes in the nature of work and the characteristics of the emerging class of workers engaged in precarious work led to the Law Commission of Ontario’s (LCO) project on Vulnerable Workers and Precarious Work.

The objective of this project on Vulnerable Workers and Precarious Work is to make recommendations designed to respond to the challenges faced by vulnerable workers in precarious work. Vulnerable workers are those whose work is characterized by low wages or insufficient hours of work, few or no benefits, little job security and minimal control over their work conditions. They are disproportionately women, immigrants (both newcomers and those established in Canada) or racialized persons.² The Project focuses, in particular, on the role of the *Employment Standards Act* and the *Occupational Health and Safety Act* in protecting these workers. However, it also reviews and makes recommendations about existing community and government supports and programs for workers’ advocacy, for employers and for training and education, as well as the role of labour organizations.

The nature of employment is evolving...[T]he “standard employment” relationship based on full-time, continuous employment, where the worker has access to good wages and benefits, is no longer the predominant employment structure...

The idea for the Vulnerable Workers and Precarious Work Project arose from several sources including the Creative Symposium in November 2006 which led to the creation of the LCO, suggestions from the Labour and Feminist Legal Analysis sections of the Ontario Bar Association and the Racialization of Poverty Conference held in April 2008.³ The Project was approved by the LCO’s Board of Governors in June 2008.

The LCO engaged in an initial literature review and consultation prior to issuing its Background and Consultation papers at the beginning of 2011. The LCO commissioned two research papers on the extent of labour market insecurity and on approaches to enforcement and compliance.⁴ Over the course of the Project, the LCO consulted with and/or received submissions from numerous private individuals, experts, business, labour and community organizations including more than 100 workers. The LCO produced an Interim Report on August 15, 2012 that was posted on our website inviting public feedback and was disseminated to over 1,200 targeted organizations, individuals and media outlets. We are grateful for this feedback. It assists us in assessing the value of our recommendations and to understand potentially unanticipated implications. Not every issue raised in the feedback could be integrated into this Final Report but, where possible, we have done so. We wish to acknowledge that all responses were carefully considered. For their privacy, we have not named private respondents but a list of organizations and experts contributing to the Report are provided in Appendix B.

This Report is the product of extensive research, consultations with and submissions from a broad range of stakeholders and advice from a Project Advisory Group.⁵ The Project Advisory Group is comprised of employers' and workers' organizations, academics, government and others to provide feedback, advice and expertise. Project Advisory Group members participated in meetings and phone calls and their expertise was carefully considered in drafting this Report. The LCO wishes to thank and acknowledge the members of the Project Advisory Group for their time and ongoing valuable contributions. The views expressed in this Report are not necessarily the views of individual Project Advisory Group members. The diversity of perspectives they provided as well as those of the stakeholders we consulted has enabled the LCO to appreciate the delicate balance required to make effective and nuanced responses to the issues addressed in this Report.

We understand very clearly the balancing of economic considerations required in implementing change within the labour context, particularly although not only, in challenging economic times.

One comment about the composition of the Project Advisory Group: despite very extensive efforts on our part, in contrast to union and worker-related organizations, there were significant challenges in engaging employer organizations. Over many months, and at all stages of the project process, we made extensive outreach efforts directing invitations to a broad range of employer organizations. This included making efforts to connect with the employer community with the assistance of the Ontario Bar Association and the Ministry of Labour and posting specific invitations on relevant websites. However, our efforts were not successful in obtaining input from the business community at that level. We had more success in obtaining employers' views through our consultations. A number of organizations were willing to meet with us and several provided valuable written submissions to the Project. Our broad dissemination of the Interim Report included major employer-related organizations, some of which posted it on their websites urging readers to provide feedback to the LCO. However, with the exception of the agricultural sector, we received very little direct feedback on the Interim Report from the business community. Despite this, we have carefully considered the views expressed by those employer organizations that did participate either through the Project Advisory Group, the consultations and/or submissions and we have reviewed research and received feedback from other sources, including government, to identify the concerns of the business community on specific issues. We have made significant efforts to ensure that these concerns and perspectives are integrated into our discussions and recommendations. We understand very clearly the balancing of economic considerations required in implementing change within the labour context, particularly although not only, in challenging economic times. In areas that are highly contentious, where the appropriate response would require further review and discussion, we have provided a foundation for future discussion and action.

The LCO recognizes that small businesses are highly sensitive to administrative processes and additional regulatory requirements. Small businesses make up the majority of businesses in Ontario. In its response to the LCO, the Ontario government pointed out that 94 percent of Ontario businesses employ fewer than 50 people; 75 percent have fewer than 10. Many of these employ part-time, casual and seasonal workers, pay at or near minimum wage and have limited financial resources and narrow

profit margins.⁶ The challenges these employers face in terms of health and safety compliance were recognized in the Dean Report. As a result, in our recommendations, we have made efforts to take into account the impacts on small businesses.

We also want to highlight our awareness of government resource implications. While some of the recommendations are relatively simple and low cost, the LCO recognizes that others will have significant resource implications for the Ontario government and there are limits, particularly in the short term, to what government is able to implement. This Report outlines the issues that are currently confronting Ontario. However, as the world of work is continuing to evolve, we also identify some issues as sign posts to guide discussions looking into the future. As a result, some of our suggested solutions can be implemented now and many of these will have minimal to moderate resource implications. Other recommendations can be considered as longer term initiatives. Accordingly, in Appendix A, we have arranged our recommendations in terms of resource implications as short, medium and long term initiatives.

No new law or policy can be put into place without having impacts on workers, businesses and government [W]e have attempted ... to select the ideas with the best chance of success that will produce the greatest benefit with the least negative impacts ... [and] contribute to the development of a plan tailored to Ontario's needs....

In addressing some of the issues discussed in this Report, we have benefitted from prior reviews undertaken by others. This work has enriched and informed the LCO's consultations, research and discussions. We have been able to draw from and, in many respects, build upon this foundational work to construct our analysis in order to move the consideration of these issues forward and, in the process, suggest new recommendations about how to address the circumstances facing vulnerable workers.

Policy development is, by its very nature, a balancing act. We acknowledge that there are costs and benefits associated with change. No new law or policy can be put into place without having impacts on workers, businesses and government. We have attempted, to the extent possible, to anticipate both the positive and negative effects of our recommendations. This task is not a precise science. It involves both reasoned consideration and educated guess-work. Taking into consideration these factors, we have attempted in this Report to select the ideas with the best chance of success that will produce the greatest benefit with the least negative impacts. In doing so, we hope that we have contributed to the development of a plan tailored for Ontario's needs to move forward to respond to the needs of Vulnerable Workers and Precarious Work.

At the outset, this Report sets out the major issues and research on vulnerable workers and precarious work. This is followed by specific targeted chapters on employment standards, health and safety and training and education. Recommendations are made for specific statutory amendments as well as process and policy changes related to the theme of each chapter. We anticipate this way of organizing the material will enable ease of reference by government offices and other organizations which are similarly organized around these issues. As indicated above, however, we have also organized our recommendations to respond to considerations of time, human resources and costs.

II. IDENTIFYING VULNERABLE WORKERS AND PRECARIOUS WORK

A. The Rise of Precarious Work

Over the past several decades there has been a significant increase in part-time, temporary and casual forms of work. This type of work lacks security and provides workers with limited benefits. The phenomenon has been a contributing factor in the rising rates of income inequality in many OECD countries, as well as a contributor to social unrest in some.⁷ On the one hand, businesses are advantaged by the ability to increase or decrease workforces with ease. This, some argue, has allowed the Canadian economy to respond to the financial crises more favourably than more regulated European economies. Furthermore, some workers undoubtedly choose this type of work for the flexibility it offers.⁸ On the other hand, many workers at the lower end of the wage and skill spectrum are losing ground in insecure employment they do not choose and struggling to make a decent wage.⁹ The nature of precarious work has also been affected by the global migration of workers that provides challenges to many countries including Canada.¹⁰

“Precarious work is characterized by lack of continuity, low wages, lack of benefits and possibly greater risk of injury and ill health...

Measures of precariousness are level of earnings, level of employer-provided benefits, degree of regulatory protection and degree of control or influence within the labour process...”

Law Commission of Ontario, Vulnerable Workers and Precarious Work Background Paper, December 2010.

Although the changing nature of work and related migration of workers have been developing for several decades, the global economic crisis has brought it into sharper focus. Canada’s economic position may have weathered the economic downturn better than many other countries. Nevertheless, Canada faces large deficits, lower revenues, high unemployment and low economic projections.¹¹ The current state of the economy is affecting businesses and therefore jobs.¹² Governments are seeking to reduce deficits while at the same time continuing to stimulate business and create jobs. Against this backdrop, initiatives to improve supports for vulnerable workers are not only imperative but must be feasible and cost-effective.

In this project, the LCO has considered the impact of the law on workers engaged in precarious forms of work (“vulnerable workers”). Both “precarious work” and “vulnerable worker” are defined in the LCO’s Background Paper:

Precarious work is characterized by lack of continuity, low wages, lack of benefits and possibly greater risk of injury and ill health...Measures of precariousness are level of earnings, level of employer-provided benefits, degree of regulatory protection and degree of control or influence within the labour process...The major types of precarious work are self-employment, part-time (steady and intermittent) and temporary.

....

It has been said that “the sector in which workers are employed, the size of the enterprise in which they work, the non-standard nature of their employment contract and their demographic circumstances are markers that help to identify them as ‘vulnerable’”. In this paper, vulnerable workers are those whose work can be described as “precarious” and whose vulnerability is underlined by their “social location” (that is, by their ethnicity, sex, ability and immigration status).¹³

Therefore, vulnerability in this context refers *not to the workers themselves but to the situation facing them*, both in their work environment and in other aspects of their lives such as their health, their families, their ability to participate in their community and their integration into Ontario life.

Among the characteristics of precarity identified in the description above, earning low income is key. For example, a high income self-employed person working contract to contract (such as a consultant) would not be considered a “vulnerable worker”. We should note that our definition does include part-time or casual workers who may earn a good hourly rate but, in total, earn a low income due to insufficient hours. The project is concerned with the increasing numbers of working poor in Canada, many of whom work in precarious conditions.¹⁴ Low income jobs often have few, if any, benefits, such as extended medical benefits.

When coupled with low income, job insecurity is also one of the important features of precarious employment. The fear of losing one’s job may arise from industry-wide phenomena such as automation of the workforce or economic pressures. Temporary foreign workers are precariously employed where their fear of being sent back to their home country prevents them from exercising legal protections to which they are entitled; they are afraid that their job is not “secure” even within the limited work period of foreign worker programs.

This group of workers experiencing low income combined with other measures of precarity has been labelled the “precariat” by Guy Standing who describes them as a growing social-economic class:

...in many countries, at least a quarter of the adult population is in the precariat. This is not just a matter of having insecure employment, of being in jobs of limited duration and with minimal labour protection, although all this is widespread. It is being in a status that offers no sense of career, no sense of secure occupational identity and few, if any, entitlements to the state and enterprise benefits that several generations of those who saw themselves as belonging to the industrial proletariat or the salariat had come to expect as their due.¹⁵

Although we have focussed on women, as well as recent immigrants and racialized persons, we recognize that precarious employment is not limited to these particular groups, a point we discuss further below. This was graphically illustrated in a response we received to the Interim Report from the wife of a man who “has been unable to secure a full-time permanent job for 4 years, despite having valuable skills and excellent work history.” She discusses how he was asked to perform work for which he was untrained and that he considered dangerous, and he was offered temporary work for barely more than minimum wage where the collective agreement provided a much higher rate. As she observes, “[t]he situation has become desperate for many people, and has put a tremendous strain on individuals and their families....It is not just stressful, it is demoralizing.”¹⁶

“The situation has become desperate for many people, and has put a tremendous strain on individuals and their families....It is not just stressful, it is demoralizing.”

Submission to the LCO,
September 30, 2012.

The LCO's consultation process in this project reinforced themes surrounding vulnerable workers and precarious work, as identified by many commentators, including: i) a lack of knowledge by both employers and employees of employee rights and employer responsibilities; ii) the lack of an expeditious method of complaint resolution; iii) barriers to the enforcement of workers' rights; and iv) the need for more broadly applicable basic minimum employment rights. There is significant concern, in particular, about the lack of representation for workers or workers' "voice" among those in precarious work.¹⁷ There is awareness of the changing nature of work, but some question as to whether the existing regulatory regime is responsive to this change. For employers, the standard employment relationship may no longer be the normative model for jobs, but many workers are still searching for stable, well-paid, permanent jobs with benefits.

The transformation that is taking place in the world of work is dynamic and even experts are uncertain where it will land. Governments, businesses, community agencies and unions each have a role to play to reach out to vulnerable workers who are finding themselves left behind. This Report will outline the extent of the problem, who it affects and how, and will suggest steps for the short and long-term that can be taken to respond to the needs of vulnerable workers.

"...[W]hile the total number of employed Canadians has returned to pre-recession levels, there has been a change in the quality of jobs. There are more part-timers than before the recession, and more self-employed workers. Most importantly, there has been a significant increase in temporary work."

Canadian Labour Congress,
Recession Watch Bulletin,
Winter 2010.

B. The Economic Backdrop

As western economies transitioned away from reliance on manufacturing and agriculture toward reliance on service and knowledge-based industries in the 1970s, a trend began across the labour markets in those economies - including Canada - towards increased levels of part-time and temporary work at the expense of full-time positions.¹⁸ This shift was further amplified as women, who work in a disproportionate share of part-time and temporary positions, continued to enter the labour force in significant numbers. Analyzing data from 1999-2009, Noack and Vosko found a stable condition of what they called "persistent precarity" in the overall structure of the Ontario labour force in terms of the proportion of full-time, part-time and self-employed workers.¹⁹ However, using data extended further out from the recent recession (2000-2011), the Ministry of Labour indicates that temporary work, in particular, continued to increase gradually but significantly into the 2000s. In 2000, 8.9 percent of employed workers in Ontario were temporary and by 2011, this figure was 10.9 percent.²⁰

Furthermore, the recent economic recession has impacted the growth of more precarious forms of employment. The Canadian Labour Congress, for instance, has argued that "while the total number of employed Canadians has returned to pre-recession levels, there has been a change in the quality of jobs. There are more part-timers than before the recession, and more self-employed workers. Most importantly, there has been a significant increase in temporary work."²¹ This conclusion appears borne out by OECD statistics indicating across all OECD economies the percentage of workers engaged in part-time work increased from 12 percent in 2001 to 16.5 percent in 2011, while the percentage of those engaged in temporary work

increased from 11 percent in 2001 to 12 percent in 2011. For Canada specifically, the percentage of part-time workers increased from 18.1 percent to 19.9 percent and the percentage of temporary workers increased from 12.8 percent to 13.7 percent across the same time frame.²²

This suggests then, that despite the relatively stable structure of the Canadian labour market in the early twenty-first century, it is beginning to undergo another transition that is likely to increase the numbers of Canadians involved in precarious forms of employment.

This section describes some of the pressures being experienced in the economy and labour market that contribute to this rise in precarious employment. Ontario's labour market is influenced by economic trends which have transformed the way business is carried out. Globalization and free trade have resulted in the creation of global markets. Increasingly, many Ontario businesses must compete with emerging economies which have the advantage of lower wage labour and relatively few regulatory controls. The technological revolution that has occurred over the past three decades has resulted in sharply reduced communications and transportation costs for those importing from elsewhere. For example, in the LCO's consultations, Ontario vegetable farmers reported competing with producers in Central and South American countries in addition to their traditional competitors in California.²³ This may be less of an influence, however, where local services do not compete beyond local markets.

The increase in smaller, fragmented workplaces means that there are fewer in-house opportunities for employees to advance, leaving many to stagnate in entry-level positions.

These trends, accompanied by the global recession that commenced in 2008, have exerted a heavy pressure on businesses to set lower consumer prices which, in turn, have caused businesses to restructure their workforce as a cost-cutting strategy. Maintaining a flexible workforce allows businesses to quickly respond to competitive pressures. Flexibility is achieved by relying on more temporary or part-time employees and hiring fewer full-time permanent employees. In some cases, employers may offer job-sharing arrangements to existing employees in order to prevent lay-offs.²⁴ Or businesses may outsource some functions altogether, thereby reducing the overall size of their workforce but increasing their reliance on contract workers (often former employees).²⁵ The result has been the fissuring of the labour market.²⁶ The increase in smaller, fragmented workplaces means that there are fewer in-house opportunities for employees to advance, leaving many to stagnate in entry-level positions.²⁷ While workers' advocates often regard flexibility in purely negative terms, it should be noted that businesses consider it to be a legitimate business choice permitting them to organize in ways that are responsive to economic turmoil. Some workers appreciate the advantages of flexibility though not its disadvantages but are sometimes willing to accept the trade-off. The legitimacy of both flexibility and security has been recognized in the European concept of "flexicurity" which combines enabling businesses to hire and shed workers flexibly with government funded income security and retraining programs.

The information revolution and dramatic technological advances of the last 30 years, as well as the gradual shift from a manufacturing-based economy to one that is services-based, have also affected the labour market. Automation in the workplace has reduced the overall demand for workers and the remaining demand is increasingly for more highly-educated/highly-skilled workers. According to Harry Arthurs in *Fairness at Work*, more than 70 percent of new jobs require post-secondary education, 25 percent require a university degree and only 6 percent of jobs do not require a high school certificate.²⁸ The result is a relatively smaller pool of jobs available to vulnerable workers and decreased job security for unskilled workers. Canadian immigration policy has reacted to this development by prioritizing the immigration of high skilled workers.²⁹

The mix of workers in Canada's labour market has also been affected by the global trend in international migration. Part of this trend is the increased movement of "guest workers". While temporary foreign workers often enter the country to perform high skilled work, there is also a significant portion of unskilled workers from developing countries who migrate in search of work that pays a higher wage than is available domestically. In addition to our need for highly skilled labour, Canada is also grappling with an aging population and a workforce no longer willing to undertake difficult and often low-paying jobs such as agricultural work and care-giving. In order to fill these labour needs, Canada permits temporary entry to low skilled guest workers. We discuss this further in the section on Temporary Migrant Workers.³⁰

The increased proportions of entry-level jobs at one end of Ontario's labour market spectrum and knowledge jobs at the other end of the spectrum have tended to squeeze out the middle-level jobs. This phenomenon has been labelled the "hourglass economy".

The increased proportions of entry-level jobs at one end of Ontario's labour market spectrum and knowledge jobs at the other end of the spectrum have tended to squeeze out the middle-level jobs. This phenomenon has been labelled the "hourglass economy" and it has contributed to a polarization not only of occupations and incomes but, also, to a social polarization.³¹

These developments have also impacted unionization rates. Managerial and professional jobs make up a growing proportion of the labour market and these jobs are less frequently unionized. It is also speculated that the smaller size of firms resulting from the fissuring of the labour market has made it more difficult to organize workers.³²

Labour market conditions, the changing workforce and the increase in precarious work have all contributed to a significant rise in income inequality in Canada over the past 20 years.³³ Over this period, the richest group of Canadians increased their share of total national income relative to that of poor and middle-income Canadians. Part of the problem is a growing disparity in wages paid to the top 10 percent of earners relative to those paid to the bottom 10 percent of earners. However, earnings inequality also depends upon the type of jobs that people hold and their work arrangements. For example, women workers represent a larger percentage of the workforce than they did 20 years ago. But women are more likely to work part-time and earn a lower income as compared to men.³⁴ Similarly, increases in self-employment relative to standard employment relationships may play some role in rising inequality because although some self-employed entrepreneurs may be very successful, the self-employed tend to be concentrated in the lower income groups.³⁵ Although globalization and technological

advancements have brought increased productivity and opportunities, these benefits have been disproportionately enjoyed by high skilled workers rather than those in low or unskilled work.

Although it is clear that income inequality has been rising in Canada, the broad implications of this phenomenon for society are less clear. Some argue that inequality affects the well-being of all levels of society, not only the poor.³⁶ According to Richard Wilkinson, more equal societies have better social relations. Communities are stronger and there are higher levels of trust and lower levels of homicide, hostility and discrimination.³⁷ In addition, less equal societies have lower than average health standards and shorter life expectancy.³⁸ Others such as the Fraser Institute, argue that economic freedom (defined as personal choice, voluntary exchange coordinated by markets, freedom to enter and compete in markets, and protection of persons and their property from aggression by others) is key to higher levels of prosperity, well-being and longer life expectancy, as well as improved well-being for women.³⁹ There is wide consensus, however, that the growth in precarious employment in Ontario over the past 30 years requires a careful legislative and policy response; one that protects the interests of workers while ensuring that Ontario businesses remain competitive in the new global economy.

Although globalization and technological advancements have brought increased productivity and opportunities, these benefits have been disproportionately enjoyed by high skilled workers rather than those in low or unskilled work.

C. What Does Precarious Work Look Like?

Noack and Vosko have assessed the prevalence of precarious work in Ontario in relation to certain dimensions of labour market insecurity including low income, little control over the labour process and limited access to regulatory protections. The authors adopt four indicators from the available data as measures of precarity: low income (defined as less than 1.5 times the minimum wage), no pension plan, small-sized firm and no union coverage.⁴⁰ Although other significant indicators of precarious work exist, including a lack of extended health, vision and dental benefits, there are insufficient data to allow these to be measured.⁴¹

Taken separately, each of the four indicators affects a significant portion of Ontario workers. Approximately 75 percent of workers lack union coverage. Just under 50 percent of workers lack an employee-sponsored pension plan. Approximately 33 percent of workers consistently earn a low wage, and 20 percent of workers work in a small firm.⁴² However, it is the combination of these circumstances that amounts to precarious employment. The authors consider workers to be precariously employed where they are subject to at least three of the four criteria. Based on this measure, their study found that approximately 33 percent of jobs in the Ontario workforce are precarious. But this figure reflects jobs combining *any* three of the four criteria, including almost 11 percent of jobs that do not have low wages (but combine the other three criteria). While this latter category of jobs may be precarious in the sense that the jobs are less secure, discontinuous, or do not have pensions or unions, these workers are not vulnerable in the framework set out by the LCO. For the purposes of this Report, it is more relevant to consider the approximately 22 percent of jobs in Ontario that are

characterized by low wages plus two of the other three indicators of precariousness: no pension, no union and/or small firm size. It is important to be aware that this is only one way to view the extent of precarious work in Ontario and, while helpful, it has limitations. Individually these factors may or may not signal precarity depending on the circumstances. In any event, this way of defining precarious work does not account for all of the factors as enunciated by the LCO's definition.

Noack and Vosko take the position that form of employment is linked to precariousness. For example, full-time employees are less likely to be in precarious work than part-time employees. About 33 percent of part-time workers are in positions with low wages, no union and no pension, as compared to almost 9 percent of full-time employees.⁴³ Although jobs may be described as part-time, in some cases workers may be working at more than one part-time job and so not properly described as part-time workers.⁴⁴ People may choose part-time or casual work for many reasons, including family responsibilities, personal reasons or study or they have left full-time work but need a part-time income. According to a recent Statistics Canada report, however, in 2012, 36.6 percent of part time workers aged 25-44 were in such work for other reasons that included market conditions and the inability to find full-time work.⁴⁵

The three-way relationship between worker, temporary work agency and client may leave workers unaware of their legal rights and more vulnerable to dangerous work or unsafe working conditions.

Similarly, temporary workers are more likely to be in precarious work than permanent workers.⁴⁶ This is significant because, at present, temporary employees may not fully benefit from Ontario employment standards provisions requiring a minimum length of tenure (such as vacation, termination notice and severance pay)⁴⁷. Furthermore, once a worker accepts a temporary job, it becomes more difficult to advance and the worker is likely to earn reduced income for many years.⁴⁸ The uncertainty associated with temporary employment makes these jobs precarious by definition. However, different forms of temporary work also have unique characteristics that add to their precarious nature.⁴⁹ One example is work performed by temporary migrant workers as discussed in the next section of this Report. Another example is work performed by temporary agency workers.

Temporary agency workers are a growing phenomenon in the labour market. According to the Ministry of Labour, there are over 1,000 temporary work agencies, employing a portion of the approximately 735,000 temporary employees in Ontario.⁵⁰ Temporary agency workers tend to have lower wages and less union coverage than permanent employees.⁵¹ Workers may seek work through temporary agencies in order to maintain a flexible work life or in order to find work quickly. These agencies are also an option for workers such as recent immigrants who have qualifications that are not recognized by regular employers. At one time, employers hired temporary agency workers in order to temporarily fill positions while regular employees were ill or away. Increasingly, however, it appears that at least some employers view temporary agency work as a permanent strategy for maintaining a flexible labour force.⁵²

The three-way relationship between worker, temporary work agency and client may leave workers unaware of their legal rights and more vulnerable to dangerous work or unsafe working conditions. Temporary agency workers have less control over their workplace and, as a result, are less likely to complain about safety conditions. They are

disproportionately subject to other risk factors for workplace injuries such as poor supervision, inadequate training and experience, youth and few qualifications, and exposure to high risk tasks. These employees tend to be less integrated into the workplace community. This may have health and safety consequences, in cases where they are not given the same safety training provided to regular employees.⁵³ In some cases, temporary agency workers are hired for the express purpose of carrying out dangerous work so that regular employees need not do so.⁵⁴ Although the temporary agency is legally the employer in this scenario, the agency is not on-site and has limited ability to ensure safe work conditions.⁵⁵

The regulatory environment is currently structured such that the temporary agency as employer pays the premiums for workers' workplace safety insurance. Some employers are shifting the cost of high-risk work by hiring temporary agency workers and thereby avoiding the increased premiums for injuries occurring at the workplace. Temporary agency workers may also be disadvantaged by Ontario's workplace safety re-employment policy. In certain circumstances, employers have an obligation to re-employ injured workers and they are given financial incentives to comply.⁵⁶ However, temporary employment agencies meet this obligation simply by placing the worker back on the employment placement roster. Thereafter, there is no protection to ensure that workers are actually offered jobs suitable for their skill set.⁵⁷

Outsourcing is associated with decreased employment in large companies, increased employment in small or medium companies and an increase in non-standard employment such as self-employment and temporary work.

Another growing trend is for companies to outsource specialized functions to external companies that provide workers directly or subcontract with a third organization for workers. This results in a contracting chain where client employees, contract employees and subcontract employees may all work in the client's workplace. Outsourcing is associated with decreased employment in large companies, increased employment in small or medium companies and an increase in non-standard employment such as self-employment and temporary work.⁵⁸

As is the case with temporary agency workers, contract and subcontract employees are vulnerable in a number of respects. First, outsourcing work often allows a company to distance itself from regulatory responsibility for these workers, resulting in fewer workplace protections. Contract chains tend to create fragmented responsibilities and confusion that undermines accountability for occupational health and safety.⁵⁹ Second, the decision to contract out work is often adopted as a cost-savings measure.⁶⁰ By treating labour as a commodity, companies are more competitive. However, the result for workers is lower income and reduced benefits.

Self-employment also has the potential to be precarious. While many enter self-employment attracted by the flexibility and control it offers, others are pushed into it by labour market forces.⁶¹ Although self-employment is traditionally associated with small businesses, many self-employed workers do not employ others. These "own-account self-employed" sell their own services in a wide spectrum of circumstances. For example, own-account self-employed professionals such as accountants and doctors have a high degree of control over their work and typically earn a high income. On the

other hand, own-account self-employment also includes workers such as personal care workers who may rely on one or a few clients, work in their clients' homes and earn a subsistence level income. In 2000, 30 percent of own-account self-employed workers worked in client locations and 18 percent reported that a previous employer was among their clients.⁶² In such circumstances, particularly where there is only one client, the level of dependence may create precarity or, alternatively, what a client characterizes as self-employment may, in fact, be an employment relationship.

Self-employed women tend to be concentrated in more precarious forms of self-employment.⁶³ In these circumstances they often "choose" self-employment for the flexibility it allows balancing work and family. While this may suggest control over their work life, the fact is that women remain primarily responsible for unpaid labour in the home. The decision to adopt precarious work in order to meet that responsibility is not really a choice but a practical necessity for many.⁶⁴

Self-employed immigrants are also disproportionately engaged in more precarious forms of self-employment. They are more likely than Canadian-born workers to be self-employed involuntarily, that is, due to difficulty finding paid employment.⁶⁵

...[T]he average income of own-account self-employed workers is significantly less than that of self-employed employers. For women, visible minorities and immigrants who are own-account self-employed, average income is lower still.

In spite of the wide continuum of own-account self-employment, the average income of own-account self-employed workers is significantly less than that of self-employed employers. For women, visible minorities and immigrants who are own-account self-employed, average income is lower still.⁶⁶ Furthermore, self-employed workers generally work longer hours than employees and they are less likely to have access to training or benefits.⁶⁷ For all these reasons, own-account self-employed workers are at risk of being precariously employed.⁶⁸ And those in a relationship of dependence are even more likely to be precariously employed.⁶⁹

According to Noack and Vosko, certain types of jobs are also more likely to be precarious. In the food services and accommodation industries, in 2008, for example, their research indicated that about three-quarters of jobs were precarious. These industries typically employ women with a high school diploma or less, many of whom are racialized or are newcomers to Canada. Many of these jobs are part-time.⁷⁰ Similarly, the agricultural industry, on Noack and Vosko's measures showed a high proportion of precarious jobs (80.5 percent in 1999; 64.7 percent in 2008). Here, though, the typical worker is male and almost two in five are temporary or seasonal employees.⁷¹ Service industries such as repair, maintenance services, laundry, personal care, and business and building support services were also disproportionately made up of precarious jobs.⁷²

In contrast, jobs in the public sector are the least likely to be precarious. Many of these jobs are unionized and employers are more likely to be large organizations, such as governments or universities, and subject to stringent employment standards.⁷³ However, creeping privatization throughout several sectors has reduced the number of such jobs that are available to Ontario workers.

Lack of access to education and skills training is another factor linked to precarious employment. On Noack and Vosko's definition, just over 60 percent of Ontarians without a high school diploma were in precarious jobs in 2008. This is reduced to 43 percent for those with a high school diploma but no post-secondary education, and is further reduced to 17 percent for those with university degrees.⁷⁴ The trend is partly explained by the fact that the types of jobs more likely to be precarious (services and agricultural, for example) are also those that do not require advanced educational credentials. However, Noack and Vosko found that even within the category of full-time permanent jobs, those with lower levels of education are more likely to be precariously employed.⁷⁵

The link between precarity and temporary and part-time work, as well as work in certain low skill job categories, also illustrates the gendered and racialized nature of precarious work. Women, immigrants and racialized persons are each over-represented in these forms and types of jobs.⁷⁶

D. Identifying Vulnerable Workers

Although anyone may be precariously employed, precarity is more likely to affect workers in "already marginalized social locations".⁷⁷ This includes women, single parents (who are disproportionately women), racialized groups, new immigrants, temporary foreign workers, Aboriginal persons, persons with disabilities, older adults and youth. The link between marginalized workers and precarious employment is partly explained by their difficulty accessing higher education and skills training.⁷⁸ It is also significant that they are more often employed in temporary and/or part-time jobs. However, even among those in full-time permanent positions, women, visible minorities and recent immigrants are more likely to hold precarious jobs than others.⁷⁹

Although anyone may be precariously employed, precarity is more likely to affect workers in "already marginalized social locations".

This Project cannot hope to do justice to the unique experiences and circumstances of all vulnerable groups of workers. While the LCO has chosen to focus this Report on the experiences of women, immigrants and racialized persons in the workforce, there is a brief discussion below of a number of groups that experience labour market disadvantages. In *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice*, the LCO has examined some of the work-related issues facing older adults. The circumstances of persons with disabilities are considered in the LCO's *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice*.⁸⁰

1. Women and Single Parents

Canadian studies show that women are more likely to be engaged in precarious work than men.⁸¹ For example, women are over-represented in part-time and temporary work.⁸² Although 50 percent of Ontario workers are women, 72 percent of permanent part-time workers are women.⁸³ They are also over-represented in the lowest income-earning groups such as minimum wage earners.⁸⁴ Even in full-time work, women are more likely to earn less than their male counterparts and this general wage disparity exacerbates the problem of women in precarious work.⁸⁵

As noted, Noack and Vosko identified food and accommodation as the most highly precarious industry in the context of Ontario, which typically employs women with a high-school diploma or less. Both racialized and recently immigrated women are overrepresented in this industry. The industry also employs the highest proportion of part-time workers, of whom about a third are temporary.⁸⁶

In some cases, women choose part-time or temporary jobs since it allows them the flexibility to fulfill home and care-giving responsibilities—although this choice is illusory where it is made necessary by employers' or society's failure to accommodate these responsibilities.⁸⁷ Others make this choice for study, or other voluntary personal reasons. Some work part-time only because they are unable to find full-time employment.⁸⁸

The high numbers of women in precarious work are, in some measure, the result of their traditional social role as caregivers.⁸⁹ Under the "gender contract" that typified the 1950s middle class, men were primarily responsible for financial support and women stayed home to care for the family. (Women in many working-class families have always worked outside the home, caring for other women's children, cleaning homes and working in factories and shops, for example.) Today, under current social and economic conditions, two incomes are often necessary to support a family and women's choices and involvement in many spheres of life have expanded. The majority of women have joined the workforce. The family unit is also more varied with increasing numbers of single parents. And yet women continue to bear primary responsibility for care-giving.⁹⁰ In 2010 Canadian women spent an average total of 50 hours per week caring for household children, double that spent by men (24 hours).⁹¹ In 2008, just over 9 percent of women reported working part-time because of childcare responsibilities as compared to less than 1 percent of men.⁹² As a result, the precarity of women's jobs is partly influenced by public policy on maternity benefits and childcare.⁹³

Racialized workers also suffer a disproportionate degree of hardship in the labour market ... and the work they are able to get is "much more likely to be insecure, temporary and low paying."

2. Racialized Persons

Racialized workers also suffer a disproportionate degree of hardship in the labour market.⁹⁴ Racialized workers experience higher unemployment rates and the work they are able to get is "much more likely to be insecure, temporary and low paying."⁹⁵ In general, racialized men and women earn less than non-racialized men and women respectively.⁹⁶ Gender also plays a role here with racialized women forming one of the most vulnerable groups.⁹⁷ Further, racialized families were three times more likely to live in poverty in 2005 than non-racialized families.⁹⁸ In workplaces, temporary migrant workers often work only with other migrant workers, often those from their own country, rather than alongside Canadians.⁹⁹

3. Newcomers to Canada and Established Immigrants

Newcomers to Canada are also disproportionately found in precarious employment. Once again, form of employment is significant here. While recent immigrants make up approximately 10 percent of Ontario workers, they make up almost 16 percent of temporary part-time workers.¹⁰⁰

Recent immigrants “have borne the brunt of the recession’s impact” and have been “disproportionately affected by rising unemployment, reductions in full time work, and a declining manufacturing base.”¹⁰¹ One might expect recent immigrants to find themselves temporarily in less stable and lower paid jobs upon their arrival to Canada but to progress to better jobs with the passage of time, particularly if they are educated. While this may have been the case in the past, a Statistics Canada report reveals that, between 1991 and 2006, the percentage of university-educated immigrants in jobs with low educational requirements increased for both recent and established immigrants.¹⁰² For recent immigrants, the percentage increased from 22 percent to 28 percent for men and from 36 percent to 44 percent for women. For established immigrants, the percentage increased from 12 percent to 21 percent for men and from 24 percent to 29 percent for women. In contrast, the percentage of university-educated Canadian-born workers in jobs with low educational requirements remained stable at 10 percent over the same time period. The report concludes that

the increases for established immigrants suggest that the difficulties, which have long plagued recent immigrants, are today affecting established immigrants, which also suggests that difficulties experienced by recent immigrants are not necessarily temporary.¹⁰³

Recent immigrants “have borne the brunt of the recession’s impact” and have been “disproportionately affected by rising unemployment, reductions in full time work, and a declining manufacturing base.”

Similarly, another study compared the incomes of university-educated racialized immigrants and university-educated non-racialized immigrants based on their immigration generation status. The study found that a significant income gap existed between first-generation racialized and non-racialized workers and that this gap persisted into the second generation.¹⁰⁴ For the first generation, this income gap may be partially due to a phenomenon called “deskilling” occurring when immigrants have limited English skills or lack Canadian work experience, or employers fail to recognize non-Canadian credentials or engage in discrimination.¹⁰⁵ Deskilling is also gendered. Jobs not requiring Canadian experience often involve manual labour more suitable for male rather than female workers.¹⁰⁶ In *Made in Canada*, Faraday points out that live-in caregivers trained as nurses or other health care professionals, are particularly impacted by deskilling due to the fact that temporary foreign workers’ work permits restrict participation in education and training programs.¹⁰⁷

In its response to the Interim Report, the Ontario Council of Agencies Serving Immigrants pointed out that having insecure immigration status, such as that experienced by refugee claimants and temporary foreign workers contributes significantly to precariousness.¹⁰⁸ A recent study indicates that those who enter Canada by means of precarious immigration status are more likely to be found in precarious work even after their status is regularized.¹⁰⁹

For individual workers and their families, deskilling has both financial and emotional consequences.¹¹⁰ In particular, workers express frustration about their inability to provide their children with the standard of living enjoyed by Canadian children.¹¹¹ In some cases, workers may gradually internalize a lower sense of self-worth and second-class status.¹¹² Most studies show that unskilled workers or those with lower levels of education are among the most vulnerable, whether born in Canada or not.

Having an education does provide immigrants with some protection against precarious employment. While a Statistics Canada report in 2012 found that immigrants with university degrees, and especially recent immigrants, had significantly higher unemployment rates than those of Canadian-born university graduates, university-educated immigrants fared better than less-educated immigrants and slightly better than average for the total population in Canada.¹¹³ This report also showed improvements over time for immigrants.

Poor working conditions experienced by recent immigrants are often exacerbated by language barriers. For example, workers may be unable to read safety notices posted in the workplace and they may be unaware of their rights under the *Occupational Health and Safety Act*.¹¹⁴

4. Temporary Migrant Workers

Workers may legally enter Canada and work in lower skilled jobs for limited periods of time through three federally-administered temporary foreign worker programs. According to 2011 statistics, there were more than 106,000 temporary foreign workers in Ontario on December 1, 2011 and more than 67,000 entries of such workers in 2011.¹¹⁵ A breakdown of categories of these 67,000 workers indicates that close to 25,000 are managerial/professional or skilled and technical (National Occupational Classification [NOC] levels O, A and B) while about 20,500 are lower skilled (NOC level C), many of whom include seasonal agricultural workers (including the Seasonal Agricultural Workers Program [SAWP] described below) and live-in caregivers, and about 800 are level D lower skilled workers. For approximately 4,600, the workers' levels are not indicated and close to 17,000 are "classified as having a synthetic code occupation which includes open work authorizations. This indicates that they may be authorized to work as the spouse/partner/child of a foreign worker, awaiting permanent residency or in an international experience Canada program."¹¹⁶ These individuals are not included in NOC categories.¹¹⁷ The numbers of temporary foreign workers that have entered Canada have risen in recent years, in both high and low skilled categories. In this Project, we are mainly concerned with those in lower skilled closed work permit situations: NOC levels C and D, including SAWP and live-in caregivers. While much higher than 10 years ago, the number of workers entering in the low skilled pilot program were at about the same levels in 2011 as they were in 2007. SAWP numbers are also relatively steady and live-in caregivers have decreased.¹¹⁸

The Seasonal Agricultural Workers Program (SAWP) allows workers from Mexico, Jamaica and other Caribbean countries, to stay and work up to eight months each year for a single designated employer (unless transferred).¹¹⁹ Administered by the Foreign Agricultural Resource Management Services (F.A.R.M.S.), SAWP allows approximately 1,400 Ontario farmers to employ from 15,000 to 20,000 workers each year – more than any other Canadian jurisdiction.¹²⁰ SAWP provides for liaison officers from the workers' home country to maintain oversight and liaison services between the workers and employers while in Canada. In 2011, while 18,783 vacancies were approved, fewer than 16,000 workers arrived in Ontario for periods of work varying from a few weeks to eight months.¹²¹

The numbers of temporary foreign workers that have entered Canada have risen in recent years, in both high and low skilled categories. While much higher than 10 years ago, the number of workers entering in the low skilled pilot program were at about the same levels in 2011 as they were in 2007.

The Live-in Caregiver Program permits caregivers to serve as domestic workers for two years with the option to apply for permanent residence after the qualifying period.¹²² The Pilot Project for Occupations Requiring a Lower Level of Formal Training for jobs within the federal National Occupational Classification systems C and D (NOC C and D) allows qualified foreign workers to obtain work permits for 24 months renewable to a maximum of 4 years to work in occupations such as clerical, health, sales and service, transportation and manufacturing and agriculture.¹²³

Canada's immigration policy is being revised to respond more nimbly to employers' needs and immigrants' capacity to integrate into Canadian society.¹²⁴ This has resulted in an increased focus on high skilled immigrants. Temporary foreign worker programs have experienced recent changes as well. In recognition of their heightened vulnerability, the most vulnerable categories of temporary foreign workers, live-in caregivers and NOC C and D workers, were provided with additional federal protections in April, 2011 with the introduction of more rigorous scrutiny including, for NOC C and D (and live-in caregivers), standard form contracts and more in-depth assessments of the genuineness of the employer's offer of employment.¹²⁵ Contracts for NOC C and D agricultural workers and live-in caregivers have been strengthened and now include stricter protections than those for other NOC C and D workers; SAWP has always had a high degree of regulation and oversight, which is reflected in its contract terms.¹²⁶ These protections are discussed more fully in Chapter III in the segment on "Employment Legislation Protecting Temporary Foreign Workers".

Canada's immigration policy is being revised to respond more nimbly to employers' needs and immigrants' capacity to integrate into Canadian society.

Other federal changes announced in April, 2012 have impacted the wages of Temporary Foreign Workers. Under the previous structure, employers were required to pay temporary foreign workers the median wage for occupations in a specific region. The government maintained that this sometimes resulted in foreign workers being paid more than Canadian workers for the same work, and that there was inconsistency in determining the median wage from region to region. Under the new system, employers may pay highly skilled temporary foreign workers at a rate 15 percent less than the median wage, as determined by Statistics Canada. They may pay low skilled workers 5 percent less than the median wage. However, the employer is still required to demonstrate that the proposed salary is the same as the salary they are paying to their Canadian employees in the same job and at the same location. Under no circumstances can a temporary foreign worker be paid less than a Canadian employed in the same position at the same employer. The new policy therefore appears to be aimed only at protecting employers who have hired Canadians at wages lower than the median for that job and wish to hire temporary foreign workers at the same rate. Wages cannot fall below minimum wage. Moreover, the new policy does not apply to the seasonal agricultural workers or live-in caregivers.¹²⁷

Workers' advocates have been critical of this initiative and critical of temporary migrant worker programs in general due to the vulnerability that low skilled workers experience as a result of their temporary work and immigration status. One area of debate has been SAWP's provision for "naming" workers, that is, allowing farmers to identify

specific workers to return to the same farm, a common practice occurring in up to 80 percent of cases.¹²⁸ F.A.R.M.S. considers the practice to be a major advantage for employers who wish to re-hire good workers, and for the named employees themselves. On the other hand, the Agricultural Workers Alliance and Faraday in *Made in Canada* are critical of naming, arguing that the power it gives to employers contributes to workers' reluctance to complain about substandard conditions.¹²⁹

Although some workers' advocates advocate for the discontinuance of temporary worker programs, arguing that only permanent residency upon arrival will be able to fully reduce the vulnerability created by temporary foreign worker programs for low skilled workers, internationally, SAWP has been regarded favourably and as a standard for some best practices.¹³⁰ In fact, when the federal government strengthened contract terms for NOC C and D agricultural workers, it seemed to be moving toward bringing the program in line with SAWP terms. Philip Martin for the International Labour Organization has taken the position that:

In the consultations, workers themselves described the long term benefits of these programs... [H]owever, migrant farm workers have been found to be at higher risk for occupational injuries, diseases and death, and they sometimes experience challenges in accessing their entitlements to health care and compensation for injuries.

Guest worker programs are here to stay ... In considering how to make the current system better, three widely shared principles need to be kept in mind. First, government policies, even if they do not work perfectly, do make a difference in the how and how many migrants arrive, how they are treated within the country, and whether they return or stay. Second, the overall economic benefits of moving workers over borders are positive, as individual migrants and their employers are better off and world GDP rises as more workers have higher wage jobs. Third, in a world of laws and rights, [] it is best for everyone if labor migration is legal and orderly.¹³¹

In the LCO's consultations, workers themselves described the long term benefits of these programs. They reported that SAWP provides them with a much higher source of income than is available in their home countries, allowing them to better support their families and educate their children.¹³² Workers reported returning year after year and many enjoyed positive and mutually beneficial relationships with their employers. They were paid in accordance with their contractual terms and hours worked, health and safety laws were respected, housing conditions were comfortable and they enjoyed a productive working relationship with their employer. Many workers also commented on long-standing friendships and personal connections they had made with their employer and people in the communities where they worked. They consistently expressed gratitude for the opportunity to earn an income in Canada.

However, migrant farm workers have been found to be at higher risk for occupational injuries, diseases and death, and they sometimes experience challenges in accessing their entitlements to health care and compensation for injuries. Low skilled migrant workers are vulnerable to exploitive recruiting and other practices and female workers are at risk for workplace sexual harassment.¹³³

In our consultations, we heard from some workers about their fear of repatriation, employer reprisals in response to complaints, health and safety concerns, insufficient hours, not enough time off, substandard housing and inadequate transportation. Many of these complaints are repeated in research studies.¹³⁴ Under the SAWP contracts,

employers are responsible for providing SAWP workers with “clean adequate living accommodations” without cost and are subject to health standards and oversight by liaison officers.¹³⁵ Under the NOC C and D agricultural program, the standard contract terms require that employers arrange for housing that has been inspected and meets National Minimum Standards for Agricultural Accommodations. Employers may deduct payment for accommodation. Workers’ advocates raised issues during our consultations regarding farm workers such as overcrowding, inadequate kitchen facilities, bedbugs, leaks, mould and lack of heat.¹³⁶ In some cases we were advised that local housing inspectors would only inspect one bunkhouse at a farm, and not the remaining ones, allowing for inadequate facilities to go undetected.¹³⁷

For low skilled temporary migrant workers, keeping their job is essential to their limited immigration status in Canada. There are high stakes associated with job loss – their ejection from Canada, the need to find a job in their home country (which will pay a fraction of what they were earning in Ontario), the consequences for their family income, and the likelihood that they will not be accepted back into Canada. One recent study has found that precarious legal residency is linked to precarious work even after the individual becomes a permanent resident.¹³⁸ Therefore, these workers experience a particular brand of job insecurity that may discourage them from exercising their legal rights. This has led the Metcalf Foundation and the Migrant Workers Alliance for Change to argue that the provision of permanent residency is the only complete solution to reduce the vulnerabilities facing temporary foreign workers, while Goldring and Landolt suggest that “the mix between permanent and temporary entry should favour the former”.¹³⁹ While federally governed decisions regarding immigration are outside the purview of this Report, we do provide commentary and recommendations in areas within Ontario’s jurisdiction that could strengthen protections for migrant workers in low skilled programs while these programs are in effect.

For low skilled temporary migrant workers, keeping their job is essential to their limited immigration status in Canada.

5. Aboriginal Persons

The Aboriginal population has faced particular challenges in the labour market which have worsened following the recession. There are approximately 300,000 Aboriginal people living in Ontario; approximately 80 percent live off reserve.¹⁴⁰ In 2008, the Ontario unemployment rate for Aboriginals aged 25-54 living off reserve was 9.2 percent while it was 5.2 percent among the non-Aboriginal population. By 2010, the gap had widened with a 12.6 percent unemployment rate among the Aboriginal population and a 7.2 percent rate among non-Aboriginals. This follows a general trend nationally in recent years of a widening of the unemployment gap between Aboriginal and non-Aboriginal populations. Employment losses between 2008 and 2010 impacted all age groups with Aboriginal youth being particularly affected. Among the core working-aged Aboriginal population (aged 25-54), full-time private sector employment showed significant declines.¹⁴¹

In his 2012 Report on Ontario’s public services, Drummond highlighted the particular labour market challenges facing Aboriginal people, especially Aboriginal youth.¹⁴² Drummond pointed to the “alarming gap” in educational performance between on-

reserve First Nations and the non-Aboriginal population. To respond to the situation, one of his recommendations was for major investment in education to increase economic, health and social outcomes.¹⁴³

6. Persons with Disabilities

Persons with disabilities have long been disadvantaged in the labour market.¹⁴⁴ In 2006, only 51 percent of persons with disabilities aged 15 to 64 were employed as compared to 75 percent of persons without disabilities. Put another way, the unemployment rate for working age persons with disabilities was over 10 percent whereas it was under 7 percent for persons without disabilities.¹⁴⁵

Even when persons with disabilities are employed, they are more likely to have temporary or part-time jobs with characteristics of precarity.¹⁴⁶ These jobs tend to pay lower salaries than average, even after taking into account fewer hours worked.¹⁴⁷ In 2006, the average income in Ontario for persons with disabilities was \$25,304 as compared to \$38,358 for those without disabilities.¹⁴⁸ The low income available in employment can be a disincentive for persons with disabilities to enter the workforce, particularly where they are eligible for income support through the Ontario Disability Support Program (ODSP). Furthermore, these jobs often do not offer extended health benefits which may be an important consideration for those who require ongoing medication or treatment.¹⁴⁹

Even when persons with disabilities are employed, they are more likely to have temporary or part-time jobs with characteristics of precarity. These jobs tend to pay lower salaries than average, even after taking into account fewer hours worked.

For persons with disabilities, precarity may be closely linked to systemic discrimination in the workforce. Persons with disabilities may “choose” non-standard employment only because appropriate accommodation of their disability is not available to them in a permanent, full-time position.¹⁵⁰

Ontario's innovative *Accessibility for Ontarians with Disabilities Act* contributes to the identification and removal of barriers to equality for persons with disabilities by setting proactive standards. In the area of employment, for example, employers in both the public and private sector must notify applicants about accommodations available in the recruitment process, develop processes for creating individual accommodation plans for employees with disabilities, and create return-to-work processes for employees who have been absent due to disability.¹⁵¹

In responding to the Interim Report, the Ontario government noted that

The Ministry of Community and Social Services funds employment supports to help individuals including people with disabilities. The Ontario Disability Support Program (ODSP) and Ontario Works' employment support services are funded based on successful client outcomes and ODSP provides a transitional supplementary health benefit for recipients exiting the program for employment until comparable coverage is available from the employer.¹⁵²

7. Youth

Ontario youth (aged 15 to 24) have a significantly higher unemployment rate than older workers.¹⁵³ In August 2012, this rate was 17.7 percent as compared to 6.3 percent for workers 25 years and over with the total rate of summer employment for Ontario students aged 15-24 falling to 43.3 percent. In April 2012, this rate was 16.4 percent as compared to 6.3 percent for workers 25 years and over.¹⁵⁴ The difficulty youth experience entering the labour force has caused many youth to accept non-standard forms of employment such as temporary, seasonal or part-time employment and unpaid internships.¹⁵⁵ In 2011, over 50 percent of young workers were in part-time employment in comparison to just under 14 percent of workers aged 25 and over.¹⁵⁶ Youth are also over-represented in temporary forms of employment.¹⁵⁷ Of course, many youth continue to pursue education in addition to working and this partly explains their tendency to accept non-standard employment.¹⁵⁸

One respondent to our Interim Report provided an extensive analysis of the inappropriate application of unpaid internships that are not part of an academic program. The misuse of unpaid internships exploits the inexperience of young workers, takes advantage of their need to gain experience and contributes to their precarity. By reducing youth employment, these practices create broader and longer term negative impacts on the Ontario economy.¹⁵⁹ In its response to the Interim Report, the CAW raised concerns about the lower minimum wage rate for students.¹⁶⁰

Young workers consistently have higher than average rates of workplace injuries... [E]ach year, 10,000 young workers are injured such that they are unable to return to work the following day.

Health and safety issues contribute to the precarious employment of young workers. Young workers consistently have higher than average rates of workplace injuries. The Ontario Workplace Safety Insurance Board reports that, each year, 10,000 young workers are injured such that they are unable to return to work the following day.¹⁶¹ There are several reasons for this. Youth are more likely to be inexperienced and those in temporary or part-time jobs are less likely to receive safety training.¹⁶² Since they are just beginning their working lives, they may also be intent on impressing their employer and be unwilling to report safety concerns.¹⁶³

The Ontario Ministry of Labour has identified workplace safety for young workers as a priority.¹⁶⁴ Education initiatives, public awareness campaigns and targeted enforcement through workplace inspection blitzes have been successful in reducing injury rates.¹⁶⁵

8. Non-Status Workers

Non-status or undocumented workers do not have immigration status to be in Canada. These workers are highly vulnerable to exploitation by employers since they are often unable or unwilling to enforce employment standards or health and safety protections.¹⁶⁶ The issues surrounding workplace protections for non-status workers are complex and fall beyond the scope of the LCO's project which addresses vulnerable workers and precarious work more generally. Nevertheless, many of the LCO's recommendations for improving conditions for vulnerable workers will also assist non-status workers.

Having identified a range of vulnerable workers in the Ontario labour market, the next section considers how women, immigrants and racialized persons, in particular, are impacted by precarious work.

E. The Negative Effects of Precarious Work on Vulnerable Workers

1. Physical and Mental Health

Studies consistently link precarious employment to negative physical and mental health outcomes.¹⁶⁷ In fact, the World Health Organization has identified the global dominance of precarious work as a significant contributor to “poor health and health inequities.”¹⁶⁸ This heightened health risk is the result of several factors, some of which are briefly described here.

RISK OF INJURY AND ILLNESS

Precarious work is more likely to be physically demanding work and is more likely to involve health and safety risks.¹⁶⁹ This is particularly the case for newcomers to Canada who are more likely than Canadian-born workers to be engaged in physically demanding work.¹⁷⁰ According to Ontario’s Expert Advisory Panel on Occupational Health and Safety (“Dean Report”), this increased risk may be due, in part, to a lack of experience or training that is job or hazard-specific; a lack of knowledge about occupational health and safety rights; and the fear of losing one’s job or, in some cases, being deported.¹⁷¹ In its 2010 Report, the Advisory Panel made several recommendations for addressing these concerns, including mandatory health and safety awareness training for new workers and supervisors and improved protections from reprisals when vulnerable workers speak up about health and safety concerns.¹⁷² These recommendations are discussed further in this Report’s Chapter on Health and Safety.

The heightened insecurity of precarious employment means that workers may live day-to-day not knowing whether they will work enough hours in a day or week to meet basic needs.

EFFECT OF LOW INCOME

Precarious workers may also suffer health consequences as a result of their lower income. Low pay often means that workers must work at more than one job or must work long hours. In turn, long hours mean that they are more susceptible to illness or injury. Low wages may also affect workers’ access to “safe transportation and sufficient nutritious food.”¹⁷³ Without safe transportation, workers expose themselves to riskier forms of transportation or are unable to travel to access health care.¹⁷⁴

JOB INSECURITY AND STRESS

The job insecurity associated with precarious work may cause workers to experience significant stress. Although the flexibility afforded by self-employment and temporary and part-time employment may allow some vulnerable workers to juggle family responsibilities, quite often these arrangements are unpredictable. Workers are often not given advance notice of their work schedule, they are required to work split shifts or they are chronically “on call”.¹⁷⁵ The heightened insecurity of precarious employment means that workers may live day-to-day not knowing whether they will work enough

hours in a day or week to meet basic needs. This job strain, the pressure of holding multiple jobs, irregular or long hours, insecure visa status and a lack of legal protections all may contribute to stress.¹⁷⁶ For temporary migrant workers, this may be exacerbated by loneliness due to family separation, social and geographic isolation, and few leisure activities.¹⁷⁷ In the LCO's consultations, there were reports of workers experiencing mental health problems including tension, exhaustion and depression.¹⁷⁸ Job strain has also been found to have consequences for one's physical health.¹⁷⁹

In some cases, the fragmented and isolated nature of precarious work prevents workers from experiencing a sense of job satisfaction and from developing rewarding work relationships. For example, temporary or part-time employees may not be given sufficient hours to fully integrate into the workplace or the continuity of employment to see the results of their work.¹⁸⁰ This may lead to a decline in mental health. Similarly, the trend of recent immigrants working in jobs for which they are over-qualified has also been associated with mental health decline.¹⁸¹

BARRIERS TO ACCESS TO MEDICAL TREATMENT AND MEDICINE

In its consultations, the LCO heard that precarious workers have difficulty accessing medicine, particularly prescription medicine. They generally do not have benefits and, because their wages are low, drugs are relatively costly.¹⁸² For example, less than 10 percent of temporary workers receive extended health care and only 2 percent receive dental benefits.¹⁸³ This lack of access to health benefits and paid sick days encourages vulnerable employees to ignore injuries and illnesses rather than seek medical treatment. For newcomer workers and temporary foreign workers, there are often language and other cultural barriers to accessing health care.¹⁸⁴ Particular concerns were expressed that a lack of health benefits may compromise the health of pregnant women. According to one advocate, pregnant women without immigration status do not have health coverage and must save their money in order to receive check-ups and assistance in the delivery of their child. These women may miss check-ups where they do not have adequate funds or they cannot afford to lose hours at work.¹⁸⁵ Also, pregnant women in workplaces with fewer than 50 people are not covered by the personal emergency leave provisions in the *Employment Standards Act* and these women may not be given enough time off to attend necessary medical appointments.¹⁸⁶ The Ontario government response to the Interim Report pointed out that those without coverage may be able to attend a Community Health Care Centre for basic care and that "Ontario hospitals cannot refuse to treat or admit an individual if the refusal would thereby endanger the person's life, regardless of the individual's residency or insurance status."¹⁸⁷

Finally, the lack of supplementary health benefits associated with precarious work may make it unfeasible for vulnerable persons receiving social assistance to take a job in the first place. The Commission for the Review of Social Assistance in Ontario (CRSAO) noted in its Discussion Paper, "with the growth in part-time and low paid work, it is increasingly difficult for people to obtain sufficient earnings and health benefits through employment to replace social assistance benefits."¹⁸⁸

For example, temporary or part-time employees may not be given sufficient hours to fully integrate into the workplace or the continuity of employment to see the results of their work. This may lead to a decline in mental health.

2. Family and Community Relationships

Precarious employment is also likely to have a negative effect on the individual's personal, family and community relationships. The effect of working multiple jobs, long hours or having to search for additional work will limit the time a person can spend on these relationships, or even time spent in forming such relationships. This can lead to negative feelings of self-worth and can erode personal integrity. Over time, the individual may lose the informal support network of family and friends.¹⁸⁹

Unpredictable work hours can also play havoc with the worker's family life and social life, making it more difficult to arrange stable childcare and leaving workers unable to commit to other socially beneficial activities such as becoming involved in their community.

3. Training and Education

Precarious workers have limited opportunities to access training or education allowing them to upgrade their skills. Without training, they are less likely to find more stable and better paid work. This contributes to long term economic vulnerability and perpetuates the cycle of precarious work.¹⁹⁰

Unpredictable work hours can also play havoc with the worker's family life and social life, making it more difficult to arrange stable childcare and leaving workers unable to commit to other socially beneficial activities such as becoming involved in their community.

Employment support programs currently available in Ontario are not well designed to target the needs of the most vulnerable workers. Many Employment Ontario programs are available only to those receiving federal employment insurance (EI) benefits. Yet workers in non-standard employment relationships are less likely to meet the eligibility requirements for EI.¹⁹¹ Dependent self-employed workers are excluded from the program altogether and temporary and part-time workers may not be able to accrue the minimum hours of insurable employment necessary for eligibility.¹⁹² According to a recent report, only 25 percent of unemployed workers in the City of Toronto are eligible for EI.¹⁹³

Even those with the means to pay for training must find enough time to attend training sessions. Some workers attempt to train while working multiple jobs – a practice which has negative health consequences and contributes to employment strain. Temporary foreign workers are frequently prohibited or highly restricted in terms of taking vocational training as a condition of their work permit.¹⁹⁴

4. Aging

The impact of a lifetime of precarious employment increases with age. Without access to sufficient savings or a private pension, vulnerable workers may continue to work when others would retire, or they may face poverty in retirement. This contributes to negative health impacts and it increases reliance and cost pressures on state-funded assistance in retirement, such as the Old Age Security Program and the Guaranteed Income Supplement for low-income older adults. This will affect more women than men, due to both the higher numbers of women in precarious work and the longer-life expectancy of women. For a broader discussion of some of the challenges facing older adults in Ontario, and particularly those with low income, see the LCO's *A Framework for*

*the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice.*¹⁹⁵

5. Intergenerational Costs

Finally, the nature of precarious work is also likely to have intergenerational costs. There do not appear to be studies that specifically examine the consequences to children when a parent is precariously employed. However, there are studies that show that poverty has high intergenerational costs.¹⁹⁶ Growing up in a low income household appears to affect a child's educational achievements and chances in life.¹⁹⁷ Although this transmission of poverty is not well-understood, low income does impose limits on the amount parents can spend on "nutritional food, educational fees, fitness and other extra-curricular activities."¹⁹⁸ Furthermore, precarious work is likely to limit family time and the stress of this type of employment is likely to have a negative effect on family life.¹⁹⁹ If parents also have precarious legal status in Canada, this will likely disadvantage their children, even where the children have been born in Canada.²⁰⁰ Nevertheless, Canada has a relatively high rate of intergenerational mobility. Only about 20-25 percent of Canadian children growing up in poverty will remain poor in adulthood as compared to 40-60 percent in the United States.²⁰¹

[P]overty has high intergenerational costs. Growing up in a low income household appears to affect a child's educational achievements and chances in life ... [L]ow income ... impose[s] limits on the amount parents can spend on "nutritional food, educational fees, fitness and other extra-curricular activities."

F. Contemporary Debate about Precarious Work

The increase in precarious work has led to increased attention to and debate on the need to protect vulnerable workers.²⁰² There have been a wide variety of studies and reports including the following:²⁰³

1. Law Commission of Canada Review

Of particular note is the project commenced by the Law Commission of Canada (LCC) on vulnerable workers in 2004 which addressed the issue more broadly than circumstances in Ontario and included consideration of federally-regulated matters.²⁰⁴ This project was not yet complete when the LCC ceased operations. Nevertheless, its Discussion Paper offers insights into the ways in which the current regulatory framework fails to protect and support vulnerable workers, noting the following problems:

- the regulatory framework has not kept up with the rise in precarious work and the more flexible forms of work being offered by employers;
- enforcement of existing laws and regulations is not adequate to protect vulnerable workers;
- supports provided to vulnerable workers are inadequate to enable them to transition to more stable and higher paying employment; and
- existing laws and policies do not accommodate unpaid work obligations adequately.²⁰⁵

The Discussion Paper goes on to identify several possible directions for reform including increasing the incomes of low-paid workers, expanding labour laws to provide more protection for vulnerable workers, and connecting eligibility for benefits (such as Employment Insurance or Canada Pension Plan) to factors other than the employment relationship.²⁰⁶

2. The Arthurs Report

The 2006 Arthurs Report, *Fairness at Work*, also provides invaluable insight into the issues of the changing nature of work. Arthurs was commissioned by the federal government to review the labour standards contained in Part III of the *Canada Labour Code*.²⁰⁷ Many federally-regulated workplaces in Canada are large organizations such as banks, telecommunications firms, transportation and pipeline companies. As a result, there are relatively fewer low-paid and otherwise vulnerable workers under federal jurisdiction than under provincial jurisdiction.²⁰⁸ This fact, paired with the different regulatory regime governing federal workplaces, limits the degree to which Arthurs' recommendations inform the LCO's project. However, the Report does provide a comprehensive picture of the modern workplace and the social and economic trends influencing it.

Family structures have become more diverse and "immigration has transformed the ethnic, racial, cultural and religious make-up of Canadian...workplaces."

Just as this Report considers the changing demographics of the Ontarian workforce over the past several decades, the Arthurs Report conducts a similar review in the federal context. It notes that the workforce is more diverse with women working in increased numbers such that "the two-income household has become the norm." In 1961, both partners worked in only 19 percent of households, whereas in 2001 that was the case in 62 percent of households. Family structures have become more diverse and "immigration has transformed the ethnic, racial, cultural and religious make-up of Canadian...workplaces."²⁰⁹ Groups that were historically under-represented in the workforce, such as Aboriginal persons and persons with disabilities, are increasingly present in significant numbers. In general, the workforce is better educated and there has been a shift towards knowledge-based occupations. As a result, both workers and employers have placed increasing emphasis on education and training. More people are opting for self-employment - whether by choice, by necessity due to other obligations or because they have not been able to find traditional forms of employment. This has resulted in "increasingly ambiguous relationships between these workers and the people they work with and the enterprises they serve."²¹⁰

The Arthurs Report also notes the difficulty of addressing the needs of vulnerable workers solely from a labour standards perspective and in isolation from broader social supports such as income support, affordable housing and affordable childcare.²¹¹

CANADIAN CHAMBER OF COMMERCE RESPONSE TO THE ARTHURS REPORT, 2009

The Canadian Chamber of Commerce represents "more than 300 local chambers of commerce speaking for 175,000 businesses of all sizes."²¹² In responding to the Arthurs' Report, the Canadian Chamber of Commerce indicated that overall the Report maintained a balance between workers' and employers' views; however, it enunciated concerns with some of the recommendations. Moreover, it made the important point, and one that we recognize, that the economy had changed since 2006.

The world has changed since the *Federal Labour Standards Review Commission* issued its report in 2006...The result is lower demand for products and services coupled with tighter credit access. This constrains businesses' ability to survive, let alone grow. If ever Canadian employers needed

flexibility in managing their relationships with employees, it is now. In these grave economic times, it is vital that the government not add any additional cost and/or administrative burden to businesses through additional regulations that do not address a real problem in a practical way and result in improvements for employees or employers.²¹³

As we have said previously, we recognize these economic complexities and we agree that new regulations impacting employers must constructively address real problems. Accordingly, we have proceeded with care when suggesting new regulatory mechanisms and we have done so only where we perceive it is necessary to respond to concrete issues. There are many examples that illustrate our approach. Our response to proposals to extend the ESA claims limitation period, to harmonize the definition of employee across legislation and to implement a registry of employers of temporary foreign workers are just a few examples of our approach.

3. The Dean Report

In January 2010, the Ontario Minister of Labour appointed an Advisory Panel on Occupational Health and Safety to conduct a review of Ontario's occupational health and safety system. The panel, chaired by Tony Dean, was composed of academics and representatives of labour and employers with expertise in health and safety issues. The Dean Report was released in December 2010. The Report's recommendations focused on enhanced training, resources and support, protections against reprisal, and an OHS structure for prevention that is aligned with enforcement.

The Ontario government has committed to implement the Dean Report recommendations and, to date, much work has been accomplished.

As a result of the Panel's recommendations, amendments were made to the *Occupational Health and Safety Act* and the *Workplace Safety and Insurance Act, 1997* establishing the Ministry of Labour as the lead for prevention of illness and injury.²¹⁴ The changes resulted in the appointment of Ontario's first Chief Prevention Officer to coordinate the prevention system and the appointment of a new Prevention Council and will permit the establishment of standards for health and safety associations, workplace education and training, and the promotion of workplace safety. Some of the Dean Report's recommendations are directed at vulnerable workers, and others, while more general, would have specific benefits for this segment of the working population. The Ontario government has committed to implement the Dean Report recommendations and, to date, much work has been accomplished.

G. Precarious Work and the Law

In the Chapters that follow, the LCO examines the *Employment Standards Act* and the *Occupational Health and Safety Act*, the two legislative schemes which play a central role in addressing the problem of precarious employment in Ontario.²¹⁵ This section provides context for the discussion by briefly identifying some of the other laws, regulations and policies which may affect precarious employment in Ontario.²¹⁶

1. The Charter and Human Rights Law

The constitutional rights enshrined in the *Charter* apply only in relation to the exercise of government power and to activities engaged in by organizations if there is a

sufficient nexus with government.²¹⁷ Therefore, the *Charter* is generally not engaged in relation to private sector employers or trade unions. However, *Charter* rights may affect private actors indirectly, such as where a law fails to provide certain employees with the same protection or benefits provided to others.²¹⁸ For example, the exclusion of agricultural workers from the collective bargaining regime in Ontario's *Labour Relations Act* (LRA) and the specific regime covering agricultural workers have been the subject of important *Charter* challenges.²¹⁹

The Ontario *Human Rights Code* does extend to private sector employers and trade unions. It prohibits employment discrimination on the basis of a number of personal characteristics: "race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability".²²⁰ As discussed above, workers who are socially marginalized as a result of one or more of these characteristics are more likely to be engaged in precarious work. The *Code* does not define "employment" but, according to the Human Rights Commission, this term would include most forms of precarious work including contract work and temporary agency work.²²¹ The *Code* does recognize that some jobs have *bona fide* occupational requirements and employers may make distinctions on this basis but these qualifications will only be considered reasonable and *bona fide* where the needs of the employee cannot be accommodated without undue hardship to persons responsible for the accommodation.²²² The *Code* also recognizes the right to enforce one's rights under the *Code* (i.e. the right to be free from discrimination) without fear of reprisal.²²³ This is analogous to the *Occupational Health and Safety Act* and the *Employment Standards Act*, which similarly prohibit reprisals for enforcing one's rights under those Acts.²²⁴

The Ontario Human Rights Code...prohibits employment discrimination on the basis of a number of personal characteristics... [W]orkers who are socially marginalized as a result of one or more of these characteristics are more likely to be engaged in precarious work.

2. International Law

Internationally, there are several conventions that address vulnerable workers and precarious employment. A number of these have been ratified by Canada and, accordingly, are binding on Ontario. These reflect international standards on the treatment of workers and they have proved to be important tools in interpreting domestic law including the *Charter* and the *Human Rights Code*.²²⁵

International law has been particularly influential in recent jurisprudence interpreting freedom of association under subsection 2(d) of the *Charter*. In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, the majority of the Supreme Court of Canada looked to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Covenant on Civil and Political Rights* (ICCPR) and the International Labour Organization's (ILO) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise* (Convention No. 87) in holding that the right to bargain collectively is protected as part of freedom of association in subsection 2(d).²²⁶ McLachlin C.J. and LeBel J. observed that:

...Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.²²⁷

More recently, the Supreme Court reaffirmed its commitment to international law as an interpretive tool in *Ontario (Attorney General) v. Fraser*.²²⁸

Canada acceded to the ICESCR in 1976. This Convention recognizes a right to work and a corresponding state obligation to create programmes and policies that will “achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”²²⁹ It further recognizes rights to “just and favourable conditions of work,” including fair wages, equal pay for equal work, “a decent living”, safe and healthy working conditions and rights to rest periods, limited work hours and holiday pay.²³⁰ Trade unionization and the right to strike are also provided for in the ICESCR.²³¹ These principles are binding on both the federal and provincial governments, although there are limited means for enforcing them.²³² In particular, the “decent living” principle has gained traction in the literature and was relied on by Arthurs in his *Fairness at Work* report. It has similarly informed the LCO’s own inquiry into precarious work by importing into our analysis of Ontario legislation a concern for basic fairness and health and safety in the workplace, as well as the recognition of the importance for workers of engaging fully in work, family and community life.²³³

[T]he “decent living” principle has gained traction in the literature... It has similarly informed the LCO’s own inquiry into precarious work by importing into our analysis of Ontario legislation a concern for basic fairness and health and safety in the workplace, as well as the recognition of the importance for workers of engaging fully in work, family and community life.

The ILO has also enacted a number of fundamental conventions addressing the rights of workers, including Convention No. 87. This Convention gives workers and employers the right “without distinction whatsoever...to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”²³⁴ It further requires that nations “take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.”²³⁵ In *Health Services*, the Supreme Court of Canada noted that Canada’s ratification of Convention No. 87 indicated “not only international consensus, but also principles that Canada has committed itself to uphold.”²³⁶ The Court relied on Convention No. 87 in interpreting freedom of association in the *Charter* to include the right of union members to bargain collectively.

There are, however, several ILO Conventions that Canada has not ratified, including another freedom of association convention, *Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and Bargain Collectively*.²³⁷ Nor has Canada ratified several ILO and UN conventions protecting the rights of migrant workers.²³⁸ There is debate over the extent to which these conventions are binding on Canada simply by virtue of its membership in the ILO. Whether binding or not, the Supreme Court has relied on un-ratified conventions as providing “a normative foundation” for interpreting domestic law.²³⁹

3. Domestic Law and Policy Initiatives

A legislative initiative with potential to impact many vulnerable workers is Ontario’s Poverty Reduction Strategy, launched in 2008.²⁴⁰ The preamble to the *Poverty Reduction Act, 2009* recognizes that the “reduction of poverty supports the social, economic and cultural development of Ontario”.²⁴¹ It also explains that

...The Government's poverty reduction strategy is guided by the vision of a province where every person has the opportunity to achieve his or her full potential, and contribute to and participate in a prosperous and healthy Ontario.²⁴²

The principles of the Act recognise that poverty is connected to the labour market, stating that there is

...untapped potential in Ontario's population that needs to be drawn upon by building and establishing supports for, and eliminating barriers to, full participation by all people in Ontario's economy and society and, in particular, persons who face discrimination on the grounds of their race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.²⁴³

The Strategy also recognises the heightened risk of poverty among groups such as immigrants, women, single mothers, people with disabilities, Aboriginal peoples and racialized groups.²⁴⁴

*"...The Government's poverty reduction strategy is guided by the vision of a province where every person has the opportunity to achieve his or her full potential, and contribute to and participate in a prosperous and healthy Ontario."
Poverty Reduction Act, 2009*

The Poverty Reduction Strategy includes initiatives regarding education, after school programs, the child tax benefit, the social assistance review, legislation to protect live-in caregivers and workers at temporary agencies and enhanced employment standards enforcement.²⁴⁵ These initiatives illustrate the government's awareness and concern about tackling this issue. For example, the Social Assistance Review's mandate was to determine how to improve Ontario's social assistance system, in particular by improving job opportunities for those who rely on social assistance and are able to undertake paid employment. Ontario Social Assistance Review's Final Report, *Brighter Prospects: Transforming Social Assistance in Ontario*, includes 108 recommendations.²⁴⁶ In these recommendations, there is an emphasis on a multidisciplinary approach between the Ontario government, municipalities and members of First Nations to integrate ODSP and Ontario Works into a single program, simplify the benefits structure, appoint a Provincial Commissioner for Social Assistance, address income inequality and encourage social assistance recipients to exit the system.²⁴⁷

Other Ontario government initiatives, such as increases to the minimum wage and its commitment to implementing the Dean Report on Occupational Health and Safety, are also significant developments responding to the needs of vulnerable workers. Ontario has also emphasized proactive enforcement of employment standards for certain groups of vulnerable workers. For example, when new standards for temporary help agencies were legislated in 2009, the government established a dedicated team to conduct targeted inspections to ensure compliance. In the summer of 2012, the Ministry of Labour engaged in compliance checks targeting the temporary agency sector that focussed proactive enforcement activities on agencies with vulnerable workers, prior history of violations, high numbers of complaints and represented a significant part of Ontario's workforce.²⁴⁸

The Ontario government is also working to attract investment and create jobs in Ontario particularly in the face of the significant decline in Ontario's core manufacturing sector.

The federal government has signalled its concern for workers in less secure forms of employment with initiatives aimed at developing ways for the self-employed to opt into special employment insurance benefits and for private sector employees to participate in self-funded group registered retirement plans. The federal government has also recently strengthened regulations relating to temporary foreign workers that will provide them with additional protections.²⁴⁹

Government responses to the rise of precarious employment must weigh the need to protect workers and the need to attract businesses providing employment and longer term economic benefits for all. This is a delicate balancing act...

Government responses to the rise of precarious employment must weigh the need to protect workers and the need to attract businesses providing employment and longer term economic benefits for all. This is a delicate balancing act, particularly in the face of the global economic situation at the time of the writing of this Report. However, this is precisely the time when the need for an effective response is greatest. In the following Chapters, the LCO assesses Ontario's key legislative and policy responses to the problem of precarious employment and makes suggestions for ways to make improvements while taking into account implications for employers and resource implications for the Ontario government.

III. EMPLOYMENT STANDARDS POLICY AND LEGISLATIVE REFORM: THE EMPLOYMENT STANDARDS ACT AND RELATED LEGISLATION

This Chapter considers the extent to which the *Employment Standards Act* and related legislation responds to the circumstances of precarious work. To address any gaps, it suggests possible reforms. It covers policy considerations, establishing a broader basic floor of minimum rights and expanding knowledge of employee rights and employer obligations. Enforcement is a central ingredient to effective employment standards and both proactive and reactive enforcement systems must respond adequately. Finally, this Chapter discusses mechanisms that support ESA compliance and enforcement both generally and in respect of specific classes of vulnerable workers.

A. Broad Policy Considerations

Employment standards in Ontario are regulated through the *Employment Standards Act, 2000* (ESA) which sets out the minimum rights of workers and the obligations of employers.²⁵⁰ The ESA regulates a wide variety of work-related issues, including minimum wages, employment records, hours, vacation, leaves of absence, termination and severance and includes relevant enforcement provisions as well as special protections for workers at temporary help agencies. Although the legislative framework provides for basic minimum protections for many workers, extensive exemptions and special rules for workers in specific occupations have been enacted, primarily through regulations. The ESA applies to all workers; however, it is most significant for non-unionized employees, since unionized workers often have higher standards and mechanisms to enforce contracts.

Enforcement is a central ingredient to effective employment standards and both proactive and reactive enforcement systems must respond adequately.

The ESA came into force in Ontario in 1969, combining several work-related statutes.²⁵¹ Since its enactment, it has frequently been amended. Legislative changes in the 1970's to early 1990's mostly expanded legislative protections for workers with the introduction of termination notice requirements, severance pay provisions, pregnancy leave and bankruptcy protection.²⁵² Not all changes made during this period expanded rights, however, as lower minimum wage rates were introduced for servers in the hospitality industry.

Reforms introduced in the mid-1990s shortened limitation periods for claims and limited the amount that could be claimed for lost wages. The Ontario government imposed a multi-year minimum wage freeze over this same period.²⁵³ As well, certain leave provisions were expanded and clarified. Government statements at the time of these legislative changes emphasized administrative efficiency and flexibility, but also highlighted the need to protect the most vulnerable workers.²⁵⁴

The *Employment Standards Act, 2000* introduced major changes with increased parental leave provisions, anti-reprisal protections and personal emergency leave.²⁵⁵ Some restrictions were removed for eligibility for public holidays and certain enforcement

provisions were introduced. At the same time, the maximum number of hours worked per week could be increased by agreement between employee and employer, breaks and vacation periods could be divided into smaller time periods, and overtime could be averaged over a four-week period.

In response to the growth in temporary help agencies, new protections for temporary help agency workers were introduced through the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*.²⁵⁶ These provisions require agencies to provide workers with information about the agency, the assignment and working conditions and they prohibit workers from being charged fees. As well, restrictions have been removed from client employers entering into employment contracts with workers. Other regulatory changes made at the same time ensured that temporary help agency workers are covered under the ESA provisions relating to public holiday pay, termination and severance.²⁵⁷

The ESA saw further amendments in 2010 under the *Open for Business Act, 2010*.²⁵⁸ The Act created a number of obligations for employees seeking to make a claim under the ESA with the result being that claimants are now usually required to approach their employers before an ESA claim will be investigated, although in certain cases, such as vulnerable employees, the obligation may be waived. Employment Standards Officers (ESOs) were also given the ability to facilitate settlements at an early stage in the proceedings upon consent of the parties. According to Vosko *et al*, up to 80 percent of cases are resolved at the early stage through compliance with an ESO determination of wages owing, settlement, withdrawal or denial of complaint.²⁵⁹ Workers' advocates are concerned that claimants feel pressured to settle for less than is owed. Further, they regard negatively any pre-order activities that do not result in a formal finding against the employer. From their perspective, it is important that formal records be kept of non-compliant employers for future enforcement proceedings.²⁶⁰

In response to the growth in temporary help agencies, new protections for temporary help agency workers were introduced through the Employment Standards Amendment Act (Temporary Help Agencies), 2009.

Much has been written and said about the workplace relationship regulatory scheme. While the following comments heard by the *Fairness at Work* panel relate to the *Canada Labour Code* system, they are reflective of the two divergent views that have emerged about the ESA.²⁶¹

In hearings, briefs and research reports, two broad views of the workplace relationship emerged. On the one hand, many employers tended to emphasize its contractual, consensual, bilateral character. "Let us work these matters out with our employees," they might say, or, "Our employees are happy with their working conditions," or even, "Terms and conditions should be a matter of contract between employer and employee." On the other hand, many unions, workers and advocacy groups tended to emphasize the inherent imbalance of power between workers and employers that, in their view, prevents fair dealing in the labour market in general, and in most employment relationships in particular. They argue that regulation is needed to undo the results of this imbalance, from which no fair consensual or contractual understandings could possibly emerge. The first position may be somewhat closer to the way the law has historically regarded employer-employee relations; the second may often be closer to the realities of the contemporary world of work. However, neither perspective can be ignored. In life, as in law, workplace relations are shaped both by contract and by regulation.²⁶²

In a similar vein, the LCO's research and consultations revealed a great deal of concern among workers' advocates and academics that the ESA claims process, as currently configured, places too onerous a burden on employees to self-advance their own claims. Workers' advocates argued for a system that places less responsibility on employees to pursue individual claims, tipping the scale in favor of increased government initiated inspections, investigations and prosecutions. From this perspective an ideal enforcement model is envisioned as both expeditious and consistent with an emphasis on mandatory, deterrent responses. Workers' advocates and academics also favored expanding legislative protections. Employers, on the other hand, expressed concern about the impacts that increased regulation and the resultant increased expenses would have on their businesses, many of which must compete in a global economy. Employers favored compliance support for businesses under the existing enforcement provisions. Workers themselves were primarily concerned about accessing the protections in the current legislation and fear of reprisal.

"[W]hen it comes down to considering improvements in standards of employment, we must improve but also maintain a balance that will help us to keep industry and to attract new industries to the province."

Hon. Dalton Bates, QC,
Minister of Labour for Ontario
(1968)

Since the enactment of the original ESA, government has been cognizant of the need to respond to both workers' and employers' interests. In 1968, at the introduction of the legislation, the Minister of Labour made the following comments: "when it comes down to considering improvements in standards of employment, we must improve but also maintain a balance that will help us to keep industry and to attract new industries to the province."²⁶³

This has been the driving force behind the multiple amendments to the ESA over the years. The result is an Act that sets out broad employment protections but limits them through special rules and exemptions. Some sections of the Act do not apply to smaller businesses. Sector specific rules or exemptions have been enacted for certain occupations within industries such as agriculture, construction, residential care workers and restaurants and accommodation. In other cases, casual, temporary or part-time workers may not qualify for certain protections due to insufficient hours or the discontinuous nature of their employment. The result is a legislative framework that, some argue, no longer meets its objective in providing a basic floor of minimum rights for all workers.

In the meantime, the struggle to find the right balance continues. As noted in *Fairness at Work*:

What, then, to make of the argument that state regulation also has its limits, that if regulation places excessive burdens on business and cripples the economy, we will all be worse off - vulnerable workers, their employers and all the rest of us? This is not merely a legitimate concern; it is a crucial question. Nonetheless, most people agree that at some undefined point this concern must be set aside, and moral or normative concerns must be allowed to trump economic or business concerns. In this day and age, in a country with Canada's affluence and moral aspirations, we are not likely to tolerate certain kinds of working conditions.²⁶⁴

For the LCO, the question is whether in today's economy and moving forward into the future, Ontario is striking the right balance and, if not, what new direction should be taken.

B. Basic Floor of Minimum Rights

1. Reducing and Updating Exemptions

As we have noted, the ESA purports to legislate minimum employment standards but contains a multitude of special rules and exemptions. In some cases, exceptions are occupation specific, where the ESA sets out differential treatment for certain categories of workers.²⁶⁵ For example, there are four categories of agricultural workers: farm workers, harvesters, near farmers and landscape gardeners. All but farm workers are entitled to minimum wage. Harvesters are entitled to public holidays but farm workers, near farmers and landscape gardeners are not. There are special rules set out for most construction workers and many other occupations and/or industries. Hours of work, eating periods and overtime pay are other areas where there are specific exemptions for certain occupations. Farm workers and harvesters are exempt from all of these.

[W]hen a significant portion of available work is shorter term and insecure, employment protections that cover only standard forms of employment are not responsive to the needs of increasing numbers of workers in non-standard working relationships. In our view, it is time to consider developing additional types of protections for non-standard workers.

In other cases, non-standard workers do not qualify for certain protections of the Act because of discontinuous employment or insufficient time worked. While precarious employment is not “synonymous with non-standard employment”, labour insecurity is often associated with engagement in non-standard and/or discontinuous forms of work.²⁶⁶ As it stands, most provisions of the ESA do not explicitly exclude non-standard employees. In fact, there are a number of provisions that explicitly take into account discontinuous periods of employment. There are, however, instances where ESA coverage is dependent upon a qualifying period. For example, persons holding multiple part-time positions may work 60 hours a week but never qualify for overtime pay as they do not work more than 44 hours a week for any individual employer. In responding to the Interim Report, government officials noted that “[t]he role of employment standards is to ensure that an employer does not exploit an employee in that relationship. But an employer cannot be responsible for the totality of an employee’s circumstances.”²⁶⁷ While this may be true, at the same time, with the shift in employment toward greater discontinuity and insecurity, legislation aimed to protect workers must be responsive to new ways that work is being organized in order to ensure effectiveness. As another example, some workers in successive temporary positions may never qualify for two weeks vacation as they may never work 12 months at any given position. Vacation pay is not subject to these qualifying periods. However, termination notice requires at least three months employment. Severance pay requires five years of employment and the employer must have a payroll of \$2.5 million or the discontinuance must be part of a mass termination. In this case, not only does length of service determine eligibility but size of the business enterprise is a determinative factor in qualifying for protection. As pointed out by the Ontario government in responding to the Interim Report, justification for these differences is based on the view that these are considered reasonable qualifying periods for these entitlements. While this may be so, when a significant portion of available work is shorter term and insecure, employment protections that cover only standard forms of employment are not responsive to the needs of increasing numbers of workers in non-standard working relationships. In our view, it is time to consider developing additional types of protections for non-standard workers.

An example of such recognition of new work realities are the legislative changes that came into force on November 6, 2009. Under the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, temporary agency workers were confirmed to be employees of the agency. By operation of regulation on the same date, termination and severance provisions under the *Employment Standards Act* became applicable to employees of temporary employment agencies.²⁶⁸ These apply as long as the employment relationship between the agency and employee continues, whether or not the employee is working on an assignment with a client of the agency.

The web of special rules under the ESA are so complex that the Ministry of Labour has developed a special rule tool on its website that helps employees and employers identify which occupations have exemptions or special rules. It is likely that each occupational specific exemption was put in place in response to a perceived industry need relevant at the time of enactment to introduce a degree of flexibility into the legislation which would serve the needs of employers operating in a competitive market. From workers advocates' point of view, however, it is viewed negatively: "most of the exemptions relate to the regulation of overtime pay, hours of work and minimum wage, enabling a regulatory regime that allows employers to minimize the costs and scheduling of labour."²⁶⁹

...[I]t is time to update, review and streamline the ESA's exemptions. It is important to determine whether each is based on legitimate, current public policy and industry considerations.

In our view, legitimate concerns have been raised about the current relevance of the exemptions. Time has passed and the Act has been amended on a piecemeal basis over an extended period of time. The result is an Act that is difficult to comprehend and navigate. The effect has eroded Ontario's intended legislative message of commitment to broadly available minimum workplace protections. In the LCO's view, it is time to update, review and streamline the ESA's exemptions. It is important to determine whether each is based on legitimate, current public policy and industry considerations. Occupational exemptions that are no longer relevant or justified should be repealed. For part-time, casual and temporary workers, given the proliferation of this type of non-standard work, serious efforts should be made to identify and close gaps in protections.

Public policy considerations should take into account a modern understanding of the new economy and of the negative implications of precarious work and particularly its disproportionate impact on racialized persons, women, the disabled, Aboriginal persons, youth, recent immigrants and those working in certain sectors. Each exemption should be reviewed with these considerations in mind with the overall objective of reducing vulnerability and providing a more uniform and broadly available set of minimum rights for Ontario's workers.

The Law Commission of Ontario recommends that:

1. The Ontario government:
 - a) in consultation with labour and owner/management stakeholders, update, review and streamline the exemptions within the ESA and related regulations including a review of existing occupational specific exemptions, with the objective of ensuring any exemptions are justified on current public policy and industry considerations; and
 - b) ensure that the review develop and use principles that aim to promote a broadly available minimum floor of basic workers' rights, including that justifications for exemptions be balanced against the need to reduce precarious work and provide basic minimum standards to a broader sector of the working population.

The ESA would benefit from a broad policy statement in a preamble to the Act to underscore the government's commitment to ensure basic minimum employee protections, support compliance and foster public, employer and employee awareness and education.

Any legislative amendments made should be monitored to identify impacts on vulnerable workers.²⁷⁰ An Innovative Solutions for Precarious Work Advisory Council as recommended at Recommendation 26 could provide the Ministry of Labour with advice on the relevance, justification and impact of sector specific exemptions and special rules.

The ESA would benefit from a broad policy statement in a preamble to the Act to underscore the government's commitment to ensure basic minimum employee protections, support compliance and foster public, employer and employee awareness and education. A similar amendment was made to the *Occupational Health and Safety Act* in response to the Dean Report, and a new section was added outlining the Minister of Labour's powers in regard to the promotion of occupational health and safety and prevention of diseases, promotion of public awareness, fostering a commitment to health and safety among employer and workers and education.²⁷¹

The Law Commission of Ontario recommends that:

2. The Ontario government codify within the ESA a broad policy statement highlighting its commitment to protecting basic minimum employment rights, supporting compliance and fostering public, employer and employee awareness and education.

2. Minimum Wage

According to Statistics Canada, in 2009, 8.1 percent of Ontario workers earned minimum wage. The Canadian average was 5.8 percent.²⁷² Poverty advocates support minimum wage as a poverty reduction policy initiative. While the policy has not been without controversy with economists arguing both for and against minimum wage as an effective poverty reduction tool, every Canadian jurisdiction has adopted a minimum wage.²⁷³

As of March 31, 2010, the rate in Ontario for minimum wage was raised to \$10.25 an hour for most jobs. The Ontario government has raised the minimum wage approximately 50 percent from \$6.85 in early 2004 in part to offset earlier freezes and to ensure minimum wages were outpacing inflation.²⁷⁴

For some years leading up to the increases, advocates had called for bringing the minimum wage up to \$10.00. After seven increases, in February 2011, the government announced that it would not raise the minimum wage further but instead would “appoint a committee representing both business and workers to provide advice on the minimum wage in advance of the 2012 budget.”²⁷⁵ This was welcomed by the Ontario Chamber of Commerce that had recommended the government:

1. Initiate an independent minimum wage review board or commission, comprising of business (representing various sectors and size), labour representatives and social groups
2. Conduct regular minimum wage reviews that include an economic impact assessment on the provincial economy
3. Combine any increase to minimum wage with social measures targeted to low income Ontarians, so as not to rely heavily on operational business costs (minimum wage) to address poverty issues in the province.²⁷⁶

However, as of the writing of this report, there is no information indicating that this Committee has been convened.

At the same time, some workers’ advocates and academics are continuing to call for additional increases to minimum wage, tying the minimum wage to the low income cut-off (LICO) index regulating the rate through a body independent of government or having the minimum wage adjusted for inflation.²⁷⁷ The business community has cautioned about the negative impacts of steep increases.²⁷⁸ In its 2011 report, the Canadian Federation of Independent Business took the position that substantial increases in minimum wages tend to hurt rather than help low income employees in small and medium businesses where employers must absorb the additional costs through reduced hours, reduced training or job cuts.²⁷⁹ Many minimum wage earners are employed in such enterprises and they would bear the costs of such increases.

In our view, the work of the proposed Committee would have been instructive had it been implemented. Such a committee would provide a forum for employer and employee representatives to advise government in identifying the best long term approach to minimum wage balancing the needs of business and employees. The LCO supports the implementation of this minimum wage advisory Committee.

In our view, the work of the proposed Committee would have been instructive had it been implemented. Such a committee would provide a forum for employer and employee representatives to advise government in identifying the best long term approach to minimum wage balancing the needs of business and employees. The LCO supports the implementation of this minimum wage advisory Committee.

The Law Commission of Ontario recommends that:

3. The Ontario government convene the minimum wage Committee, or similar body, to review minimum wage issues balancing the needs of business and employees.

3. Part-time employees paid proportionately at the same rate as full-time employees

The LCO's consultations and research revealed the need for a response to the situation of part-time workers receiving lower pay than full-time workers. While there are often legitimate business reasons to hire part-time employees, some employers appear to use part-time employment to hire workers at a lower rate.²⁸⁰ Unless there is a justification for the difference based on skill levels, experience or job description, Arthurs argues that such discrepancies are unfair to part-timers and, ultimately, will reduce the standards of full-time workers as well.²⁸¹ The negative impacts of this situation are exacerbated by the fact that part-time work is highly gendered and that, among part-time workers, women are more likely to be low-paid.²⁸² As noted earlier, while choice is a factor for many women engaging in part-time work, the choice is frequently illusory where women are bound by home and care-giving responsibilities.

Findings also suggest that single parents, often women, racialized workers and recent immigrants are more likely to find themselves in part-time, temporary work.²⁸³ The result is that paying part-time workers at a lower rate than full-time workers disproportionately creates vulnerability in these traditionally disadvantaged groups. Within the Project Advisory Group, some members commented upon the need for equal (proportionate) pay provisions to be extended to all workers including casual, temporary and part-time. This would appear to be justifiable in the absence of some clear basis for distinguishing the work done on the basis of experience, skill or job description.

The effort to reduce unequal treatment of part-time workers could serve several purposes. It would proportionately increase equivalency of rate of pay for those who are employed on a part-time basis, thereby partially reversing some of the negative impacts encountered disproportionately by women and other traditionally disadvantaged groups in part-time work by increasing income and perhaps reducing reliance on social assistance. This, in turn, may serve to promote fair and flexible work arrangements in a way that may make part-time work more attractive to workers, benefitting both businesses as well as employees.

Care would be required in crafting legislation to ensure that the concept of equal work is defined in a way that is relatively easy to identify. Lessons can be learned from the UK experience where legislation has been enacted to protect part-time workers from less favourable treatment.²⁸⁴ The legislation also aims to promote flexible work arrangements. According to at least one report, while the legislative protections have improved the situation for some part-time workers and contributed to reducing

Findings also suggest that single parents, often women, racialized workers and recent immigrants are more likely to find themselves in part-time, temporary work. The result is that paying part-time workers at a lower rate than full-time workers disproportionately creates vulnerability in these traditionally disadvantaged groups.

discrimination, the fact that individuals must assert “less favourable treatment” on a case-by-case basis through litigation presents as a barrier to broad access to the right. Furthermore, the definition of “less favourable treatment” as articulated in the legislation has been challenging to identify, particularly in the absence of a full-time employee as comparator and, as a result, the Act is considered to have had a limited impact on transforming the nature of part-time work.²⁸⁵ In the final analysis, we support equal, proportionate pay for part-time workers, while we recognize there will be certain complexities involved in developing an effective, legislative response.

The Law Commission of Ontario recommends that:

4. The Ontario government, taking into account the complexities of the issue, consider what amendments could be made to the ESA to ensure part-time workers are paid at proportionately the same rate as full-time workers in equivalent positions where there is no justification for the difference based on skill, experience or job description.

4. Benefits

Arthurs suggested that the government investigate a range of possibilities for developing new vehicles such as a benefits bank or other mechanisms for delivering benefits coverage to non-standard workers through an employee and/or employer purchased group insurance plan or plan delivered by a public agency.

Whatever is the right model, some way must be found to provide benefits coverage for vulnerable workers who do not now have access to it. Moreover, it would be better if the solution were found sooner rather than later. As unionization rates decline, as more workers move from large firms to small firms, as more workers move from regular employment to non-standard contracts or self-employment, the case for a new approach to benefits insurance comes to rest on a new basis: not only do vulnerable workers need protection, but so too does a growing proportion of the entire workforce.²⁸⁶

One submission to the LCO suggested “a benefit agency modeled along the lines of the multi-employer premium based WSIB experience could be explored...Creating multi-employer agencies, councils or trust vehicles...would be cost effective and a creative way to ensure that employees obtain necessary coverage.”²⁸⁷

The Commission for the Review of Social Assistance in Ontario recommended that “the Province should examine ways to make prescription drug, dental, and other health benefits available outside social assistance to all low-income Ontarians.”²⁸⁸ The Review identifies one possible model as a pooled public insurance plan administered by government or private sector with graduated subsidies for low-income earners.

Another proposal that has been suggested to address temporary workers’ need for benefits is to require employers to pay a premium for short term contracts. This opinion was reiterated by Poverty and Employment Precarity in Southern Ontario (PEPSO) in its response to the LCO’s Interim Report suggesting consideration of the casual loading concept in place in Australia in which casual employees must be paid at a rate 15-25

“Whatever is the right model, some way must be found to provide benefits coverage for vulnerable workers who do not now have access to it.”

Arthurs, Fairness at Work

percent higher than minimum wage to compensate for the lack of certain entitlements such as paid leave. In some cases, part-time workers are entitled to a part-time increase in rate as well. In France, temporary agency workers and fixed term contract workers receive an additional percentage of their pay (10 percent and 6 percent respectively) at the completion of the work assignment. Whether such a concept could be adapted for some or all short term workers to compensate for the lack of benefits, may be a future consideration for the government after consultation with employee and employer stakeholders. We recognize that such an innovation would have cost implications for employers but it may also serve to reduce some of the vulnerability created by casual and temporary forms of work making this type of work less precarious. The Australian Industry Group, representing employers, has suggested that the flexibility of casual work benefits both employers and employees and that the casual loading supplement is attractive to many casual employees.²⁸⁹ Consideration of such an initiative would necessarily require an extensive analysis of the costs and benefits to all parties in order to determine the best course of action. A review of the initiative's experience in Australia and France would also be warranted. The Innovative Solutions for Precarious Work Advisory Council (Recommendation 26) could consider these issues.

The Law Commission of Ontario recommends that:

5. The Ontario government, utilize the Innovative Solutions for Precarious Work Advisory Council (Recommendation 26) in consultation with labour, management and insurance representatives, to explore options for the provision of benefits for non-standard and other workers without benefits coverage, with consideration given to the concepts of a benefits bank and mandatory short term contract premium for temporary workers, among other options.

5. Emergency/Medical Leaves

PERSONAL EMERGENCY LEAVE FOR NON-STANDARD EMPLOYEES

The personal emergency leave provisions of the ESA provide for an annual 10 days of unpaid leave for illness, injury, medical emergency, bereavement or urgent situations related to close relatives. These provisions are only applicable to employees whose employer regularly employs 50 or more employees. While not explicit in the Act, the Ministry of Labour indicates that part-time employees are eligible for the full 10 days annually even where the employment has commenced part-way through the year.²⁹⁰ While the ESA Policy and Interpretation Manual is silent about the eligibility of temporary employees for personal emergency leave, the Ministry of Labour advised that, in fact, temporary workers are eligible for personal emergency leave.²⁹¹ By contrast, the manual is explicit that family medical leave, for example, is available to contract employees.²⁹²

Family medical leave is an eight week leave to provide care or support to prescribed family members for serious medical conditions with a significant risk of death. Unlike personal emergency leave, it is not restricted to larger businesses. Family caregiver leave

was another eight week leave introduced in the Legislature in December 2011 that provided up to eight weeks of unpaid job protected leave for employees to provide care and support to a sick or injured family member with “a serious medical condition” where death need not have been imminent and there was no restriction for those working in small businesses. As the legislature prorogued while this Bill was in committee, it remains to be seen whether it will be re-introduced in the future. Family caregiver leaves represent a relatively recent legislated recognition of workers’ family responsibilities. Yet these leaves are not dependent upon the size of the employer’s enterprise as is the case with personal emergency leave. These differences in eligibility raise the question of whether the personal emergency provisions should be reviewed to ensure that each provision has a solid rationalization based on current public policy grounds.

...[R]espondents noted that the lack of access to personal emergency leave is particularly difficult for vulnerable workers who often work in smaller businesses. The example of pregnant women attending medical appointments was raised as a particularly critical gap.

In the LCO’s consultations, respondents noted that the lack of access to personal emergency leave is particularly difficult for vulnerable workers who often work in smaller businesses.²⁹³ The example of pregnant women attending medical appointments was raised as a particularly critical gap. However, not everyone we consulted agreed that the leave provisions should be extended further. Some employer organizations noted that the leave provisions did not necessarily benefit lower wage workers and indicated that the provisions were primarily accessed, and in some cases inappropriately used, by workers in higher skilled positions. Some members of the Project Advisory Group supported extending personal emergency leave to all employees and enacting provisions for paid sick leave.

The LCO believes that personal emergency leave should be available to all workers notwithstanding the size of the enterprise. We are aware, however, that smaller enterprises may be operating with much less flexibility than larger ones. Employers have also raised concerns about their ability to maintain competitiveness in the face of lower regulations in neighbouring jurisdictions.²⁹⁴ One compromise position that was suggested is the possibility of legislating extended personal emergency leave while, at the same time, categorizing available leaves into more defined categories as is the case in Prince Edward Island. Prince Edward Island’s employment standards legislation provides three days per year for illness and injury; in addition, after five years of employment, one day of paid sick leave is available. Three unpaid days of leave are available for bereavement, one day of which is paid in the case of the death of an immediate family member.²⁹⁵ There would be a downside for workers in that more defined limits would be placed on the amount of leave that could be taken for any given category; however, this would be one way to extend the protection to all while minimizing the impact on businesses. We do not necessarily endorse this suggestion. It is simply an example of an alternative approach that was raised during the course of our consultations. It would be necessary to weigh the costs and benefits to consider whether such an approach would be worth considering. We note that, at the time of this report, Prince Edward Island is the only Canadian province to have introduced provisions for paid sick leave in employment standards legislation and the provisions are very limited.

The Law Commission of Ontario recommends that:

6. The Ontario government review personal emergency leave provisions in the ESA to ensure each provision is justified on current public policy grounds and to determine ways to extend the benefit to workers in workplaces with fewer than 50 employees (including part-time, casual and temporary employees of these small enterprises).

EXTENDED MEDICAL LEAVE

Some members of the Project Advisory Group believe that the *Employment Standards Act* should protect workers in cases of long term illness. Anecdotal evidence was cited about promising European models for mandatory employer paid insurance plans. Also raised was the possibility of a legislated requirement for employers to extend benefits to non-standard workers when full-time employees were covered. Saskatchewan's legislation requiring benefits for some part-time employees was raised, although the significant limits to that legislation are notable. In declining to recommend that employers provide benefits to non-standard workers, Arthurs' comments are useful.

...[W]e ... suggest ... that the Ontario government explore options for the provision of benefits for non-standard workers utilizing the Precarious Work Advisory Council.

No doubt some employers decide to deny coverage to non-standard workers purely and simply in order to lower their payroll costs. However, it is also likely that providing coverage for non-standard workers and those employed by SMEs [small and medium-sized enterprises] is more complicated and expensive than for regular full-time workers in larger enterprises. The actuarial problem of spreading risks from across a small group, the administrative diseconomies of small-scale plans and the problem of pro-rating certain benefits for part-time workers all represent potential disincentives to employers considering whether to provide benefits coverage to non-standard workers. These problems are severely exacerbated by the difficulties of collecting premiums from and providing benefits to a transient population, such as temporary and agency workers. It is not completely clear whether the barriers to benefits coverage that I have identified are real or merely hypothetical. However, I am not prepared to recommend that employers be required to provide benefits to non-standard workers unless and until I am convinced it is practicable for them to do so.²⁹⁶

While we are not making a recommendation for the provision of benefits for non-standard workers to be enshrined in legislation, we do suggest in recommendation 5 that the Ontario government explore options for the provision of benefits for non-standard workers utilizing the Precarious Work Advisory Council Advisory Council (Recommendation 26).

C. Knowledge of Rights and Obligations

1. Public Awareness, Education and Outreach

In *Fairness at Work*, Arthurs observed

the best prospects for securing compliance with labour standards involve programs to educate workers and employers concerning their rights and responsibilities...Where possible, these

programs ought to be undertaken in cooperation with employer, worker or advocacy organizations.²⁹⁷

Lack of workers' and employers' knowledge about their rights and responsibilities was a frequent theme raised in the LCO's consultations by government, employers, workers, community service providers, workers' advocates and academics alike.²⁹⁸

The Ministry of Labour has made very extensive efforts to respond to concerns about lack of knowledge through the development of its ESA website, providing multilingual information, special tools and contact information about the Ministry's telephone line. Despite these efforts, the consultations demonstrated that limited access to computers, limited literacy and language skills, as well as fear of reprisals, created barriers for workers' access to the system. In our consultations with temporary foreign workers, the LCO heard that some had received no information about their rights prior to arrival in Canada and did not know who to turn to for assistance.

A campaign featuring ads, posters and information sessions would raise the profile of the legislation for both workers and businesses highlighting government support for protecting vulnerable workers and for supporting employers with ESA compliance.

Further efforts to increase public education would be an effective method for getting the message out. As an example, *Working on the Edge* proposed the promotion of employees' rights and employers' responsibilities through a Ministry of Labour public education campaign.²⁹⁹ A campaign featuring ads, posters and information sessions would raise the profile of the legislation for both workers and businesses highlighting government support for protecting vulnerable workers and for supporting employers with ESA compliance. Based on the information we received during our consultations and submissions, the LCO notes the importance of active rather than passive public education. Emphasis by the Ministry of Labour on actively bringing the information to workers and employers rather than reliance primarily on the Ministry's website would have a greater impact. Both employer and worker stakeholders noted concerns about over-reliance on the internet for disseminating public information. Not everyone has access to the internet and rural Ontario does not always have access to high speed internet.³⁰⁰ Public education materials and sessions should be situated where the workers and employers are, in public places such as subways, buses, television and in workplaces. As noted in their feedback to the Interim Report, the Metro Toronto Chinese and Southeast Asian Legal Clinic made the point that it would be important to ensure that materials and sessions were accessible to ethno-racial communities.³⁰¹ Existing government-employer-employee committees can be another way to disseminate information. Such a campaign could be initiated as part of a larger provincial strategy that we recommend in Recommendation 47.

The Ministry of Labour currently conducts some outreach information sessions with worker and employer groups. Programs like these, particularly those that feature person-to-person contact between the Ministry and the employment community, should be supported and expanded. As noted by the Chinese Interagency Network of Greater Toronto, providing workers with greater personal access to Ministry of Labour staff for questions, complaints and information would be very useful.³⁰² Increasing ESA access through direct personal contact as well as partnerships between the Ministry and community has been proposed by various commentators.³⁰³ The Ministry of Labour is

well-positioned to continue to expand its current outreach programs and to develop community partnerships through the implementation of initiatives aimed at workers in industries and groups that are disproportionately affected by precarious employment including temporary foreign workers, recent immigrants, youth, the disabled, racialized persons, Aboriginal persons and women.

A number of commentators have advocated a model based on the New York Wage Watch Program, initiated as a pilot in 2009 by the New York State Department of Labor.³⁰⁴ This Program is a formal partnership program between government and community agencies to hold workers' rights sessions, provide employers with compliance information, distribute literature and refer cases of encountered violations to the Department of Labor. It is an innovative project that trains community members who work closely with workers and employers on the ground and with government agencies tasked with administering labour laws. The program has attracted some controversy in that it is framed as an information and education program, yet opponents have expressed concerns that it is, in reality, a form of community enforcement that is being used as a mechanism for union organization.³⁰⁵ Further, opponents contend that the program was implemented without consulting the employer community. In our view, a program that builds community-government partnerships to increase knowledge of rights and responsibilities would be beneficial. Consistent with the Drummond Report's recent recommendation for more stakeholder and community group involvement in policy development, implementation of any such program would require consultation with employer and workers' organizations and careful study of the effectiveness and impacts of New York's program.³⁰⁶ A government-community partnership between the Ministry of Labour and the Ontario Council of Agencies Serving Immigrants (OCASI) has resulted in more than 40 on-site education sessions for immigrant and settlement groups during which "employment standards officers provided a basic introduction to the ESA, a demonstration of tools and copies of print resources."³⁰⁷

...[A] program that builds community-government partnerships to increase knowledge of rights and responsibilities would be beneficial.

As recommended in Recommendations 13 and 23, expansion of the workers' rights services of the Legal Aid Ontario clinic system and/or community agencies serving vulnerable workers would be another option for enhancing capacity for educational sessions and the development of government-community partnerships. The objective would be to heighten ESA awareness. It would have the potential for decreasing fear among workers in pursuing legitimate ESA claims resulting in increased access to justice.

The Law Commission of Ontario recommends that:

7. The Ministry of Labour:

- a) launch a public awareness campaign on *Employment Standards Act* rights and responsibilities;
- b) to support workers' and employers' needs for additional information about the ESA, continue to offer and to expand capacity for providing outreach through ESA informational/educational sessions including but not limited to those in high risk sectors and groups; and
- c) develop partnerships with employer, employee and community organizations to enhance worker and employer knowledge of ESA rights and responsibilities.

2. ESA Handout at Outset of Working Relationship

A simple, virtually no cost strategy for increasing ESA knowledge and supporting compliance in the workplace could be achieved through a handout provided to employees at the outset of the working relationship.

A simple, virtually no cost strategy for increasing ESA knowledge and supporting compliance in the workplace could be achieved through a handout provided to employees at the outset of the working relationship. Currently, subsection 2(3) of the *Employment Standards Act* requires employers to display an informational poster in the workplace that outlines ESA rights and responsibilities and provides the Ministry of Labour contact information. It must be displayed in English and the majority language of the workplace if the Ministry provides the poster in the majority language. This poster is available in printable form as a one-page document on the Ministry of Labour website. Employers can obtain it on the website free of charge and in multiple languages. We suggest an amendment to the ESA that requires employers at the outset of the working relationship to not only display the poster, but also provide a copy of it in document format to all new employees both in English and the language of the worker, if available. In our view, this would increase the likelihood that basic ESA information would be made more accessible to workers. It would increase the chance that workers would take the document home to read it and possibly other family members would read it as well. Such an action has the potential for fostering conversation and inquiry. It may lead more workers to review the Ministry website. By providing such a handout at the outset of the working relationship, employers would set the stage for establishing a sense of commitment to ESA compliance in the workplace.

The Law Commission of Ontario recommends that:

- 8. The Ontario government amend the ESA to require employers to provide the ESA poster in handout format to all new employees in English and, to the extent possible, in the language of the employee.

3. Setting Out the Terms of the Employment Relationship

Arthurs emphasized the importance of employers and workers having a clear understanding of the terms of employment; he recommended a legislated requirement that employers provide non-unionized employees with written notice of rates of pay, hours of work, general holidays, annual vacations and conditions of work at the outset of the employment relationship. An obligation to set out in writing the status and terms of the working relationship would increase the likelihood of compliance by

reminding employers of their obligation to obey the law, and by alerting employees to the possibility of taking remedial action if the law is violated...Clear understandings will facilitate legal recourse for the injured party and perhaps make the job of the defendant easier....³⁰⁸

Temporary agency workers must receive information describing work assignment, hours of work and rate of pay under section 74.6 of the ESA.³⁰⁹ Now, pursuant to the new federal requirements, temporary foreign workers (NOC C and D and live-in caregivers) must receive this type of information in standard form employment contracts. This suggests government awareness of the protective effect of this type of written record for vulnerable workers. In our view, the requirement should be extended to all employees. A clear description of the terms of the employment received at the outset of the relationship has the potential for increased compliance and, if necessary, assistance in asserting ESA rights. In the section on self-employment, there is further discussion of this concept in the context of independent contractors.

A clear description of the terms of the employment received at the outset of the relationship has the potential for increased compliance and, if necessary, assistance in asserting ESA rights....

The Law Commission of Ontario recommends that:

9. a) The Ontario government amend the ESA to require employers to provide all employees with written notice of their employment status and terms of their employment contract; and
- b) the Ministry of Labour develop standard forms to support employers in this task.

D. Employment Standards Act Enforcement

1. The Existing Model: A Critique

In this section, we describe Ontario's general approach to employment standards enforcement and the challenges associated with it. Later, we discuss collateral issues arising from current ESA enforcement.

Ontario's ESA regulation model has been described as "a mix of 'hard' and 'soft' law approaches" with "soft" referring to the "government's reliance on voluntary employer compliance or self-regulatory behaviour from firms" and the "hard" law approach including "orders to pay, compliance orders, and fines or prosecution".³¹⁰ Arthurs observed that worker activists and academics tend to view the employment relationship as essentially an unequal power imbalance rather than one of equal parties to a

contract, and because of this, they support a system which primarily focuses on investigation and prosecution of employment standards violations as public responsibilities similar to the criminal justice system. Such advocates reject the idea of a self-enforcement model that places, in their view, too much responsibility on individual claimants. However, the reality is more complex. A purely public enforcement system such as the criminal justice system focuses on the public interest objective of achieving justice for society as a whole. Individual compensation to the harmed party plays a lesser role. In our view, a purely public law model is not workable for employment standards because a key objective must be compensating individuals for their loss. Therefore, the system must, necessarily, retain elements of the civil justice process. As Arthurs points out, the system is a hybrid of regulation and contract, of public and private law.³¹¹

Arthurs perceives the success of the existing model as highly dependent upon its ability to ensure compliance.

"...[E]ngagement with employers and employees covered by the Employment Standards Act, 2000 (ESA) has been part of the Employment Standards Program from its early history. It has long been recognized that education and compliance go hand in hand."

Ministry of Labour

Labour standards ultimately succeed or fail on the issue of compliance. Widespread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law.³¹²

Ontario's Ministry of Labour works to promote the "soft law" approach of voluntary compliance through its Education, Outreach and Partnership strategy. The Ministry's website outlines the goals of the strategy:

- To create an environment where employers and employees understand their rights and obligations under the Employment Standards Act, 2000 ('ESA').
- To increase employer awareness of responsibilities under the ESA by providing employers with the resources and tools to help them comply.
- To encourage compliance with the ESA.

The Ministry's approach demonstrates its understanding of the link between education and compliance.

The Education, Outreach & Partnership (EOP) initiative began formally in 2009. Yet engagement with employers and employees covered by the Employment Standards Act, 2000 (ESA) has been part of the Employment Standards Program from its early history. It has long been recognized that education and compliance go hand in hand.³¹³

Information is provided through a multi-lingual phone service that received more than 300,000 calls in 2011.³¹⁴ The Ministry responded to 9,000 email inquiries in 2010 and the Ministry's website has very extensive tools, videos and explanatory materials with many resources available in 23 languages.³¹⁵ The Ministry also engages in direct informational sessions with groups of employers and employees. As the government response to the Interim Report explained, "[e]xtensive website materials, including interactive tools, are available to assist employers to educate themselves and ensure they are in compliance with the ESA. Interactive tools include Hours of Work and

Overtime Tool, Public Holiday Calculator and Severance and Termination Tools.”³¹⁶ When contraventions of the ESA are found through inspections or claims investigations, employment standards officers are empowered to impose escalating administrative penalties, issue tickets under Part I and initiate prosecutions under Part III of the *Provincial Offences Act*.

However, as Doorey points out, this approach has its limitations.

...many employers weigh the costs of compliance against the relatively low probability of being found in non-compliance and the weak penalties associated with a breach, and make an economic decision not to comply...The MOL already provides considerable resources on its various websites, and offers telephone assistance to provide advice to workers. However, few vulnerable employees know how to find these websites or even to look for them, even assuming that they have access to the Internet, or know about the telephone service. While the MOL has done a good job of translating some of the information into multiple languages, the general MOL website is in English and difficult for non-English speaking workers to navigate. More fundamentally, a model intended to aid vulnerable workers that places the burden on employees to conduct internet research and then claim their legal entitlements will always be ineffective.³¹⁷

We heard about wages below minimum wage for temporary help agency and temporary foreign workers. Temporary foreign workers reported unpaid wages. Temporary help agencies were reported as continuing to charge fees despite the new provisions prohibiting this practice.

This point was echoed by the Chinese Interagency Network of Greater Toronto in feedback to the Interim Report.³¹⁸ Our consultations revealed frequent reports of a lack of employment standards enforcement.³¹⁹ We heard about wages below minimum wage for temporary help agency and temporary foreign workers. Temporary foreign workers reported unpaid wages. Temporary help agencies were reported as continuing to charge fees despite the new provisions prohibiting this practice.³²⁰ These types of practices and other contract violations were further highlighted by workers and advocates in our consultation with the Migrant Workers Alliance for Change.³²¹ Non-status workers were subject to multiple violations.³²² The LCO was made aware of “agents” who place temporary foreign agricultural workers with employers, creating a triangular employment relationship similar to the temporary help agency relationship. Employers do not pay more than minimum wage of \$10.25 per hour to the agent, and the worker receives less from the agent (as low as \$7.50 per hour).³²³ According to the Chinese Interagency Network of Greater Toronto, some employers manipulate wage records to hide the fact that workers had worked excessive hours and were paid less than minimum wage. The Network advised us that in one such case an employee had worked a 60 hour week and was paid \$7.00 per hour, some of it in cash to hide the rate and working hours in the record.³²⁴ Issues related to unpaid wages, vacation pay, termination pay, overtime and public holidays were the main complaints reported to the Ministry of Labour.³²⁵ Some suggest that ESA violations are widespread.³²⁶

What is strikingly clear from workers’ experiences is the “everydayness” of substandard working conditions. Workers do not come forward with just one experience of employer violations. When reviewing previous job experiences, it becomes clear that people in low-wage and precarious work experience violations of labour standards in job after job...workers go from one bad job to the next with no protection against employers’ violations.³²⁷

Despite these reports, the LCO's research and consultations revealed that most employers are compliant with the legislation.

These findings do not indicate that all or most employers violate ES [employment standards]. Many employers do comply with the ESA. However, the prevalence of violations undermines employers who do comply with minimum labour standards and contributes to a downward pressure on wages and working conditions.³²⁸

Advocates have pointed out, accurately, in our view, that the current process overemphasizes investigating individual complaints of employer violations.³²⁹ Detection of violations is largely through workers' self-enforcement and individual claims. This approach has been described as "expensive and risks overloading available capacity."³³⁰

There is general consensus that proactive enforcement is a much more effective mechanism for ensuring the protections of the ESA than the reactive system of responding to individual complaints. The Auditor General suggested that the need for increased proactive inspections is demonstrated by the fact that violations were found in 40 percent to 90 percent of such inspections. 2011-12 data from the Ministry of Labour indicate that 83 percent of inspections revealed violations.³³¹ Vosko *et al* pointed to the success of proactive inspections and to the fact that 92 percent to 99 percent of confirmed unpaid wages were recovered through proactive processes whereas only about half were recovered through the individual claims process.³³² Current Ministry of Labour data support these findings, showing that approximately 60 percent of monies owing is recovered through investigations while 98 percent is recovered through proactive inspections. The Ministry attributes this, in part, to the fact that proactive inspections are conducted on active businesses while investigations sometimes relate to insolvent businesses.

There appears to be widespread agreement that Ontario should shift its focus to concentrate more on proactive enforcement activities. We agree. However, the need will continue for a model that also responds to individual complaints.

In *Fairness at Work*, Arthurs said

I received many submissions to the effect that the [federal] Labour Program's enforcement strategy ought to be more proactive. Instead of concentrating on processing workers' complaints, inspectors ought to take the initiative randomly auditing sectors or enterprises that exhibit a profile of non-compliance, or making a concerted effort to enforce particular provisions of Part III [of the Canada Labour Code] that seem to be violated with unusual frequency. These submissions make good sense, and I accept them.³³³

The occupational health and safety regime has been identified as a system that places stronger emphasis on proactive enforcement activities than the ESA system.³³⁴ In arguing for more proactive enforcement under the ESA regime, Vosko *et al* make the point that although it may seem reasonable to prioritize stronger protection for health and safety over employment protections which can be remedied through financial compensation, the differences should not be overstated, given the negative impacts on quality of life associated with prolonged precarious work.³³⁵

There appears to be widespread agreement that Ontario should shift its focus to concentrate more on proactive enforcement activities. We agree. However, the need will continue for a model that also responds to individual complaints.

Compliance is likely to be secured through a range of strategies. Strategies should include information, education, persuasion and proactive monitoring - all designed to encourage compliance without coercion. But they should also include effective remedies and sanctions - administrative, civil and criminal - with gradations of severity. Sanctions should be used when non-coercive strategies fail to produce the desired results, especially in the case of egregious violations. Compliance strategies should operate proactively for the most part, rather than being invoked when violations have already occurred. And they should address root causes and patterns of persistent non-compliance as well as isolated violations.³³⁶

....Still, it is very difficult to turn away a complainant with a seemingly meritorious case.³³⁷

In the long-run, better front-end enforcement may work to decrease individual claims by increasing compliance. In the meantime, we acknowledge that a recommendation focussed on increased proactive enforcement will have significant resource implications for the Ontario government.

The Law Commission of Ontario recommends that:

10. The Ministry of Labour place a greater emphasis on ESA proactive enforcement processes while continuing to use a range of strategies including voluntary compliance, proactive inspections and responses to individual complaints.

“[M]ost workers are unlikely to be assertive protagonists”.

Professor Eric Tucker

2. Specific Issues Arising from Current Enforcement

APPROACHING EMPLOYER PRIOR TO CLAIM

As we have noted, the primary method of enforcement under the ESA’s current structure, the individual claims process, has been the subject of considerable negative commentary. The views of most academics and advocates are in line with Professor Eric Tucker’s comment: “most workers are unlikely to be assertive protagonists”.³³⁸ In other words, vulnerable workers, in insecure employment, are not well-placed to make complaints. It has been suggested that the individual claims system is made more problematic by the fact that historically the Ministry of Labour has encouraged employees to attempt recovery of wages on their own.³³⁹ Not surprisingly, workers’ advocates have taken a very dim view of the enactment of changes under the *Open for Business Act* that had the effect of imposing further obligations on many claimants before an investigation is commenced.³⁴⁰

Pursuant to the amendments that took effect in January 2011, the Director of Employment Standards can require the complainant to take certain steps such as communicating with the employer about the violation, and providing information about the employer’s response. While not explicit in the legislation or the *ESA Policy and Interpretation Manual*, it is apparent from statements on their website that the Ministry of Labour has made a general policy decision to require all claimants to contact their employers about the violation unless a decision is made to waive the requirement.³⁴¹

The Ministry of Labour materials make clear that exceptions can be made for vulnerable workers such as live-in caregivers, youth, persons with disabilities, workers with language barriers, those who fear their employers, those with reasons relating to the *Human Rights Code* or those with other appropriate reasons.³⁴² Exceptions can also be made for such situations as when the claim is close to the six month limitation period or the employer cannot be located. These exceptions can be granted, upon request, presumably as an exercise of the Director's (or delegate's) discretion. It is unknown how frequently these exceptions are requested and/or granted.

While the LCO did not hear of any instances in which the Ministry had declined to exercise its discretion in appropriate cases, it is apparent from the materials we reviewed that workers' advocates believe that the process is a strong disincentive to workers making a claim. As a case in point, the Colour of Poverty Campaign and Metro Chinese and Southeast Asian Legal Clinic supported the removal of all mandatory requirements for workers to attempt self-enforcement of ESA violations with employers prior to filing an ESA claim.³⁴³ We are not clear whether advocates are basing their objections on actual situations where the Ministry failed to waive the requirement for vulnerable workers or whether they believe workers are simply discouraged at the outset from bringing claims by even the possibility of having to approach the employer. It is also possible that the Ministry's willingness to waive the requirement for vulnerable workers is not well known among employee and worker-side stakeholders. The Ministry of Labour's website does set out the exceptions that will generally relieve employees from having to contact their employer prior to filing a claim, as does the claim form and guide book available in multiple languages. However, elsewhere on the website it is emphasized that most employees must approach employers. Online commentary and information about the ESA among stakeholders revealed that the exceptions are often not mentioned.³⁴⁴ In any event, it may be that, as a matter of principle, advocates object to a requirement that workers request special protection as an exception rather than having it granted as of right. In its response to the Interim report, the Ontario government indicated that the rationale behind the requirement to approach employers is for improved efficiency, saying "[i]f the complaint is resolved to the satisfaction of the employee, it helps the employee to obtain a remedy more quickly and also saves government resources in the enforcement process."³⁴⁵

Whatever the specific basis for their objections, workers' advocates have little confidence in the current system.

Whatever the specific basis for their objections, workers' advocates have little confidence in the current system. The LCO was unable to determine whether there had been any impact on claims since the implementation of the *Open for Business Act* (OBA). Data are not available from the Ministry of Labour for the relevant period. In our view, this issue is significant enough to warrant a review. Consistent with the findings of the Drummond Report recommending ministries improve data collection and engage in evidence-based policy development, we are of the view that an evaluation should be undertaken to assess the impact of the OBA changes with the goal of determining whether claims had declined during the post-OBA period and, if so, whether the policy change was the precipitating factor.³⁴⁶ If so, this would justify reconsideration of the policy decision requiring, as a general rule, that employees approach their employers before embarking on an ESA claim.

The Law Commission of Ontario recommends that:

11. The Ministry of Labour:

- a) engage in data collection and evaluation to determine the impact of the policy requiring employees to approach employers prior to initiating an ESA claim; and
- b) consider reversal of policy if evaluation reveals negative impacts such as declines in claims attributable to the policy changes.

12. The Ministry of Labour improve communication about the vulnerable worker exemptions to approaching employers at the outset of an ESA claim.

EXPEDITING AND FACILITATING ESA CLAIMS

Lengthy time periods for resolution of ESA claims were identified as problematic in the consultations.³⁴⁷ In an effort to improve, the Ministry of Labour launched a task force in August 2010 to deal with a backlog of 14,000 employment standards complaints. The backlog was eliminated by October 2011.³⁴⁸ This process was criticized by some for encouraging workers to accept settlements for less than they are owed, a method that is viewed negatively by workers' advocates.³⁴⁹

Properly documented claims and responses would work to expedite and improve the quality of the claims process.

Person-to-person assistance for workers preparing their claims has been promoted as a means of increasing ESA accessibility and potentially expediting the claims-making process, thereby counteracting the effects of lack of internet access and/or language barriers. Appropriate claims information may ultimately assist adjudicators in the decision-making process.³⁵⁰ A related proposition by Professor David Doorey envisions the concept of one-stop shopping for employees seeking advice and assistance with ESA matters and a corresponding office for employers, or alternatively, a dedicated office offering service to both.³⁵¹ Direct personal assistance could be provided through legal aid clinics or government funded offices serving workers and employers functioning in a similar role to that played by the Office of the Worker Adviser (OWA) and the Office of the Employer Adviser in workplace safety and insurance matters. The Office of the Worker Adviser supports this concept but proper resources would be required. The OWA points to the challenges of its current caseload due to its double mandate (non-unionized injured workers and OHS reprisals), the increasing complexity of WSIB cases and demands to participate in policy issues.³⁵² However the service is structured, it would be important to provide workers with assistance in asserting their claims and to employers in responding, ensuring that the requisite information, in the proper format, is submitted to the Ministry. Properly documented claims and responses would work to expedite and improve the quality of the claims process. As Professor Doorey highlights, support for employers is also important. In our view, small enterprises could particularly benefit from this service.

The Law Commission of Ontario recommends that:

13. The Ontario government facilitate and expedite the ESA claims-making process, by providing a mechanism for workers and employers to obtain person-to-person assistance in the claims process through additional support services such as Legal Aid Ontario clinics, Office of the Employment Standards Advisor and/or other types of worker and employer support services.

LIMITATION PERIOD AND MONETARY CAP

Section 111 of the ESA sets out a six month limitation period for bringing claims related to wages. The limitation period for recovery of wages is twelve months for cases where there is more than one violation with respect to wages of the same employee as long as one of the violations occurred within the six month period. Vacation pay also has a twelve month recovery period. For contraventions where reinstatement/compensation is sought as a remedy, the general limitation period is two years under section 96(3). The mandatory time limits may be extended in exceptional cases of fraudulent concealment, where the employee has been misled.³⁵³

The shorter limitation period for recovery of wages was enacted in 1996. It was justified by the government at the time of its introduction as a means of improving administrative efficiency, improving the likelihood of successful investigation and enforcement, better use of tax dollars, introducing flexibility and, as a result, an improvement for workers and employers.³⁵⁴ However, these changes were controversial at the time and today advocates continue to press for a return to the two year limitation period that was in place prior to 1996. They argue that claimants who delay have no recourse under the ESA and are left to seek relief in the civil courts which will be difficult for them to navigate. A number of observers have made the point that most claims are made after workers leave the job and some workers leave jobs being owed significant amounts of unpaid wages. "Job dislocation and difficulties learning how to pursue ES rights" make the six month limitation period a significant obstacle to accessing ESA protections.³⁵⁵ Despite this, most provinces currently have limitation periods in the six to twelve month range. The ESA also imposes a monetary cap of \$10,000 on recovering money owing. According to critics, "the \$10,000 cap on monies recoverable under the ESA leaves these workers without remedy through the ES [employment standards] claim process."³⁵⁶

Recent increases in minimum wages along with the point that most ESA claimants have left the job suggest consideration for expanding the ESA's limitation period for recovery of wages and increasing the monetary cap to \$25,000.³⁵⁷ Providing for a higher monetary penalty would bring the ESA cap in line with the Small Claims Court cap. In our view, there does not appear to be a sufficiently strong justification for capping the ESA at a lower rate than the Small Claims Court cap. The limitation period, on the other hand, has been established and maintained since 1996 in a range consistent with that of other provinces. Returning to the two year limitation seems out of step with current trends. On any analysis, efficiency and the ability to successfully investigate are

important objectives that serve all parties and utilize government resources effectively. However, we also understand that most claimants wait until they leave a job before making a claim and this can result in forfeiture of the ability to collect on long overdue wages. We would like to see a discretion provided to extend the limitation period where there were extenuating circumstances that had resulted in the claim not having been made within the six month limitation period. To accomplish this would require a legislative amendment to provide the Director with the discretion to extend the time frame for special circumstances. Policy could be developed to identify the reasons for failure to make claims in a timely fashion that could trigger this exercise of discretion, with an umbrella clause allowing for other possibilities to be considered at the Director's discretion with the overall objective focussing on providing increased access to justice for the most vulnerable workers.

The Law Commission of Ontario recommends that:

14. The Ontario government:

- a) amend the ESA to provide for a discretionary time extension for claims for wages in special circumstances; and
- b) raise the ESA monetary cap to \$25,000.

We believe it desirable that the Ministry of Labour arrange for an easily accessible, well-advertised mechanism to accept third party information.

THIRD PARTY AND ANONYMOUS COMPLAINTS

Hardly any nonunion *employees* file ESA complaints. The ESA enforcement mechanisms are used almost exclusively by unionized employees who can file grievances under a collective agreement and by *former* employees, who have been dismissed by their employer or who have quit.³⁵⁸

The Auditor General made a similar point.³⁵⁹ This is evidence of a system that does not meet the needs of protecting workers while they are still employed. As a partial remedy, it has been proposed that the Ministry of Labour accept third-party and anonymous complaints

to initiate inspections in order to minimize threats to workers whose rights are being violated. Implementing this recommendation would mean that the most precariously employed workers, facing heightened threats of reprisal, are not obliged to take on their employers....³⁶⁰

We have been advised that the Ministry of Labour will accept anonymous/third party information and that an inspection may be commenced on that basis. Information can be provided through the Employment Standards Portal on the Ministry's website or by calling the Employment Standards Information Centre (call centre).³⁶¹ We note, however, that this is not advertised and does not appear to be well known. We believe it desirable that the Ministry of Labour arrange for an easily accessible, well-advertised mechanism to accept third party information. Such information could be used as a basis to determine where proactive inspections should be targeted. As pointed out by the government in its comments on the Interim Report, there are limits to the Ministry's ability to respond to information provided anonymously; however in our view, it could be an important mechanism for responding to the many serious concerns we have

heard regarding reprisals.³⁶² It may be necessary to consider whether the reprisal protection sections of the ESA will sufficiently protect employees when they are also third party complainants if their identify becomes known or whether there is protection for employees on whose behalf a third party complainant (outside the workplace) makes a complaint.

In their submissions to the LCO, employer representatives noted the importance of developing built-in checks and balances to ensure that unfounded or vexatious complaints did not trigger costly and unwarranted inspections.³⁶³ This is a valid point. It would be important to develop policy criteria for determining whether information supplied by third parties either on its own or together with other information available to the inspectors was a sufficient foundation to warrant launching an inspection.

The Law Commission of Ontario recommends that:

15. The Ministry of Labour:

- a) Develop an accessible and well communicated mechanism – such as a hotline – for ESOs to receive third-party and/or anonymous complaints which could trigger proactive inspections; and
- b) develop corresponding policy criteria to ensure that unfounded complaints do not trigger unwarranted inspections.

Reporting on ESA enforcement practices in 2004, the Auditor General expressed concern that the Ministry of Labour was focusing its efforts almost entirely on investigating individual complaints against former employers even though previous proactive inspections had uncovered violations in 40 percent to 90 percent of cases.

Reporting on ESA enforcement practices in 2004, the Auditor General expressed concern that the Ministry of Labour was focusing its efforts almost entirely on investigating individual complaints against former employers even though previous proactive inspections had uncovered violations in 40-90 percent of cases. As mentioned earlier, this concern has been echoed by others.³⁶⁴ The Auditor General found there had been no significant improvements since a 1991 audit had revealed deficiencies in investigations, proactive inspections and prosecutions. The 2004 Report recommended increased proactive inspections, improved guidance to ESOs on enforcement and that the Ministry assess the impact of making employers pay for investigations when violations are found. In its follow-up 2006 Report, the Auditor General found progress in some areas but found no implementation of the recommendation that non-compliant employers pay for inspections. However, the Ministry committed to consider this change in future legislative reviews. Employer representatives raised concerns that inspection cost recovery for minimal infractions might impose penalties that are out of proportion with the violation and erode employer support for ESA compliance.³⁶⁵ In our view, these concerns have merit and, as a result, we do not necessarily suggest a “one-size-fits-all” approach. Clearly such an amendment would require policy development to identify appropriate situations and to what extent in each this tool would be employed.

The Auditor General noted that the Ministry of Labour had increased proactive inspections from 151 in 2003-2004 to 2,355 in 2004-2005 and 2,560 in 2005-2006.

The Auditor General considered these to be the new benchmarks “upon which to establish future targets”.³⁶⁶ These inspections dropped to fewer than half that number in 2010-2011 when there were only 1,093. However, that number rose to 2,248 in 2011/12.³⁶⁷ The Ministry of Labour currently indicates that the Employment Standards program will consult with stakeholders as it moves “into a more proactive compliance model”. The Dedicated Enforcement Team “will focus on repeat violators and high risk sectors for vulnerable workers”.³⁶⁸

The prioritization of high-risk industries with vulnerable workers has been recommended in workplaces where intervention will have a high impact and deterrence will take effect.³⁶⁹ Enforcement sweeps and educational campaigns are supported, targeting “fissured” industries where decisions are downloaded from major employers to a complex network of smaller employers such as are found in the hospitality, janitorial and construction industries.³⁷⁰

...[M]igrant workers who worked alongside Canadian workers reported that the Canadian workers were rarely asked to work overtime and... were generally treated better... [M]igrant workers' attempts to raise such concerns with employers resulted in employers... insisting they work additional hours with the threat of termination if they refused.

As mentioned, it would be effective for the Ministry of Labour to ensure that the disproportionate representation of vulnerable workers in certain industries and groups is considered in identifying areas for targeting increased proactive inspections. For example, our consultations revealed reports of temporary foreign workers being regularly required to work late and on weekends without receiving either overtime or vacation pay. In some instances, migrant workers who worked alongside Canadian workers reported that the Canadian workers were rarely asked to work overtime and, we were advised, they were generally treated better. We heard of instances where migrant workers' attempts to raise such concerns with employers resulted in employers' retaliation by insisting they work additional hours with the threat of termination if they refused. We heard accounts of sexual abuse of women employees in the workplace.³⁷¹

In feedback received, the Chinese Interagency Network of Greater Toronto proposed more expanded investigations as one way to reduce reliance on ESA self-enforcement through individual claims.³⁷² The 1991 audit specifically identified the lack of expanded investigations as a major issue. It noted that when violations were detected, an investigation should be extended to determine whether other employees had experienced similar violations. This was not occurring. In its 2004 report, the Auditor General found no significant increase in the number of expanded investigations for confirmed violations.

To be effective in fulfilling its mandate, the Ministry has an obligation to protect the employment rights of currently employed workers who may be reluctant to file claims.

Greater ministry emphasis on extending investigations of a substantiated claim to cover other employees of the same employer to determine whether additional violations had taken place would be an effective means of enforcing the employment standards legislation.³⁷³

However, as of 2006, the Auditor General's report indicated there had been no significant improvements in the number of expanded investigations conducted by the

Ministry.³⁷⁴ This appears to be an ongoing issue. When the lack of expanded investigations was flagged in 1991, 1,795 such investigations had taken place (out of 18,582 complaints). That number had decreased to 802 by 2003-2004. While we are advised that the Ministry re-inspects 10 percent of the employers in any given year, the most recent data indicate that there were 5 expanded investigations in 2010-2011 and 53 in 2011-2012.³⁷⁵ The Ministry of Labour noted that this may be an underestimate of expanded investigation activity due to the way information is recorded in the database.³⁷⁶

The Law Commission of Ontario recommends that:

16. The Ministry of Labour:

- a) substantially increase proactive inspections, particularly in higher risk industries based on established benchmarks;
- b) develop strategic, proactive enforcement initiatives that target high-risk for violation workplaces, including those comprised of concentrations of temporary foreign workers, temporary agency workers, recent immigrants, racialized workers, youth, the disabled and Aboriginal people, as well as areas known for high-rates of substandard practices;
- c) conduct expanded investigations when violations are detected; and
- d) ensure enforcement activities include follow-up on previous violations.

17. The Ontario government amend the ESA to permit orders requiring employers found in violation of the ESA to cover the costs of investigations and inspections, in appropriate cases.

3. Penalties

There are a variety of sanctions that may be engaged to respond to ESA violations. Employment Standards Officers have the discretion to use or not use these options. They include orders to pay wages (maximum of \$10,000 per employee plus administrative costs), orders for compensation and/or reinstatement, compliance orders, tickets, (\$295 plus victim fine surcharge and costs), notices of contravention (\$250 for first contravention up to \$1000 for subsequent contraventions, in many cases multiplied by the number of affected employees) and prosecution (maximum fine \$50,000 for individuals or 12 months in jail, or both; for corporations \$100,000 and higher for subsequent convictions, to a maximum of \$500,000). In addition, the employer may also be required by the court to pay outstanding wages, compensate and/or reinstate the employee.

The Auditor General noted that in the five years leading up to 2004, there had been only 63 convictions under the ESA. Prosecutions were not commenced even when the amounts owing were high. In its 2004 Report, the Auditor General recommended that the Ministry of Labour provide direction to employment standards officers regarding

the appropriate use of enforcement measures, including notices of contravention and prosecutions, and increase monitoring of the use of these measures for consistency of application. After the Auditor General's Report, prosecutions reached a high of 594 in 2006-2007 and 505 in 2008-2009 but dropped to 196 in 2010-2011, only 4 of which were prosecutions under Part III of the *Provincial Offences Act* resulting in more serious fines.³⁷⁷ The prosecutions are overwhelmingly of the Part I type, resulting in total fine amounts of \$360 or less.³⁷⁸ Workers' advocates are of the view that "tickets are not an effective cost for violations in the first place, nor will they act as a deterrent to ongoing or future violations."³⁷⁹

Commentators agree that the system must have and utilize effective penalties and sanctions.³⁸⁰ Some observers promote stronger policy or legislative standards with less discretion placed in the hands of ESOs.³⁸¹ Other suggestions include set legislated fines for confirmed violations even in the settlement process and increased prosecutions. In general, the consultations revealed dissatisfaction with the existing use of penalties that were considered to be ineffective at deterring non-compliant employers. Advocates do not support the current widespread use of tickets under Part I of the POA which are perceived as providing inadequate incentives to compliance. Instead, they advocate for fines that double or triple the amount owed and for the payment of interest on all unpaid wages, a power which ESOs currently do not have. Advocates consider the 10 percent administrative fee levied on orders to pay wages to be an insufficient motivation for non-compliant employers to repay wages.³⁸²

[Employment Standards Officers] must have flexibility to be able to respond appropriately to the myriad of individual circumstances they encounter, they also need clear policy direction on when to initiate prosecutions, particularly where deterrence is required in the case of repeat offenders and wilful non-compliance with payment orders.

The LCO agrees that effective sanctions must be utilized to achieve compliance. The 196 prosecutions in 2010-2011 resulted from approximately 17,000 complaints.³⁸³ The ESA Policy and Interpretation Manual that is directed at ESOs, lawyers, human resource professionals and others, explains the legislation and case law. This manual, however, provides very little specific policy direction to ESOs in terms of use of the various sanctions. While, on the one hand, ESOs must have flexibility to be able to respond appropriately to the myriad of individual circumstances they encounter, they also need clear policy direction on when to initiate prosecutions, particularly where deterrence is required in the case of repeat offenders and wilful non-compliance with payment orders. Some commentators have called for mandatory prosecution policies. We do not agree. Such policies can have unanticipated negative consequences by injecting unnecessary rigidity into the system. The existing scheme has adequate mechanisms in place to effect deterrence: however, as it is currently being implemented, for example, the use of tickets as the primary sanction, it is less effective than it could be. In our view, greater use should be made of the more deterrent sanctions available under the current legislative scheme in appropriate cases.

ESOs should be provided with specific policy direction and education to emphasize deterrence in selection of penalties and sanctions (i.e., notices of contravention and prosecution), in cases of repeat violations and wilful non-compliance. In our view, this should include those who have been the subject of previous orders such as orders to pay wages under the ESA.

The Law Commission of Ontario recommends that:

18. The Ministry of Labour strengthen ESO policy direction supported by education to direct ESOs to select deterrent sanctions for appropriate cases, most particularly repeat violators and those who wilfully fail to comply with payment orders.

E. Mechanisms to Support Compliance and Enforcement

1. Employee Voice and Participation

Professor Anil Verma argues that “employee voice can be a powerful tool in ensuring better labour standards.”³⁸⁴ Other commentators agree. Building upon this concept, the LCO has considered ways to increase ESA awareness and compliance by way of improved “employee voice” through joint employee-employer work councils. This framework exists in Ontario under the *Occupational Health and Safety Act* in the form of the joint health and safety committee scheme.³⁸⁵ We explored the concept of importing such a system into the ESA as a means of enhancing compliance particularly in non-unionized workplaces populated by low wage workers.

Roy Adams proposed adopting the German model of employee work councils.³⁸⁶ Under the German model, work councils are a mandatory, elected body in German workplaces with five or more employees. The council has legislated rights regarding consultation, information and participation. Participation rights, referred to as co-determination, allow for joint decision-making jurisdiction over a wide variety of issues, including hours, occupational health and safety, training, job classification, and individual and mass dismissals. Work councils co-exist with unions.³⁸⁷ Unless approved by the collective agreement, work councils do not engage in bargaining over wages.³⁸⁸ Adams suggested this model is considered successful by both management and unions; he offers its resilience following economic downturns in the 1980s and 1990s as a marker of this success.³⁸⁹

In 2006, Professor Verma noted that while the European Union had used this model to design various measures to increase worker participation, the German government had been evaluating the work council system in the face of increased international competition and made legislative changes to adapt it to changing circumstances.³⁹⁰ In many cases, the changes strengthened the system. The election procedure was simplified; work councils could now be set up for more types of business relationships such as joint work councils operating across related businesses, or divisional councils could be created for specific products or business types. The scope of council activities has been increased and equity and discrimination policies have been introduced. Professor Verma concluded that “work councils were not perfect vehicles for dealing with the pressures of globalization” nor could there be a wholesale transfer of the German model to the Canadian workplace. However, he noted the value of the principles upon which work councils are founded for joint workplace decision-making.³⁹¹

“[E]mployee voice can be a powerful tool in ensuring better labour standards.”

Professor Anil Verma

Building upon this concept, we have considered the possibility of creating a model for work councils in the Ontario workplace aimed at increasing employee participation and knowledge, for initiating discussions between employers and employees on ESA matters and potentially for resolving disputes. If effectively implemented, the existence of the council would work to reduce worker isolation by creating a system of support and representation in the workplace. ESOs could rely on the work council as a source of information during investigations and/or inspections. The introduction of work councils would necessitate the training of employee and employer representatives. This alone could benefit the workplace through increased knowledge. In our consultations, it was suggested that ESA work councils could be facilitated by “piggy backing” onto the existing structure of OHS joint committees.

...[G]iven the challenges facing vulnerable workers, we are of the view that it is important to consider new ways of approaching the issues of maintaining minimum standards. We cannot continue to rely entirely on existing practices and processes.

Project Advisory Group members had a mixed reaction to the general idea of introducing work councils and, specifically, to utilizing the existing OHS scheme for their implementation. Some members representing labour interests indicated that OHS committees are not operative or effective in many workplaces, and raised concerns about intimidation and reprisal in non-unionized workplaces. Employer members noted that health and safety committees work well in non-unionized environments and that most employees do not operate in a state of fear of the employer, but they raised concerns about the costs of such councils. Government representatives raised the possibility that the format for joint work councils might not easily translate from the OHS to the ESA context.³⁹² Feedback to the Interim Report from the Workers Action Centre/Parkdale Community Legal Services, reiterated these concerns. We were advised that employees in non-unionized workplaces are in a poor position to enforce the ESA due to the power imbalances in non-unionized workplaces. There would be a need for “externally provided ESA training [and]...an employee complaints procedure with the Ministry of Labour where reprisals or violations of the Council mandate takes place”.³⁹³ The CAW noted the lack of a role for unions and the concern that such councils would promote alternatives to unionization that would interfere with efforts to organize in such enterprises.³⁹⁴ However, we note that the OHS joint worker-employer model exists in both unionized and non-unionized enterprises. Moreover, many of the workplaces referred to in this Project are non-unionized.³⁹⁵

While we understand the concerns that have been raised, given the challenges facing vulnerable workers, we are of the view that it is important to consider new ways of approaching the issues of maintaining minimum standards. We cannot continue to rely entirely on existing practices and processes. Developing a mechanism for injecting some of the principles of work councils into the non-unionized workplace could assist in adapting to the changing realities of the modern workplace. In our Interim Report, we were considering the value of a pilot project in select non-unionized workplaces with concentrations of vulnerable workers and, while we continue to support the idea, based upon the feedback we received, a more conservative approach is warranted. At this point, we are recommending simply that the concept of developing and utilizing some of the principles of work councils in non-unionized workplaces with concentrations of vulnerable workers be explored through government-stakeholder consultations. Depending upon the outcome of these consultations, a pilot project should be explored.

The Law Commission of Ontario recommends that:

19. The Ministry of Labour explore, through stakeholder consultations, the concept of utilizing the principles of work councils in non-unionized workplaces with high concentrations of vulnerable workers.

2. Focusing on the Top Echelon of Industry

David Weil's 2010 report on Strategic Enforcement to the U.S Department of Labor's Wage and Hour Division recognized that, because of the extreme effects of competition, companies were shifting away from direct employment to subcontracting, use of temporary workers and temporary agency workers, resulting in a weakening of the impact of traditional approaches to enforcement. This "fissuring" of employment by using external workers, in Weil's view, requires a response directed at "higher levels of industry structures in order to change behaviour at lower levels, where violations are most likely to occur."³⁹⁶ The report supports a coordinated approach to strategic enforcement, identifying and prioritizing workplaces with high concentrations of vulnerable workers, who are unlikely to complain, and in sectors where employer behaviours are likely to be changed. One strategy discussed is government reaching out to the top echelons of the industry or company through non-confrontational communications highlighting the government's commitment to employment standards and the important role played by the top level of industry.

This "fissuring" of employment by using external workers... requires a response directed at "higher levels of industry structures in order to change behaviour at lower levels, where violations are most likely to occur."

Weil's report proposes targeting branded companies to encourage leadership within their fields for employment standards compliance. Such companies rely on their "brand" to create a unique product with a loyal client base willing to pay a premium for the brand. Good image is important to branded companies and governments can leverage this interest in maintaining a good image to encourage companies to act as leaders within their branded field by prioritizing employment standards compliance for external workers affiliated with their company. Leading employers could be featured in public campaigns and provided with additional incentives through forms of special recognition. Furthermore, among such companies, publicising the results of compliance or non-compliance would provide a significant incentive to comply among competing companies and brands within the sector.

Weil's report proposes the coordination of enforcement activities among branches or franchises of a branded company. In situations where violations are detected, Weil recommends that part of the resolution could involve a comprehensive agreement covering all outlets/branches of a particular company. Communications about enforcement targets and resolutions such as the above could be made highly visible within industries that employ vulnerable workers. In this way, pressure to comply could be brought to bear on supply chains. To be effective, deterrent penalties would be required when violations are detected.³⁹⁷ Given that small enterprises are legally required to comply with the ESA, we were asked what the point would be to engage larger businesses in supply chain compliance? In our view, given that subcontracting and

outsourcing is a reality in the new economy, and the fact that there are limits to Ministry of Labour enforcement resources, we see this as an opportunity to engage larger businesses in taking responsibility for the effects of subcontracting to ensure compliance throughout the supply chain. It was suggested that it would be useful to use these methods to encourage larger companies to incentivize affiliated enterprises to provide higher than minimum standards.³⁹⁸ We agree that this could be built into an escalating scale of recognition and incentives for larger companies taking responsibility for the actions of the enterprises they engage. Other ways to engage supply chains are discussed in the Chapter on Health and Safety.

Another mechanism that utilizes the idea of placing responsibility on the main employer to ensure compliance and fair wages for subcontractors is a Fair Wage Policy in place in a number of Ontario municipalities, many of them based upon the City of Toronto's model. Fair Wage Policies protect workers by requiring contractors with the City to pay subcontractors at prevailing rates set out in the fair wage schedule. The Policy requires compliance with acceptable working conditions and hours. The Policy originally applied only to the construction sector but expanded to include other industrial sectors such as clerical and cleaning. It attempts to create a level playing field between union and non-union competition and protects workers. Notably, such policies do not apply to small enterprises and can be waived in some circumstances. The Ontario government has had a Fair Wage Policy in place since 1995 for construction, building cleaning and security contracts; however, the minimum wage levels were not updated since the Policy's establishment and over time market wages increased to levels higher than the Policy's prescribed minimums. A 2008 review of the Policy prepared for the Ontario government highlighted the controversial nature of Fair Wage Policies by outlining the arguments and evidence for and against them; however it provided few concrete conclusions.³⁹⁹ While such policies might have limited scope in the situation of many vulnerable workers, particularly in small enterprises, we note that they have been a means of protecting workers through a form of supply chain compliance and, as such, some of their principles might be adaptable in developing supply chain policies for subcontractors in larger companies.⁴⁰⁰

The Law Commission of Ontario recommends that:

20. The Ministry of Labour:

- a) develop processes of reaching out to and focusing on the top echelon of industry to address ESA non-compliance where workers are affiliated with the company, particularly those subcontracted to small enterprises and temporary agency workers; and
- b) identify and provide recognition and incentives for companies that are leaders in extending employment standards compliance and higher than minimum standards to external workers particularly those subcontracted to small enterprises and temporary agency workers.

3. Responding to Temporary Foreign Workers: Fear of Repatriation

Low skilled workers in temporary foreign worker programs have specific concerns due to the fact that their Canadian work permit is specifically tied to an individual employer. If an employee is terminated, some temporary foreign worker programs allow for the employee to find other employment within a specified period, although there are significant limitations on their ability to transfer. The Seasonal Agricultural Workers Program (SAWP) contract provides for repatriation of the employee to his or her home country when the employer, in consultation with the government agent, terminates the employment based on non-compliance, refusal to work or any other sufficient reason. While there are processes in place to avoid early termination (described below in more detail), when and if these fail, SAWP workers must return immediately to their home countries. Tied work permits were specifically highlighted in *Made in Canada* as one of the major causes of worker vulnerability.⁴⁰¹ According to advocates for migrant workers, the solution would be to create sector-specific, province-specific or open work permits and ultimately, to provide mechanisms for workers to obtain permanent residency.⁴⁰² Work permits are a federal immigration function and therefore beyond the purview of this Report. However, research has also identified concerns about termination, repatriation or non-contract renewal as an effective disincentive for workers to access provincially regulated legal remedies intended to protect such workers.⁴⁰³ Repatriation need not be expressly threatened by the employer, it can be implicit. Or, the fear arises simply from the migrant workers' temporary status; workers know they can be sent home or not asked back. This, we were told, effectively mutes any worker's complaints about breaches of employment standards, health and safety legislation or housing standards.⁴⁰⁴

Low skilled workers in temporary foreign worker programs have specific concerns due to the fact that their Canadian work permit is specifically tied to an individual employer.

If repatriation is achieved without an opportunity for an appeal or independent review, it effectively denies the worker avenues of legal redress available under Ontario law, such as seeking protection from the anti-reprisal provisions found in the ESA.⁴⁰⁵ When workers are no longer in Ontario, it is difficult to exercise these legal rights.

Concerns about repatriation were also raised in the Dean Report in its review of Occupational Health and Safety.⁴⁰⁶ In response, the Report recommended expediting the hearing of reprisal complaints at the Ontario Labour Relations Board and relevant changes have now been implemented. In our view, a similar mechanism should be made available in the context of the *Employment Standards Act*. This would assist all workers facing reprisal but most particularly temporary foreign workers whose vulnerability is more acute.

While "naming" in SAWP can have benefits for workers and employers, it also can serve to create concern among employees that they will not be "named" by the employer to return to Canada the next year or that they will be refused by their home country's Ministry of Labour. Workers indicated that with the availability of agricultural labourers through the NOC C and D Pilot Project, there is another pool of workers who can replace an existing SAWP worker.

...[O]ur consultations... revealed significant concerns about job loss and repatriation...It is the fear itself that has been identified in the research as the primary barrier to workers asserting their rights, making them vulnerable to exploitation by non-compliant employers.

Despite concerns about repatriation, rates of actual termination of SAWP workers are not high. Of the approximately 15,000 SAWP workers in each of 2009 and 2010, F.A.R.M.S. advised that only 73 and 120 respectively were repatriated for breach of contract and for all reasons only about .5 percent are repatriated.⁴⁰⁷ Therefore, F.A.R.M.S. and liaison officers did not perceive termination as a tool used by SAWP employers to exercise undue control over workers. The Labour Issues Coordinating Committee observed, “[m]ost farm workplaces are cooperative in nature with employer and employee working shoulder to shoulder.”⁴⁰⁸ Furthermore, they considered termination as an avenue of last resort. Before termination is exercised, we were advised that employers will often try to resolve issues directly with workers. Where that is unsuccessful, employers will often contact F.A.R.M.S., who will work with the employer and liaison officer to seek to resolve the issue or to negotiate a transfer of the worker to another employer (with the approval of Human Resources and Skills Development Canada [HRSDC]). However, we were advised that transfers did not occur frequently.⁴⁰⁹ F.A.R.M.S. noted that termination has negative consequences for employers in terms of administrative costs, travel and other costs to hire a SAWP worker and they emphasized the role of liaison officers in resolving workers’ issues.⁴¹⁰ Liaison Services supported these views advising that termination and repatriation, at will by the employer, does not occur. Under the employment contract, the Liaison Officer must be consulted before termination occurs and, where an employer is acting unreasonably, F.A.R.M.S. will intercede and discuss the matter with the employer. It is also possible that workers will no longer be made available to that employer, although this has occurred only rarely. As was noted by the Labour Issues Coordinating Committee, “workers are wanted and needed for viable business...injured or unhappy workers greatly reduce the efficiencies needed for business.”⁴¹¹

Despite the mechanisms in place under SAWP to minimize terminations, our consultations and research nevertheless revealed significant concerns about job loss and repatriation among these workers.⁴¹² It is the fear itself that has been identified in the research as the primary barrier to workers asserting their rights, making them vulnerable to exploitation by non-compliant employers.⁴¹³ NOC C and D workers may have slightly more mobility in that they are eligible to initiate job transfers if they can find another eligible employer who is willing and able to obtain a labour market opinion (LMO) and successfully navigate the procedures for hiring a temporary foreign worker. On the other hand, SAWP workers have liaison agents and F.A.R.M.S. to assist with transfers.⁴¹⁴

In our view, the most effective response to workers’ fear of repatriation would be to develop an independent decision-making procedure prior to repatriation. Given that actual instances of termination occur infrequently under SAWP, this should not create a significant challenge for SAWP employers; however it would be important to ensure that the process was designed to minimize impacts on farm employers. Since repatriation statistics do not appear to be readily available for the NOC C and D program, it is not known to what extent it occurs under this program, but, clearly, this

type of mechanism could be beneficial for these employees who lack the practices and oversight of the SAWP program and are therefore more likely to be in need of protections. Moreover, the implementation of an added level of oversight may be a way to improve confidence and reduce fear among temporary foreign workers. In our view, an independent decision-making body made up of Ministry of Labour and/or HRSDC representatives and/or worker and employer representatives would help to ensure that repatriation is not being utilized as a reprisal for workers attempting to access their rights or is otherwise unjustified. Such a mechanism would be particularly important for NOC C and D workers. The process should be very simple and efficient. It should be available to convene and make a decision within very short time frames. It would be important that the decision-making system not become overburdened with process and delay. While we support interim reinstatement provisions for appropriate circumstances, we recognize there would be challenges in any process that put employers and employees back into a relationship that is no longer workable for one or both.⁴¹⁵

While we support interim reinstatement provisions for appropriate circumstances, we recognize there would be challenges in any process that put employers and employees back into a relationship that is no longer workable for one or both.

In feedback to the Interim Report, the Labour Issues Coordinating Committee cautioned against overburdening farm employers with regulation to respond to a small minority of noncompliant employers. The importance of enacting legislation that employers understand and believe in was stressed as key to achieving compliance. We were cautioned against “sledge hammer legislation” where penalties are out of proportion to the seriousness of the infraction. In their view, it was important to “[in]form educate, advise followed by progressively stronger penalties to amend behaviour”. In our view, in principle, a progressive approach makes good sense, recognizing that it is important to ensure that employers who are repeatedly non-compliant are subject to appropriate penalties.

Government feedback to the Interim Report suggested that an alternative approach to an independent decision-making process would be to provide more information to SAWP participants on the low likelihood of repatriation, the safeguards in place and the process that occurs before repatriation. Education was also suggested for employees on how to approach employers and liaison agents with concerns and education for employers on how to respond appropriately.⁴¹⁶ This is a good idea. Ideally this would be put in place in addition to the decision-making mechanism.

In feedback we received to the Interim Report, the Civil Liberties and Human Rights Section of the Ontario Bar Association (OBA) supported a similar point to the one made by Faraday that an administrative body be created to hear all issues concerning the terms of migrant workers contracts prior to repatriation.⁴¹⁷ The OBA section also raised the important point that migrant workers were sometimes not available when their matters came up for hearings. The OBA section suggested that legislative amendments are required to “allow claims hearings for repatriated employees to be conducted using alternative forms of evidence, such as affidavit or video-taped evidence, and alternative arrangements for cross-examination.”⁴¹⁸ This issue may benefit from a fuller review.

The Law Commission of Ontario recommends that:

21. The Ontario government:

- a) amend the ESA to include a process for ensuring reprisal complaints are expedited and, in the case of migrant workers, that such complaints are heard before repatriation.
- b) work together with F.A.R.M.S. and other organizations serving workers in low skilled temporary migrant worker programs to provide:
 - i) information to temporary migrant workers about the process and likelihood of premature repatriation,
 - ii) education to employees regarding how to approach employers and liaison agents with issues and
 - iii) education for employers on ensuring employees are comfortable raising issues and employers are receptive to employees' concerns.

22. In coordination with the federal government, the Ontario government:

- a) institute a process for independent decision-making to review decisions to repatriate temporary foreign workers prior to the repatriation to ensure dismissal is not a reprisal for accessing workers' rights under federal or provincial legislation or contract;
- b) for reprisals, the independent-decision making body have the authority to order interim reinstatement for appropriate circumstances pending decisions and appeals; and
- c) where there is a finding of reprisal, provision be made for transfer to another employer or, where appropriate, reinstatement.

An independent decision-making process prior to repatriation... would be an area where legal representation could play a valuable role.

Agencies that provide legal service to temporary migrant workers should be fostered. An independent decision-making process prior to repatriation, as described above, would be an area where legal representation could play a valuable role. In general, availability of legal and other support for workers could increase knowledge of and access to workers' rights for temporary foreign workers and other vulnerable workers. We heard from or met with organizations such as the Caregivers Action Centre that assist live-in caregivers and the Office of the Worker Adviser, that provides assistance to workers making claims of reprisals. In its response to the Interim Report, the Office of the Worker Adviser raised the issue that it would be important that migrant workers have legal supports for reprisals.⁴¹⁹ We heard about the crucial role played by legal clinics in providing worker support. In our consultations, we met with several organizations and became aware of others that provide support, assistance, advocacy and outreach to migrant workers.⁴²⁰ For example, the Agricultural Workers Alliance (AWA) Support Centres operate four centres in Bradford, Leamington, Simcoe and Virgil and are ventures of the United Food and Commercial Workers Union and the

Agricultural Workers Alliance. These centres provide direct or referred assistance to migrant farm workers dealing with repatriation concerns and claims for workers' compensation, parental leave benefits, Canada Pension Plan, Employment Insurance and health insurance.⁴²¹ In the Niagara Region, Community Legal Services of Niagara South has partnered with the Niagara Migrant Workers Interest Group, a group of community organizations and volunteers, to provide legal and other supports to migrant workers. This type of innovative work undertaken by unions and community groups is a positive step in creating new pathways of providing support to migrant workers in asserting their legal rights. As referred to previously, through a Ministry of Labour partnership with the Ontario Council of Agencies Serving Immigrants (OCASI), the Ministry has provided more than 40 education sessions providing introductory employment standards information and resources.⁴²²

...[I]nnovative work undertaken by unions and community groups is a positive step in creating new pathways of providing support to migrant workers in asserting their legal rights.

The Law Commission of Ontario recommends that:

23. The Ontario government support the establishment of greater legal and other supports for temporary migrant workers asserting rights and making claims through expanded legal services or other such mechanisms.
24. Unions and community groups continue to develop and expand innovative services to support migrant workers to assert their legal rights.

4. Enforcing Vulnerable Workers Rights through Association

Many commentators are of the view that one of the most effective means of reducing worker vulnerability and enforcing workers' rights is through unionization. Unionization's benefits have been described as important social values, related to workers' well-being and providing a forum for airing grievances.⁴²³ The Supreme Court of Canada has noted that:

It is widely accepted that labour relations laws function not only to provide a forum for airing specific grievances, but for fostering dialogue in an otherwise adversarial workplace. As P. Weiler has written, unionization introduces a form of political democracy into the workplace, subjecting employer and employee alike to the "rule of law".⁴²⁴

Despite unionization's benefits for workers, unions have never been a panacea. Even at the height of unionization in Canada, only about 35 percent of Ontario workers were unionized.⁴²⁵ While many workers' advocates are pressing for increased unionization as the remedy to precarious work, the prospect of increased unionization may be out of step with global trends. Unions themselves are assessing their appropriate role in today's and the future's economic and social conditions.⁴²⁶ Ontario, in common with much of the industrialized world, is experiencing a gradual decline in unionization rates.⁴²⁷ While Canadian unions remain strong relative to the United States and, in fact, in absolute numbers, union membership is increasing in Canada, union density (the percentage of the Canadian workforce that is unionized) decreased between 1997 and 2010 from 33.7-31.5 percent.⁴²⁸ As 2011 data indicate, unionization rates are much higher in the public sector (74.7 percent) as compared to the private sector (17.5

percent). Private sector rates in Canada have declined over the past decade from approximately 19.9 percent in 2001.⁴²⁹ And among Canadian jurisdictions, Ontario had the second lowest unionization rate, at 27.9 percent, in 2010.⁴³⁰ Interestingly, while national rates for men have declined over the past decade, women's unionization rates have increased to 32.7 percent beyond the national average. This tracks a trend starting in 2006 when unionization rates for women first surpassed that of men.⁴³¹

The declines that have occurred have been attributed to the radical economic, technological and social changes that have taken place over the past 30 years.⁴³² Competitive pressures brought about by globalization, free trade and economic downturns diminish the bargaining power of unions and in an environment of financial insecurity, workers are less willing to organize. The decline of the manufacturing industry has also been an important contributing factor in Ontario. It is significant that the role of most unions in Canada has traditionally been a narrow one, focused on bargaining for wages, job security and working conditions in the immediate workplace rather than on broader issues of training, hiring and career development.⁴³³ With the rise of precarious and non-standard forms of work, this model is in decline. The Wagnerian collective bargaining model adopted in the Ontario *Labour Relations Act* (LRA) was developed in the context of a traditional workplace with one employer and many employees carrying out standardized skills in a single workplace, a scenario which is becoming ever less common in the modern economy.⁴³⁴

One area where the debate about vulnerable workers has been centered is the express exclusion of agricultural workers from Ontario's traditional labour relations regime.

Commentators have suggested that unions must adopt a broader focus that is responsive to the unique needs of workers in non-standard employment relationships.⁴³⁵ The issue of unionization is always a highly politicized one, but it is particularly delicate in this period of economic uncertainty. On the other hand, others argue that "union membership is central to limiting precarious employment."⁴³⁶

One area where the debate about vulnerable workers has been centered is the express exclusion of agricultural workers from Ontario's traditional labour relations regime. A 1992 Task Force considering the issue of extending collective bargaining rights to agricultural workers looked to other jurisdictions and observed that providing agricultural workers with the right to bargain collectively had not resulted in organizing to any significant degree nor did it have an undue negative impact on farms in those jurisdictions.⁴³⁷ The Task Force proposed a collective bargaining regime that included provision for an exclusive bargaining unit and a collective bargaining process that emphasized negotiation and prohibited strikes, but provided for binding arbitration in the event of an impasse. This model was adopted in the *Agricultural Labour Relations Act, 1994* (ALRA). It should be noted that the ALRA excluded from its scope the most vulnerable agricultural workers in Ontario – temporary foreign workers and other seasonal workers.⁴³⁸ The ALRA was short-lived, being repealed by the newly elected government in 1995. In response to the repeal, the United Food and Commercial Workers (UFCW) and individual agricultural workers in *Dunmore et al. v. Ontario (Attorney General)* challenged the exclusion of agricultural workers from the labour relations scheme as a violation of their freedom of association and equality rights as guaranteed in the *Canadian Charter of Rights and Freedoms*.⁴³⁹

In *Dunmore*, the Supreme Court of Canada recognized the particular vulnerability of agricultural workers.

Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J. [at trial], agricultural workers are “poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility”.⁴⁴⁰

On the other hand, the Court also acknowledged the threat that unionization posed to the family farm in Ontario:

...[t]he Attorney General has demonstrated that unionization involving the right to collective bargaining and to strike can, in certain circumstances, function to antagonize the family farm dynamic. The reality of unionization is that it leads to formalized labour-management relationships and gives rise to a relatively formal process of negotiation and dispute resolution; indeed, this may be its principal advantage over a system of informal industrial relations. In this context, it is reasonable to speculate that unionization will threaten the flexibility and cooperation that are characteristic of the family farm and distance parties who are otherwise ... ‘interwoven into the fabric of private life’ on the farm.⁴⁴¹

...I am satisfied both that many farms in Ontario are family-owned and operated, and that the protection of the family farm is a pressing enough objective to warrant infringement of s. 2(d) of the *Charter*. The fact that Ontario is moving increasingly towards corporate farming and agri-businesses does not, in my view, diminish the importance of protecting the unique characteristics of the family farm; on the contrary, it may even augment it. Perhaps, more importantly, the appellants do not deny that the protection of the family farm is, at least in theory, an admirable objective.⁴⁴²

But where the employment relationship between farmer and workers was already formalized, the Court noted that “preserving ‘flexibility and co-operation’ in the name of the family farm is not only irrational, it is highly coercive.”⁴⁴³

On the issue of the economic fragility of Ontario’s farming industry, the Court noted:

I disagree with the appellants that the ‘Government has provided no evidence that the Ontario agricultural sector is in a fragile competitive position or that it is likely to be substantially affected by small changes in the cost and operating structure of Ontario farming.’⁴⁴⁴

The Court apparently accepted the Ministry of the Attorney General’s submission that

agriculture occupies a volatile and highly competitive part of the private sector economy, that it experiences disproportionately thin profit margins and that its seasonal character makes it particularly vulnerable to strikes and lockouts...these characteristics were readily accepted by the Task Force leading to the adoption of the *ALRA*.⁴⁴⁵

However, the Court in *Dunmore* noted that this same rationale could be extended to many industrial sectors that experience thin profit margins and unstable production cycles (due to consumer demand or international competition, for example).⁴⁴⁶

In *Dunmore*, the Court held that “the total exclusion of agricultural workers from the LRA violates section 2(d) of the *Charter* and cannot be justified under section 1.”⁴⁴⁷ It should be noted that only the right to associate and not the right to collective bargain was at issue in *Dunmore*.⁴⁴⁸ The Court went on to hold

at minimum the statutory freedom to organize in s. 5 of the LRA ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.⁴⁴⁹

In response to the *Dunmore* decision, Ontario introduced the *Agricultural Employees Protection Act, 2002* (“AEPA”), an alternative legislative scheme. The AEPA was enacted to

...protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including but instead not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.⁴⁵⁰

[According to Fraser,] Health Services represented the view that the good faith negotiations required by section 2(d) constituted a requirement for “the parties to meet and engage in meaningful dialogue”, avoid unnecessary delays and make reasonable efforts “to arrive at an acceptable contract”.

Under the AEPA, agricultural workers have the right to join an employees’ association and to make representations to their employers through the association, respecting the terms and conditions of their employment. They also have the right to protection against interference, coercion and discrimination in the exercise of their rights.⁴⁵¹ The AEPA utilizes the Agriculture, Food and Rural Affairs Appeal Tribunal to rule on disputes over the application of the Act.⁴⁵²

The AEPA does not provide for majority representation, a limit on the number of associations that may represent a particular segment of the workforce, the right to strike or arbitration. In short, it provides for the formation of employee associations but does not provide the full Wagner model labour relations process available under the LRA. As a result, the UFCW and three agricultural workers challenged the constitutionality of the AEPA in *Fraser v. Attorney General of Ontario*.⁴⁵³

In *Fraser*, the Supreme Court reviewed in general terms the meaning of its previous holding in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*.⁴⁵⁴ It affirmed that s.2(d) protects “good faith bargaining on important workplace issues ...not limited to a mere right to make representations to one’s employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer.”⁴⁵⁵

Fraser went on to say that *Health Services* represented the view that the good faith negotiations required by s.2(d) constituted a requirement for “the parties to meet and engage in meaningful dialogue”, avoid unnecessary delays and make reasonable efforts “to arrive at an acceptable contract”. It did not “require the parties to conclude an agreement or accept any particular terms”, nor did it “guarantee a legislated dispute

resolution mechanism in the case of an impasse". Section 2(d) protected the right to a general process of collective bargaining but not to a particular model.⁴⁵⁶

Fraser held that the AEPA was constitutional by finding that "properly interpreted", the Act imposed "a duty on agricultural employers to consider employee representations in good faith."⁴⁵⁷ The Court found that the AEPA was not intended to deny agricultural workers collective bargaining rights within the meaning of s.2(d), but only that the AEPA did not extend Wagner model collective bargaining to farm workers.

These considerations lead us to conclude that s.5 of the *AEPA*, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer.⁴⁵⁸

The majority concluded: "The bottom line may be simply stated: Farm workers in Ontario are entitled to meaningful processes by which they can pursue workplace goals."⁴⁵⁹

This decision has been highly criticized by those in the labour movement who contend that it did not take into account the social reality and unique vulnerabilities of agricultural workers. In particular, the Court's statement that section 2(d) must provide a process that allows for "the right of an employees' association to make representations to the employer and have its views considered in good faith" is viewed as a retreat from the emphasis in *Health Services* on a duty of good faith bargaining to "a much paler right to 'good faith consideration'".⁴⁶⁰ This is viewed by workers' advocates as wholly inadequate, unworkable and unrealistic. From their perspective, agricultural workers are so vulnerable that nothing short of statutory protection for the full labour relations scheme as provided in the LRA will be effective.

Post-Fraser, the debate continues unabated as to what is required to meet the needs of farm workers weighed against Ontario's agricultural industry.

Post-*Fraser*, the debate continues unabated as to what is required to meet the needs of farm workers weighed against Ontario's agricultural industry. Given the reaction to *Fraser*, it seems unlikely that a consensus position among the various stakeholders will emerge in the near future. Through the course of the decisions, however, certain matters have become accepted facts by the Court. The vulnerability of agricultural workers and their need for labour relations protection in some form has been recognized. The Court in *Dunmore* also recognized the economic tenuousness of the agricultural industry, the legitimacy of the interest in protecting the family farm and the mix of family businesses and large agri-businesses that comprise Ontario farms. This type of evidence was also before the Court in *Fraser*. Other than adopting its position in *Dunmore* on the vulnerability of agricultural workers, the Supreme Court in *Fraser* appeared to prefer to leave the balancing of these various interests to the legislature.

Beyond *Fraser*, should there be government appetite to revisit the issue and to implement feasible law reform in this area, in view of the challenges and balancing of interests required to make major policy changes, it might be helpful if an expert panel were assigned to undertake an analysis of the case law, relevant literature and evidence presented to the courts and broad consultation with relevant labour and management stakeholders as well as affected ministries. Such an undertaking is beyond the capacity and scope of this Project.

In the immediate term, the AEPA should be reconsidered in light of *Fraser*. As noted, the Court in *Fraser* in affirming *Health Services* used language such as “good faith negotiations” to describe section 2(d) protections and later in the decision when applying the facts specifically to the AEPA, referred to “good faith consideration of employee representations.” While some observers view this as a partial retraction of the section 2(d) protections articulated in *Health Services*, such an interpretation is not explicit in *Fraser*. Rather, the Court in *Fraser* affirms the *Health Services* ratio that section 2(d) protects “good faith negotiations”. The Court makes explicit that this includes the “right to make representations to one’s employer” and a duty on agricultural employers to consider employee representations in good faith, including the requirement that the employer “engage in a process of consideration and discussion” in relation to those representations.⁴⁶¹ Parties must “meet and engage in meaningful dialogue”. They must “avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract”.⁴⁶² In our view, these elements have been expressly identified as protected by section 2(d) in both *Fraser* and *Health Services*.

The majority in *Fraser* noted the union’s lack of utilization of the AEPA. As Justice Farley noted at the trial level:

The role unions could play in assisting workers to access the rights articulated in the AEPA as interpreted by Fraser would be highly beneficial for these workers.

There has been no use of the mechanics of the AEPA as to bringing a case before the Tribunal; the Applicants stated that it would be fruitless to bring a useless application before a useless Tribunal. I am of the view that this condemnation is premature. A successful application would do one of several things: be effective positively as to action; or morally give the wrongdoing employer a “bloody nose”; or if truly an empty process it would demonstrate the need for strengthening by legislative amendment.⁴⁶³

While the AEPA does not provide for union certification or majoritarianism, nothing in the legislation prevents unions from assisting workers to form employee associations. In our view, agricultural workers could benefit from union support for the AEPA employee associations. While this may not be satisfactory to unions and workers’ advocates because they might believe this would impede the development of a fully realized collective bargaining regime, there does not appear to be a significant likelihood of achieving this objective in the near future. The role unions could play in assisting workers to access the rights articulated in the AEPA as interpreted by *Fraser* would be highly beneficial for these workers. Unions could also play an important role in assisting workers to utilize the Tribunal in appropriate cases particularly in view of the elements of good faith bargaining now read into the AEPA. The Supreme Court in *Fraser* supported Justice Farley’s cautious hope that the AEPA Tribunal would be effective in resolving disputes.⁴⁶⁴

Section 11 of the AEPA specifically empowers the Tribunal to make a determination that there has been a contravention of the Act, and to grant an order to remedy with respect to that contravention. The Tribunal may be expected to interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way. Labour tribunals enjoy substantial latitude when applying their constituent statutes to the facts of a given case.⁴⁶⁵

Codification of *Fraser* in the manner we recommend coupled with serious efforts to form employee associations, engage in good faith bargaining and utilize the Tribunal may contribute to improving the lives of vulnerable agricultural workers and if not, these efforts will provide a concrete evidentiary basis for future government or judicial consideration of the effectiveness of the legislation.

The Law Commission of Ontario recommends that:

25. The Ontario government amend the AEPA by explicitly including the elements of bargaining in good faith protected by section 2(d) of the *Charter* as identified by the Supreme Court of Canada in *Health Services* and affirmed in *Fraser*.

Codification of Fraser in the manner we recommend coupled with serious efforts to form employee associations, engage in good faith bargaining and utilize the Tribunal may contribute to improving the lives of vulnerable agricultural workers and if not, these efforts will provide a concrete evidentiary basis for future government or judicial consideration of the effectiveness of the legislation.

Even where unionization is available, migrant and other vulnerable workers are frequently unwilling to join unions for fear of displeasing their employer, endangering their job and, for some, risking limited immigration status. While other provinces, except Alberta, have brought agricultural workers into their labour relations schemes, unionization rates of farm workers in other provinces are not high, although in Tucker's view there has been a positive impact.⁴⁶⁶ The inherent limitations of Ontario's traditional collective bargaining process as applied to agricultural workers, as well as other vulnerable workers highly dependent on their employer, suggests that new models of labour support should be developed to respond to changing realities.

There are several different forms of unionization that have emerged globally, as well as other forms of non-union association. Community unionism expands the focus of the union beyond the conditions of employment. It involves "the formation of coalitions between unions and non-labour groups in order to achieve common goals."⁴⁶⁷ This model developed, in part, in response to rising unemployment rates as a means of supporting unemployed workers who did not have a workplace within which to organize.⁴⁶⁸ Unlike the traditional model of industrial unionism, it reaches workers who tend to move frequently among different workplaces such as temporary agency workers or dependent self-employed workers.

Sector-based unionism in Canada has taken two dominant forms: craft unionism and labour market unionism. Craft unions, prominent in Canada prior to the rise of industrial unionism, "seek to provide their members with employment security by controlling the supply of labour and establishing a monopoly over skills."⁴⁶⁹ For instance, a union may collectively bargain for all workers in an industry with all potential labour users and become the sole provider of a certain form of skilled labour through the use of hiring halls, a form of union-run employment referral centre. Although difficult to organize, craft unionism has been used successfully in skilled sectors in Canada, with the construction industry serving as its most notable example.⁴⁷⁰ Labour market unionism facilitates collective organizing and bargaining for workers located on multiple worksites who may be working with multiple employers.⁴⁷¹ Sectoral bargaining overcomes the problem of small shops and high turnover that typify many low-wage industries.

International trade unionism facilitates international cooperation between unions as a response to the multinational nature of work in the globalized marketplace. With the establishment of the International Trade Union Confederation in the 2000s, member unions agree to take international policy into account when making domestic decisions and to provide the Confederation with both financial support and regular updates on the trade union's activity.⁴⁷² In exchange, they receive "solidarity and assistance" from the Confederation.⁴⁷³

Outside the Confederation framework, other international unions act across borders. For example, in the Canadian construction industry, labour relations are dominated by the 14 international building trades unions, headquartered in the United States with offices throughout Canada.⁴⁷⁴ Another example is the UFCW which has entered into agreements with Mexican governments and advocacy groups to provide support to Mexican agricultural workers working in Canada under temporary foreign worker programs. It also supports these workers following repatriation.⁴⁷⁵ Cross-border action by a national union is a unique alternative function for unions, consistent with community unionism as outlined above.

It may be useful for academics or a public policy think tank to consider a project to assist in the development of ideas for new forms of worker representation.

Unionization is not the only model available for supporting vulnerable workers. Other models of employee associations have sprung up, including non-profit hiring halls, cooperatives and mandatory employment councils. Still other models may emerge that better adapt to the changing nature of work in the 21st century. Worker organizations need to continue to adapt themselves to new situations. It may be useful for academics or a public policy think tank to consider a project to assist in the development of ideas for new forms of worker representation. Such a review would consider possible alternative models to traditional unionization and the Wagner model of collective bargaining to support and assist vulnerable workers in the workplace. This could include consideration of emerging models for representing worker interests in various forms of precarious work in Ontario, including agricultural work, domestic work, temporary agency work and others.

5. Innovative Solutions for Precarious Work Advisory Council

Some of our recommendations such as those involving the implementation of partnerships, those related to targeting high-risk industries and the modernization of ESA exemptions will require extensive consultation by government with workers and employer organizations, community agencies, government and experts. In the context of responding to the unique needs of vulnerable workers in the Occupational Health and Safety setting, the Dean Report recommended the use of an advisory committee appointed under section 21 of the OHS Act which provides that "the Minister may appoint committees ..or persons to assist or advise...on any matter that the Minister considers advisable."⁴⁷⁶ In December 2012, this committee was established by the Ontario government.⁴⁷⁷

The Dean Report explained the reason for the recommendation as follows:

an advisory committee appointed under section 21 of the OHS Act would improve the OHS system's ability to respond to the needs of vulnerable workers. It would be a standing forum for consulting parties who are knowledgeable about vulnerable workers and have a role in protecting them. Such a committee could include representatives of labour and employer groups from sectors with precarious employment; immigrant and refugee support agencies; community and social service agencies; legal clinics; other ministries; and federal and municipal programs. Specific matters about which the committee could provide advice include implementing the Panel's recommendations, improving enforcement strategies and developing and distributing awareness materials.⁴⁷⁸

While the *Employment Standards Act* does not have a section comparable to section 21, this is not a bar to the implementation of such an expert advisory group on employment issues. The *Employment Standards Act* provides for the power to make regulations for the establishment of Ministerial Advisory committees, or the committee could be implemented more informally.⁴⁷⁹ A standing expert advisory group of participants willing to work together would be a valuable tool that the Ministry could draw upon to assist it in developing innovative solutions that respond to these and other emerging workplace issues. The issues that arise in this area can be contentious and views are often polarized along the worker-employer divide. It is very difficult to find areas of consensus. Project Advisory Group members questioned whether a single committee could adequately represent all the industry specific concerns and interests. This could be addressed by subcommittees of industry specific business, labour, academic and community representatives where areas of consideration require this type of specific expertise.

A standing expert advisory group of participants willing to work together would be a valuable tool that the Ministry could draw upon to assist it in developing innovative solutions that respond to these and other emerging workplace issues.

For such an advisory council to operate successfully participants must be willing to put aside differences and find ways to move forward on the issues; the right people must be chosen. This will require identification of individuals interested in reducing precarious work within current economic realities in government, academia, the business, labour and non-profit communities who have demonstrated fair, objective and creative thinking and an ability to engage in productive dialogue with participants representing opposing sides of the argument.

The Law Commission of Ontario recommends that:

26. The Ministry of Labour convene an Innovative Solutions for Precarious Work Advisory Council of representatives of relevant ministries, experts, and labour and employer organizations to obtain advice and to develop initiatives for improved and expedited ESA compliance and enforcement with a view to recommending best practices for responding to the existing and emerging needs of vulnerable employees/precarious work in the changing workplace.

F. Employment Legislation Protecting Temporary Foreign Workers

In recent years, concerns have increasingly been raised about the fair treatment of temporary foreign workers, particularly those in lower skilled employment. Governments have responded through a variety of legislative and policy measures. Federally, changes to the *Immigration and Refugee Protection Regulations* have been enacted that came into effect April 1, 2011.

...the Government of Canada has become increasingly aware of instances where employers, or third-party agents working on their behalf, are failing to abide by commitments made to workers. Prior to these amendments, no provisions existed in the Regulations to hold employers accountable for their actions regarding TFWs [temporary foreign workers]. Breaches that could occur include employers paying TFWs less than promised; providing TFWs with poor working conditions or giving them different occupations from those agreed upon in the offer of employment; inadequate accommodations for some TFWs; and third-party agents charging fees to workers, rather than employers, in contravention of any existing provincial/territorial legislation.⁴⁸⁰

In recent years, concerns have increasingly been raised about the fair treatment of temporary foreign workers, particularly those in lower skilled employment.

Employers seeking to hire temporary foreign workers must now demonstrate compliance with past offers of employment to such workers, including wages, working conditions, housing, health insurance, transportation and federal-provincial laws regulating employment. Failure to comply can result in denial of the Labour Market Opinion and a two year ban on hiring. In addition, the employer's name may be posted on Citizenship and Immigration Canada's website. It should be noted, however, as of the date of this Report, no employers' names are posted.⁴⁸¹ As previously mentioned, there are now standard form employment contracts for NOC C and D workers and live-in caregivers that employers must use covering wages, accommodation, benefits, hours of work, duties, vacation and sick leave entitlements. They require that health care insurance be provided at the employer's expense until the worker is eligible for provincial health care coverage and a one week termination notice must be given to workers who have worked for longer than three months. Recruitment fees may not be recovered from the employee and transportation costs must be covered by employers. Unlike SAWP, which allows some cost recovery, transportation costs may not be recovered from the worker.

The contract makes clear that terms are subject to provincial employment and health and safety standards. To respond to the need to provide greater protection for temporary foreign workers in the lower skilled NOC C and D Program there are more detailed and specific contract terms required for NOC C and D agricultural workers. Live-in caregivers, also in need of greater protection, have specific contract terms. Agricultural employers are required to provide appropriate housing (in accordance with guidelines and which may be at a cost to the employee), a Record of Employment and, at the employer's expense, chemical and pesticide safety equipment.⁴⁸² Other federal changes limit the time that workers may remain in Canada to four years after which they must wait an additional four years before applying under the program again.⁴⁸³ The intention is to reinforce the temporary nature of the work permits. SAWP workers are exempt from these limits.

The live-in caregiver program provides for the option to obtain permanent residence at the completion of the service period. While this is a major advantage, it has caused some to refer to the live-in caregiver program as a “carrot and stick” approach to permanent residency requiring participants to remain working and living in their employers’ homes for the qualifying period during which workers are highly unlikely to risk termination of employment to complain about infringements of their rights.⁴⁸⁴ Instances of exploitation and abuse have been well-documented: live-in caregivers have been required to work excessive hours, denied time-off, paid inadequate wages, physically and psychologically abused and had their passports confiscated.⁴⁸⁵ With the location of the workplace inside private residences, monitoring and enforcement of employment standards is very difficult.⁴⁸⁶

Women coming to Canada under the Live-in Caregiver Program (LCP) face unique difficulties because they are confined to live and work in their employers’ homes for at least two (2) years. During this time, they are dependent upon their employers for wages, food, shelter, health care, and a good work reference to help them gain permanent resident status. Their dependent and temporary worker status puts live-in workers and caregivers at risk of unfair treatment and abuse by their employers. It also makes them less likely to complain, leave, or report the abuse for fear of losing the opportunity to gain permanent resident status.⁴⁸⁷

Instances of exploitation and abuse have been well-documented: live-in caregivers have been required to work excessive hours, denied time-off, paid inadequate wages, physically and psychologically abused and had their passports confiscated.

In recognition of live-in caregivers’ need for special protection, in 2009 Ontario enacted the *Employment Protections for Foreign Nationals Act* (EPFNA).⁴⁸⁸ This Act

- prohibits recruiters from charging any fees to foreign live-in caregivers, either directly or indirectly.
- prevents employers from recovering placement costs from the live-in caregiver.
- prohibits employers and recruiters from taking a live-in caregiver’s property, including documents such as a passport or work permit.
- prohibits a recruiter, an employer, or a person acting on their behalf from intimidating or penalizing a live-in caregiver for asking about or asserting their rights under the Act.
- requires recruiters and, in some situations, employers to distribute information sheets to live-in caregivers setting out their rights under the EPFNA and those provisions of the *Employment Standards Act, 2000* (ESA) considered to be of particular relevance.⁴⁸⁹

When the new legislation first became effective, the Ministry of Labour set up a hotline for live-in caregivers to call for information; however, the hotline has since been discontinued. The Ministry has developed fact sheets in English, French, Hindi, Filipino and Spanish, available on its website, for employers and recruiters to provide to workers explaining the new legislation.

In addition to federal protections outlined above that have been implemented for temporary foreign workers, genuineness assessments for offers of employment to live-in caregivers now have additional criteria beyond those for other migrant workers.⁴⁹⁰ Employers must demonstrate the “need for the live-in caregiver, the provision of adequate accommodation, and the ability to pay the wages offered”.⁴⁹¹ Effective

December 11, 2011, live-in caregivers who have completed the requirements for permanent residency receive open work permits while awaiting finalization of their status. This permits them to move out of the employer's home sooner and seek work in other fields.⁴⁹²

In our consultations, we were advised that the main areas of concern for live-in caregivers are non-payment of wages, unresolved claims with the Ministry of Labour, performing non-caregiver tasks (e.g., nursing, housework and similar tasks) and little control over working hours. Some workers' advocate groups have suggested that EPFNA protections have been ineffective. They suggest that the Ministry's enforcement efforts have been directed solely at recruiters and otherwise have been inadequate. In their view, workers need more knowledge of rights, more support for asserting their rights, less fear of reprisal, the ability to make anonymous complaints to the Ministry of Labour and proactive enforcement. Others have indicated that for migrant workers not covered by EPFNA, recruitment and other abuses represent significant problems.⁴⁹³ The Migrant Workers' Alliance for Change brought to our attention the story of a live-in caregiver who, because of fear, endured abuse and living in an unsafe basement in terrible conditions for 24 months until she completed her contract, after which, with the support of police and information from the Caregivers Action Centre, she was able to file a report with the Ministry of Labour.⁴⁹⁴

[W]e met with workers... who reported paying between \$5,000 to \$12,000 to a recruiter to facilitate their coming to work in Canada.

In our consultations during 2011, we met with workers in the NOC C and D program who reported paying between \$5,000 to \$12,000 to a recruiter to facilitate their coming to work in Canada. To pay these amounts, each had to take significant loans for at least half of the recruiter's fee, with the balance paid from the worker's savings. The work that was made available paid minimum wage (\$10.25/hr).⁴⁹⁵ The payment of the recruiter's fee and the debt incurred played a significant role in the decision of these workers to stay in very unfavourable working conditions. While the new federal standard form contract aims to negate employers passing on recruiter fees to workers through contractual terms, it remains to be seen whether it will be effective. In our view, there would be a greater chance of success if the province supported the federal initiative with a clear message of denouncement against unscrupulous recruitment fees by extending the *Employment Protection for Foreign Nationals Act* (EPFNA) to all temporary migrant workers.⁴⁹⁶

Manitoba's response to exploitive recruitment fees, workers arriving to find no job available and the developing underground economy was the *Worker Recruitment and Protection Act* (WRAPA) which came into effect April 1, 2009.⁴⁹⁷ The Act requires employers seeking to hire temporary migrant workers to register with the Manitoba government before seeking an LMO with HRSDC. With cooperation from the federal government, an employer must show proof of registration in Manitoba before an LMO application can proceed. Registration under the WRAPA requires employers to

provide information on their company, the types of positions they want to fill and, if applicable, the third parties that will be involved in the recruitment process. Third parties must be licensed as foreign worker recruiters by the Manitoba Employment Standards Branch or exempt from the legislation.⁴⁹⁸

A key advantage to the legislation is that the government of Manitoba knows where the migrant workers are, allowing for compliance monitoring. Similar to the federal government’s new genuineness assessment, Manitoba considers the employer’s past conduct in assessing the merits of the application.

The Manitoba Ministry of Labour maintains a database of employers to assess compliance history. The legislation has resulted in approximately 2,000 business registrations each year and, at the date of this report, 19 recruiters of foreign workers registered.⁴⁹⁹ While initial start-up resources were higher, currently the program utilizes five full time equivalent positions for its operation including enforcement. Manitoba received approximately 3,200 entries of foreign workers in 2010, while Ontario received 66,000. Monitoring 66,000 workers in Ontario we could expect resource requirements to be very high compared to Manitoba. On a cost-benefit analysis, it is questionable whether it would be feasible to recommend such an initiative for Ontario. While the Manitoba model may work well in smaller jurisdictions and is recommended in *Made in Canada*, the LCO received mixed reaction from those we consulted about the feasibility of this type of scheme for Ontario.⁵⁰⁰ In general, respondents were of the view that, while helpful, it would not be a complete response to concerns about migrant labour. Without effective enforcement which would be very resource intensive for Ontario, some were concerned that such legislation would become a registration only on paper.

Prescribing all temporary migrant workers under EPFNA would extend protections against unscrupulous recruitment.

In our view, rather than enacting another statute, it would be preferable for Ontario to build upon what is already in place. EPFNA currently applies only to live-in caregivers. But it has a structure in place to permit its extension to other classes of migrant workers by way of regulation. During consultations prior to its enactment, live-in caregivers were confirmed as among the most vulnerable. The Ontario government has indicated that the federal government has moved to provide protection for temporary foreign workers and it continues to monitor the situation of other temporary foreign workers “and will assess, when needed, if any additional action is required to further protect temporary foreign workers coming to Ontario.”⁵⁰¹

In our view there is ample evidence to suggest that time has come. Prescribing all temporary migrant workers under EPFNA would extend protections against unscrupulous recruitment. This would complement the federal protections described above regarding genuineness assessments. These measures could provide a substantial level of protection to migrant workers. Extending EPFNA to all migrant workers would also raise the workers’ knowledge of their employment rights in Ontario. This is in line with one of the recommendations in *Made in Canada* that recommends that migrant workers be provided with information both pre and post-arrival regarding their employment, social and human rights.⁵⁰²

The Law Commission of Ontario recommends that:

27. The Ontario government extend the *Employment Protection for Foreign Nationals Act* to all temporary migrant workers in Ontario.

For Ontario, one of the gaps to be closed is to ensure that information about the identity and whereabouts of temporary foreign workers and their employers is received in order to enforce existing legislation. As a means of enforcing the new protective regulations and supporting provincial initiatives to protect migrant workers, the federal government is seeking to improve federal-provincial information-sharing. HRSDC advises that it may share decisions made on labour market opinions (LMOs)

with federal-provincial/ territorial governments for the purpose of the administration and enforcement of relevant legislation and regulations (e.g. employment standards, occupational health and safety, immigration, and third party recruitment).⁵⁰³

To support federal decision-making on LMOs and genuineness assessments, Ontario needs to have a clear process for communicating to the federal government on non-compliant employers. The need for greater federal-provincial information sharing was identified by Ontario's Expert Roundtable on Immigration.⁵⁰⁴ The flow of such information requires a Canada-Ontario information-sharing agreement. The federal government has indicated its desire to negotiate such agreements and other provinces, including Manitoba, have had them in place for a number of years.⁵⁰⁵ Information-sharing agreements by their very nature raise complex issues about privacy and the use of personal information, and therefore they are also time-consuming and challenging for governments to negotiate. While the Temporary Foreign Worker Agreement commits Ontario to negotiating such an agreement and such negotiations are ongoing, no such agreement has been completed between Ontario and the federal government.⁵⁰⁶ However, in the absence of such an agreement, information about the names and whereabouts of employers and foreign workers obtained by the federal government will not be available to Ontario for enforcement mechanisms. Moreover, federal efforts to protect migrant workers through the genuineness assessment will be much less effective. As noted by Ontario's Expert Roundtable on Immigration, "[b]oth governments [federal and provincial] share a commitment and a responsibility for protecting temporary foreign workers".⁵⁰⁷

As noted by Ontario's Expert Roundtable on Immigration, "[b]oth governments [federal and provincial] share a commitment and a responsibility for protecting temporary foreign workers".

The Law Commission of Ontario recommends that:

28. a) The Ontario government negotiate an information-sharing agreement with Human Resources and Skills Development Canada and Citizenship and Immigration Canada to permit information to flow between Ontario and the federal government for the purpose of increasing protections for temporary foreign workers by:
- i) strengthening federal-provincial oversight over temporary foreign worker contracts;
 - ii) increasing enforcement of temporary migrant workers' rights under provincial legislation; and
 - iii) imposing consequences upon employers who violate provincial legislation or breach contractual agreements with temporary foreign workers.
- b) The Ontario government initiate consultations with the federal government to bring about greater co-ordination of policies affecting worker protection for low skilled temporary foreign workers.

In the LCO's consultations, workers' advocates, most notably, the Migrant Workers Alliance for Change expressed the view that workers who enter Canada to respond to labour needs should be provided with permanent resident status. In their view, temporary foreign workers create too great a power imbalance between employer and worker due to the dependency of the workers' immigration status on the employment relationship. This lays the foundation for the risk of exploitation, creating a situation in which workers will never feel sufficiently secure to assert their rights. These observers believe that the federal government should refocus its efforts away from temporary labour and invest in making long term immigration decisions to secure a sufficient workforce for Canada's needs. In other words, Canada's immigration policies should include provision for accepting lower skilled workers on a more permanent basis. This view is echoed in *Made in Canada*.⁵⁰⁸

The arguments in support of Temporary Foreign Worker Programs focus on the fact that Canada and Ontario obtain labour for the period it is needed but do not have to support the worker over periods of unemployment. Workers who need employment can obtain it, supporting themselves and their families in their home country. Workers' countries of origin receive benefits in the form of the self-sufficiency of their citizens. Our immigration system emphasizes a preference for skilled and educated workers as permanent residents rather than workers for low skilled employment. Given that there are very few new jobs created in Canada for the workers in lower skilled jobs, there may be some support for this. The Final Report by the Ontario Expert Roundtable on Immigration, which focuses on high skilled workers, suggests that temporary foreign worker programs should only be used to bring in lower skilled workers after all other avenues to find suitable workers have been exhausted. Similarly, the Fraser Institute, suggests that the lower skilled work

currently performed by temporary foreign workers should be performed by permanent residents or citizens.⁵⁰⁹ This would appear to overlook the reality that employers have been unable to find suitable local employees for these positions although recent federal initiatives to make changes to the Employment Insurance program requiring unemployed Canadians to accept a broader range of work may perhaps be targeted at this issue.⁵¹⁰ At this point, Ontario's agricultural industry continues to be highly dependent upon the temporary foreign worker labour force. We import it every year. It may be that the time has come for an acceptance and a greater appreciation of the contribution made by lower skilled migrant workers. In recognition of the vulnerabilities faced by lower skilled temporary foreign workers, the Ontario Expert Roundtable on Immigration indicated the need for better protections, both federal and provincial, for these workers.⁵¹¹

G. Self-Employment

1. The Extent of Self-Employment

Until the 1970s, self-employment rates in Canada had been on a downturn due to decreased agricultural employment.⁵¹² From that point, however, self-employment rose steadily for almost two decades reaching a peak of approximately 17 percent in 1998 before falling back to about 15 percent in 2002.⁵¹³ Levels remained relatively stable in the 2000s.⁵¹⁴ In 2009, self-employment constituted 16 percent of employment in Canada.⁵¹⁵ Ontario's experience is reflective of Canada's as a whole; self-employment has remained relatively stable over the past decade, with data suggesting that approximately 15 percent of the Ontario workforce was self-employed from 1999-2011.⁵¹⁶

The main area of vulnerability among the self-employed occurs among the own-account self-employed.

2. Own-Account Self-Employment

The main area of vulnerability among the self-employed occurs among the own-account self-employed. Own-account self-employed people are those who "do not employ workers and who do not control the risks of the production process or accumulate capital."⁵¹⁷ Unlike traditional self-employment, it more closely resembles employment than entrepreneurship.⁵¹⁸ In some cases, these workers may be self-employed but have only one client and be in a state of significant dependency upon that client, making them vulnerable to exploitation. Some workers are incorrectly classified as self-employed when, in fact, they are employees under the ESA. Not all own-account self-employed workers are vulnerable, but own-account self-employment can be an indicator of precarity, particularly when coupled with low wages because it does not include the protections associated with employment (e.g., protection under the *Employment Standards Act, 2000*).

Canadian rates of own account self-employment grew dramatically between 1976 and 2000, from 4 percent to nearly 9 percent of total female employment and from 7 percent to 12 percent of total male employment.⁵¹⁹ In the 1990s, nearly 45 percent of new employment emerged in the form of own-account self-employment.⁵²⁰ According to one research team, the "increase in own-account self-employment accounted for the entire increase in self-employment during the 1987–98 periods".⁵²¹ This is consistent with findings across industrialized nations where growth in self-employment in the 1980s and 1990s was concentrated in own-account self-employment.⁵²² Own-account self-employment also played a significant part in the more recent recessionary growth of self-employment.⁵²³

Own-account self-employed workers generally earn less than employees or employers.⁵²⁴ This is exacerbated by the fact that self-employed workers are less likely to have benefits coverage.⁵²⁵ Women and members of visible minorities are more likely to be found in own-account self-employment as compared to other forms of self-employment.⁵²⁶ While the category of self-employed employers has a higher concentration of men and highly educated individuals, the own-account self-employed are more often women and workers with lower levels of education.⁵²⁷ Part-time employment rates for the own-account self-employed are high, particularly among female workers.⁵²⁸ Female own-account self-employed workers are often engaged in service jobs. In 2000, one third of female own-account self-employed workers were in the service industry.⁵²⁹ Nineteen percent of immigrants, compared to 15 percent of Canadian-born workers, were engaged in self-employed work and more immigrants were likely to report that they had entered self-employment because of a lack of suitable paid jobs (33 percent of immigrants, compared to 20 percent of Canadian-born workers).⁵³⁰

Noack and Vosko found that approximately 15 percent of Ontario's workforce are self-employed (5 percent of the Ontario workforce are self-employed employers and about 10 percent are own-account self-employed). The Ontario experience is similar to the Canadian experience as a whole in that Ontario women were less likely to be self-employed as compared to men; however, when they were self-employed, it was in own account self-employment, much of this work being in a low income category.⁵³¹

The Ontario experience is similar to the Canadian experience as a whole in that Ontario women were less likely to be self-employed as compared to men; however, when they were self-employed, it was in own account self-employment, much of this work being in a low income category.

3. The Legal Framework

Self-employed workers are not covered under the ESA which requires the existence of an employment relationship where the worker and employer fall within the Act definition of "employee" and "employer". For workers in precarious forms of work, classification as an employee is a condition of enjoying ESA protections and basic minimum standards. According to Parry and Ryan, the definitions of employee and employer have attracted more attention and controversy than any others under the ESA.⁵³²

"employee" includes

- (a) a person, including an officer of a corporation, who performs work for an employer for wages,
- (b) a person who supplies services to an employer for wages,
- (c) a person who receives training from a person who is an employer, as set out in subsection (2), or
- (d) a person who is a homemaker, and includes a person who was an employee

"employer" includes:

- (a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and
- (b) any persons treated as one employer under section 4, and includes a person who was an employer.⁵³³

As Ryan and Parry point out, the Ontario Labour Relations Board has indicated that distinguishing employee from independent contractor can be very difficult.⁵³⁴ Because the definitions are broadly drafted, employment standards officers (ESOs) trying to distinguish between legitimate independent contractors and those who should be classified as employees must go beyond the text of the statute and apply common law tests.⁵³⁵ However, a clear test for determining whether a worker is an employee or an independent contractor remains elusive. As Fudge, Tucker and Vosko report, “[s]ince the 1950s, prominent employment and labour scholars have concluded that the English common law did not have a unified conception of employment or a coherent method for distinguishing between employees and independent contractors.”⁵³⁶

The ESA Policy and Interpretation Manual states that “it is the existence of the relationship between the employer and the employee that defines an employee for the purposes of the Act”.⁵³⁷ The definition of the employment relationship in other statutes has not been found to be of great relevance to the determination under the ESA.⁵³⁸ However, a number of approaches to making the determination have emerged within the common law.

In a 2003 decision, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, the Supreme Court of Canada explicitly rejected a single test approach.⁵³⁹ It did, however, review the prevailing tests and present a non-exhaustive list of relevant criteria for making a determination as to whether a worker “engaged to perform...services is performing them as a person in business on his own account.”⁵⁴⁰ These factors include:

- Whether the worker has control over his or her own activities,
- Whether the worker owns his or her own tools,
- Whether the worker hires other workers to help, and,
- Whether the worker has i) an opportunity for profit or ii) takes on either financial risk or “responsibility for investment and management held by the worker”.⁵⁴¹

...[A] clear test for determining whether a worker is an employee or an independent contractor remains elusive.

Sagaz reviewed the fourfold test set out in *Montreal (City) v. Montreal Locomotive Works Ltd.*; control, ownership of tools, chance of loss or profit and integration. Following the direction in *Sagaz* that there is no single definitive test, employment standards officers, adjudicators and courts must draw upon the factors in *Sagaz*, the fourfold test in *Montreal* and other tests that have emerged: the “organization test” that focuses on whether the worker was part and parcel of or integral to the organization, the “enterprise test” that examines the degree of control and risk taken by the employer and the “business practices test” that looks at the intention of the business arrangement between the parties.⁵⁴² Each test offers an approach to the central question: “is the person who has been engaged to perform services performing them as a person in business on his or her own account?”⁵⁴³

One issue that has arisen in the legislation is whether a “dependent contractor” is or could be included in the definition of employee under the ESA. “Dependent contractors” are not defined under the ESA but they are under the *Labour Relations Act*. The definition of employee under the *Labour Relations Act* includes dependent contractor.

“Dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a

position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.⁵⁴⁴

In general, dependent contractors are workers with only one client, opening them up to extreme vulnerability. Whether this type of vulnerability can be remedied through legislation is an open question discussed later.

4. The Key Issue: Misclassification

The primary concern arising out of the LCO's research and consultations, regarding self-employment, was that of misclassification. Some individuals are misclassified as own-account self-employed contractors when they would more properly be considered employees under the ESA. If a worker is misclassified (i.e., defined as self-employed when they should be defined as an employee) either deliberately or erroneously, the worker may not be aware that he or she is in an employment relationship and can access the protections of the ESA. This can have particularly harsh impacts on low income workers with disproportionately negative impacts on women and immigrants. As pointed out by the CAW in their response to the Interim Report,

[t]he misclassification of employees as something else, such as independent contractors, presents a serious problem because these employees are often denied access to critical benefits and protections – such as family and medical leave, overtime compensation, minimum wage pay and Unemployment Insurance – to which they are entitled. In addition, misclassification can create economic pressure for law-abiding business owners, who often find it difficult to compete with those who are skirting the law. Employee misclassification also generates substantial losses for state Unemployment Insurance and workers' compensation funds.⁵⁴⁵

Advocates have indicated that workers sometimes agree to be classified as self-employed by signing contracts or setting up paper corporations at the request of the employer simply in order to secure some form of income.

Advocates have indicated that workers sometimes agree to be classified as self-employed by signing contracts or setting up paper corporations at the request of the employer simply in order to secure some form of income. In other cases, workers erroneously believe that they are self-employed simply because of an assertion made by the employer.⁵⁴⁶ However, these are not the governing factors in determining whether an employment relationship exists. Some advocates are concerned with what is referred to as “creative classification” by employers. Practices of misclassification have been identified in industries such as cleaning and trucking. In our consultations, we heard about examples of some pizza delivery persons and workers in the catering industry being misclassified as independent contractors and their employers not acknowledging their employment standards obligations.⁵⁴⁷ In responding to the Interim Report, the Chinese Interagency Network of Greater Toronto indicated that they had encountered workers, most prevalently among sewing machine operators in factories and general help in grocery stores, “forced to be self-employed by the employers in order to be hired”.⁵⁴⁸ Sewing machine operators earned their wages through piece-work creating an “atmosphere of competition among workers as well as to minimize workers’ cohesiveness in addressing any kinds of work issues.”⁵⁴⁹

Employers may also legitimately contract work out and indicate that this is a necessity to compete in the global market in areas such as manufacturing. Workers’ advocates, however, do not accept globalization as the primary cause.

Employers argue that these strategies are necessary because of global economic integration. While it may be that some local manufacturers struggle to drive down their costs in order to compete against firms located elsewhere, globalization does not explain new employer practices in Ontario. Many employers and industries engaged in outsourcing, indirect hiring, and misclassifying workers that have been documented by the WAC [Workers Action Centre] are in sectors that have a distinctly local market - restaurants, janitorial services, business services, construction, trucking, and home health care, warehousing, packaging and manufacturing of locally consumed goods.⁵⁵⁰

When considering options for reform, it is important to understand the distinction between misclassification and business choices that companies are making to increase their competitiveness, such as outsourcing and using temporary agency workers. Misclassification, whether it is deliberate or inadvertent, is covered by existing legislation and therefore efforts to address it must be enforcement driven. Legitimate business choices that result in labour insecurity require other types of responses such as incentives or regulation for large employers to take responsibility for ESA compliance among their subcontractors (i.e., supply chain regulation) and perhaps strengthened legislative protection as discussed previously and in the next Chapter dealing with the OHSA.

5. Possibilities for Reform

...[I]t is important to understand the distinction between misclassification and business choices that companies are making to increase their competitiveness, such as outsourcing and using temporary agency workers.

Some writers have proposed harmonization of the definition of “employee” or “worker” across relevant legal regimes, to provide conformity of the *Employment Standards Act* definition with those established in other contexts, such as under federal income tax law. Alternatively, it has been suggested that employment statutes “could be revised to include provisions allowing for determinations on the definition of employee in one context to be made applicable in other contexts.”⁵⁵¹

Another line of thinking suggests that definitional reform is insufficient. Fudge, Tucker and Vosko suggest abolishing the distinction between employees and independent contractors and extending protection to all workers, not only in the employment standards context, but also with respect to collective bargaining and income tax law, maintaining at least that “[t]he starting-point should be that all workers dependent on the sale of their capacity to work be covered, unless there are compelling public policy reasons for a narrower definition.”⁵⁵² Rather than relying on an expanded or broadened definition of employee as the basis for protection, Fudge, Tucker and Vosko suggest protection as a default, regardless of how one labels the sale of labour. On a similar note, the Wellesley Institute argues for extended ESA coverage without regard to classification. Arguing on the basis of equality and human rights legislation, it suggests

[t]here should be no difference in pay or working conditions for workers doing the same work but which is classified differently, such as part-time, contract, temporary, or self-employed.

The ESA has a role in establishing a framework for equality among workers doing comparable work. The government should not enable employers to impose inferior conditions on workers (who end up being primarily women, racialized workers, immigrant workers and young workers) simply because of the form of employment or employment status. This measure would help bring the ESA in line with the Human Rights Code.⁵⁵³

While the LCO supports the general view that workers, such as those in part-time positions, should be paid proportionately the same as their counterparts in full-time

positions for equivalent work, self-employed persons are in a different category. Suggestions that any distinction between the self-employed and the employed be collapsed in all regulation would have far-reaching consequences and would potentially have negative impacts for self-employed persons. In any event, it would require broad policy considerations at both the provincial and federal level that are beyond the scope of this Project.

It is difficult to understand the justification for regulating the work of those who are legitimately self-employed. Furthermore, we are of the view that implementation of such a policy would have feasibility challenges. For example, should self-employed individuals be required to limit themselves to a certain number of hours per week or be required to pay themselves a certain wage? Such regulation would not only be unenforceable but also undesirable. Furthermore, how would the responsibility for a two-week vacation be divided among an independent contractor's multiple clients?

In our view, the real issue is how to identify and remedy the situation of workers erroneously misclassified as self-employed when an employment relationship actually exists. A secondary issue is whether additional protections should be put in place to protect self-employed workers in dependent working relationships (i.e., low-wage workers with only one client), while allowing for other self-employed persons to benefit from flexibility and choice in self-determination of working conditions.

...[T]he real issue is how to identify and remedy the situation of workers erroneously misclassified as self-employed when an employment relationship actually exists.

In the LCO's view, the most straightforward approach would be to target the actual issue, the practice of misclassifying employees, through improved enforcement procedures, policy development, ESO training and public awareness. This would protect the most vulnerable without negatively impacting those who benefit from self-employment. The advantages of compliance and enforcement practices such as proactive inspections and expanded investigations outlined earlier are equally applicable to the situation of identifying cases of misclassification. The most effective enforcement activities would be those directed at industries known to be at high-risk for practices of misclassification such as trucking, cleaning and catering, as well as identification and proactive monitoring of industries populated by workers known to be disproportionately affected.

Our consultations revealed a sense that those who work with vulnerable workers were not confident that Ministry of Labour determinations on classification of employee versus self-employed were consistently made appropriately. In the ESA Policy and Interpretation Manual, ESOs are provided with information about the various legal tests. However, no substantive policy direction is provided.⁵⁵⁴ Policy direction on an approach to the determination based on the common law tests may be a way to provide more transparency and confidence among stakeholders in the decision-making process. We have discussed the merits of public awareness campaigns earlier in this Report. In our view, highlighting the practice of misclassification and educating on the appropriate definition of employee and self-employment through public awareness posters, ads and information sessions targeted at the general public and at high-risk industries would increase the likelihood of compliance and build a foundation for improved enforcement.

Consideration should be given to the possibility that there is systemic misclassification. In other words, it may be that entire classes of workers are being incorrectly identified as independent contractors. Once these classes or types of workers are identified, rather than requiring each worker to bring his or her case to the Ministry of Labour as an individual complaint, proactive blitz-type enforcement activities would have the added potential of

uncovering this type of systemic misclassification. Such processes could pave the way for specific policy development and employer education.

A clear test for defining employment codified within the ESA is another way that the Province could make an emphatic statement about the issue and, at the same time, provide guidance for employers, employees and decision-makers. It may be challenging, however, to create a definition specific enough to provide a test that is useful yet flexible enough to keep pace with the metamorphic nature of employment. We caution against implementing improved consistency at the expense of some degree of flexibility. Rigid consistency does not always produce the desired results. In our view, policy and law must operate by balancing flexibility and consistency. The government and courts must have a clear policy and legal framework, but they must also be given adequate discretion to respond to the wide-range of individual circumstances presented to them.

Beyond considerations of consistency, extending protection to workers in relationships of dependency (i.e., low-wage contractors with one client) presents unique challenges. For example, a state of dependency may be fluid in that some such workers may be dependent upon one client at one point in time and have several clients at another time.⁵⁵⁵ Consideration of a definition of “employee” that extends itself to include such workers would need to take into account the needs of independent and/or self-employed persons who benefit from flexibility and control over their working arrangements. It would also have to respond to concerns expressed by employee representatives that have, in the past, suggested that such measures could cause employers “who already mislabel workers to do so with respect to newly-protected dependent contractors, i.e. labeling them as ‘independent’ contractors.”⁵⁵⁶ In other words, it could make things worse instead of better. These would have to be considered in carefully drafting any new standard and it should also leave room for the recognition of new and emerging forms of employment with a range of individual situations. Recognizing that such changes cannot anticipate all impacts, any such policy and legislation should be evaluated after a reasonable period of time to determine effectiveness and whether adjustments are required.

Rigid consistency does not always produce the desired results. In our view, policy and law must operate by balancing flexibility and consistency.

The Law Commission of Ontario recommends that:

29. The Ministry of Labour act to reduce misclassification of employees as self-employed by:
 - a) engaging in proactive compliance and enforcement processes directed at industries with known high incidences of misclassification;
 - b) increasing transparency in decision-making through policy guidance and training for employment standards officers on the definition of employee and the common law tests; and
 - c) launching a public education campaign to raise awareness of the issue of misclassification of employees under the *Employment Standards Act*.
30. The Ontario government consider extending some ESA protections to self-employed persons in dependent working relationships with one client, focussing on low wage earners, and/or identifying other options for responding to their need for employment standards protection.

At Recommendation 9, we recommend that the Ministry of Labour enact a requirement that employers provide all workers with written notice of their employment status and terms of their employment contract at the outset of the working relationship. We believe this step would have particular benefits for workers misclassified as self-employed. It would create a situation requiring all parties to turn their minds to the issue of the employment relationship. In its response to the Interim Report, Ontario government officials raised concerns about the possibility that requiring a written contract could increase the risk of deliberate or erroneous misclassification of employees as self-employed.⁵⁵⁷ As we have noted, sometimes simply a written assertion that a worker is self-employed is accepted as sufficient when, in law, it is not the case. However, if forms developed by the Ministry of Labour for this purpose set out the appropriate definition of employee versus self-employed, the forms themselves could provide guidance and education on proper definitions. Inclusion of Ministry contact information would encourage individuals to seek clarification from the Ministry on grey areas. The forms themselves and the requirement to complete them would have the effect of improving knowledge and voluntary compliance. It would also benefit decision-makers later should a dispute arise. Coupled with an effective public education campaign, this simple low-cost step would be a valuable strategy for confronting the issue of misclassification. The Ontario government's feedback raised concerns about the fact that standard forms could not anticipate all employment contract issues and would therefore not be an ideal response.⁵⁵⁸ We would reiterate that the federal government has fashioned standard form contracts for several categories of vulnerable workers to attempt to extend additional protections to these workers. This is a clear message of the perceived protective effect of articulating the terms of the employment relationship. While we recognize that not all terms could be covered by standard forms, the most general terms could be included.

The Law Commission of Ontario recommends that:

31. a) The Ontario government amend the ESA to require employers and contractors to provide all workers, including independent contractors, with written notice of their work or employment status and the general terms of their employment or work contract (including remuneration, hours, and other terms); and
- b) the Ministry of Labour develop standard forms to support employers and contractors in this task.

IV. HEALTH AND SAFETY

A. The Legislative Framework for Health and Safety

Ontario's regulatory scheme for health and safety is primarily governed by two statutes: the *Workplace Safety and Insurance Act, 1997* (WSIA) and the *Occupational Health and Safety Act* (OHSA).⁵⁵⁹ The WSIA is administered through the Workplace Safety and Insurance Board (WSIB). Workplace safety insurance provides an employer funded compensation and early and safe return to work insurance plan for work-related injury/illness.

The legislative mechanism by which workers' health and safety is protected is governed by the *Occupational Health and Safety Act* and its regulations. The OHSA is based on the principle of the internal responsibility system under which the workplace parties share responsibility for occupational health and safety. Employers are required to have a health and safety policy and must ensure there is a joint health and safety committee (and in smaller workplaces, health and safety representatives). The OHSA sets out the four basic rights of workers: a) the right to participate in identifying and responding to workplace health and safety concerns; b) the right to know and have training and information about any potential hazards; c) the right to refuse work that is dangerous or exposes the worker to workplace violence; and d) the right of certified members of a joint health and safety committee to stop work in dangerous circumstances. The OHSA sets out the obligations of those who have control over the workers, workplace, materials or equipment. The Act imposes a general duty on employers to take all reasonable precautions to protect the health and safety of workers and specifically defines the employers' responsibilities. Workers are required to work safely and comply with the Act and its regulations. If the internal responsibility system fails, the Ministry of Labour has the authority to enforce the OHSA and it does so through inspections both proactive and reactive, compliance orders and charges. Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009*, introduced strengthened protections for workers from workplace harassment and violence by requiring employers to develop and implement policies and procedures to respond to and prevent workplace violence and harassment.⁵⁶⁰ A more detailed description of historical developments in Ontario's health and safety system are outlined in the Dean Report and by Vosko *et al.*⁵⁶¹

Amendments to the OHSA in 2011 explicitly define the Minister's powers and duties to include the promotion of health and safety and the prevention of injuries, public awareness, education and the fostering of a commitment to occupational health and safety among workers and employers.⁵⁶²

1. Reprisals and 2011 Amendments

Section 50 of the OHSA prohibits reprisals against workers for acting in compliance with or seeking enforcement of the Act or regulations. A worker who believes they have been penalized because they exercised their rights and responsibilities under the Act can file a

complaint with the Ontario Labour Relations Board (OLRB). At the OLRB, the onus is on the employer to prove that no reprisal took place.⁵⁶³ In response to the Dean Report, under 2011 amendments to the OHS Act that became effective April 1, 2012, Ministry of Labour inspectors, on consent of the worker, may refer a worker's reprisal complaint to the OLRB.⁵⁶⁴ Also effective April 1, 2012, a new regulation under the OHS Act prescribed the functions of the Office of the Worker Adviser (OWA) and Office of the Employer Adviser (OEA) in respect of reprisal complaints. These are discussed further in the discussion section on reprisals leading up to Recommendation 35.

2. Joint Health and Safety Committees (JHSCs)

Joint health and safety committees/representatives provide a process for identifying and resolving workplace health and safety concerns. This mechanism provides a forum for worker voice and participation, functioning as a partnership between management and workers to fulfill an advisory role for workplace safety.⁵⁶⁵ In most workplaces with at least twenty employees, committees must be established. In smaller workplaces, individual representatives are appointed by workers or, where applicable, the trade union. Representatives have essentially the same powers as the joint committee. In larger workplaces, at least one worker and one management representative of the committee must be "certified". As of April 1, 2012, the Ministry of Labour, through the Chief Prevention Officer, has the mandate to set standards for the certification and training of joint health and safety committees, and to certify members who meet the standards. Committees identify hazards by conducting workplace inspections and obtaining information from employers.⁵⁶⁶ Committees can make written recommendations on health and safety improvements to which the employer must respond.⁵⁶⁷ Any work refusals and serious injuries can be investigated by the committee. Some Project Advisory Group members suggested that some employers did not set up operational joint health and safety committees/representatives or, in some cases, they were in place in name only. In its response to the Interim Report, the government explained, "[a]s part of an inspection or investigation, inspectors typically monitor the functioning of the internal responsibility system at a workplace, and one of the key ways inspectors do this is by assessing whether there is a properly functioning joint health and safety committee (or representative) in place."⁵⁶⁸ Accordingly, this is an area that would benefit from increased proactive enforcement.

"As part of an inspection or investigation, inspectors typically monitor the functioning of the internal responsibility system at a workplace, and one of the key ways inspectors do this is by assessing whether there is a properly functioning joint health and safety committee (or representative) in place."

Comments by Ontario Government Officials

The Law Commission of Ontario recommends that:

32. OHS Act enforcement activity include proactive inspections to ensure joint health and safety committees and representatives are in place where required and are effectively operational.

Under the OHS Act system, compliance and enforcement are achieved through a combination of an internal responsibility system which relies on the worker-employer partnership and an external responsibility system which relies on formal enforcement strategies through inspections, proactive and reactive to complaints, critical injuries, fatalities and refusals.⁵⁶⁹ Confirmed violations can result in the issuance of compliance

orders and/or stop work orders or prosecutions under Part I (tickets) or for more serious matters, Part III, of the *Provincial Offences Act*.⁵⁷⁰ In very rare circumstances, in proceedings separate from the OHSA, following police investigation and the laying of criminal charges, offenders are prosecuted under the *Criminal Code*.⁵⁷¹

The OHSA applies to most workplaces but there are certain exemptions and limitations. For example, it does not apply to “work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence.”⁵⁷² Among others, live-in caregivers are excluded from the Act. Originally, farming operations were exempt but in 2006 farming operations were brought under the OHSA, with some limitations.⁵⁷³ Farming employers have the same legal obligation to take every precaution reasonable in the circumstances for the protection of workers as employers in other industries. Farming supervisors and workers also have the same obligation as those working in other industries to take appropriate steps to identify and address all workplace hazards. The inspection and enforcement regime also applies. While the OHSA requires a joint health and safety committee to be set up at a workplace with 20 or more regularly employed workers, the application of this requirement is limited to mushroom, greenhouse, dairy, hog, cattle and poultry farming. For other types of and smaller farms (i.e., 6-19 regularly employed workers), health and safety representatives are required. In workplaces with temporary agency workers, some stakeholders are of the view that certain employers are misinterpreting “regularly employed workers” to exclude temporary agency workers in order to circumvent the requirement to have a joint health and safety committee.⁵⁷⁴ As part of the recommendation above, proactive enforcement activities should include targeting this type of activity to ensure proper compliance.

Rather than regulations specifying hazards, there are Occupational Health and Safety Guidelines for Farming Operations in Ontario which have been jointly developed by representatives of the farming community; farm safety association; the Ministry of Agriculture, Food and Rural Affairs; and the Ministry of Labour.⁵⁷⁵ These guidelines are a “starting point for the workplace parties to think about how to fulfill their obligations under the OHSA.”⁵⁷⁶ In our consultations we heard concerns raised from labour-side commentators about the importance of worker participation in any stakeholder discussions, such as technical advisory committees regarding farm health and safety issues. On the other hand, we also heard that stakeholder consultation of both labour and employer-side interests are consistently undertaken in the development of OHSA regulations, legislation, policies and sector plans.⁵⁷⁷ It is unclear to us whether consultations on worker-side concerns are currently sufficient, but we are clear that they are necessary. Such consultation could include workers themselves, their organizations, legal representatives or other experts and representatives.

The Law Commission recommends that:

33. The Ontario government ensure that stakeholder discussions between industry and government regarding health and safety include workers or their representatives.

B. The Dean Report

Highlighting the protection of vulnerable workers as a priority, the Dean Report defined vulnerable workers as “those who have a greater exposure than most workers to conditions hazardous to health or safety and who lack the power to alter those conditions.”⁵⁷⁸ Worker vulnerability was recognized as arising from

not knowing one’s rights under the OHSA, such as the right to refuse unsafe work; having no work experience or training that is job - or hazard - specific; and being unable to exercise rights or raise health and safety concerns for fear of losing one’s job, or in some cases, being deported.⁵⁷⁹

The Report pointed to particular subgroups, including young workers; recent immigrants; workers new to their jobs or workplaces; low-wage workers in multiple part-time jobs; temporary agency workers; and temporary foreign workers who are employed in agriculture, hotel/hospitality and construction.⁵⁸⁰ The Dean Report also commented upon the vulnerability of undocumented workers and refugees and those employed in the underground economy of industries such as construction, building cleaning, restaurant, transportation, farming and the garment trade. The Dean Report found that there was wide-spread commitment for the internal responsibility system.⁵⁸¹ The existing model within the OHSA presents a balance between internal and external enforcement. We support the continued commitment to that model.

...[T]he Dean Report defined vulnerable workers as “those who have a greater exposure than most workers to conditions hazardous to health or safety and who lack the power to alter those conditions.”

The Dean Report and the Chief Prevention Officer have noted the importance of prioritizing vulnerable workers and small businesses.⁵⁸² Given that precarious work can often be found in small and medium sized enterprises, this is an important development, in our view.

The Dean Report acknowledged the Ontario government’s efforts since 2000 in prioritizing the protection of young workers through targeted enforcement, education and aggressive public awareness campaigns producing “a 45 percent decline in the lost-time injury rate for teenagers since 2008.”⁵⁸³ However, it noted that providing outreach, locating vulnerable workers, and providing meaningful information, services and legislative enforcement presented ongoing challenges to protecting vulnerable workers, particularly in the case of those with language barriers.⁵⁸⁴

We highlight below the Dean Report recommendations we consider to be most significant for vulnerable workers. Recommendations 29-35 (discussed below) were specifically aimed at vulnerable workers; and while Recommendations 10 and 14-17 pertain to all workers, they were identified as having particular advantages for vulnerable workers. We acknowledge the Ontario Government’s work accomplished to date in responding to this Report, and we strongly support the full implementation of all recommendations relating to vulnerable workers.

Our comments and recommendations below build upon this important work to provide additional and more specific guidance for its implementation.

1. Mandatory Health and Safety Awareness Training for Workers Before Starting Work and for All Supervisors Responsible for Frontline Workers (Dean Report Recommendations 14 and 15)

These recommendations refer to training on rights and responsibilities, the internal responsibility system, recognizing and responding appropriately to hazards and the role of joint health and safety committees/representatives. The Panel appreciated the need to consider the literacy and language challenges in developing training programs and the need for broad accessibility through delivery in multiple formats at non-traditional venues such as Employment Ontario and settlement and community offices. Implementation of these recommendations is underway.⁵⁸⁵ *Made in Canada* recommended rights information be given to temporary foreign workers at both the pre and post-arrival stage. In our view, it is important to take into consideration the unique situation of temporary foreign workers to ensure adequate health and safety training for these workers as part of the implementation of this recommendation.⁵⁸⁶

2. Mandatory Entry Level Training for Construction Workers and Other Identified Sectors; Mandatory Fall Protection Training and Other High-Hazard Activities (Dean Report Recommendations 16, and 17)

Hazard-specific training to help address and lower the higher rate of injuries known to occur among new workers, and also benefit young workers and recent immigrants who tend to be disproportionately employed in physically demanding or hazardous jobs.⁵⁸⁷ Implementation of these recommendations is underway.⁵⁸⁸

In the Dean Report's Recommendation 32, in recognition of the particular need for protection in the agricultural industry, the Panel recommended that any new regulations requiring mandatory training for workers apply also to farms.

3. Increased Proactive Inspections and Enforcement Campaigns at Workplaces and Sectors Where Vulnerable Workers are Concentrated (Dean Report Recommendation 30)

This recommendation is meant to highlight proactive investigation and enforcement. Our consultations and research also revealed the need for greater enforcement. The Ministry of Labour's response to the Dean Report's recommendation has included engaging in the development of sector specific plans for increased safety blitzes and proactive workplace inspections.⁵⁸⁹ Increases in inspections have led to increased exercise of enforcement powers over recent years making them an effective strategy for compliance.⁵⁹⁰ Through our consultations, we were advised that the Ministry of Labour takes the presence of vulnerable workers into account when deciding where to carry out enforcement blitzes.⁵⁹¹

While we support the Dean Report's Recommendation 30, we believe that a recommendation providing more specific guidance would be useful. Our consultations revealed that among agricultural workers, temporary migrant workers have significant health and safety concerns. The Dean Report recognized the dangers in farming. A number of respondents to our consultations suggested that farms are infrequently

Our consultations revealed that among agricultural workers, temporary migrant workers have significant health and safety concerns.

subjected to OHS inspections, while representatives of the farming industry pointed out that other industries had similar or higher levels of danger. A review of the Ministry of Labour's information on Ontario's critical injuries and fatalities demonstrates that, between 2008 and 2010, farming reported 11 fatalities and 29 critical injuries. The rate of fatalities was the second highest among 29 of Ontario's industrial subsectors after tourism, recreation and hospitality that reported 15 fatalities. Twenty other subsectors reported higher numbers of critical injuries compared with agriculture. It should be noted that the number of OHS inspections conducted in farming were much lower than most other sectors. Out of 29 subsectors, there were only 5 others that had lower rates of inspection than farms and all of these had much lower fatality rates (0 or 1) over the same time period compared to agriculture.⁵⁹² We do not have clear information as to why this is the case, but the situation suggests a need for review. The agricultural industry is an area where proactive enforcement activities could have a significant positive impact on workers and particularly migrant workers who, as we have noted earlier, are in a situation with unique vulnerabilities due to their reluctance to report injuries or assert their rights on their own initiative. In its 2012-2013 Sector Plan, the Ministry of Labour has recognized the relationship between temporary migrant workers and hazards in farming. Information, instruction and training of new, temporary and young workers are to be one of the focuses of inspections in this sector.⁵⁹³

The agricultural industry is an area where proactive enforcement activities could have a significant positive impact on workers and particularly migrant workers...

Consultation participants identified other industries including hospitality and cleaning as susceptible to workplace injuries as well as gradual onset repetitive injuries among factory-based garment workers due to the need to work quickly.⁵⁹⁴ Members of the Project Advisory Group identified the temporary staffing industry as an area of significant concern for health and safety issues. Consultation participants emphasized enforcement concerns and in response to the Interim Report, the Toronto Workers' Health and Safety Legal Clinic and Workers Action Centre /Parkdale Community Legal Services commented upon the eroded impact of inspections when accompanied by advance notice. This was also noted by a worker in our meeting with the Migrant Workers Alliance for Change. The Ministry of Labour has indicated to the LCO that it is not Ministry policy to provide advance notice of inspections.⁵⁹⁵

The Law Commission of Ontario recommends that:

34. a) The Ministry of Labour conduct more proactive OHS inspections in industries employing vulnerable workers at high risk for workplace injuries including agriculture, hospitality and cleaning and workplaces with temporary staffing agency workers; and
- b) temporary foreign workers in all sectors be a priority for the Ministry of Labour's proactive OHS enforcement activities.

4. Poster of Key OHS Rights and Responsibilities (Dean Report Recommendation 10)

The Dean Panel recommended the development of a poster of key rights and responsibilities based on the evidence it heard that many workers had “little to no understanding of the *Occupational Health and Safety Act* or their rights as workers or the obligations of employers. This was particularly the case with vulnerable workers.”⁵⁹⁶ As of June 2012, this poster was made available to the public and enforcement began on October 1, 2012.⁵⁹⁷

5. Information Products in Multiple Languages and Formats for Distribution through Various Media and Organizations to Raise Occupational Health and Safety Awareness among Vulnerable Workers (Dean Report Recommendation 31)

The Panel recommended that basic OHS and WSIA information be developed in multiple languages and formats for distribution in ways that would reach vulnerable workers at the community level. The Report found that new distribution avenues, such as agencies and services for newcomers, government websites aimed at new immigrants, advertisements, libraries and public transportation would better serve vulnerable workers and reach out to those who do not visit government offices and those with language or literacy barriers.⁵⁹⁸ As noted, the Panel recognized the challenges, also echoed in the LCO’s consultations, to protecting workers who do not speak English as a first language or at all.⁵⁹⁹ While some of our respondents expressed criticism of the Dean Report for over-emphasizing training at the expense of enforcement, in our view, the Panel’s recommendations regarding the development of informational materials, their dissemination and education on health and safety rights and responsibilities are responsive to the issues that were raised in our consultations regarding the need for workers’ increased knowledge of rights.⁶⁰⁰ We heard about temporary foreign workers lacking training, knowledge of rights and whom to contact to enforce them, particularly following repatriation.⁶⁰¹ Consistent with the recommendation in *Made in Canada* calling for rights information to be provided to migrant workers, it may be possible as part of this initiative to develop materials directed specifically to migrant workers and to arrange through SAWP and other programs for pre or post-arrival or both dissemination.⁶⁰²

We heard about temporary foreign workers lacking training, knowledge of rights and whom to contact to enforce them, particularly following repatriation.

6. Regulations for Key Hazards in Farm Work (Dean Report Recommendation 32)

The Dean Report commented upon the dangers associated with the agricultural industry and as we have noted, in Ontario between 2008-2010, farming had the second highest number of reported fatalities.⁶⁰³ Injuries most often reported to WSIB result from overexertion, falls, repetitive motion and part of the body caught/compressed by equipment. In our consultations, we heard from workers about these types of injuries resulting in back pain, hernias, hand/toe amputations from equipment, heat exposure and exhaustion, repetitive strain and exposure to chemicals and pesticides. Representatives from the farming industry highlighted the improved health and safety training that is now given to workers. Among other things, they noted developments such as the Pesticide Safety Training Requirements of Agricultural Assistants and the Ontario Pesticide Education Program that is available to farm workers. In addition, Workplace Safety and Prevention Services offers free or minimal charge

health and safety training available to its members. F.A.R.M.S. also noted that migrant workers are provided with Ontario health and safety information through brochures from their respective countries. In LCO consultations, many temporary foreign farm workers reported receiving some training on such topics as the Workplace Hazardous Materials Information System and pesticide use, although many others had not.⁶⁰⁴

The Dean Report recommended stronger protection for farm workers through extending some existing regulations to farms and/or development of new regulatory provisions specific to farms to cover key hazards that are currently addressed by the farming guidelines. In its submission to the LCO, the Migrant Workers' Alliance for Change included the following experiences of a migrant worker who described the pressure to accept work with chemicals even if it is dangerous: "If the Boss chooses six guys to spray and you say you will not spray, you will not be taken back...When the inspector comes, the employer gives you a good mask and gloves. When they are gone, you go back to dollar gloves...When the inspector comes to the farm the Boss knows two weeks before. For 1 week before the inspector comes, everything is cleaned up. We do not spray for that week. Once the inspector is gone, everything returns to normal."⁶⁰⁵

7. Reprisals (Dean Report Recommendations 33, 34 and 35)

Section 50 of the OHSA prohibits reprisals. Yet our consultations revealed that workers' fear of reprisal continues to be a barrier to workers exercising their rights under the OHSA with the problem being particularly acute in the temporary foreign worker context where workers expressed fear of being sent home or excluded from returning in the future.⁶⁰⁶ The Dean Report Panel recognized this concern as a problem, finding that fear of reprisal was a significant point of vulnerability for temporary migrant workers.

As solutions, the Dean Report recommended the development of a process for Ministry of Labour inspectors to refer "serious reprisals involving worker dismissal" to the OLRB and a new process for expediting the OLRB's response. The Dean Report further recommends enhancing prosecution policies for reprisals emphasizing deterrence and providing independent third party support for reprisal complainants through an organization such as the Office of the Worker Adviser. As the report also comments, the Ontario Labour Relations Board (OLRB) may order interim reinstatement. More generally, the OLRB may make orders that "remove or change any penalty the employer may have imposed, reinstate/rehire the worker, and/or compensate the worker for related losses".⁶⁰⁷

In response to the Dean Report, the Ontario government has made recent amendments to the OHSA to include a new process by which inspectors may refer reprisal matters to the OLRB. The OLRB has amended its rules to allow for the expedited handling of these matters. The Ontario government has also enacted regulations to prescribe the functions of the Office of the Worker Adviser (OWA) and Office of the Employer Adviser (OEA) to educate, advise and, in the case of the OWA, to represent non-unionized workers before the OLRB and, in the case of the OEA, to represent employers of fewer than 50 employees before the OLRB.⁶⁰⁸ These are important achievements that apply

"If the Boss chooses six guys to spray and you say you will not spray, you will not be taken back..."
Migrant Worker (as quoted by the Migrant Workers' Alliance for Change)

equally to foreign and resident workers. But repatriation remains a real concern. It is important to recognize that, for temporary foreign workers, such amendments will have limited benefit unless these processes are available while the workers are still in Ontario. We recognize that the timing of repatriation is a federal matter, but we urge the OLRB to take into account the strict time limitations for such workers so that effective expedited hearings and discussions are made available to any temporary foreign workers that make their way to the OLRB through this process. Our Recommendation regarding an independent decision-making process regarding repatriation for temporary foreign workers as made in the Chapter on employment standards would be responsive to these concerns.

The Law Commission of Ontario recommends that:

35. The Ontario Labour Relations Board, the Ministry of Labour and the Office of the Worker Adviser ensure that systems are in place to ensure to the extent possible section 50 reprisal complaints for temporary foreign workers are heard at the OLRB prior to repatriation.

...[R]epatriation remains a real concern... [F]or temporary foreign workers,... amendments [to the OHSA regarding reprisals] will have limited benefit unless these processes are available while the workers are still in Ontario.

8. Vulnerable Workers Section 21 Committee (Dean Report Recommendation 29)

The Dean Report recommended the implementation of two advisory committees under section 21 of the OHSA, one on the issues of vulnerable workers and another regarding the health and safety challenges faced by small businesses. The vulnerable workers committee was envisioned as a forum for consulting with knowledgeable parties regarding vulnerable workers to provide advice to the Ministry on how the Dean Report recommendations should be implemented, improving enforcement and developing and distributing educational materials.⁶⁰⁹ The relationship between vulnerable workers and small enterprises is such that these workers would also benefit from the work of the small business advisory committee. The Ontario government announced the establishment of these committees in December 2012.⁶¹⁰ The LCO strongly supports these Committees. In our view, in addition to implementation issues, there are a number of pressing matters that the vulnerable workers advisory committee could address. For example, the Panel suggested the committee could be a source of information for identifying workplaces and sectors where vulnerable workers are concentrated for the purpose of targeting sectors for enforcement campaigns. We agree.

The Law Commission of Ontario recommends that:

36. The Ontario government ensure the section 21 Vulnerable Workers Committee addresses the following:

- a) prioritizing health and safety training, both basic and hazard specific, for migrant workers and their supervisors;
- b) determining ways to provide access to basic rights training and hazard specific training to migrant workers either prior to arrival in Canada through consulates or immediately upon arrival; and
- c) identifying sectors where there are concentrations of vulnerable workers so that proactive enforcement activities are directed at these sectors.

[W]e heard from the Industrial Accident Victims' Group of Ontario (IAVGO) and the Injured Workers' Consultants about the inability of some places of employment to provide appropriately modified work and about workers being re-injured when they were required to return to work too soon.

C. Health Care and Workplace Safety Insurance Issues

WSIB policy emphasizes the worker's return to work with his or her employer. While this may make good theoretical sense, our consultations revealed a high level of concern among injured workers and those who work to assist them that WSIB policy and practice changes in recent years have resulted in more claimants being denied or receiving decreased benefits as a result. In response to our Interim Report we heard from the Industrial Accident Victims' Group of Ontario (IAVGO) and the Injured Workers' Consultants about the inability of some places of employment to provide appropriately modified work and about workers being re-injured when they were required to return to work too soon.⁶¹¹ Workers' advocates have argued that WSIB should assess workers in terms of the whole worker, taking into account their language and other skills, psychological state, educational level, physical status as well as the realities of the local labour market.

In responding to our Interim Report, IAVGO, Injured Workers' Consultants of Toronto and the Migrant Workers Alliance for Change voiced significant concerns with the WSIB practice in some cases of permanently injured workers of "deeming" these workers to have found suitable employment in a designated field, after which loss of earnings benefits are recalculated, whether or not the worker has actually found a job. It seems that WSIB has made efforts to respond by introducing more flexibility in an apparent effort to look more broadly at the whole worker and his or her circumstances. However, advocates continue to assert that the policies are working unrealistically and unfairly against workers, resulting in shortened and reduced benefits and ultimately sending many to welfare or the Ontario Disability Support Program. According to the Migrant Workers Alliance for Change, the situation is particularly acute for repatriated migrant workers, because the worker is "determined" to be in Ontario's job market, when, in reality, the worker is in his or her country of origin with much lower employment prospects.⁶¹² WSIB is currently assessing its processes as evidenced by the Arthurs' funding review and other ongoing WSIB policy reviews. It is clear that advocates have been bringing these issues to the attention of the WSIB for some time. For example,

they are mentioned as having been raised in the recent Arthurs' WSIB funding review report.⁶¹³ While the WSIB system is not the central focus of our Report, the role of WSIB in combatting precarity was raised in our consultations and, for this reason, we wish to highlight the concerns expressed by the workers and advocates we encountered.⁶¹⁴

Another WSIB issue that was brought to our attention by Project Advisory Group members was workplace safety insurance premiums for temporary agency work. WSIB premiums are payable by employers. Premium rates are determined based on an "experience rating system" that takes into account the employer's WSIB history and the assessed risk presented by the type of employment. According to Lippel *et al*, temporary employment agency workers employed in a triangular relationship of employee, client (the worksite) and temporary employment agency (the deemed employer) raise unique workplace safety insurance issues. The authors note that the three-way work relationship creates a situation where workplace injuries occurring at the client worksite are not recorded as part of the client's WSIB history. They should appear on the temporary employment agency's records but it is unclear how frequently this happens.⁶¹⁵ This creates a potential incentive for employers to contract out more dangerous work to temporary agencies avoiding higher WSIB premiums. This type of risk shifting to the temporary agency may also negatively impact smaller temporary employment agencies by raising their premiums. It should be noted, however, that if a temporary agency worker is injured, the client employer could be subject to enforcement under the OHSA.⁶¹⁶

Lippel *et al* raise other issues such as the undervaluing by WSIB of the earning capacity of temporary and part-time employees, disincentives for client employers to bring injured temporary agency workers back to work and worker reluctance to report injuries.

Some workers clearly feel expendable and uneasy about exercising their rights. When injured, their loss of earning capacity is under-valued, which leads not only to minimal compensation benefits, but also to an underestimation of the worker's needs for occupational rehabilitation, the only requirement being support to help the worker attain pre-injury earnings.⁶¹⁷

While not specific to the situation of temporary agency workers discussed above, Arthurs' *Funding Fairness, A Report on Ontario's Workplace Safety and Insurance System* engaged in significant discussion and recommendations regarding WSIB's experience rating system.⁶¹⁸ Arthurs raised concerns about experience rating systems, recommending that they be thoroughly reviewed to determine whether they should continue. Arthurs pointed out that the system likely creates incentives for suppression of claims and other abuses. Arthurs recommended that the experience rating system should only be maintained if it is shored up with stronger policy and enforcement procedures. To this end, the funding review made a number of recommendations related to improving workers' knowledge of rights, participants' fairness and honesty in WSIB proceedings, more worker protections including deterrence and punishment for claims suppression and other abuses. Arthurs also made recommendations regarding the redesign of the experience rating system. The Arthurs Report's recommendations

are under review by WSIB and the Ministry of Labour.⁶¹⁹ Worker representatives in the funding review also raised the issue of increased risk of injury faced by temporary agency workers due to their unfamiliarity with the worksite. Arthurs concluded that this issue would benefit from validation through further research.⁶²⁰

The Law Commission of Ontario recommends that:

37. The Ontario government and the WSIB review the impacts of WSIB policies and practices:
- a) to determine the effects of the experience rating program and other policies on vulnerable workers, most particularly temporary foreign workers and temporary agency workers; and
 - b) consideration be given to attributing health and safety incidents to the client-worksite.

James et al have highlighted the nexus between the rise in less integrated work activities and a corresponding shift to increased use of contingent or peripheral forms of labour.

Supply chain regulation in the context of both occupational health and safety and the ESA was strongly advocated by labour-side members of the Project Advisory Group. Research in this area and existing models have primarily been in the context of health and safety. In their paper commissioned by the LCO, Vosko *et al* recommended development of supply chain regulation of health and safety in Ontario.⁶²¹ Supply chain regulation here refers to the imposition of worker protection or health and safety standards or both by larger businesses upon their subcontractors and other smaller enterprises they engage to carry on their business. This can take the form of a regulation imposing responsibility on larger business for the standards of the smaller enterprises they utilize to carry on their business. Alternatively, it can be accomplished through contractual obligation and could be the basis upon which proposed contractors are evaluated. In the study mentioned below, supply chain regulation is referred to as imposing upstream duties or duties imposed upon those higher up the supply chain on those further down.

James *et al* have highlighted the nexus between the rise in less integrated work activities and a corresponding shift to increased use of contingent or peripheral forms of labour.⁶²² This phenomenon has resulted in a move away from integrated or central control of production and service delivery. Control is now based on competition of external suppliers for the best price and quality. The authors pointed out that contracting out dangerous work does not necessarily result in lower health and safety compliance as user-employers may seek to ensure that their employment does not result in higher risks. However, in general, they concluded that there are a number of bases upon which the externalization of work to small and medium-sized businesses may have adverse health and safety impacts. Smaller businesses statistically have generally poorer health and safety records, due to limited resources, so that the outsourcing of work by larger businesses to smaller businesses causes a health and

safety squeeze further down the supply chain. Decentralizing work activities through subcontracting limits investment in health and safety and disrupts coordination particularly in workplaces where in-house and temporary agency workers are working together.⁶²³ The authors note other concerns including widespread lack of health and safety awareness among temporary work agencies and host-employers, and come to the general conclusion that outsourcing deteriorates health and safety standards.⁶²⁴ After reviewing several models for legislative regulation of supply chain, James *et al* remain optimistic about the usefulness of this type of model even though they admit that the limited use of such measures internationally provide “far from extensive” evidence of their effectiveness.⁶²⁵

The authors did not support broad-based supply chain regulation but argued instead for such regulation in sectors where externalization was creating specific problems and where such measures could produce the greatest benefits. They suggested the greatest benefits would be achieved among temporary agency workers engaged in particular types of hazardous work and where manufacturing work is subcontracted to “smaller organizations possessing a workforce below a particular size threshold.”⁶²⁶

That was in 2007. In 2010, two of the same authors released an evaluative study of an Australian model of supply chain regulation. Findings showed poor compliance with what the authors referred to as upstream duties, or duties imposed upon those higher up the supply chain on those further down. Implementation appeared to be difficult with very strong enforcement mechanisms required to ensure proper and ongoing implementation. Nevertheless, the authors continue to be supportive of these measures and hopeful that improvements will be made to strengthen their effectiveness.⁶²⁷

The Dean Report recognized the Ontario government’s ability to influence the health and safety performance of the companies with which it does business through its procurement policies.

Rather than statutory change, another approach suggested by the Dean Report recommended the development of supply chain relationships in Ontario government procurement policies that would consider the occupational health and safety “performance of suppliers in order to motivate a high level of performance.” The Dean Report recognized the Ontario government’s ability to influence the health and safety performance of the companies with which it does business through its procurement policies. By requiring vendors’ work proposals to be evaluated based on established qualifications that demonstrate a high standard of health and safety performance, the Ontario government would be able to substantially regulate health and safety compliance along its supply chains, particularly for locally supplied services. There was recognition that for goods, which could be supplied from international sources, such a system may be less feasible.⁶²⁸ The Dean Report further recommended the development of WSIB financial incentives for employers that “qualify suppliers based on their health and performance.” In making this recommendation, the Dean Report noted the challenges that small businesses might face in evaluating the health and safety performance of suppliers. To that end, the Report suggested the development of standards and guidance material to encourage small businesses to include health and safety qualification into supply chain relationships. The new prevention organization, in consultation with stakeholders, would develop standards for incorporating qualification

The Law Commission of Ontario recommends that:

38. The Ontario government:

- a) explore health and safety supply-chain mechanisms to address the issue of subcontracting to small enterprises and particularly to temporary agency work; and
- b) implement the Dean Report recommendations relating to supply chain regulation through government procurement policies and WSIB financial incentives for employers that qualify suppliers based on health and safety performance.

Studies suggest [temporary foreign workers] do not access WSIB benefits or encounter difficulties when they do.

Our consultations revealed WSIB concerns relating to temporary foreign workers.⁶³⁰ Studies suggest that such workers do not access WSIB benefits or encounter difficulties when they do. Researchers have reported that 93 percent of SAWP workers in Ontario said that they did not know how to make a worker's compensation claim and that many sick or injured workers are repatriated before their injury can be fully investigated or treated.⁶³¹ Although the literature focuses on SAWP, this is likely because the program is more visible and accessible. Project Advisory Group members pointed out that as with most issues facing migrant workers, it is likely that NOC C and D workers are even in greater need of protection due to the lack of central oversight in the program. As already noted, workers fear making a complaint given the possibility (real or perceived) of repatriation or being barred from returning.⁶³² Language barriers and inadequate support to communicate with physicians or the WSIB present further challenges and there are difficulties communicating with workers once they have returned home. The same research also suggests Canadian doctors are not aware that migrant workers are entitled to WSIB benefits and, therefore, do not submit a claim.⁶³³

We received some reports that migrant workers were experiencing difficulty finding doctors, translation was not always available for doctor's appointments and there was not always an available medical walk-in clinic; workers had to go to a hospital for all health-related issues.⁶³⁴ In one area, despite large numbers of Spanish speaking migrant workers, there were no Spanish-speaking doctors. There are challenges in receiving appropriate health care if workers cannot effectively communicate with their medical practitioner or vice versa. Often, workers do not know where to get appropriate health services (e.g., chiropractic care).⁶³⁵ OHIP eligibility is not usually the problem. As pointed out in the Ontario government response to the Interim Report, migrant workers including SAWP, live-in caregivers and those holding valid work permits for at least 6 months are eligible for OHIP.⁶³⁶ Moreover, SAWP has processes in place for consulates to submit workers' initial OHIP applications and the cards are usually mailed to the farm. When OHIP renewals and photos are required, ServiceOntario provides a mobile outreach service to rural communities with extended hours to accommodate work schedules. Health care options are listed online or through a toll-free number and include available family doctors, clinics, nurse-practitioner clinics, and urgent care

centres, among other options. To fill the language barrier gap, the Ministry of Health and Long Term Care works with language interpretation services for callers and patients using ambulance services.⁶³⁷ However, migrant workers experience challenges in obtaining medical services despite these resources.

For migrant workers, admitting sickness may be coupled with fear of [re]patriation or not being invited back by the employer. In some cases, employers do not arrange for OHIP cards for migrant workers, as they are supposed to do, or migrant workers have difficulty reaching a medical clinic or doctor because of lack of transportation.⁶³⁸

In response to these concerns, in one rural community a volunteer community group was working with municipal public health officials to establish a health clinic at a centre.⁶³⁹ Workers work long hours and it is difficult to take time off to seek medical attention and the workplace location presents challenges when there is limited access to transportation. They are often dependent upon their employers to take them to the nearest town to access any medical care that may be available.⁶⁴⁰

...[A]ccess to medical service, language issues and workplace safety insurance claims may be sufficiently linked such that areas with high concentrations of migrant workers could benefit from a mobile medical clinic that traveled to rural areas populated by migrant workers offering medical services coupled with assistance in making a workplace safety insurance claim.

Where workers have supplemental insurance plans provided by their home countries, some respondents in the LCO's consultations indicated that it is easier to make a claim under the private insurance plan and send the worker home rather than make a WSIB claim and keep the worker in Canada in housing provided by the employer.⁶⁴¹ The WSIB claims resolution process was described as lengthy and difficult to navigate. The LCO heard that WSIB locations add a time constraint on claimants from rural areas and smaller cities that make the process more difficult for them.⁶⁴² We also heard that some migrant workers were either not receiving OHIP cards or were experiencing challenges applying for OHIP resulting in difficulty accessing medical service without them. We note the feedback we received from the Ontario government that Community Health Centres accept patients without OHIP and that hospitals will not refuse to treat patients if to do so would endanger the person's life.⁶⁴³

In the LCO's view, access to medical service, language issues and workplace safety insurance claims may be sufficiently linked such that areas with high concentrations of migrant workers could benefit from a mobile medical clinic that traveled to rural areas populated by migrant workers offering medical services coupled with assistance in making a workplace safety insurance claim for appropriate cases. Translation services or medical staff with fluency in the worker's language would respond to language needs. The mobility of the clinic would overcome the barriers of accessing medical services presented by rural locations. The presence of staff knowledgeable in OHS/WSIB issues would be responsive to the need for added support. In our discussions on the potential of this project, both workers' advocates and employers' representatives stressed the importance of the neutrality of medical staff independent of the WSIB, union and other interests. It would be important that any such clinic addressed the issue of provision of service to migrant workers whose employers had not taken the necessary steps to ensure workers obtained coverage despite the requirement that they do so. In responding to our Interim Report, the Office of the Worker Adviser indicated support for this recommendation.⁶⁴⁴

The Law Commission of Ontario recommends that:

39. The Ontario government implement:

- a) a pilot mobile medical clinic service for migrant workers in rural areas where they reside providing access to medical care and corresponding support to facilitate WSIB claims, where appropriate; and
- b) direct service or translation in the language of the migrant worker.

Living in rural settings, in housing with strangers, many of these workers have only limited access to medical, community, religious or other supports, as they are dependent upon their employer for transportation and access to these supports.

Some temporary foreign workers, particularly those in agricultural settings experience depression, anxiety and alcoholism due to stress, isolation and family separation.⁶⁴⁵ Living in rural settings, in housing with strangers, many of these workers have only limited access to medical, community, religious or other supports, as they are dependent upon their employer for transportation and access to these supports (although some farmers provide their workers with bicycles).⁶⁴⁶ If such supports are available, cultural or language barriers may prevent the worker from accessing those services.⁶⁴⁷ A promising model of a community response to migrant workers' support needs is the Niagara Migrant Workers Interest Group (NMWIG) that has organized

to coordinate the efforts of individuals and interested organizations in Niagara who provide services in the areas of justice, health, transportation, nutrition, finances, employment, worker's health and safety, language, education, etc. to seasonal migrant workers.⁶⁴⁸

Through community events such as concerts, health fairs, health clinics and church events, the NMWIG has been successful in building bridges between the seasonal workers and local residents and promoting health and well-being among workers and within the community. In Leamington, Ontario, the walk-in medical clinic has Spanish speaking staff, there are businesses with Spanish language capacity and the faith community provides Spanish services and meetings such as alcoholics anonymous. In British Columbia the faith community has taken a leadership role, convening prayer meetings and providing Spanish services and Bibles as well as arranging for psychological counselling services and social and sporting events. Moreover, community volunteers have provided a hotline for help services, volunteer shopping, translation at medical appointments and errand services to migrant workers.

Jenna Hennebry outlines some of the many initiatives by non-profit organizations and the faith communities that "serve to empower migrant farm workers or to encourage their active participation within or communication with a community." She describes these efforts as "immense strides toward integrating migrant farm workers into their communities". However, as she points out, without a guaranteed source of funding or central commitment to the programs, they will remain a patchwork of local initiatives at risk of discontinuing at any time.⁶⁴⁹ In our view, employers, government at all levels, F.A.R.M.S. and communities have a role to play in supporting these integration efforts.⁶⁵⁰

The Law Commission of Ontario recommends that:

40. The Ontario government work together with municipal governments, employers, F.A.R.M.S., and community and worker advocacy organizations, to continue to find ways to implement medical, legal, spiritual and social supports to migrant workers.

V. TRAINING AND EDUCATION

A. Training While Employed

The downturn has highlighted the vulnerability of workers who are no longer essential to production processes due to either low skills, or “old skills”. In the future, communities will need to build a more skilled workforce which is less expendable, more adaptable to change and better able to transfer within and between economic sectors. This will require investing in generic skills and lifelong learning through broad based strategies that support the attraction, integration and upgrading of talent.

However, it is not enough to just invest in the supply of skills. Employers also need to address the organisation of their workplaces so as to better harness the skills of their workers, and create more sustainable employment opportunities in the future. The economic downturn has raised awareness of both the vulnerability of modern economies, and a rising inequality in our labour markets.⁶⁵¹

“The demise of the traditional career ladder” caused by the disappearance of middle level jobs has been identified as one of the contributing factors to the current labour market situation in Canada and Ontario. The rising inequality referenced above has manifested itself in increasing polarization of work into one of two categories: entry level jobs with little opportunity for promotion or high skilled knowledge jobs. While entry level jobs have increased, these jobs are less likely to be, as they once were, a pathway to higher wage, more secure, middle level positions. Instead workers frequently become trapped in less secure, lower paying positions.⁶⁵² There has also been an increase in knowledge level jobs; however, they are accessible only to those with specialized levels of skill, experience and/or education. Progression up the ladder from entry to middle to knowledge jobs is no longer the norm. In the face of the economic downturn and an increasingly global and competitive market, employers are less likely to invest in workers in lower skilled positions through training and promotion. Put another way, businesses have less attachment than in the past to lower skilled employees, who increasingly find themselves without the requisite education, skills and work experience to access higher level positions.

To boost “productivity potential and future earnings”, the OECD has emphasized the importance of better training and education for lower skilled workers.⁶⁵³

Over the past two decades, the trend to increased education attainment has been one of the most important elements in counteracting the underlying increase in wage inequality in the longer run. Policies that promote the upskilling of the work-force are therefore key factors to reverse the trend to further growing inequality.⁶⁵⁴

Employers’ and workers’ organizations have recognized this phenomenon and prioritized it on their agendas. In *Business Results Through Workforce Capabilities*, Canadian Manufacturers and Exporters (CME) noted that “our workforce began some time ago to shift away from unskilled labour towards skilled and semi-skilled positions.

To boost “productivity potential and future earnings”, the OECD has emphasized the importance of better training and education for lower-skilled workers.

This trend has continued to accelerate, and now even semi-skilled labour is rapidly becoming redundant.⁶⁵⁵ In our consultations, CME stressed the importance of training workers while they are employed, noting that improved productivity requires well-trained employees.⁶⁵⁶ In association with Human Resources and Skills Development Canada, CME provides training on literacy and essential skills in the health and safety context through a program known as Innovations Insights.⁶⁵⁷ In another initiative, at the Centre for Workplace Skills, the CME works in partnership with the Canadian Labour Council “to encourage better participation and investment in skills development in Canada’s workplaces. The Centre promotes and facilitates the exchange of knowledge to address key workplace skills development issues.”⁶⁵⁸ The Centre is engaged in:

- Identifying effective and innovative practices in work-related learning, and... [sharing] these with people who can use the information in their own work-related learning decisions
- Engaging employers, unions, workers and other workplace stakeholders in the search for new approaches and solutions to critical workforce skills issues
- Supporting the Roundtable on Workforce Skills, <http://www.workforceskills.ca/>, a body of labour, business and government leaders who will explore emerging workforce trends and identify actions to address labour market challenges.⁶⁵⁹

...CME stressed the importance of training workers while they are employed, noting that improved productivity requires well-trained employees.

The Centre has developed a best practices database and has produced reports on workplace learning. As an example, the Centre’s report for the Conference Board of Canada, *Investing in Skills: Effective Work-Related Learning in SMEs*, examines “effective work-related learning programs implemented at 45 Canadian and international small to medium-sized enterprises” setting out best practices to respond effectively to the needs of employee training.⁶⁶⁰ Recognized best practices include assessing learning needs aligned with organizational goals, making learning flexible, forging partnerships, supporting informal learning, recognizing achievements and sharing with other organizations. Other reports produced by the Centre identify the need for learning that is worker accessible, voluntary, builds on workers’ existing knowledge, reflects diverse needs and learning styles, is sensitive to gender, race, ethnicity and culture and involves workers in planning and design.⁶⁶¹

Supporting the notion of training workers while they are still employed, the Ontario Federation of Labour (OFL) noted that many laid-off workers believed that training during their employment would have improved their chances of securing decent work after their layoffs.⁶⁶² One of the challenges, however, for precarious workers is recent evidence suggesting “that less skilled workers, who tend to have poor quality employment, are also unlikely to participate in training.”⁶⁶³ In particular,

workers who are female, are immigrants to Canada, have low-tenure or non-standard employment status, have lower education, are not covered by a collective agreement and/or are not in a managerial/professional occupation sometimes appear to be less likely to access training from their employer.⁶⁶⁴

In our consultations, unions underlined a lack of training opportunities, including on-the-job training for workers in low skilled employment.⁶⁶⁵ They reported that workers' training opportunities outside the workplace were often difficult to access. Even where cost was not prohibitive, vulnerable workers often did not have time to dedicate to training opportunities due to irregular schedules and long work hours.⁶⁶⁶ Lewchuk *et al* stressed that it was important for governments to recognize and give priority to training as an essential economic policy.⁶⁶⁷ This sentiment is echoed in the Commission on the Reform of Ontario's Public Services' report, *Public Service for Ontarians: A Path to Sustainability and Excellence* (Drummond Report).

A highly educated and skilled workforce is a key determinant of healthy and sustainable long-term economic growth. With the rise of the knowledge economy and rapid technological change, there is growing demand for highly skilled, adaptable workers. The government plays an important role in helping meet this demand. Studies have demonstrated the need for, and benefits from, government investment in education and training...Equity arguments for government intervention include the promotion of equal opportunity, social mobility and more equal distribution of economic rewards...Ontario's aging population, slower labour-force growth and increasing global competition, among other forces, have made skills development, workplace training and lifelong learning more important. For example, literacy needs have evolved and increased over time as a result of fundamental changes in the economy. In addition to reading and writing, many people today require analytical skills, numeracy, and technological and computer literacy to do increasingly complex work.

Even where cost was not prohibitive, vulnerable workers often did not have time to dedicate to training opportunities due to irregular schedules and long work hours.

Employment and training programs are important tools to ensure that workers have skills that are relevant for available jobs and to facilitate job matching. Effective government training programs help reduce the skills gap for many of these displaced workers and can increase their re-employment earnings.⁶⁶⁸

Drummond identified youth, recent immigrants, Aboriginal persons, female single parents with young children, older workers and persons with disabilities as having particular labour market challenges: "[t]he persistent lack of employment opportunities for these groups, as well as media reports of skill mismatches and unfilled vacancies, shows that the existing program delivery structure needs significant improvement."⁶⁶⁹

Increased investment in workplace training was the subject of several Drummond Report recommendations suggesting that management of Ontario's 25 Workforce Planning Boards be decentralized to the regional level and that the boards be directed to encourage "employers to increase investments in workplace-based training."⁶⁷⁰ Workforce Planning Boards are funded by the Ministry of Training, Colleges and Universities with a mandate to help improve labour market conditions at the community level through partnership development, research and planning.

Another model for encouraging workplace training is known as the "1 percent law" implemented by Quebec that requires employers to devote at least 1 percent of their payroll to training or invest 1 percent of the value of their payroll into a public fund

supporting workplace training.⁶⁷¹ While the Quebec law was originally directed at a broader range of enterprises, as of 2004 it is applicable only to businesses with a payroll of \$1,000,000 or more.⁶⁷² One study found that the initiative, as it was until 2003, improved workplace training participation with more companies actively planning and implementing training and promoting adult learning through the cooperative efforts of employers, governments, unions and community groups. However, Canadian Policy Research Networks suggests there is mixed evidence for the effectiveness of this type of scheme that raises questions about its future usefulness as a policy initiative.⁶⁷³

Working Without Commitments emphasized the importance of formally recognizing the skills of workers employed through a series of short term contracts with different employers.⁶⁷⁴ Lewchuk *et al* favour more effective employment support networks possibly through sectoral councils reaching out to workers through electronic bulletin boards and regional job fairs. They suggest that sectoral councils (partnerships of employment, educational and labour representatives that promote workplace learning) could play a greater role in developing skills certification that would enable broader recognition of skills learned on the job.⁶⁷⁵ We note, however, that recent federal funding changes have eliminated core funding for sectoral councils and the impact of this on their services is not yet clear. As pointed out by the Ontario government in their feedback to the Interim Report,

[t]he Ontario Labour Market Partnership program provides funding to encourage and support employers, employee/employer associations, and communities, in developing and implementing strategies for dealing with labour force adjustments, and in meeting human resource requirements. Services such as electronic bulletin boards and job fairs are activities which may be supported through the Ontario Labour Market Partnership program.⁶⁷⁶

In our view, another possibility for developing skills certification would be to maximize the expertise of the new College of Trades which is currently phasing in its operations. The College is being put into place as a regulatory body for the skilled trades to “encourage more people to work in the trades and give industry a greater role in governance, certification and training.”⁶⁷⁷ The Drummond Report has recommended an expanded role for the College taking on the non-classroom administrative aspects of apprenticeship programs.⁶⁷⁸ While the scope of practice is already defined for each trade in regulation, from our point of view, it is important to ensure that skills recognition criteria are responsive to the way work is now structured. Therefore ensuring maximum skills recognition for workers in short term serial contracts with multiple employers should be a priority.

“...[T]he Ontario Labour Market Partnership program provides funding to encourage and support employers, employee/employer associations, and communities, in developing and implementing strategies for dealing with labour force adjustments, and in meeting human resource requirements.”

Ontario Government
Submission to the LCO

The Law Commission of Ontario recommends that:

41. The Ontario government engage the College of Trades (perhaps in partnership with sectoral councils, colleges and/or unions) to develop skills recognition criteria for a broader range of workers, including workers employed through a series of short term contracts with different employers.

B. Employment Ontario

Working Without Commitments identified

...a need for policies and programs to assist workers looking for work by retraining them for new positions and helping them to keep jobs once they find them. Such programs would include employment counseling to more effectively link individuals' abilities and aspirations with available or emerging jobs.⁶⁷⁹

The issue of more effectively linking individuals' abilities with available or emerging jobs was addressed by Drummond who recommended developing "stronger local linkages and broaden[ing] community and regional planning for economic development" by "transferring responsibility for Workforce Planning Boards to the Ministry of Training, Colleges and Universities' regional offices".⁶⁸⁰

The Ministry of Training, Colleges and Universities operates Employment Ontario, which is responsible for employment and training policy direction and delivery of services, labour market research and planning, as well as programs that support workplace training including apprenticeship, career and employment preparation and literacy skills.⁶⁸¹ Through these programs the Ontario government seeks to address emerging challenges facing unemployed individuals in the labour market. With a budget of about \$1 billion annually and serving approximately one million clients annually, Employment Ontario is an integrated, provincial employment and training network of service providers that offer a range of employment related services to employers, laid-off workers, apprentices, older workers, newcomers and youth.⁶⁸² Employment Ontario's Employment Service consists of five components: client service planning and coordination; resource and information; job search, job matching, placement and incentives; and job/training retention.⁶⁸³

One of the most promising training programs offered by the Ministry is Second Career, a program to re-train out of work individuals for high demand occupations.

Ontario Job Creation Partnerships (OPEC) support community generated projects focusing on work experience placements for EI eligible individuals providing opportunities to improve long term employment prospects and benefit local communities or local economies. The Literacy and Basic Skills (LBS) program provides services at no cost to eligible individuals to improve their reading, writing, numeracy and essential skills.⁶⁸⁴

One of the most promising training programs offered by the Ministry is Second Career, a program to re-train out of work individuals for high demand occupations. Laid-off workers who have since taken temporary or contract jobs or become self-employed to make ends meet are also eligible. The Program provides up to \$28,000 in financial assistance for tuition, books, transportation, and a basic living allowance.⁶⁸⁵ Launched in 2008, the program exceeded its three-year goal of 20,000 participants within only 16 months.⁶⁸⁶ It is now a permanent program and, as of January 2012, Second Career has trained 53,366 individuals.⁶⁸⁷

The Ontario Federation of Labour (OFL) has recommended the Ministry review the Program’s eligibility criteria. The OFL believes that the threshold of means testing for determination of eligibility for Second Career is too low for many participants as it is based on family rather than individual income.⁶⁸⁸ The OFL has voiced concerns about the Ministry’s decision to fold a previous program, the Skills Development Program, into Second Career. According to the OFL, the Skills Development Program provided upgrading, language and literacy refreshers to address the short term needs of laid-off workers and this program should be reinstated as a complement to Second Career.⁶⁸⁹ While all the details of Second Career’s 2010 evaluation are not publicly available, the Ministry advises that 95 percent of participants have completed their skills training program and 63 percent of surveyed participants found work after completing their skills training program.⁶⁹⁰ What is not clear is the degree to which participants found work that was stable, high-quality or in a skilled field. In our view it is important to ensure that employment programs translate into secure, sustainable employment rather than any type of job. Consistent with this perspective, the Drummond Report called for improved program evaluation, better data collection and tying employment and training programs to measured outcomes.

Ontario must improve how it tracks outcomes. Most program measures focus on service indicators... as opposed to outcomes. While client satisfaction and throughput are important, they are no substitute for measures of success such as employment duration, wage level and growth, and so forth.
Drummond Report

Ontario must improve how it tracks outcomes. Most program measures focus on service indicators (e.g., clients served, satisfaction) as opposed to outcomes. While client satisfaction and throughput are important, they are no substitute for measures of success such as employment duration, wage level and growth, and so forth. Key success indicators should be chosen based on best practices in other jurisdictions and from current literature...Regular evaluation of program performance using the collected data should be undertaken to inform future changes that will continually improve effectiveness.⁶⁹¹

The Law Commission of Ontario recommends that:

42. a) Second Career and other training programs be assessed for their ability to reduce precarity through increased credentials that translate into increased wages, benefits, hours, duration of employment and other key measures of employment security; and
- b) programs that demonstrate measures of success based on these criteria should be expanded.

Our consultations revealed a need for better data collection to improve labour market projections linking individuals with existing and future labour needs. On a similar note, the Drummond Report indicated the need for an improved understanding of employment gaps to make employment and training services more effective.⁶⁹² Among other suggestions, Drummond recommended the development of a labour-market policy framework to strengthen the link between employment and training services with economic development initiatives, a suggestion we support.⁶⁹³

As noted earlier, a significant portion of Employment Ontario’s funding is tied to federal funding arrangements and employment insurance eligibility. In this way, the federal government is able to direct the funding to specific targeted populations based on its own forecasting and priorities. Ontario, however, conducts labour market forecasts that identify the province’s specific future employment needs. Ontario currently develops and assesses labour market projections of occupational needs that can be accessed online as Ontario Job Futures. This model is currently being updated and will provide an assessment of employment prospects for 2013-2017. The Ministry of Training, Colleges and Universities is also working with federal-provincial-territorial partners to improve long term labour market projections, identify short term imbalances and develop a public indicator of local labour needs.⁶⁹⁴

In our view, Ontario must have the flexibility to determine the direction of its particular employment needs such that program delivery is targeted at those who need the programs most rather than tying programs to employment insurance eligibility. The Drummond Report made the point very clearly:

...Ontario must have the flexibility to determine the direction of its particular employment needs such that program delivery is targeted at those who need the programs most rather than tying programs to employment insurance eligibility.

The patchwork of federal-provincial labour-market agreements that targets various groups of clients not only creates challenges for Ontario’s “one-stop shop” vision of employment and training service delivery, but also leads to fragmented and distorted policy-making, based on federal notions of labour-market priorities as opposed to responsiveness to local conditions.

The differing program and client eligibility requirements contained in these agreements limit Ontario’s ability to maximize the benefits from providing an integrated suite of labour-market programs and services.⁶⁹⁵

The Drummond Report recommended a comprehensive training agreement with the federal government that was not tied to Employment Insurance eligibility that can be flexibly integrated into Employment Ontario services, is responsive to labour market needs and permits creative pilot projects. In feedback we received from the Ontario government, we were advised that the Ministry of Training, Colleges and Universities supports Drummond’s recommendation. We were advised that Ontario’s preference is “to negotiate a more flexible and comprehensive employment and training agreement with the federal government that delivers long term, stable funding at existing levels so that Ontario can serve clients based on local needs.”⁶⁹⁶ We agree.

The Law Commission of Ontario recommends that:

43. The Ontario government continue working toward the development of ways to more closely track present and emerging labour market needs linking these with employment and training initiatives.

Our consultations revealed that, for workers in lower skilled positions, it was most effective to provide training in basic literacy, workplace and digital skills. While the Ontario government funds a number of apprenticeship programs, there appears to be a gap in government programming in the area of other types of employer-government partnerships for on-the-job training for workers in lower skilled positions that facilitate placement into higher skilled jobs. This type of initiative would be consistent with the current government’s stated focus on partnering with business to create jobs.⁶⁹⁷ In the 2012 Ontario Budget, the government committed to explore integration of employment and training programs. This may create an opportunity to provide programming to this category of workers. Furthermore, the Budget placed emphasis on apprenticeship completion that will include measures for literacy and numeracy training, facilitating employment links between individual and employers, strategies for key groups including youth, Aboriginal persons and women.

Our consultations revealed that, for workers in lower skilled positions, it was most effective to provide training in basic literacy, workplace and digital skills.

The Law Commission of Ontario recommends that:

44. The Ontario government:

- a) develop employer-government partnerships for on-the-job-training for individuals working in lower skilled positions that facilitate job placement into higher skilled positions;
- b) continue to support self-funded education initiatives including those that provide upskilling for certification; and
- c) increase bursary and loan programs for self-funded education, where possible.

C. Programs for Women

The Ontario Women’s Directorate funds provincial programs specifically tailored to women. Low-income, underemployed and unemployed women in Ontario are eligible for the Women in Skilled Trades and Information Technology Training Program. As noted by the Ontario government in feedback provided,

[t]he Skilled Trades stream offers pre apprenticeship training in-class and on the job for specific trades. It includes employability and workplace preparation to help women prepare for a predominately male work environment as well as to make them aware of employer expectations, while the Information Technology Stream focuses specifically on preparing women for entry into that field.⁶⁹⁸

Both programs also provide gender sensitivity training to employers and monitor work placements. Nine programs were funded by the Ontario Women’s Directorate between 2009 and 2011, preparing women for positions as electricians, horticulture technicians and general carpentry, as well as occupations in information technology applications and

technical support network administration, web development, and IT business analysis.⁶⁹⁹ OWD is also currently funding ten training programs for victims of domestic violence.⁷⁰⁰ The programs are offered through partnerships between “a women’s organization that provides violence against women prevention and support services; a training organization (e.g., college or community agency); and a minimum of two employers” and range from multi-sector programs (i.e., the Multi-Sector Training Program) to those tailored to specific industries (e.g., the Women in Transportation Project).⁷⁰¹

Given the over-representation of women in precarious work, these types of initiatives are important and should be evaluated for their impacts on reducing precarity and expanded where appropriate.

D. Recent Immigrants

Temporary foreign workers are often subject to restrictions on access to government funded education programs... [O]ur consultations and research have demonstrated that temporary foreign workers can be significantly disadvantaged in accessing employment and health and safety protections as well as health services as a result of language barriers.

Studying the effectiveness of strategies to reduce precariousness, Goldring and Landolt found that immigrants whose initial jobs in Canada were in precarious work tended to remain in such work.⁷⁰² Therefore, to ensure better long term outcomes, newcomers must enter into less precarious work at the earliest opportunity, preferably within the first year. Based on these findings, government sponsored education and employment initiatives aimed at recent immigrants within the first months are crucial. Goldring and Landolt’s research also identified three strategies that were most effective in reducing precariousness for immigrants: individual investment in continuing education leading to certification; employer supported on-the-job training; and English-language competence. Current government thinking is evidently in line with these findings as demonstrated by the menu of programs that are on offer emphasizing post-secondary education, literacy skills, retraining and apprenticeships. Consistent with the research on the importance of early employment success, many of these programs provide both employment and immigration support simultaneously.⁷⁰³

A 2012 study by Goldring and Landolt pointed to the persistence of precarious employment among workers who initially entered Canada with temporary resident status and later became permanent residents. While this study focusses primarily on the public policy debate about federal temporary foreign worker programs, its findings also have implications for provincial education programs.⁷⁰⁴ Temporary foreign workers are often subject to restrictions on access to government funded education programs by the terms of their federally issued work permits. However, our consultations and research have demonstrated that temporary foreign workers can be significantly disadvantaged in accessing employment and health and safety protections as well as health services as a result of language barriers. Furthermore, language training could serve to increase social integration which has mental health and other benefits. For this reason, we are of the view that access to basic language training services for temporary migrant workers would provide a means of reducing vulnerability in several respects.

Through our consultations, we learned of the availability of many social supports for immigrants. Ethno-racial-religious service providers are numerous.⁷⁰⁵ These groups are

specifically tailored to meet the needs of certain communities. The Toronto Region Immigrant Employment Council stated that English as a Second Language training was a crucial “key to reducing vulnerability” and unions reported that workers’ conditions improved after attending ESL courses.⁷⁰⁶ Some groups noted the significance of the lack of specific supports. For instance, the only mentoring program raised in the consultation process was designed for high skilled immigrant workers.⁷⁰⁷

The Toronto Region Immigrant Employment Council stated that English as a Second Language training was a crucial “key to reducing vulnerability” and unions reported that workers’ conditions improved after attending ESL courses.

The Law Commission of Ontario recommends that:

45. The Ontario government:

- a) prioritize the provision of education and training programs for targeted communities of vulnerable workers including women, racialized persons and recent immigrants;
- b) focus its training and education programs for immigrants on individual investment in continuing education leading to certification; employer supported on-the-job training; and English-language competence prioritizing entry into programs within the first months after arrival; and
- c) focus literacy skills education on providing a high degree of literacy skills that are transferable to the Ontario labour market.
- d) in consultation with the federal government, consider ways to provide access to basic language training services for temporary migrant workers.

At the government level, responsibility for the integration of immigrants is shared among the Ministry of Citizenship and Immigration, the Ministry of Economic Development and Trade, the Ministry of Training, Colleges and Universities, the Ministry of Education, the Ministry of Health and Long Term Care, the Ministry of Community and Social Services and the Ministry of Government Services.⁷⁰⁸ Ontario’s Ministry of Citizenship and Immigration offers six key programs: Ontario Bridge Training Program, Global Experience Ontario, English and French as a Second Language Services, Opportunities Ontario: Provincial Nominee Program, Newcomer Settlement Program and Language Interpreter Services.⁷⁰⁹ The Ontario government pointed out

[t]he delivery of immigrant specific settlement and integration services are designed to orient immigrants to their new lives in Ontario so they may integrate both economically and socially, and overcome barriers such as language proficiency, lack of foreign credential recognition and Canadian work experience. These services are in addition to mainstream human services such as social assistance, education and employment services available to all Ontario residents.⁷¹⁰

A recent TD Economics Report, *Knocking Down Barriers Faced by New Immigrants*, suggests that the vast offering of current immigrant integration programs must be better coordinated through the adoption of best practices and, for language services, a

standardized curriculum. The success of Manitoba's Entry Program is highlighted for providing a single point of access for information for immigrants, such as language training and credential recognition. The TD Report promotes pre-arrival services offered by the Canadian Immigration Integration Program providing newcomers from certain countries with information about Canadian social values, the type of documentation required, where to access services and language assessment and training. TD Economics supports similar integration services for immigrants once they arrive.⁷¹¹

Observing the need for better coordination, Drummond suggested that integration and settlement programs for newcomers, among others, be streamlined and integrated with Employment Ontario's employment and training programs.⁷¹² In his view, not only would this achieve efficiencies, it would also improve client access to services. We agree.

In the 2012 Budget, the government committed to explore integration of other government employment and training programs with Employment Ontario. The government's response to the Interim Report pointed out that

[e]fforts to improve coordination have focused on enhancing programs' 'front doors' through coordination of intake, initial needs pre-screening and referral services, and clarifying and improving adult learning pathways for learners who may need to transition between programs funded by different ministries.⁷¹³

The Law Commission of Ontario recommends that:

46. The Ontario government improve coordination of integration and settlement programs for immigrants with other Ontario programs, including employment and training programs.

VI. A COMPREHENSIVE PROVINCIAL STRATEGY

...As the policy agenda of OECD countries moves from job preservation to new job creation, labour market policy makers will need to collaborate with a broad set of actors – not only employers, but also unions, economic development agencies, colleges and business support providers. Much of this collaboration will need to happen at the level of relatively homogenous local labour markets. Public resources need to be used wisely in the delivery of joined up local approaches that are innovative but effective, minimizing duplication and building up relationships based on trust and mutual accountability. Producing better policy alignment will be important for both achieving better job outcomes, and also maintaining or reducing current levels of public expenditure. It is important that communities do not get back to “business as usual” after the crisis, but use the current situation as an opportunity to build a better partnership with employers to better utilize skills and build meaningful career ladders that support progression for the lower skilled. Communities also need to anticipate future skills demands, while ensuring that they build on their own comparative advantages and are adaptable to change.⁷¹⁴

“It is important that communities do not get back to ‘business as usual’ after the crisis, but use the current situation as an opportunity to build a better partnership with employers to better utilize skills and build meaningful career ladders that support progression for the lower skilled.”

Froy & Giguère, “Putting in Place Jobs that Last”

The issue of Vulnerable Workers and Precarious Work is multidimensional and affects stakeholders from a broad range of sectors. Solutions cannot be confined to one level of government or to one government ministry, nor will the solution emanate solely from the government. Employers, workers, employer organizations, advocates, unions, educational institutions and community agencies all have a role to play.

In responding to our Interim Report, the Ontario Bar Association, Civil Liberties and Human Rights Section stated support for the LCO’s multi-dimensional approach to building effective protection for vulnerable workers which includes:

- a) strong pro-active government oversight;
- b) meaningful protection for the effective exercise of fundamental rights, including collective representation;
- c) substantive workplace rights that are responsive to vulnerable workers;
- d) effective and accessible mechanisms for enforcing rights;
- e) active involvement of community organizations to support the voice of vulnerable workers; and
- f) identification of best practices through on-going stakeholder involvement.⁷¹⁵

One of the most significant steps that could be taken would be to implement a provincial strategy with a focus on reducing precarity in lower skilled jobs. While job creation has certainly been at the forefront of government policy for some time, in our view, the issue of not just any work but work that provides fair wages and safe and healthy working conditions would be a more appropriate objective. A provincial strategy would engage multiple ministries and stakeholders in comprehensive, coordinated initiatives that would focus attention on the issue and set appropriate targets.

The Law Commission of Ontario recommends that:

47. The Ontario government:

- a) build upon principles of the Poverty Reduction Strategy to develop and implement a multi-sectoral/cross-ministerial employment strategy coordinated by an identified lead Ministry with the objective of improving support to vulnerable workers and reducing employment precarity among the most disproportionately affected; and
- b) measure initiatives on the basis of whether programs create or enable participants to engage in secure and sustainable work.

VII. LIST OF RECOMMENDATIONS

EMPLOYMENT STANDARDS POLICY AND LEGISLATIVE REFORM

1. The Ontario government:
 - a) in consultation with labour and owner/management stakeholders, update, review and streamline the exemptions within the ESA and related regulations including a review of existing occupational specific exemptions, with the objective of ensuring any exemptions are justified on current public policy and industry considerations; and
 - b) ensure that the review develop and use principles that aim to promote a broadly available minimum floor of basic workers' rights, including that justifications for exemptions be balanced against the need to reduce precarious work and provide basic minimum standards to a broader sector of the working population.
2. The Ontario government codify within the ESA a broad policy statement highlighting its commitment to protecting basic minimum employment rights, supporting compliance and fostering public, employer and employee awareness and education.
3. The Ontario government convene the minimum wage Committee, or similar body, to review minimum wage issues balancing the needs of business and employees.
4. The Ontario government, taking into account the complexities of the issue, consider what amendments could be made to the ESA to ensure part-time workers are paid at proportionately the same rate as full-time workers in equivalent positions where there is no justification for the difference based on skill, experience or job description.
5. The Ontario government, utilize the Innovative Solutions for Precarious Work Advisory Council (Recommendation 26) in consultation with labour, management and insurance representatives, to explore options for the provision of benefits for non-standard and other workers without benefits coverage, with consideration given to the concepts of a benefits bank and mandatory short term contract premium for temporary workers, among other options.
6. The Ontario government review personal emergency leave provisions in the ESA to ensure each provision is justified on current public policy grounds and to determine ways to extend the benefit to workers in workplaces with fewer than 50 employees (including part-time, casual and temporary employees of these small enterprises.)

7. The Ministry of Labour:
 - a) launch a public awareness campaign on *Employment Standards Act* rights and responsibilities;
 - b) to support workers' and employers' needs for additional information about the ESA, continue to offer and to expand capacity for providing outreach through ESA informational/educational sessions including but not limited to those in high risk sectors and groups; and
 - c) develop partnerships with employer, employee and community organizations to enhance worker and employer knowledge of ESA rights and responsibilities.
8. The Ontario government amend the ESA to require employers to provide the ESA poster in handout format to all new employees in English and, to the extent possible, in the language of the employee.
9.
 - a) The Ontario government amend the ESA to require employers to provide all employees with written notice of their employment status and terms of their employment contract; and
 - b) the Ministry of Labour develop standard forms to support employers in this task.
10. The Ministry of Labour place a greater emphasis on ESA proactive enforcement processes while continuing to use a range of strategies including voluntary compliance, proactive inspections and responses to individual complaints.
11. The Ministry of Labour:
 - a) engage in data collection and evaluation to determine the impact of the policy requiring employees to approach employers prior to initiating an ESA claim; and
 - b) consider reversal of policy if evaluation reveals negative impacts such as declines in claims attributable to the policy changes.
12. The Ministry of Labour improve communication about the vulnerable worker exemptions to approaching employers at the outset of an ESA claim.
13. The Ontario government facilitate and expedite the ESA claims-making process, by providing a mechanism for workers and employers to obtain person-to-person assistance in the claims process through additional support services such as Legal Aid Ontario clinics, Office of the Employment Standards Advisor and/or other types of worker and employer support services.
14. The Ontario government:
 - a) amend the ESA to provide for a discretionary time extension for claims for wages in special circumstances; and
 - b) raise the ESA monetary cap to \$25,000.

15. The Ministry of Labour:
 - a) develop an accessible and well communicated mechanism - such as a hotline - for ESOs to receive third-party and/or anonymous complaints which could trigger proactive inspections; and
 - b) develop corresponding policy criteria to ensure that unfounded complaints do not trigger unwarranted inspections.

16. The Ministry of Labour:
 - a) substantially increase proactive inspections, particularly in higher risk industries based on established benchmarks;
 - b) develop strategic, proactive enforcement initiatives that target high-risk for violation workplaces, including those comprised of concentrations of temporary foreign workers, temporary agency workers, recent immigrants, racialized workers, youth, the disabled and Aboriginal people, as well as areas known for high-rates of substandard practices;
 - c) conduct expanded investigations when violations are detected; and
 - d) ensure enforcement activities include follow-up on previous violations.

17. The Ontario government amend the ESA to permit orders requiring employers found in violation of the ESA to cover the costs of investigations and inspections, in appropriate cases.

18. The Ministry of Labour strengthen ESO policy direction supported by education to direct ESOs to select deterrent sanctions for appropriate cases, most particularly repeat violators and those who wilfully fail to comply with payment orders.

19. The Ministry of Labour explore, through stakeholder consultations, the concept of utilizing the principles of work councils in non-unionized workplaces with high concentrations of vulnerable workers.

20. The Ministry of Labour:
 - a) develop processes of reaching out to and focusing on the top echelon of industry to address ESA non-compliance where workers are affiliated with the company, particularly those subcontracted to small enterprises and temporary agency workers; and
 - b) identify and provide recognition and incentives for companies that are leaders in extending employment standards compliance and higher than minimum standards to external workers particularly those subcontracted to small enterprises and temporary agency workers.

21. The Ontario government:
 - a) amend the ESA to include a process for ensuring reprisal complaints are expedited and, in the case of migrant workers, that such complaints are heard before repatriation.

- b) work together with F.A.R.M.S. and other organizations serving workers in low skilled temporary migrant worker programs to provide:
 - i) information to temporary migrant workers about the process and likelihood of premature repatriation,
 - ii) education to employees regarding how to approach employers and liaison agents with issues and
 - iii) education for employers on ensuring employees are comfortable raising issues and employers are receptive to employees' concerns.

- 22. In coordination with the federal government, the Ontario government:
 - a) institute a process for independent decision-making to review decisions to repatriate temporary foreign workers prior to the repatriation to ensure dismissal is not a reprisal for accessing workers' rights under federal or provincial legislation or contract;
 - b) for reprisals, the independent-decision making body have the authority to order interim reinstatement for appropriate circumstances pending decisions and appeals; and
 - c) where there is a finding of reprisal, provision be made for transfer to another employer or, where appropriate, reinstatement.

- 23. The Ontario government support the establishment of greater legal and other supports for temporary migrant workers asserting rights and making claims through expanded legal services or other such mechanisms.

- 24. Unions and community groups continue to develop and expand innovative services to support migrant workers to assert their legal rights.

- 25. The Ontario government amend the AEPA by explicitly including the elements of bargaining in good faith protected by section 2(d) of the *Charter* as identified by the Supreme Court of Canada in *Health Services* and affirmed in *Fraser*.

- 26. The Ministry of Labour convene an Innovative Solutions for Precarious Work Advisory Council of representatives of relevant ministries, experts, and labour and employer organizations to obtain advice and to develop initiatives for improved and expedited ESA compliance and enforcement with a view to recommending best practices for responding to the existing and emerging needs of vulnerable employees/precarius work in the changing workplace.

- 27. The Ontario government extend the *Employment Protection for Foreign Nationals Act* to all temporary migrant workers in Ontario.

- 28. a) The Ontario government negotiate an information-sharing agreement with Human Resources and Skills Development Canada and Citizenship and Immigration Canada to permit information to flow between Ontario and the federal government for the purpose of increasing protections for temporary

foreign workers by:

- i) strengthening federal-provincial oversight over temporary foreign worker contracts;
- ii) increasing enforcement of temporary migrant workers' rights under provincial legislation; and
- iii) imposing consequences upon employers who violate provincial legislation or breach contractual agreements with temporary foreign workers.

b) The Ontario government initiate consultations with the federal government to bring about greater co-ordination of policies affecting worker protection for low skilled temporary foreign workers.

29. The Ministry of Labour act to reduce misclassification of employees as self-employed by:

- a) engaging in proactive compliance and enforcement processes directed at industries with known high incidences of misclassification;
- b) increasing transparency in decision-making through policy guidance and training for employment standards officers on the definition of employee and the common law tests; and
- c) launching a public education campaign to raise awareness of the issue of misclassification of employees under the *Employment Standards Act*.

30. The Ontario government consider extending some ESA protections to self-employed persons in dependent working relationships with one client focussing on low wage earners, and/or identifying other options for responding to their need for employment standards protection.

31. a) The Ontario government amend the ESA to require employers and contractors to provide all workers, including independent contractors, with written notice of their work or employment status and terms of their employment or work contract (including remuneration, hours, and other terms); and

b) The Ministry of Labour develop standard forms to support employers and contractors in this task.

HEALTH AND SAFETY

32. OHSA enforcement activity include proactive inspections to ensure joint health and safety committees and representatives are in place where required and are effectively operational.

33. The Ontario government ensure that stakeholder discussions between industry and government regarding health and safety include workers or their representatives.

34. a) The Ministry of Labour conduct more proactive OHS inspections in industries employing vulnerable workers at high risk for workplace injuries including agriculture, hospitality and cleaning and workplaces with temporary staffing agency workers; and
b) temporary foreign workers in all sectors be a priority for the Ministry of Labour's proactive OHS enforcement activities.
35. The Ontario Labour Relations Board, the Ministry of Labour and the Office of the Worker Adviser ensure that systems are in place to ensure to the extent possible section 50 reprisal complaints for temporary foreign workers are heard at the OLRB prior to repatriation.
36. The Ontario government ensure the section 21 Vulnerable Workers Committee addresses the following:
 - a) prioritizing health and safety training, both basic and hazard specific, for migrant workers and their supervisors;
 - b) determining ways to provide access to basic rights training and hazard specific training to migrant workers either prior to arrival in Canada through consulates or immediately upon arrival; and
 - c) identifying sectors where there are concentrations of vulnerable workers so that proactive enforcement activities are directed at these sectors.
37. The Ontario government and the WSIB review the impacts of WSIB policies and practices:
 - a) to determine the effects of the experience rating program and other policies on vulnerable workers, most particularly temporary foreign workers and temporary agency workers; and
 - b) consideration be given to attributing health and safety incidents to the client-worksite.
38. The Ontario government:
 - a) explore health and safety supply-chain mechanisms to address the issue of subcontracting to small enterprises and particularly to temporary agency work; and
 - b) implement the Dean Report recommendations relating to supply chain regulation through government procurement policies and WSIB financial incentives for employers that qualify suppliers based on health and safety performance.
39. The Ontario government implement:
 - a) a pilot mobile medical clinic service for migrant workers in rural areas where they reside providing access to medical care and corresponding support to facilitate WSIB claims, where appropriate; and
 - b) direct service or translation in the language of the migrant worker.

40. The Ontario government work together with municipal governments, employers, F.A.R.M.S., and community and worker advocacy organizations, to continue to find ways to implement medical, legal, spiritual and social supports to migrant workers.

TRAINING AND EDUCATION

41. The Ontario government engage the College of Trades (perhaps in partnership with sectoral councils, colleges and/or unions) to develop skills recognition criteria for a broader range of workers, including workers employed through a series of short term contracts with different employers.
42. a) Second Career and other training programs be assessed for their ability to reduce precarity through increased credentials that translate into increased wages, benefits, hours, duration of employment and other key measures of employment security; and
b) programs that demonstrate measures of success based on these criteria should be expanded.
43. The Ontario government continue working toward the development of ways to more closely track present and emerging labour market needs linking these with employment and training initiatives.
44. The Ontario government:
a) develop employer-government partnerships for on-the-job-training for individuals working in lower skilled positions that facilitate job placement into higher skilled positions;
b) continue to support self-funded education initiatives including those that provide upskilling for certification; and
c) increase bursary and loan programs for self-funded education, where possible.
45. The Ontario government:
a) prioritize the provision of education and training programs for targeted communities of vulnerable workers including women, racialized persons and recent immigrants;
b) focus its training and education programs for immigrants on individual investment in continuing education leading to certification; employer supported on-the-job training; and English-language competence prioritizing entry into programs within the first months after arrival; and
c) focus literacy skills education on providing a high degree of literacy skills that are transferable to the Ontario labour market.
d) in consultation with the federal government, consider ways to provide access to basic language training services for temporary migrant workers.

46. The Ontario government improve coordination of integration and settlement programs for immigrants with other Ontario programs, including employment and training programs.

PROVINCIAL STRATEGY

47. The Ontario government:
- a) build upon principles of the Poverty Reduction Strategy to develop and implement a multi-sectoral/cross-ministerial employment strategy coordinated by an identified lead Ministry with the objective of improving support to vulnerable workers and reducing employment precarity among the most disproportionately affected; and
 - b) measure initiatives on the basis of whether programs create or enable participants to engage in secure and sustainable work.

APPENDIX A: SHORT, MEDIUM AND LONG TERM RECOMMENDATIONS

The following list characterizes each recommendation as either a short, medium or long term initiative. Short term initiatives have the lowest resource implications or are the least complex to implement or both, while those characterized as long term have the most significant resource implications or have a high degree of implementation complexity or both.

SHORT TERM

2. The Ontario government codify within the ESA a broad policy statement highlighting its commitment to protecting basic minimum employment rights, supporting compliance and fostering public, employer and employee awareness and education.
3. The Ontario government convene the minimum wage Committee, or similar body, to review minimum wage issues balancing the needs of business and employees.
7. The Ministry of Labour:
 - a) launch a public awareness campaign on *Employment Standards Act* rights and responsibilities;
 - b) to support workers' and employers' needs for additional information about the ESA, continue to offer and to expand capacity for providing outreach through ESA informational/educational sessions including but not limited to those in high risk sectors and groups; and
 - c) develop partnerships with employer, employee and community organizations to enhance worker and employer knowledge of ESA rights and responsibilities.
8. The Ontario government amend the ESA to require employers to provide the ESA poster in handout format to all new employees in English and, to the extent possible, in the language of the employee.
9.
 - a) The Ontario government amend the ESA to require employers to provide all employees with written notice of their employment status and terms of their employment contract; and
 - b) the Ministry of Labour develop standard forms to support employers in this task.
10. The Ministry of Labour place a greater emphasis on ESA proactive enforcement processes while continuing to use a range of strategies including voluntary compliance, proactive inspections and responses to individual complaints.
11. The Ministry of Labour:
 - a) engage in data collection and evaluation to determine the impact of the policy requiring employees to approach employers prior to initiating an ESA claim; and
 - b) consider reversal of policy if evaluation reveals negative impacts such as declines in claims attributable to the policy changes.
12. The Ministry of Labour improve communication about the vulnerable worker exemptions to approaching employers at the outset of an ESA claim.
15. The Ministry of Labour:
 - a) develop an accessible and well communicated mechanism – such as a hotline – for ESOs to receive third-party and/or anonymous complaints which could trigger proactive inspections; and
 - b) develop corresponding policy criteria to ensure that unfounded complaints do not trigger unwarranted inspections.
17. The Ontario government amend the ESA to permit orders requiring employers found in violation of the ESA to cover the costs of investigations and inspections, in appropriate cases.
18. The Ministry of Labour strengthen ESO policy direction supported by education to direct ESOs to select deterrent sanctions for appropriate cases, most particularly repeat violators and those who wilfully fail to comply with payment orders.

20. The Ministry of Labour:
 - a) develop processes of reaching out to and focusing on the top echelon of industry to address ESA non-compliance where workers are affiliated with the company, particularly those subcontracted to small enterprises and temporary agency workers; and
 - b) identify and provide recognition and incentives for companies that are leaders in extending employment standards compliance and higher than minimum standards to external workers particularly those subcontracted to small enterprises and temporary agency workers.
24. Unions and community groups continue to develop and expand innovative services to support migrant workers to assert their legal rights.
25. The Ontario government amend the AEPA by explicitly including the elements of bargaining in good faith protected by section 2(d) of the *Charter* as identified by the Supreme Court of Canada in *Health Services* and affirmed in *Fraser*.
26. The Ministry of Labour convene an Innovative Solutions for Precarious Work Advisory Council of representatives of relevant ministries, experts, and labour and employer organizations to obtain advice and to develop initiatives for improved and expedited ESA compliance and enforcement with a view to recommending best practices for responding to the existing and emerging needs of vulnerable employees/precarious work in the changing workplace.
27. The Ontario government extend the *Employment Protection for Foreign Nationals Act* to all temporary migrant workers in Ontario.
28. a) The Ontario government negotiate an information-sharing agreement with Human Resources and Skills Development Canada and Citizenship and Immigration Canada to permit information to flow between Ontario and the federal government for the purpose of increasing protections for temporary foreign workers by:
 - i) strengthening federal-provincial oversight over temporary foreign worker contracts;
 - ii) increasing enforcement of temporary migrant workers' rights under provincial legislation; and
 - iii) imposing consequences upon employers who violate provincial legislation or breach contractual agreements with temporary foreign workers.
 b) The Ontario government initiate consultations with the federal government to bring about greater co-ordination of policies affecting worker protection for low skilled temporary foreign workers.
31. a) The Ontario government amend the ESA to require employers and contractors to provide all workers, including independent contractors, with written notice of their work or employment status and terms of their employment or work contract (including remuneration, hours, and other terms); and
 - b) The Ministry of Labour develop standard forms to support employers and contractors in this task.
32. OHSA enforcement activity include proactive inspections to ensure joint health and safety committees and representatives are in place where required and are effectively operational.
33. The Ontario government ensure that stakeholder discussions between industry and government regarding health and safety include workers or their representatives.
35. The Ontario Labour Relations Board, the Ministry of Labour and the Office of the Worker Adviser ensure that systems are in place to ensure to the extent possible section 50 reprisal complaints for temporary foreign workers are heard at the OLRB prior to repatriation.
36. The Ontario government ensure the section 21 Vulnerable Workers Committee, addresses the following:
 - a) prioritizing health and safety training, both basic and hazard specific, for migrant workers and their supervisors;
 - b) determining ways to provide access to basic rights training and hazard specific training to migrant

- workers either prior to arrival in Canada through consulates or immediately upon arrival; and
- c) identifying sectors where there are concentrations of vulnerable workers so that proactive enforcement activities are directed at these sectors.

MEDIUM TERM

1. The Ontario government:
 - a) in consultation with labour and owner/management stakeholders, stakeholders, update, review and streamline the exemptions within the ESA and related regulations including a review of existing occupational specific exemptions, with the objective of ensuring any exemptions are justified on current public policy and industry considerations; and
 - b) ensure that the review develop and use principles that aim to promote a broadly available minimum floor of basic workers' rights, including that justifications for exemptions be balanced against the need to reduce precarious work and provide basic minimum standards to a broader sector of the working population.
4. The Ontario government, taking into account the complexities of the issue, consider what amendments could be made to the ESA to ensure part-time workers are paid at proportionately the same rate as full-time workers in equivalent positions where there is no justification for the difference based on skill, experience or job description.
6. The Ontario government review personal emergency leave provisions in the ESA to ensure each provision is justified on current public policy grounds and to determine ways to extend the benefit to workers in workplaces with fewer than 50 employees (including part-time, casual and temporary employees of these small enterprises.)
14. The Ontario government:
 - a) amend the ESA to provide for a discretionary time extension for claims for wages in special circumstances; and
 - b) raise the ESA monetary cap to \$25,000.
16. The Ministry of Labour:
 - a) substantially increase proactive inspections, particularly in higher risk industries based on established benchmarks;
 - b) develop strategic, proactive enforcement initiatives that target high-risk for violation workplaces, including those comprised of concentrations of temporary foreign workers, temporary agency workers, recent immigrants, racialized workers, youth, the disabled and Aboriginal people, as well as areas known for high-rates of substandard practices;
 - c) conduct expanded investigations when violations are detected; and
 - d) ensure enforcement activities include follow-up on previous violations.
19. The Ministry of Labour explore, through stakeholder consultations, the concept of utilizing the principles of work councils in non-unionized workplaces with high concentrations of vulnerable workers.
21. The Ontario government:
 - a) amend the ESA to include a process for ensuring reprisal complaints are expedited and, in the case of migrant workers, that such complaints are heard before repatriation.
 - b) work together with F.A.R.M.S. and other organizations serving workers in low skilled temporary migrant worker programs to provide:
 - i) information to temporary migrant workers about the process and likelihood of premature repatriation,
 - ii) education to employees regarding how to approach employers and liaison agents with issues and

- iii) education for employers on ensuring employees are comfortable raising issues and employers are receptive to employees' concerns.
- 29. The Ministry of Labour act to reduce misclassification of employees as self-employed by:
 - a) engaging in proactive compliance and enforcement processes directed at industries with known high incidences of misclassification;
 - b) increasing transparency in decision-making through policy guidance and training for employment standards officers on the definition of employee and the common law tests; and
 - c) launching a public education campaign to raise awareness of the issue of misclassification of employees under the *Employment Standards Act*.
- 34. a) The Ministry of Labour conduct more proactive OHSA inspections in industries employing vulnerable workers at high risk for workplace injuries including agriculture, hospitality and cleaning and workplaces with temporary staffing agency workers; and
 - b) temporary foreign workers in all sectors be a priority for Ministry of Labour's proactive OHSA enforcement activities.
- 37. The Ontario government and the WSIB review the impacts of WSIB policies and practices
 - a) to determine the effects of the experience rating program and other policies on vulnerable workers, most particularly temporary foreign workers and temporary agency workers; and
 - b) consideration be given to attributing health and safety incidents to the client-worksites.
- 39. The Ontario government implement:
 - a) a pilot mobile medical clinic service for migrant workers in rural areas where they reside providing access to medical care and corresponding support to facilitate WSIB claims, where appropriate; and
 - b) direct service or translation in the language of the migrant worker.
- 40. The Ontario government work together with municipal governments, employers, F.A.R.M.S., and community and worker advocacy organizations, to continue to find ways to implement medical, legal, spiritual and social supports to migrant workers.
- 41. The Ontario government engage the College of Trades (perhaps in partnership with sectoral councils, colleges and/or unions) to develop skills recognition criteria for a broader range of workers, including workers employed through a series of short term contracts with different employers.
- 42. a) Second Career and other training programs be assessed for their ability to reduce precarity through increased credentials that translate into increased wages, benefits, hours, duration of employment and other key measures of employment security; and
 - b) programs that demonstrate measures of success based on these criteria should be expanded.
- 44. The Ontario government:
 - a) develop employer-government partnerships for on-the-job-training for individuals working in lower skilled positions that facilitate job placement into higher skilled positions;
 - b) continue to support self-funded education initiatives including those that provide upskilling for certification; and
 - c) increase bursary and loan programs for self-funded education, where possible.
- 45. The Ontario government:
 - a) prioritize the provision of education and training programs for targeted communities of vulnerable workers including women, racialized persons and recent immigrants;
 - b) focus its training and education programs for immigrants on individual investment in continuing education leading to certification; employer supported on-the-job training; and English-language competence prioritizing entry into programs within the first months after arrival; and
 - c) focus literacy skills education on providing a high degree of literacy skills that are transferable to the Ontario labour market.

- d) in consultation with the federal government, consider ways to provide access to basic language training services for temporary migrant workers.
- 46. The Ontario government improve coordination of integration and settlement programs for immigrants with other Ontario programs, including employment and training programs.
- 47. The Ontario government:
 - a) build upon principles of the Poverty Reduction Strategy to develop and implement a multi-sectoral/cross-ministerial employment strategy coordinated by an identified lead Ministry with the objective of improving support to vulnerable workers and reducing employment precarity among the most disproportionately affected; and
 - b) measure initiatives on the basis of whether programs create or enable participants to engage in secure and sustainable work.

LONG TERM

- 5. The Ontario government utilize the Innovative Solutions for Precarious Work Advisory Council (Recommendation 26) in consultation with labour, management and insurance representatives, to explore options for the provision of benefits for non-standard and other workers without benefits coverage, with consideration given to the concepts of a benefits bank and mandatory short term contract premium for temporary workers, among other options.
- 13. The Ontario government facilitate and expedite the ESA claims-making process, by providing a mechanism for workers and employers to obtain person-to-person assistance in the claims process through additional support services such as Legal Aid Ontario clinics, Office of the Employment Standards Advisor and/or other types of worker and employer support services.
- 22. In coordination with the federal government, the Ontario government:
 - a) institute a process for independent decision-making to review decisions to repatriate temporary foreign workers prior to the repatriation to ensure dismissal is not a reprisal for accessing workers' rights under federal or provincial legislation or contract;
 - b) for reprisals, the independent-decision making body have the authority to order interim reinstatement for appropriate circumstances pending decisions and appeals; and
 - c) where there is a finding of reprisal, provision be made for transfer to another employer or, where appropriate, reinstatement.
- 23. The Ontario government support the establishment of greater legal and other supports for temporary migrant workers asserting rights and making claims through expanded legal services or other such mechanisms.
- 30. The Ontario government consider extending some ESA protections to self-employed persons in dependent working relationships with one client focussing on low wage earners, and/or identifying other options for responding to their need for employment standards protection.
- 38. The Ontario government:
 - a) explore health and safety supply-chain mechanisms to address the issue of subcontracting to small enterprises and particularly to temporary agency work; and
 - b) implement the Dean Report recommendations relating to supply chain regulation through government procurement policies and WSIB financial incentives for employers that qualify suppliers based on health and safety performance.
- 43. The Ontario government continue working toward the development of ways to more closely track present and emerging labour market needs linking these with employment and training initiatives.

APPENDIX B: CONTRIBUTORS TO THE PROJECT

Over the course of the Project, the LCO consulted with or received submissions or both from numerous individuals – workers and employers – and organizations. The following list includes all organizations and experts who provided written submissions or participated or both in one or more consultations with LCO staff.

- Access Alliance
- Association of Canadian Search, Employment and Staffing Services
- Agricultural Workers Alliance
- Alliance for Equality of Blind Canadians
- Belleville Community Advocacy and Legal Centre
- Canadian Hearing Society
- Canadian Federation of Independent Business
- Canadian Manufacturers and Exporters
- Canadian Mental Health Association
- Canadian Auto Workers
- Canadian Union of Public Employees (CUPE) Ontario.
- CanAg Travel Services (F.A.R.M.S.)
- Caregivers' Action Centre
- CAW Former Simmons Workers Action Centre
- CAW Local 1285 Chrysler Action Centre
- Central Toronto Community Health Centre (Yi Man Ng)
- Chinese Canadian National Council, Toronto Chapter
- Chinese Interagency Network of Greater Toronto
- Colour of Poverty Campaign
- Community Advocacy & Legal Centre (CALC) – Workers' Action Centre
- Dignidad Obrera Agrícola Migrante (DOAM)
- Dr. David J. Doorey, York University, School of Human Resource Management
- Dr. Luin Goldring, York University
- Equal Pay Coalition
- Professor Faye Faraday, Osgoode Hall Law School
- Foreign Agricultural Resource Management Services (F.A.R.M.S.)
- Hispanic Development Council
- Human Resources and Skills Development Canada
- IAVGO
- International Association of Machinists
- Jamaican Liaison Service, Seasonal Agricultural Workers Program
- Dr. Patricia Landolt, University of Toronto Scarborough
- Labour Education Centre
- Dr. Wayne Lewchuk, McMaster University
- Labour Issues Coordinating Committee
- Labour Ready-Dependable Temporary Labour
- Legal Clinic Workers Compensation Network
- Loyalist College Community Services
- Dr. Ellen MacEachen, Institute for Work & Health

- Manitoba Ministry of Labour
- Metro Toronto Chinese and Southeast Asian Legal Clinic
- Mexican Consulate, Seasonal Agricultural Workers Program
- Michelynn Lafleche, United Way Toronto
- Migrant Workers Alliance for Change
- Niagara Migrant Workers Interest Group
- Occupational Health Clinics for Ontario Workers Inc.
- Office of the Worker Adviser
- Ontario Bar Association, Human Rights and Civil Liberties Section
- Ontario Council of Agencies Serving Immigrants (OCASI)
- Ontario Federation of Agriculture
- Ontario Federation of Labour, Labour Adjustment Committee
- Ontario Ministry of Agriculture, Food and Rural Affairs
- Ontario Ministry of the Attorney General
- Ontario Ministry of Citizenship and Immigration
- Ontario Ministry of Labour – Employment Standards Branch & Occupational Health and Safety Branch
- Ontario Ministry of Training, Colleges and Universities
- Ontario Women’s Directorate
- Ontario Works
- OPSEU Local 101
- Parkdale Community Legal Services
- Progressive Moulded Products (PMP) Workers Action Center
- Poverty and Employment Precarity in Southern Ontario (PEPSO)
- Queen West Community Health Centre
- Quinte United Immigrant Services
- Dr. Richard Mitchell, Brock University
- Sam Vrankulj, McMaster University
- Service Canada
- South Asian Legal Clinic of Ontario (SALCO)
- St. Stephen’s Community House
- Temporary work agency
- Toronto Catholic District School Board
- Toronto Region Immigrant Employment Council (TREIC)
- Toronto Workers’ Health and Safety Legal Clinic
- Unite Here
- United Food and Commercial Workers Union Canada
- United Steel Workers
- United Way of Quinte and Quinte Labour Council (Workers’ Help Centre)
- Windsor Legal Assistance
- WoodGreen Community Services
- Working Women Community Centre
- Workplace Safety and Insurance Board

ENDNOTES

1. There have always been workers outside the “standard” employment relationship. Regardless, the nature of employment has changed. See Leah F. Vosko, “Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity” in Leah F. Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006) 4, 6; Judy Fudge, “The New Workplace: Surveying the Landscape” (2009) 33 *Man LJ* 131; Katherine Stone, “The New Psychological Contract: Implications of the Changing Workplace for Labour and Employment Law” (2001) 48 *UCLA L Rev* 519.
2. A brief note on terminology and classification. Immigrants are people who have emigrated from other countries throughout the world and have settled in Ontario. They may be established in Canada or recently arrived. Racialization has been defined as “the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life”: Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination* (2005, revised 2009). Online: <http://www.ohrc.on.ca/en/racial-discrimination-race-and-racism>. Many immigrants are racialized persons and vice versa. Between 2001 and 2006, “over three quarters of immigrants to Canada were from the global South or countries with racialized majority populations” [Sheila Block & Grace-Edward Galabuzi, *Canada’s Colour Coded Labour Market: The Gap for Racialized Workers* (Canadian Centre for Policy Alternatives and the Wellesley Institute, 2011), 6. Online: http://www.wellesleyinstitute.com/wp-content/uploads/2011/03/Colour_Coded_Labour_MarketFINAL.pdf]. However, there are important distinctions between the two categories. Many racialized persons have been Canadian for several generations and immigrants who are not visible minorities are less likely to be racialized. Then again, Caucasian immigrants may be racialized because of an accent or other cultural differences. The LCO discusses immigrants and racialized Ontarians separately while acknowledging the commonality in how they may experience precarious work.
3. A Creative Symposium was held on November 30, 2006 in order to discuss the creation of a new law reform commission for Ontario and identify potential law reform projects.
4. Andrea M. Noack & Leah F. Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers’ Social Location and Context* (Law Commission of Ontario, 2011). Online: <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-noack.pdf>; Leah F. Vosko, Eric Tucker, Mark P. Thomas & Mary Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada* (Law Commission of Ontario, November 2011). Online: <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf>. See also student paper: Jamie Baxter, *Precarious Pathways: Evaluating the Provincial Nominee Programs in Canada* (Law Commission of Ontario, July 2010). Online: <http://www.lco-cdo.org/baxter.pdf>.
5. See Appendix B for a list of consultations carried out in the Vulnerable Workers and Precarious Work Project.
6. Comments by Ontario government officials, October 2012.
7. Efforts to reduce the benefits of employees in secure jobs with excellent benefits (particularly pensions) have recently threatened the stability of several European countries such as Greece. See for example, Niki Kitsantonis, “Ahead of Summit, Greece Rushes to Approve New Cuts”, *New York Times* (29 February 2012).
8. Peter Shawn Taylor, “In praise of ‘precarious’ work”, *Canadian Business*, (24 October 2012). Online: <http://www.canadianbusiness.com/article/102189—in-praise-of-precarious-work>.
9. For example, according to Statistics Canada, in 2012, 36.6 percent of Canadian workers aged 25-44 were engaged in part-time work for reasons that include business conditions and/or the inability to find full-time work. Statistics Canada, *CANSIM Table 282-0014 and 282-0001 Reasons for part-time work by sex and age group*. Online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/labor63a-eng.htm>.
10. “50th OECD Anniversary: International Migration and the SOPEMI” in *International Migration Outlook 2011* (Organization for Economic Cooperation & Development, 2011). Online: <http://www.oecd.org/dataoecd/22/5/48342373.pdf>.
11. The Canadian Chamber of Commerce, *2012-2013 Economic Outlook, Economy Battles Strong Headwinds: Modest Growth Ahead*, Economic Policy Series (2011). Online: <http://www.chamber.ca/images/uploads/Reports/2011/EconomicOutlook111228.pdf>.
12. John Morrissy, “Canadian jobs market headed for serious downturn”, *Financial Post* (2 November 2011). Online: <http://business.financialpost.com/2011/11/02/canadian-jobs-market-headed-for-serious-downturn/>.
13. Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (December 2010), vi-vii (Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*). Online: <http://www.lco-cdo.org/VulnerableWorkersBackgroundPaper-December2010.pdf>. Citing Harry W. Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau: Human Resources Skills Development Canada, 2006), 232. Online: http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/final_report.pdf.

14. John Stapleton, Brian Murphy & Yue Xing, *The "Working Poor" in the Toronto Region: Who They Are, Where They Live, and How Trends are Changing* (Metcalfe Foundation, February 2012), 24-25. Online: <http://metcalffoundation.com/wp-content/uploads/2012/02/Working-Poor-in-Toronto-Region.pdf>.
15. Guy Standing, *Precariat: The New Dangerous Class* (Huntington: Bloomsbury, 2011), 24.
16. Submission to LCO September 30, 2012.
17. Vosko, *et al*, note 4.
18. "Chapter 3: Taking the measure of temporary employment", in *OECD Employment Outlook 2002* (Organization for Economic Cooperation & Development, 2002). Online: <http://www.oecd.org/employment/employmentpoliciesanddata/17652675.pdf>.
19. Noack & Vosko, note 4, 11.
20. Comments by Ministry of Labour officials, December, 2012.
21. *Recession Watch Bulletin*. Issue 4 (Canadian Labour Congress, Winter 2010), 3. Online: <http://www.canadianlabour.ca/news-room/publications/recession-watch-bulletin-issue-4-winter-2010>.
22. "How do OECD labour markets perform?", *Employment Policies and Data* (Organization for Economic Cooperation & Development, 9 July 2012). Online: <http://www.oecd.org/employment/employmentpoliciesanddata/howdooeclabourmarketsperform.htm>.
23. LCO consultation meeting with F.A.R.M.S. (17 January 2012).
24. In certain circumstances, a federal program may provide these employees with temporary employment insurance support: Service Canada, *Work-Sharing*. Online: http://www.servicecanada.gc.ca/eng/work_sharing/index.shtml.
25. Tom Zizys, *Working Better: Creating a High Performing Labour Market in Ontario* (Metcalfe Foundation, 2011), 21. Online: <http://metcalffoundation.com/wp-content/uploads/2011/05/working-better.pdf>.
26. Leah F. Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000), 27.
27. Zizys, note 25.
28. Arthurs, note 13, 19.
29. Citizenship and Immigration Canada, News Release, "More Federal Skilled Workers for Canada in 2012" (3 November 2011). Online: <http://www.cic.gc.ca/english/department/media/releases/2011/2011-11-03.asp>; Wallace Immen, "Ottawa to seek innovative business migrants", *The Globe and Mail* (9 March 2012) A6. A new Federal Skilled Trades Program, effective January 2, 2013, will create an avenue of permanent resident status for workers in skilled trades (NOC level B) in occupations such as electrician, pipefitter, heavy-duty equipment mechanics, welders, etc., Citizenship and Immigration, News Release, "Building an Immigration System that Works for Canada", (10 December 2012). Online: <http://www.cic.gc.ca/english/department/media/releases/2012/2012-12-10.asp>.
30. Canada has three temporary foreign worker programs for low skilled positions discussed below.
31. Zizys, note 25, 9.
32. René Morissette, Grant Schellenberg & Anick Johnson, "Diverging Trends in Unionization", *Perspectives on Labour and Income*, Vol 6, No 4 (Statistics Canada, April 2005). Online: <http://www.statcan.gc.ca/pub/75-001-x/10405/7827-eng.htm>.
33. The Conference Board of Canada Hot Topics, *Canada Inequality: Is Canada Becoming More Unequal?* (July 2011). Online: www.conferenceboard.ca/hcp/hot-topics/canInequality.aspx; Sheila Block, Work and Health: Exploring the Impact of Employment on Health Disparities (9 December 2010). Online: http://www.wellesleyinstitute.com/wpcontent/uploads/2010/12/Work_and_Health.pdf. In 2011, the rate of income inequality in Canada was slightly higher than the OECD average: OECD, *Society at a Glance 2011: OECD Social Indicators* (2011). Online: <http://www.oecd.org/els/socialpoliciesanddata/societyataglance2011-oecd-social-indicators.htm>.
34. OECD, *Growing Income Inequality in OECD Countries: What Drives It and How Can Policy Tackle It?*, *Forum, Paris, 2 May 2011* (2011), 7 (OECD, Growing Income Inequality). Online: <http://www.oecd.org/dataoecd/32/20/47723414.pdf>.
35. OECD, *Growing Income Inequality*, note 34, 7.
36. Richard Wilkinson & Kate Pickett, *The Spirit Level: Why Equality Is Better for Everyone* (London: Penguin Books, 2010).
37. Richard G. Wilkinson, *The Impact of Inequality: How to Make Sick Societies Healthier* (New York: The New Press, 2005), 40-53 and 221.
38. Wilkinson, note 37, 101.
39. James Gwartney, Robert Lawson & Joshua Hall, *Economic Freedom of the World, Annual Report 2011* (Fraser Institute, 2011). Online: http://www.freetheworld.com/2011/reports/world/EFW2011_complete.pdf. Women's well-being is defined by the United Nations Development Programme Gender Inequality Index in relation to five variables (maternal mortality, adolescent fertility, female parliamentary representation, educational attainment and female labour force participation rate). See: United Nations Development Programme Gender Inequality Index (GII), (2011). Online: <http://hdr.undp.org/en/statistics/gii/>.
40. Noack & Vosko, note 4.
41. Noack & Vosko, note 4, 6.

42. Noack & Vosko, note 4, 12.
43. Noack & Vosko, note 4, 17.
44. Standing, note 15, 15.
45. Statistics Canada, “Reasons for part-time work by sex and age group,” note 9.
46. Noack & Vosko, note 4, 16-18.
47. Noack & Vosko, note 4, 38; See also the section on Employment Standards below.
48. Standing, note 15, 15.
49. Noack & Vosko, note 4.
50. Ministry of Labour, New Release, “Ensuring Temporary Workers’ Rights, McGuinty Government Committed to Protecting Employment Standards” (8 June 2012). Online: <http://news.ontario.ca/mol/en/2012/06/ensuring-temporary-workers-rights.html>.
51. Sylvia Fuller and Leah F. Vosko, “Temporary Employment and Social Inequality in Canada: Exploring Intersections of Gender, Race and Immigration Status”, *Soc Indic Res* (2008) 88:31. Online: <http://link.springer.com/content/pdf/10.1007%2Fs11205-007-9201-8>
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53. MacEachen, *et al*, note 52.
54. MacEachen, *et al*, note 52.
55. MacEachen, *et al*, note 52.
56. Ontario Workplace Safety and Insurance Board, *Responsibilities of the Workplace Parties in Work Reintegration*, No 190202 (15 July 2012). Online: <http://www.wsib.on.ca/en/community/WSIB/OPMDetail?vnextoid=5b0bc0d9ca3d7210VgnVCM100000449c710aRCRD>.
57. Katherine Lippel, Ellen MacEachen, Ron Saunders, Natalia Werhun, Agnieszka Kosny, Liz Mansfield, Christine Carrasco & Diana Pugliese, “Legal Protections Governing the Occupational Safety and Health and Workers’ Compensation of Temporary Employment Agency Workers in Canada: Reflections on Regulatory Effectiveness” (2011) 9:2 *Policy and Practice in Health and Safety* 69, 80.
58. Isabel Nunes, “The Nexus Between OSH and Subcontracting” (2012) 41 *Work* 3062, 3063.
59. Joan M. Eakin, Danièle Champoux & Ellen MacEachen, “Health and Safety in Small Workplaces: Refocusing Upstream” (2010) 101 *Canadian Journal of Public Health* S29, S30; David Walters & Philip James, *Understanding the Role of Supply Chains in Influencing Health and Safety at Work: Report Submitted by the IOSH Research Committee* (Leicestershire, UK: Institution of Occupational Safety and Health, 2009). Online: http://www.iosh.co.uk/information_and_resources/research_and_development/research_fund/grants_awarded/idoc.ashx?docid=c1116aa4-5a15-4049-aeac-89ee47147634&version=-1.
60. Although the long term consequences of privatization can be costly on many levels, particularly for government employers: Robert Dryden & Jim Stanford, *The Unintended Consequences of Outsourcing Cleaning Work* (March 2012, Canadian Centre for Policy Alternatives Ontario). Online: http://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2012/03/Unintended%20Consequences%20of%20Outsourcing_final.pdf.
61. Feng Hou and Shunji Wang, “Immigrants in self-employment.” *Perspectives on Labour and Income* (Statistics Canada: 24 June 2011). Online: <http://www.statcan.gc.ca/pub/75-001-x/2011003/article/11500-eng.htm#a3>.
62. Cynthia J. Cranford, Judy Fudge, Eric Tucker, & Leah F. Vosko, *Self-Employed Workers Organize: Law, Policy, and Unions* (Montreal & Kingston: McGill – Queen’s University Press, 2005), 13-14 (Cranford, *et al*, *Self-Employed Workers*). It is not made clear, but these appear to be Canadian statistics.
63. Leah F. Vosko & Nancy Zukewich, “Precarious By Choice? Gender and Self-Employment” in Leah F. Vosko, ed, *Precarious Employment: Understanding Labour Market Security in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006), 76-77.
64. Vosko & Zukewich, note 63.
65. Feng Hou & Shunji Wang, “Immigrants in Self-Employment”, *Perspectives on Labour and Income*, Vol 23, No 3 (Statistics Canada, Autumn 2011). Online: <http://www.statcan.gc.ca/pub/75-001-x/2011003/article/11500-eng.pdf>. Note that children of immigrants may choose self-employment as a matter of preference due in part to language skills, education and Canadian experience: Teresa Abada, Feng Hou, & Yuqian Lu, “Choice or Necessity: Do Immigrants and Their Children Choose Self-employment for the Same Reasons?”, *Analytical Studies — Research Paper Series*, (Statistics Canada, Social Analysis Division, Analysis Branch, April 2012). Online: <http://www.statcan.gc.ca/pub/11f0019m/11f0019m2012342-eng.pdf>.
66. Cranford, *et al*, *Self-Employed Workers*, note 62, 11-12, referring to figures from 1999; Noack & Vosko, note 4, 9.
67. Cranford, *et al*, *Self-Employed Workers*, note 62, 13.
68. Judy Fudge, Eric Tucker & Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Law Commission of Canada, October 2002), 16-17 (Fudge, Tucker & Vosko, “The Legal Concept of Employment”). Online: http://publications.gc.ca/collections/collection_2007/lcc-cdc/JL2-35-2002E.pdf.
69. Leah F. Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2009), 172.

70. Noack & Vosko, note 4, 24.
71. Noack & Vosko, note 4, 24.
72. Noack & Vosko, note 4, 25.
73. Noack & Vosko, note 4, 22-23.
74. Noack & Vosko, note 4, 28.
75. Noack & Vosko, note 4, 31-32.
76. Noack & Vosko, note 4, 18-21 and 24-32.
77. "The concept of 'social location' has been developed to specify the ways in which political and economic conditions interact with class, ethnicity, culture, and sexual orientation to shape the meanings and strategies of working men and women": Fudge, Tucker & Vosko, "The Legal Concept of Employment", note 68, 7. For the connection between precarity and marginalized social location, see Vosko, note 1, 379; Workers' Action Centre, *Working on the Edge* (2007) (Workers' Action Centre, *Working on the Edge*). Online: http://www.workersactioncentre.org/wpcontent/uploads/2011/12/pb_WorkingOnTheEdge_eng.pdf. Alternatively, working in precarious employment may itself place workers into a marginalized social position.
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80. Law Commission of Ontario; *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: April 2012). Online: <http://www.lco-cdo.org/en/older-adults-final-report>. Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Toronto: September 2012). Online: <http://www.lco-cdo.org/en/disabilities-final-report>.
81. Julie Cool, *Wage Gap Between Women and Men*, No 2010-30-E (Library of Parliament, 29 July 2010), 7-8. Online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-30-e.htm>. Also see Leah F. Vosko & Lisa F. Clark, "Canada: Gendered Precariousness and Social Reproduction" in Leah F. Vosko, Martha MacDonald & Iain Campbell, eds, *Gender and the Contours of Precarious Employment* (London: Routledge, 2009) 26, 31-32 and Cynthia J. Cranford & Leah Vosko, "Conceptualizing Precarious Employment: Mapping Wage Work Across Social Location and Occupational Context" in Vosko, note 1, 43, 58-59.
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221. Ontario Human Rights Commission, *Human Rights at Work, 2008*, 3d ed (Toronto: Ontario Human Rights Commission, 2008) (Ontario Human Rights Commission, *Human Rights at Work*). Online: <http://www.ohrc.on.ca/en/human-rights-work-2008-third-edition>.
222. *Human Rights Code*, note 220 ss 11, 24.

223. *Human Rights Code*, note 220 s 8.
224. *Occupational Health and Safety Act*, note 114 s 50(1); *Employment Standards Act, 2000*, note 186 s 74(1).
225. Ontario Human Rights Commission, *Human Rights at Work*, note 221; Health Services and Support - *Facilities Subsector Bargaining Assn v. British Columbia*, 2007 SCC 27 (*Health Services*), para 69; *Dunmore*, note 218, 27.
226. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976) (ICESCR). Online: <http://www2.ohchr.org/english/law/cescr.htm>; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976); International Labour Organization, "Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)" in International Labour Office, *The International Labour Organization's Fundamental Conventions (2003) (Convention No 87)*. Online: http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_095895.pdf.
227. *Health Services*, note 225, para 78. (Emphasis in original).
228. *Fraser*, note 219, 91-97.
229. ICESCR, note 226 art 6.
230. ICESCR, note 226 art 7.
231. ICESCR, note 226 art 8.
232. ICESCR, note 226 art 28 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."). The Ontario Human Rights Commission explains that "the ICESCR is binding on the federal government and each of the provinces and territories, and rights that are within provincial competence are the obligation of the provincial and territorial governments"; Ontario Human Rights Commission, *Social, Cultural and Economic Rights Under International Law: Research Paper, Policy and Education Branch*. Online: http://www.ohrc.on.ca/sites/default/files/attachments/Human_rights_commissions_and_economic_and_social_rights.pdf.
233. See the also Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 13, 46-47.
234. *Convention No 87*, note 226 part I art 2.
235. *Convention No 87*, note 226 part II art 11.
236. *Health Services*, note 225, para 71.
237. *Convention (No 98) Concerning the Application of the Principles of the Right to Organise and Bargain Collectively*, 1 July 1949, 96 UNTS 257 (entered into force: 18 July 1951).
238. See Judy Fudge, *The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, Working Paper Series No 11-15 (Metropolis British Columbia, 2011). Online: <http://www.mbc.metropolis.net/assets/uploads/files/wp/2011/WP11-15.pdf>.
239. *Dunmore*, note 218, para 27.
240. Government of Ontario, *Breaking the Cycle: Ontario's Poverty Reduction Strategy* (Toronto: Ministry of Children and Youth Services, December 2008). Online: <http://www.children.gov.on.ca/htdocs/English/breakingthecycle/index.aspx>.
241. *Poverty Reduction Act, 2009*, SO 2009, c 10 preamble.
242. *Poverty Reduction Act, 2009*, note 241 preamble.
243. *Poverty Reduction Act, 2009*, note 241 s 2(2)1.
244. *Poverty Reduction Act, 2009*, note 241 s 2(2)3.
245. *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, SO 2009, c 32; *Employment Standards Amendment Act (Temporary Help Agencies)*, 2009, SO 2009, c 9.
246. Commission for the Review of Social Assistance in Ontario, note 188.
247. Commission for the Review of Social Assistance in Ontario, News Release, "Prospects report charts course to transform social assistance" (24 October 2012). Online: <http://www.socialassistancereview.ca/final-report>.
248. Ontario Ministry of Labour, News Release, "Protecting Vulnerable Workers" (8 June 2012). Online: <http://news.ontario.ca/mol/en/2012/06/protecting-vulnerable-workers.html>.
249. *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, SOR/2010-172. Online: <http://gazette.gc.ca/rp-pr/p2/2010/2010-08-18/html/sor-dors172-eng.html>. These protections are more fully discussed in Chapter III under the segment "Employment Legislation Protecting Temporary Foreign Workers".
250. *Employment Standards Act, 2000*, note 186.
251. *Employment Standards Act*, SO 1968, c 35.
252. *Vosko, et al*, note 4, 8-9.
253. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess (1 December 2003) (Hon Alvin Curling, Speaker). Online: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2003-12-01&Parl=38&Sess=1&locale=en#P175_26881; *Exemptions Special Rules and Establishment of Minimum Wage*, O. Reg. 285/01; *Vosko, et al*, note 4, 10.
254. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Parl, 1st Sess (6 June 1996) (Hon John Baird). Online: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1996-10-17&Parl=36&Sess=1&locale=en#P1122_330982; Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Parl, 1st Sess (6 June 1996) (Hon John O'Toole). Online: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1996-06-06&Parl=36&Sess=1&locale=en#P735_214233.

255. *Employment Standards Act, 2000*, note 186.
256. *Employment Standards Amendment Act (Temporary Help Agencies)*, note 245.
257. O.Reg. 397/09.
258. *Open for Business Act, 2010*, SO 2010, c 16.
259. Vosko *et al*, note 4.
260. Vosko, *et al*, note 4, 17-18 ; Workers' Action Centre, *Working on the Edge*, note 77, 56-57.
261. *Canada Labour Code*, RS, c L-1 s 1.
262. Arthurs, note 13, 80.
263. Notes for an Address by the Hon Dalton Bales, QC, Minister of Labour for Ontario, During 2nd Reading of *The Employment Standards Act, 1968* (31 May 1968), Toronto, Archives of Ontario (Ministry of Labour, Minister, Correspondence, File 7-1-0-1407.2, box 47).
264. Arthurs, note 13, 30.
265. Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 13, 38-39.
266. Noack & Vosko, note 4, 4.
267. Comments by Ontario government officials, October, 2012. The Ontario government's response states: "The role of employment standards is to ensure that an employer does not exploit an employee in that relationship. But an employer cannot be responsible for the totality of an employee's circumstances (e.g., that he or she works at multiple jobs and, as a result, has long hours overall) ... the report expresses concern about qualifying periods for vacations, termination notice and severance pay under the ESA, mentioning that the size of the business an employee works for is a factor in qualifying for severance pay. These entitlements, however, are not intended to apply to all employees equally, for the reasons that follow:
- There are minimum periods that are considered reasonable for an employee to work for an employer before being entitled to vacation time (12 months), notice of termination (three months), and severance pay (five years).
 - Although there is a length of service threshold for vacation time, employers are required to pay vacation pay as a percentage of all wages earned; there is no minimum length of tenure for this aspect of the vacation standard.
 - Notice of termination is provided to give an employee time to adjust to an unexpected loss of employment. An employee does not typically have an expectation of stability in their work in the first few months of employment.
 - The rationale for severance pay is different than for notice of termination/termination pay. It provides compensation for the loss of seniority rights, human capital investment, etc., of a long-standing job. The rationale for making the size of the business a factor in the standard is the employer's ability to pay severance. It should be noted that Ontario is the only province/territory in Canada that has a legislated requirement for severance pay."
268. *Employment Standards Amendment Act (Temporary Help Agencies)*, note 245; O. Reg. 397/09, note 257.
269. Workers' Action Centre, *Working on the Edge*, note 77, 49.
270. Metro Toronto Chinese & Southeast Asian Legal Clinic Submission, October 1, 2012.
271. *Occupational Health and Safety Act*, note 114 s 4.1(2).
272. Statistics Canada, *Table 2 Rate of employees working for minimum wage or less, by province*. Online: <http://www.statcan.gc.ca/pub/75-001-x/tables-tableaux/topics-sujets/minimumwage-salaireminimum/2009/tbl02-eng.htm>.
273. Adam Ozimek, "Why Conservatives Should Support the Minimum Wage" (Forbes Magazine: 25 July 2012). Online: <http://www.forbes.com/sites/modeledbehavior/2012/07/25/why-conservatives-should-support-the-minimum-wage/>.
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275. Ontario Ministry of Labour, *2011 Minimum Wage Rate Set - Highest of Canadian Provinces: McGuinty Government Striking the Right Balance* (11 February 2011). Online: <http://news.ontario.ca/mol/en/2011/02/2011-minimum-wage-rate-set—highest-of-canadian-provinces.html>.
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277. Workers' Action Centre, *Working on the Edge*, note 77, 68.
278. Marilyn Braun-Pollon, Amelia DeMarco & Queenie Wong, *Minimum Wage: Reframing the Debate* (Canadian Federation of Independent Business, 2011), 18. Online: <http://www.cfib-fcei.ca/cfib-documents/rr3216.pdf>.
279. Braun-Pollon, DeMarco & Wong, note 278, 5.
280. Arthurs, note 13, 238.
281. Arthurs, note 13, 238.
282. Vosko & Clark, note 81, 32-33.
283. Noack & Vosko, note 4, 19-20.
284. Mark Bell, "Achieving the objectives of the part-time work Directive? Revisiting the part-time workers regulations", (2011), *Industrial Law Journal* 40(3): 254-279.
285. Mark Bell, note 284, 254-279.
286. Arthurs, note 13, 241.
287. CAW Submission to LCO's Interim Report. October, 2012.
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- Ontario, note 188, 83.
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293. Consultation with Chinese Interagency Network of Greater Toronto Labour Committee (6 May 2011) Toronto, Ontario. The Network is comprised of 10 agencies: Central Toronto Community Health Centre, Centre of Information and Community Services, Chinese Canadian National Council Toronto Chapter, Injured Workers' Consultants, Labour Community Services, Metro Toronto Chinese and Southeast Asian Legal Clinic, St. Stephen's Community House, WoodGreen Community Services, Workers' Action Centre and Working Women Community Centre.
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297. Arthurs, note 13, xiv.
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301. Metro Toronto Chinese & Southeast Asian Legal Clinic Submission, October 1, 2012.
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314. Ontario Ministry of Labour, Bulletin, "Know Your Employment Rights-in Your Language: Ministry of Labour Protects Vulnerable Workers" (30 June 2012). Online: http://www.labour.gov.on.ca/english/news/2012/nr_esright_s20120730.php.
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320. Consultation meeting with the Labour Committee of the Chinese Interagency Network of Greater Toronto.
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338. Vosko, *et al*, note 4, 72 citing Eric Tucker, "Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom" (Paper delivered at the Theo Nichols Conference "Safety or Profit", Cardiff University, 11 January 2011), 17; Consultation meeting with the Caregivers' Action Centre (28 February 2011) Toronto, Ontario; Consultation meeting with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011) Toronto, Ontario; Consultation meeting with Wayne Lewchuk and Sam Vrankulj (21 April 2011) Toronto, Ontario; Colour of Poverty Campaign, Metro Toronto Chinese and the Southeast Asian Legal Clinic Submission (on file with the LCO).
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341. *Employment Standards Act 2000: Policy and Interpretation Manual*, vol 2 (Scarborough: Carswell, 2001), 26-7; The Ministry of Labour's website states: "If you have not already tried to contact your employer, you will generally need to do so before your claim will be investigated." Ontario Ministry of Labour, *Steps to Filing a Claim* (January 2011). Online: <http://www.labour.gov.on.ca/english/es/pubs/start/index.php#steps>.
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350. Workers' Action Centre, *Working on the Edge*, note 77, 74; Vosko, *et al*, note 4, 106.
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354. Ontario Legislative Assembly, Official Report of Debates (Hansard), 36th Parl, 1st Sess (6 June 1996) (Hon John O'Toole). Online: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1996-06-06&Parl=36&Sess=1&locale=en#P735_214233.
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357. Mark P. Thomas, *Regulating Flexibility: The Political Economy*

- of *Employment Standards* (Montreal & Kingston: McGill-Queen's University Press, 2009) 131-132.; Vosko, *et al*, note 4, 36; Some advocates suggest there should be no cap, CAW Submission, October 4, 2012.
358. Doorey, note 298, 3. Emphasis in original.
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360. Vosko, *et al*, note 4, 106.
361. Comments by Ontario government officials, October 2012.
362. Comments by Ontario government officials, October 2012.
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370. Vosko, *et al*, note 4, 64; This strategy was employed by the Ministry of Labour in its enforcement blitzes in the aftermath of the deaths of four migrant workers who fell from scaffolding on 24 December 2009.
371. Consultation meetings with migrant and other workers; Consultation meeting with Migrant Workers Alliance for Change and the Canadian Auto Workers (CAW) (1 March 2011) Toronto, Ontario; Consultation meetings with Niagara Migrant Workers Interest Group (30 March 2011) St. Catharines, Ontario, (9 May 2011) Niagara-on-the-Lake, Ontario; Consultation meeting with Agricultural Workers Alliance.
372. Chinese Interagency Network of Greater Toronto, Submission to LCO October 1, 2012.
373. Office of the Auditor General, *2004 Annual Report*, note 331, 242.
374. Office of the Auditor General, *2006 Annual Report*, note 366, 309-310.
375. Comments by Ontario government officials, October 2012; Data provided by the Ministry of Labour, October 2012 (on file with LCO).
376. Data provided by the Ministry of Labour, October 2012 (on file with LCO).
377. *Provincial Offences Act*, RSO 1990, c P 33 (POA).
378. See Law Commission of Ontario, *Modernization of the Provincial Offences Act* (2011), 16-17. Online: <http://www.lco-cdo.org/POA-Final-Report.pdf>. Part I proceedings under the POA are commenced by way of a certificate of offence. For these offences, "the provincial offences officer has elected to proceed by way of a less formal ticketing process, rather than compel the person's attendance in court through the Part III mechanism... The maximum fine is \$1,000 and imprisonment is not a permitted penalty." Proceedings under Part III of the POA are commenced by swearing of an information before a justice and are used for more serious provincial offences. "The decision whether to prosecute under Part I or Part III often rests with the police officer or provincial offences officer. That decision will depend upon the nature of the offence and the public interest that may demand higher penalties... The decision to charge under Part III may also depend on the circumstances or consequences of the commission of the offence." (17).
379. Workers' Action Centre, *Working on the Edge*, note 77, 59.
380. Arthurs, note 13, 196; Office of the Auditor General of Ontario, *2004 Annual Report*, note 331, 244-245.
381. Vosko, *et al*, note 4, 104-105.
382. Consultation meeting with service providers (13 April 2011) Belleville, Ontario; Colour of Poverty Campaign, Metro Toronto Chinese and the Southeast Asian Legal Clinic Submission (on file with the LCO).
383. Data provided by Ontario Ministry of Labour (on file with LCO).
384. Anil Verma, *The Role of Employee Voice in Obtaining Better Labour Standards* (Federal Labour Standards Review, 2006), 3. Online: http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/research19.pdf.
385. *Occupational Health and Safety Act*, note 114.
386. Roy Adams, *Industrial Relations Under Liberal Democracy: North America in Comparative Perspective* (Columbia: University of South Carolina Press, 1995), excerpted in The Labour Law Casebook Group, *Labour & Employment Law: Cases, Materials and Commentary*, 7th ed (Toronto: Irwin Law, 2004), 388.
387. Adams, note 386, 390.
388. Verma, note 384, 26.
389. Adams, note 386, 390.
390. Verma, note 384, 26.
391. Verma, note 384, 27-29.
392. Comments by Ontario government officials, October 2012.
393. Workers Action Centre/Parkdale Community Legal Services,

- Submission to LCO, October, 2012.
- ^{394.} CAW Submission to LCO, October, 2012.
- ^{395.} In its response to the LCO, the CAW made the following point: "The public image of a CAW member in Ontario may be one of a full-time male employee earning above-average wages. That image is outdated and inaccurate. Over the past decades, our membership has grown and it has diversified. Today, our union represents workers in 17 major economic sectors across the country, including in excess of 20,000 hospital and medical service employees and thousands more in the province's retail and hospitality sectors. These service-oriented workplaces form a critical, and increasing, part of our Ontario membership base. A large majority of the workers in these sectors are new immigrants, young people and women. In fact, over a third of members in the province currently are women."
- ^{396.} David Weil, *Improving Workplace Conditions Through Strategic Enforcement*, Boston University School of Management Research Paper No 2010-20 (2010), 2. Online: http://www.dol.gov/whd/resources/strategic_enforcement.pdf.
- ^{397.} Weil, note 396, 16-17.
- ^{398.} Comments by Ontario government officials, October, 2012.
- ^{399.} "Fair Wage Policy", *City of Toronto Municipal Code*, c 67, Schedule A. Online: <http://www.toronto.ca/fairwage/policy.htm>; Diane MacDonald & David Fairey, *Old Policies in Liberal "New Era" Labour Platform: A Backgrounder on the BC Liberals' Proposed Labour Policy Changes* (Canadian Centre for Policy Alternatives: June 2001), Online: http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/newera.pdf at 4; Toronto Taxpayers Coalition, "Scrap the Fair Wage Policy". Online: <http://www.torontotaxpayer.ca/Main/ScrapTheFairWagePolicy>.
- ^{400.} Supply chain regulation is discussed further in the Chapter on Health and Safety. It refers to the imposition of worker protection and/or health and safety standards by larger businesses upon their subcontractors and other smaller enterprises they engage to carry on their business. This can take the form of a regulation imposing responsibility on larger business for the standards of the smaller enterprises they utilize to carry on their business. Alternatively, it can be accomplished through contractual obligation, incentive programs or other means and could be the basis upon which proposed contractors are evaluated.
- ^{401.} Faraday, note 107, 78 & 103; Consultation with Migrant Workers Alliance for Change, September 22, 2012.
- ^{402.} Faraday, note 107, 78 & 103; Consultation with Migrant Workers Alliance for Change, September 22, 2012.
- ^{403.} See Hennebry, note 99, 14 and 16; Kerry L. Preibisch, "Migrant Agricultural Workers and Processes of Social Inclusion in Rural Canada: Encuentros and Descuentros" (2004) 29 *Canadian Journal of Latin and American & Caribbean Studies* 203, 212 and 229; Human Rights, Equity and Diversity Department of the United Food and Commercial Workers Union, *Report on the Status of Migrant Workers in Canada 2011* (2011), 22-23. Online: <http://www.ufcw.ca/templates/ufcwcanada/images/Report-on-The-Status-of-Migrant-Workers-in-Canada-2011.pdf>; Janet McLaughlin, "Falling Through the Cracks: Seasonal Foreign Farm Workers' Health and Compensation Across Borders" (October 2007) 21:1 *The IAVGO Reporting Service*, 5 (McLaughlin, "Falling Through the Cracks"). Online: <http://www.injuredworkersonline.org/Documents/ONIWGconfMcLaughlin.pdf>.
- ^{404.} Hennebry, note 99, 14.
- ^{405.} *Employment Standards Act, 2000*, note 186, s 74.
- ^{406.} *Dean Report*, note 114, 46. Issues related to health and safety and WSIB were also reported. These are discussed in the Chapter on Health and Safety.
- ^{407.} Consultation meeting with the Foreign Agricultural Resource Management Services (F.A.R.M.S.), the Labour Issues Coordinating Committee and CanAg Travel (17 January 2012) Mississauga, Ontario; F.A.R.M.S. information indicates workers return home for other reasons including medical, domestic, and incompatible match. The highest number of returns are for domestic (worker's personal) reasons. Information supplied by F.A.R.M.S. (on file with LCO). In its October, 2012 submission to the LCO, the Migrant Workers Alliance for Change, argued that commentators should look beyond the repatriation statistics and consider the number of workers who leave the job for medical reasons and who go AWOL because these workers often do so due to injuries sustained at work. While this increases the percentage of workers who leave, the percentages appear to remain relatively low.
- ^{408.} Labour Issues Coordinating Committee Submission to LCO, September 2012.
- ^{409.} Consultation meeting with the Foreign Agricultural Resource Management Services (F.A.R.M.S.), the Labour Issues Coordinating Committee and CanAg Travel (17 January 2012) Mississauga, Ontario. See Faraday, note 107, 41: Out of 17,776 workers who came to Ontario in 2010, 2,331 were transferred to a second or subsequent farm.
- ^{410.} Consultation meeting with Foreign Agricultural Resource Management Services (F.A.R.M.S.) (17 May 2011) Mississauga, Ontario.
- ^{411.} Labour Issues Coordinating Committee Submission to LCO, September 2012.
- ^{412.} Consultations with workers; Information provided by F.A.R.M.S. to LCO (April 2012).
- ^{413.} Hennebry, note 99, 14 and 16.
- ^{414.} Comments by Ontario government officials, October, 2012.
- ^{415.} *Dean Report*, note 114, 50.
- ^{416.} Comments by Ontario government officials, October 2012.

417. Ontario Bar Association, Civil Liberties and Human Rights Section Submission to the LCO, October, 2012. This concept was also recommended in *Made in Canada*, Faraday, note 107.
418. Ontario Bar Association, Civil Liberties and Human Rights Section Submission to the LCO, October, 2012.
419. Office of the Worker Adviser Submission to the LCO September 2012.
420. MIGRANTE – Ontario, the Caregivers Action Centre, Justicia for Migrant Workers and the Niagara Migrant Workers Interest Group.
421. United Food and Commercial Workers Union, *Maps to Agriculture Workers Alliance Regional Offices* (2011). Online: http://www.ufcw.ca/index.php?option=com_content&view=article&id=2008&Itemid=246&lang=en; United Food and Commercial Workers Canada & Agriculture Workers Alliance, *The Status of Migrant Farm Workers in Canada 2010-2011* (2011), 12. Online: http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf.
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423. Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012), 17-19; Human Resources and Skills Development Canada, *Work – Unionization Rates* (Human Resources and Skills Development Canada, *Work – Unionization Rates*). Online: <http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=17>.
424. *Dunmore*, note 218, para 46.
425. Dan Cameron, “Employee Voice In The Non-Union Setting”, *Policy Options* 29:04 (April 2008) 67. Online: <http://www.irpp.org/po/archive/apr08/cameron.pdf>.
426. John Allemang, “The sorry state of our unions”, *The Globe and Mail* (24 March 2012). Online: <http://www.theglobeandmail.com/news/national/the-sorry-state-of-our-unions/article2380055/page3/>.
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428. Lewchuk, Clarke & de Wolff, note 176, 288; Angelo DiCaro, Chad Johnston & Jim Stanford, “Canada’s Labour Movement in Challenging Times: Unions and their Role in a Changing Economy” in Norene Pupo, Dan Glenday & Ann Duffy, eds, *The Shifting Landscape of Work* (Toronto: Nelson Education, 2011), 49.
429. Sharanjit Uppal, “Unionization 2011”, *Perspectives on Labour and Income* (Statistics Canada: October 26, 2011). Online: <http://www.statcan.gc.ca/pub/75-001-x/2011004/article/11579-eng.pdf>.
430. Human Resources and Skills Development Canada, *Work – Unionization Rates*, note 423.
431. Human Resources and Skills Development Canada, *Work – Unionization Rates*, note 423.
432. See Chapter 1.
433. Lewchuk, Clarke & de Wolff, note 176, 288.
434. *Labour Relations Act*, SO 1950, c 34.
435. Some union leaders have made the same point recently suggesting that unions must adapt to changing realities, Allemang, note 426.
436. John Anderson, James Beaton, & Kate Laxer, “The Union Dimension: Mitigating Precarious Employment?”, in Vosko, ed, *Precarious Employment*, note 1, 301.
437. *Fraser*, note 219, 365; Ontario Ministry of Labour, *Task Force on Agricultural Labour Relations: Report to the Minister of Labour* (Task Force on Agricultural Labour Relations, 1992), 3.
438. *Agricultural Labour Relations Act, 1994*, SO 1994, c 6 s 4.
439. *Dunmore*, note 218; The s. 15 argument was not considered by the majority in *Dunmore* and it was unsuccessful in *Fraser*, the subsequent SCC case on the issue.
440. *Dunmore*, note 218, para 41.
441. *Dunmore*, note 218, para 54.
442. *Dunmore*, note 218, para 52.
443. *Dunmore*, note 218, para 54.
444. *Dunmore*, note 218, para 53.
445. *Dunmore*, note 218, para 53.
446. *Dunmore*, note 218, para 55.
447. *Dunmore*, note 218, para 2. (Emphasis in original).
448. *Dunmore*, note 218, para 42.
449. *Dunmore*, note 218, paras 2. and para 67.
450. *Agricultural Employees Protection Act, 2002*, SO 2002, c 16 s 1(1) (AEPA).
451. AEPA, note 450 s 1(2).
452. There is no express provision in the AEPA for employers to consider employee representations in good faith but the Supreme Court of Canada has held that this duty is implicit: *Fraser*, note 219, paras 101-102.
453. *Fraser*, note 219.
454. *Health Services*, note 225.
455. *Fraser*, note 219, para 40. The Ontario Court of Appeal has recently considered *Fraser* in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2012 ONCA 363.
456. *Fraser*, note 219, para 41.
457. *Fraser*, note 219, paras 101-102.
458. *Fraser*, note 219, para 107.
459. *Fraser*, note 219, para 117.
460. *Fraser*, note 219, para 99; Faraday, Fudge & Tucker, note 423, 49.

461. Fraser, note 219, para 40.
462. Fraser, note 219, para 41.
463. *Fraser v. Ontario (Attorney General)* (2006), 79 OR (3d) 219 (SCJ) (*Fraser SCJ*), para 18.
464. Fraser, note 219, paras 109 and 110.
465. Fraser, note 219, para 112.
466. Tucker, note 338.
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468. Cynthia J. Cranford & Deena Ladd, "Community Unionism: Organising for Fair Employment in Canada" (2003) 3 *Just Labour* 46, 55, n2. Online: <http://www.justlabour.yorku.ca/volume3/pdfs/cranford.pdf>.
469. Cranford, *et al*, *Self-Employed Workers*, note 62, 187.
470. DiCaro, Johnston & Stanford, note 428, 52.
471. Cynthia J. Cranford, *et al*, "Thinking Through Community Unionism" in Vosko, ed, *Precarious Employment*, note 1, 359.
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475. Janet McLaughlin, *Migration and Health: Implications for Development: A Case Study of Mexican and Jamaican Migrants in Canada's Seasonal Agricultural Workers Program* (The Canadian Foundation for the Americas (FOCAL), 2009), 10. Online: <http://www.focal.ca/pdf/Migrant%20Health%20McLaughlin%202009.pdf>; Human Rights, Equity and Diversity Department of the United Food and Commercial Workers Union, note 403, 5 and 18-20.
476. *Occupational Health and Safety Act*, note 114 s 21.
477. Ministry of Labour, "Two Task Groups Named to Study Prevention Among Vulnerable Workers, Small Business." December 19, 2013. Online: http://www.gov.on.ca/english/hs/prevention/task_groups.php#vulnerable.
478. *Dean Report*, note 114, 47.
479. *Employment Standards Act, 2000*, note 186, s. 141(1).
480. *Regulatory Impact Analysis Statement* (2009) C Gaz, Vol 143, No 41. Online: <http://www.gazette.gc.ca/rp-pr/p1/2009/2009-10-10/pdf/g1-14341.pdf>.
481. *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, note 249; *Immigration and Refugee Protection Regulations, SOR/2002-227 s 200(5)(d)*; Citizenship and Immigration Canada, *Operational Bulletin 275-C - April 1, 2011, Temporary Foreign Worker Program: Operational Instructions for the Implementation of the Immigration and Refugee Protection Regulations*, 2.2. Online: <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob275C.asp#list>; Citizenship and Immigration Canada, *List of Ineligible Employers - Temporary Foreign Worker Program*. Online: <http://www.cic.gc.ca/english/work/list.asp>.
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558. Comments by Ontario government officials, October 2012.
559. *Occupational Health and Safety Act*, note 114; *Workplace Safety and Insurance Act, 1997*, note 214.
560. *Occupational Health and Safety Act*, note 114, s 32.0.1-32.0.7; In response to our Interim Report, we received a note describing workplace violence experienced by a teacher in the classroom and advocating for annual employer training on protecting teachers from workplace violence.
561. *Dean Report*, note 114, 14; Vosko, *et al*, note 4, 45-47.
562. *Occupational Health and Safety Act*, note 114 s 4.1(2).
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564. Bill 160, *Occupational Health and Safety Statute Law Amendment Act, 2011*, 2nd Sess, 39th Leg, Ontario, 2011 (Royal Assent received Chapter Number: SO 2011 C 11) s 13(1). Online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2463.
565. *Occupational Health and Safety Act*, note 114 s 9.
566. *Occupational Health and Safety Act*, note 114 s 9(18)(a).
567. *Occupational Health and Safety Act*, note 114 s 9(20).
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569. Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
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571. Criminal charges were laid against the construction company and others related to the tragic deaths of four workers by falling from scaffolding on 24 December 2009 in Toronto, Ontario.
572. *Occupational Health and Safety Act*, note 114; s 3(1).
573. *Farming Operations*, O Reg 414/05.
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579. *Dean Report*, note 114, 46.
580. *Dean Report*, note 114, 46.
581. *Dean Report*, note 114, 6.
582. *Dean Report*, note 114, 17; George Gritziotis, "Prevention Update" *Safe at Work Ontario*, No 10 (Ontario Ministry of Labour, March 2012), 2. Online: http://www.labour.gov.on.ca/english/hs/pdf/sawo_today10.pdf.
583. *Dean Report*, note 114, 46-47.
584. *Dean Report*, note 114, 47.
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591. Consultation with Ontario Ministry of Labour (10 May 2012).
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594. Consultation meeting with the Niagara Migrant Workers Interest Group (30 March 2011); Consultation meeting with workers; Consultation meeting with the Workers' Compensation Network (29 April 2011); Consultation meeting with Windsor Legal Assistance (14 June 2011); Consultation meeting with the Agriculture Workers Alliance (AWA).
595. Toronto Workers' Health and Safety Legal Clinic Submission, September 28, 2012; Consultation with Migrant Workers Alliance for Change, September 22, 2012; Workers Action

- Centre/Parkdale Community Legal Services, Submission to the LCO September, 2012; Comments by Ministry of Labour officials, December, 2012.
596. *Dean Report*, note 114, 27-28.
597. Ontario Ministry of Labour, Poster, *Health & Safety at Work-Prevention Starts Here*, Online: <http://www.labour.gov.on.ca/english/hs/pubs/posterinfo.php>.
598. *Dean Report*, note 114, 47-48.
599. Consultation meeting with the Labour Committee of the Chinese Interagency Network of Greater Toronto (6 May 2011); Consultation meeting UFCW Canada (7 April 2011).
600. Consultation meeting with the Labour Committee of the Chinese Interagency Network of Greater Toronto (6 May 2011).
601. Consultation meeting with workers; Consultation meeting with the Agriculture Workers Alliance (AWA); Consultation meeting UFCW Canada (7 April 2011).
602. Faraday, note 107, 107.
603. *Dean Report*, note 114, 48; See also: Ontario Ministry of Labour, *Industrial Sector Plan 2011-2012*, note 592, 20 (where farming has been shown to be the industrial subsector with the second highest number of fatalities in Ontario between 2008-2010).
604. Consultation meeting with Dignidad Obrera Agrícola Migrante (DOAM) (8 May 2011); Consultation meeting with SAWP Workers.
605. Migrant Workers Alliance for Change Submission to LCO October 2012; Comments from Ministry of Labour, December, 2012.
606. In the temporary foreign worker context: Consultation meeting with workers and SAWP workers; Consultation meetings with Niagara Migrant Workers Interest Group (30 March 2011), (9 May 2011); Consultation meeting with Windsor Legal Assistance (13 June 2011); Consultation meeting with the Agriculture Workers Alliance (AWA); DOAM Submission (on file with the LCO) ("The threat of repatriation is the primary reason why most workers never document or come forward with health concerns regarding the workplace."). The issue was raised in a broader context twice: Consultation meeting with an OPSEU Representative (15 June 2011); Toronto Workers' Health and Safety Legal Clinic Submission.
607. *Occupational Health and Safety Act*, note 114 s 50. See also: Ontario Ministry of Labour, *Information for Workers and Employers About Reprisals*, note 563. Online: <http://www.labour.gov.on.ca/english/hs/topics/reprisal.php>.
608. *Ontario Labour Relations Board Rules of Procedure*, r 41; *Occupational Health and Safety Act*, note 114 s 50, s 50.1; O Reg 33/12 s 1.
609. *Dean Report*, note 114, 47.
610. Consultation with Ontario Ministry of Labour (10 May 2012); *Safe at Work*, No 10 (Ontario Ministry of Labour, March 2012). Online: <http://www.labour.gov.on.ca/english/hs/sawo/pubs/issue10.php>; Ministry of Labour Bulletin, "Strengthening Workplace Health and Safety", December 19 2012. Online: http://www.labour.gov.on.ca/english/news/2012/bul_previnjury20121219.php.
611. Meeting with IAVGO, Injured Workers' Consultants and injured workers, October 4, 2012.
612. Migrant Workers Alliance for Change Meeting on Interim Report and Submission to LCO, September-October, 2012.
613. Harry Arthurs, *Funding Fairness, A Report on Ontario's Workplace Safety and Insurance System* (Queen's Printer for Ontario 2012), 110.
614. Consultation with IAVGO, Injured Workers' Consultants and Injured Workers, October 4, 2012.
615. Lippel, *et al*, note 57, 81.
616. Comments by Ontario government officials, October 2012.
617. Lippel *et al*, note 57, 81.
618. Arthurs, *Funding Fairness*, note 613.
619. Comments by Ontario government officials, October 2012.
620. *Funding Fairness*, note 613, 114.
621. Vosko *et al*, note 4, 88.
622. Phil James, *et al*, "Regulating Supply Chains to Improve Health and Safety" (2007) 36:2 *Indus LJ* 163, 166.
623. James *et al*, note 622, 166-170.
624. James *et al*, note 622, 166-170.
625. James *et al*, note 622, 186.
626. James, *et al*, note 622, 187.
627. Richard Johnstone, Michael Quinlan & Maria McNamara, *Enforcing Upstream: Australian Health and Safety Inspectors and Upstream Duty Holders*, Working Paper 77 (Canberra: National Research Centre for Occupational Health and Safety Regulation (NRCOHSR), 2010). Online: http://regnet.anu.edu.au/sites/default/files/u86/WorkingPaper_77_0.pdf.
628. *Dean Report*, note 114, 55.
629. *Dean Report*, note 114, 41 and 51-52.
630. SAWP workers' coverage begins as soon as they reach the agreed upon point of departure in their home country and it remains in place until they return to their country. It also covers time while they are in transit to or from the airport to the employer's premises, when using transportation authorized by the employer or while staying in employer-provided accommodations. If injured, SAWP workers must file a claim for benefits before leaving Canada. If a claim is not filed before leaving Canada, the workers' liaison officer is responsible for reporting the injury. In our consultations, we heard that some SAWP liaison officers had been effective in coordinating with WSIB to arrange for workers' access to workplace safety insurance.
631. Janet McLaughlin & Jenna L. Hennebry, "Backgrounder on Health and Safety for Migrant Farmworkers", IMRC Policy Points, No 1 (Waterloo: International Migration Research

- Centre, 2010), 5. Online: http://www.wlu.ca/documents/44258/IMRC_Policy_Points_Issue_1_-_Migrant_Farmworker_Health.pdf.
632. McLaughlin, "Falling Through the Cracks", note 403, 5.
633. McLaughlin, "Falling Through the Cracks", note 403, 9.
634. Consultation meeting with SAWP Workers; Consultation meeting with Agriculture Workers Alliance (AWA).
635. Consultation meeting with SAWP Workers; Consultation meeting with Agriculture Workers Alliance (AWA).
636. Comments by Ontario government officials October 2012; Detailed information regarding OHIP eligibility can be found at Ministry of Health and Long-Term Care, *OHIP Eligibility*. Online: http://www.health.gov.on.ca/en/public/publications/ohip/ohip_eligibility.aspx.
637. Comments by Ontario Government officials, October 2012.
638. Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 13, 43; Janet McLaughlin, "Challenges and Considerations: Providing Accessible Health Care for TFW" (Presentation at Permanently Temporary: Temporary Foreign Workers and Canada's Changing Attitude to Citizenship and Immigration Community Research Symposium, 4 February 2010), 32-34. Online: <http://ceris.metropolis.net/Virtual%20Library/other/PermanentlyTemporary.pdf>.
639. Consultation meeting with Niagara Migrant Workers Interest Group (30 March 2011) St. Catharines, Ontario.
640. Michael Pysklywec *et al*, "Doctors Within Borders: Meeting the Health Care Needs of Migrant Farm Workers in Canada" (2011) 183:9 *Can Med Assoc J* 1039, 1041.
641. Consultation meeting with Agriculture Workers Alliance (AWA) staff.
642. Consultation meeting with the Workers' Compensation Network (29 April 2012).
643. Toronto Workers' Health and Safety Legal Clinic Submission to LCO, September 28, 2012; Comments by Ontario government officials, October, 2012.
644. Office of the Worker Adviser Submission to the LCO, September 2012.
645. Consultation meeting with the Agriculture Workers Alliance (AWA) and UFCW Canada, Toronto, Ontario; Consultation meeting with temporary foreign workers; Submission from the employer of a Live-In Caregiver (on file with the LCO).
646. Consultation meeting with the Niagara Migrant Workers Interest Group (30 March 2011).
647. Consultation meeting with the Niagara Migrant Workers Interest Group (30 March 2011).
648. *Niagara Migrant Workers Interest Group Blog*. Online: <http://nmwig.blogspot.com>.
649. Hennebry, note 99, 23-25.
650. An innovative model of providing support for migrant workers utilized by the UFCW is discussed under the heading Enforcing Vulnerable Workers Rights through Association.
651. Francesca Froy & Sylvain Giguère, *Putting in Place Jobs that Last: A Guide to Rebuilding Quality Employment at Local Level* (OECD, 2010), 3. Online: <http://www.oecd.org/dataoecd/12/6/44418145.pdf>.
652. Zizys, note 25, 7-9. Zizys does not attribute labour market polarization solely to the demise of career ladders. He also recognizes the impact of the loss of better paying blue-collar manufacturing jobs and the corresponding increase in entry level service sector positions paying considerably less. Decline in unionized jobs is another factor caused by a shift away from "union-heavy" manufacturing to "union-light" service sector jobs but also political decisions. He further identifies declines in minimum wages in most North American jurisdictions, a trend that is being reversed.
653. OECD, *Growing Income Inequality*, note 34, 12.
654. OECD, *Growing Income Inequality*, note 34, 12.
655. Canadian Manufacturers and Exporters, *Business Results Through Workforce Capabilities: A Resource for Developing and Maintaining a Highly Skilled Workforce* (2007), 9.
656. LCO Consultation with Canadian Manufacturers and Exporters (11 May 2011).
657. LCO Consultation with Canadian Manufacturers and Exporters (11 May 2011).
658. Centre for Workplace Skills, *What We Do*. (Centre for Workplace Skills, *What We Do*). Online: <http://www.workplaceskills.ca/en/who-we-are/overview.html>.
659. Centre for Workplace Skills, *What We Do*, note 658.
660. Centre for Workplace Skills, *Investing in Skills: Effective Work-Related Learning in SMEs* (2011), 4. Online: http://www.workplaceskills.ca/_uploads/media/4nvw3ps0.pdf.
661. Centre for Workplace Skills, *Union-Led Work-Related Learning: Profiles of Effective Practices* (2011), 6. Online: <http://www.workplaceskills.ca/en/workers/union-led-work-related-learning-profiles-of-effective-practices.html>.
662. Ontario Federation of Labour (OFL) Submission, (on file with the LCO).
663. Gordon B. Cooke, James Chowhan & Trevor Brown, "Declining Versus Participating in Employer-Supported Training in Canada" (2011) 15:4 *International Journal of Training and Development* 271, 272.
664. Cooke, Chowhan & Brown, note 663, 275.
665. LCO Consultation with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011).
666. LCO Consultation with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011).
667. Lewchuk, Clarke & de Wolfe, note 176.
668. *Drummond Report*, note 142, 277.
669. *Drummond Report*, note 142, 278.
670. *Drummond Report*, note 142, 285.
671. Lewchuk, Clarke & de Wolfe, note 176, 285; *An Act to*

- Promote Workforce Skills Development and Recognition*, RSQ, c D-8.3 s 3.
672. Paul Bélanger & Magali Robitaille, *Portrait of Work-Related Learning in Quebec* (Work and Learning Knowledge Centre, 2008), 20. Online: <http://www.ccl-cca.ca/pdfs/WLKC/WorkplaceTrainingQuebecEN.pdf>. This report found that the initiative had improved the delivery of workplace training participation with more companies actively planning and implementing training for their employees and that adult learning was being promoted through the combined, cooperative efforts of employers, governments, unions and community groups.
673. Richard Brisbois, Nicole Pollack & Ron Saunders, *Lessons from Other Countries Regarding Incentives for Employer-Sponsored Training* (Canadian Policy Research Networks, 2009), 26. Online: http://www.cprn.org/documents/51134_EN.pdf.
674. Lewchuk, Clarke & de Wolfe, note 176, 286.
675. Lewchuk, Clarke & de Wolfe, note 176, 286.
676. Comments by Ontario government officials, October, 2012.
677. Ontario Ministry of Training, Colleges and Universities, *Ontario Improves Skilled Trades System: McGuinty Government Establishes College Of Trades To Modernize Apprenticeship* (27 October 2009). Online: <http://news.ontario.ca/tcu/en/2009/10/ontario-improves-skilled-trades-system.html>. See: Ontario College of Trades. Online: <http://www.collegeoftrades.ca>.
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679. Lewchuk, Clarke & de Wolfe, note 176, 285.
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682. *Drummond Report*, note 142, 279.
683. Ontario Ministry of Training, Colleges and Universities, *Employment Service: Service Provider Guidelines* (2010), s 2.2-1. Online: http://www.tcu.gov.on.ca/eng/eopg/publications/eopg_sp_guidelines.pdf.
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686. Ontario Ministry of Colleges, Training and Universities, *Second Career*, note 685.
687. Information provided to LCO by the Ontario Ministry of Training Colleges and Universities. In the Ontario 2012 Budget, the government reaffirmed its commitment to support unemployed workers by maintaining \$251 million in funding for the Second Career program in 2012-13 in order to serve 12,000 participants. There was also a commitment to explore ways in which cross-government employment and training services could potentially be integrated with Employment Ontario. Comments by Ontario government officials, October, 2012.
688. LCO Consultation with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011).
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690. Information provided to LCO by the Ontario Ministry of Training Colleges and Universities.
691. *Drummond Report*, note 142, 283.
692. *Drummond Report*, note 142, 283.
693. *Drummond Report*, note 142, 285.
694. Comments by Ontario government officials, October 2012.
695. *Drummond Report*, note 142, 282.
696. *Drummond Report*, note 142, 283; Comments by Ontario government officials, October 2012.
697. Ontario Ministry of Economic Development and Innovation, News Release, "Ontario Is Attracting Investment, Creating Jobs: McGuinty Government Supports Regional Economic Development" (29 November 2011). Online: http://www.ontariocanada.com/ontcan/1medt/en/news_2011_11_30_en.jsp.
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699. Ontario Women's Directorate, *Key Programs*, note 698.
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701. Ontario Women's Directorate, *Key Programs*, note 698; Information provided by Ontario Women's Directorate.
702. Luin Goldring & Patricia Landolt, *Immigrants and Precarious Employment in the New Economy: Brief 2* (York University Immigrants and Precarious Employment Project, 2009), 4. Online: http://www.arts.yorku.ca/research/ine/public_outreach/materials.html; Goldring & Landolt, note 78.
703. Ontario provides language training for eligible adult immigrants, whether recently arrived or longer term immigrants. Ontario also provides pilot projects for occupation specific language training customized for employees' workplace and communication needs. Comments by Ontario government officials, October 2012.

704. Goldring & Landolt, note 78.
705. LCO Consultation with Toronto Region Immigrant Employment Council (TRIEC) (18 May 2011).
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707. LCO Consultation with Toronto Region Immigrant Employment Council (TRIEC) (18 May 2011).
708. Ontario Ministry of Citizenship and Immigration, "Immigration Overview: Ministry of Citizenship and Immigration" (PowerPoint presentation, March 2011) [unpublished], 5 (Ontario Ministry of Citizenship and Immigration, "Immigration Overview").
709. Ontario Ministry of Citizenship and Immigration, *Key Services*. Online: <http://www.citizenship.gov.on.ca/english/keyinitiatives/index.shtml>.
710. Comments by Ontario government officials, October 2012.
711. Alexander, Burleton & Fong, note 101, 15-16.
712. *Drummond Report*, note 142, 294.
713. Comments by Ontario government officials, October 2012; Ontario Budget, 2012, http://www.fin.gov.on.ca/en/budget/ontariobudgets/2012/ch1.html#c1_integratingEATS.
714. Froy & Giguère, note 651, 63.
715. Ontario Bar Association, Civil Liberties and Human Rights Section Submission to the LCO, October, 2012.

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