



LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO

**VULNERABLE WORKERS  
AND  
PRECARIOUS WORK**

**BACKGROUND PAPER**

**(Note: there is a companion Consultation Paper  
in this Project)**

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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 Ontario law deans. It is situated at York University, officially housed at Osgoode Hall Law School.

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 study areas that are underserved by other research. The LCO is independent of government. It selects projects that are of interest to and reflective of the diverse communities in Ontario and is 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.

This Background Paper is intended to accompany a Consultation Paper which provides a shorter discussion of the main issues and which sets out questions on which the LCO particularly seeks feedback. Both documents are available on the LCO's website at [www.lco-cdo.org](http://www.lco-cdo.org).

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## PREFACE

In July 2008, the Board of the Governors of the Law Commission of Ontario (“LCO”) approved a Project to consider the degree of regulatory protection afforded persons in various forms of “precarious” employment. The Project emphasizes the disproportionate impact of precarious employment on diverse communities, particularly racialized men and women and women of majority communities, considers the impact of precarious work on vulnerable workers beyond their employment and has the objective of developing recommendations to ameliorate the situation of vulnerable workers, taking into account the needs of employers and the benefits to Ontario society at large. The LCO adopts a multidimensional approach to precariousness to reflect an appreciation of the relationship between precarious employment and the vulnerability of employees. In short, concern rests with both paid work *and* with people.

This Background Paper reviews the nature of precarious employment, the identity of vulnerable workers, the existing protections for employees engaged in these forms of paid work, the limitations of the protective legislation, the challenges and difficulties in enforcing rights under existing legislation, the impact of precarious work on the daily lives of vulnerable workers and some of the potential responses. It has been distributed to stakeholders for comment, as well as posted on the LCO website. Based on the LCO’s independent research, the written responses to this Paper and the Consultation Paper and pro-active consultations, the LCO will prepare recommendations for legislative and broader public policy action. The LCO will incorporate academic, community and experiential expertise in reaching its recommendations. Detailed instructions on providing input are set out in the final section of this Paper.

This Paper is not intended to be an exhaustive review, nor is it meant to preclude the advancement of potential solutions other than the ones referred to in Section VII below. The LCO looks to stakeholders and their expert knowledge to raise issues the LCO has not raised and to propose remedies that the Paper has not addressed, including responses to precarious work

and the situation of vulnerable workers in contemplation of anticipated labour market and immigration trends. The LCO invites workers engaged in precarious work who have experienced or are experiencing the conditions of “vulnerability” to tell us about your experiences and organizations who serve vulnerable workers, employers, government and academics to provide your views. Stakeholders may find the shorter version of the Paper useful. It includes specific questions on which the LCO welcomes input. It is available on the LCO’s website at [www.lco-cdo.org](http://www.lco-cdo.org).

## **EXECUTIVE SUMMARY**

### **PREFACE**

The Law Commission of Ontario's Board of Governors approved this project to consider the application of protective employment statutes to vulnerable workers in July 2008. The project emphasizes the disproportionate impact of precarious employment on diverse communities, particularly racialized men and women and women of majority communities, considers the impact of precarious work on vulnerable workers beyond their employment and has the objective of developing recommendations to ameliorate the situation of vulnerable workers, taking into account the needs of employers and the benefits to Ontario society at large.

### **I. INTRODUCTION**

Over the past twenty years, government, courts, workers' organizations, policy and research centres and academics have addressed the issues related to precarious work and vulnerable workers. The Canadian experience cannot be isolated from the phenomenon of global migration. Although many vulnerable workers are Canadian born, many others have entered Canada under federal migrant worker schemes. Canada ranks among "higher growth nations", in which there has been an increase of more than two per cent of foreign-born migrants from 1990 to 2010. The shift from so-called "standard" work to precarious work has increased with the decline of manufacturing, rapid technological advances and changes in immigration policy. The increase in this work needs to be addressed, not only in the interests of vulnerable workers, but also in the context of future labour challenges.

The situation facing vulnerable workers is reflected in their employment, but in other parts of their lives, including their health, community participation, families and integration into Ontario.

### **II. WHAT WE MEAN BY "PRECARIOUS WORK" AND "VULNERABLE WORKERS"**

Precarious work is characterized by lack of continuity, low wages, lack of benefits and possibly greater risk of injury and ill health. It is often compared to "standard" employment which is long-term with one employer in a single location with good benefits during and after the working period, increasingly subject not only to minimum statutory protections but also to greater protections through collective bargaining or individual negotiation. This norm assumed a white able-bodied heterosexual male, a primary breadwinner married to a supportive wife, who did not work for pay or was the secondary earner. The social safety net was designed to address gaps in standard employment. Precarious work has always existed alongside standard work; today, however, nearly 40% of paid work is said to exist outside the standard pattern. Appreciating who was included in the norm also helps an appreciation of who was omitted and who is more likely to be engaged in precarious work.

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. One may also think of these indicia as "life/social security" (benefits, health care access and other social factors), job security (tenure in a particular job); employment security (capacity to



move within and between different sectors); income security (during and after employment); and voice-representation and process-based security.

The major types of precarious work are self-employment, part-time (steady and intermittent) and temporary. Self-employment refers to workers who are treated as independent contractors, but whose relationship to the “contractor” is more akin to an employment relationship, and who bear the costs of employment. Temporary employment occurs through temporary agencies and federal migration schemes or may take the form of seasonal work. Flexibility may be important both to employers and workers; however, a proportion of workers who work part-time, for example, would prefer to work full-time.

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 characteristics 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).

### **III. THE LEGISLATIVE AND POLICY FRAMEWORK**

Although labour and employment law falls primarily, although not exclusively, within provincial jurisdiction, federal law and policy affect work that is “precarious” and workers who are “vulnerable”. Thus provincial capacity to address the situation of vulnerable workers must take federal law and policy (in areas such as migrant workers) into account.

A review of the development of labour and employment law in Canada and particularly in Ontario leads to consideration of domestic regimes, including the common law, minimum standards (employment standards, health and safety, compensation for illness and injury, pay equity and anti-discrimination legislation), enforcement of statutory protections and collective representation. Not only employment and labour statutes are relevant to the analysis. The *Canadian Charter of Rights and Freedoms* may have relevance for challenging the law on the basis that it disproportionately affects women and members of particular ethnic groups, for example.

### **IV. HOW THE LEGAL REGIMES AFFECT VULNERABLE WORKERS**

In some cases vulnerable workers (or forms of precarious work) are not subject to protective labour and employment provisions. More often, the law does not distinguish explicitly, but has preconditions before the protection takes effect and these preconditions may serve to exclude vulnerable workers or certain kinds of precarious work. Vulnerable workers may find enforcement difficult because of the conditions of work or for other reasons and may be reluctant to use reprisal provisions if they are penalized for filing a complaint.

## **V. WHO IS MOST AFFECTED?**

While Part II focused on the conceptual and concrete meaning of precarious work and vulnerable workers, this Part focuses on the workers themselves to identify the people most affected by this phenomenon.

## **VI. THE IMPACT OF PRECARIOUS WORK ON WORKERS' LIVES**

Precarious work affects the workers and society at large. Workers suffer ill health and have less access to extended health care. The cost of health care may be borne by society at large. Workers often do not have time or energy to spend time with family, if they have a family, form extensive personal friendships, to engage with their community or integrate into society at large. They enter old age without a private pension or savings. Society may lose the benefit of skills these workers could have provided.

## **VII. A REVIEW OF PROPOSED POLICY AND LEGAL RESPONSES**

This section sets out proposals made by academics and others to address the challenges proposed by precarious work and designed to better the situation of vulnerable workers. Proposals have included the enhancement of existing protections, the extension of protective legislation to those not currently covered or benefitting from it, enhancements in the social assistance system and improvements to enforcement processes. The LCO has not yet adopted any of these proposals.

## **VIII. CONCLUSION**

### **IX. NEXT STEPS AND HOW TO PARTICIPATE**

Stakeholders from all constituencies are invited to comment on this Paper, including but not only responding to the questions, and to advise the LCO of their interest in participating in the consultation process. See page 49 for further information.

The companion Consultation Paper can be read separately from or together with this Background Paper. It includes specific questions on which the LCO welcomes responses from workers, worker advocates, employers, representatives of government and the general public.

# Vulnerable Workers and Precarious Employment

## Background Paper<sup>1</sup>

### I. INTRODUCTION

Precarious employment has been the subject of much important policy analysis and research in recent years. In 1990, the Economic Council of Canada identified “the growth of ‘nonstandard’ work” as a social force “acting to increase the ‘segmentation’ of the labour market, with employment experiences becoming increasingly polarized into two categories -- ‘good’ jobs and ‘bad’ jobs”.<sup>2</sup> The Canadian Policy Research Network and the Law Commission of Canada generated a series of publications on vulnerable workers.<sup>3</sup> The province of Quebec also initiated a review on these matters.<sup>4</sup> More recently, there has been a proliferation of academic work on precarious employment.<sup>5</sup> Much of this work is explicitly policy oriented, multidisciplinary and highly sophisticated in its treatment of these issues.

Since the late 1980s, the Supreme Court of Canada has shown marked interest in the subject, using the language of “vulnerable workers”.<sup>6</sup> In *Dunmore*, addressing the freedom of association of rights of agricultural workers in Ontario, the Court identified the “inherent vulnerability” of workers generally *vis-à-vis* management and the “specific vulnerability” of agricultural workers.<sup>7</sup> The Ontario Ministry of Labour also employs the term “vulnerable workers” in providing information about their rights.<sup>8</sup>

The Canadian experience of vulnerable workers is not an isolated one. Other countries have also grappled with the situation of workers who for one reason or another do not benefit from the protections many other workers enjoy, even if they are legally entitled to them, and this is not always the case. Although many vulnerable workers are Canadian born, the issue cannot be separated from the phenomenon of global migration. A considerable proportion of vulnerable

workers are workers who have entered Canada (and other countries) as temporary workers, although not all “migrants” are vulnerable workers. Similarly, many vulnerable workers are immigrants who are eligible for citizenship, although not all immigrants are vulnerable workers. Other vulnerable workers live in Canada, including Ontario, without legal immigration status for a variety of reasons. A United Nations review of the growth in foreign-born migrants shows that Canada ranks among “higher growth nations”, nations in which there has been an increase of more than two per cent of foreign-born migrants from 1990 to 2010.<sup>9</sup>

The phenomenon of vulnerable workers has increased in significance over the last quarter century with the decline of manufacturing, rapid technological advances, changes in immigration policy and global migration of people and corporations. This Background Paper explores these changes which have attracted some positive responses, but require others. The future holds even more change, however, in the nature of work, the retirement of “baby boomers”<sup>10</sup> (although this situation is not uncomplicated), the “plateauing” of the entry of youth into the labour force and a decline in skilled workers, all of which affect the availability of labour.<sup>11</sup> Furthermore, “the overall participation rate is projected to drop sharply by 2031. Canada is seen as moving from a position of surplus to a deficit in labour supply”.<sup>12</sup> Not everyone agrees there will be widespread labour shortages (at least, not one resulting from an ageing population), although there may be localized shortages geographically and in certain segments of the market.<sup>13</sup> In any event, although Ontario is one of three provinces expected to be an exception with a larger labour force in 2031 than in 2005, it will nevertheless face challenges in labour force composition.<sup>14</sup> The “shortage challenge”, however, can also be an opportunity to address other problems in the labour market, including those facing vulnerable workers.

The situation facing vulnerable workers is reflected not only their work life, but also in other aspects of their lives, including their health, their participation in the community, their families and in many cases their integration into Canadian, including Ontario, society. The treatment of vulnerable workers, including workers whose skills and education levels are high but who are

unable to obtain employment commensurate with their skills and education, has ramifications for Canadian, and Ontario, society generally.

## **II. WHAT WE MEAN BY “PRECARIOUS WORK” AND “VULNERABLE WORKERS”**

### **A. Precarious Work**

#### ***1. The Meaning and Increasing Prevalence of “Precarious Work”***

The LCO’s Project examines the impact of insecurity in the labour market on Ontarians.<sup>15</sup> A variety of terms are employed to characterize labour market insecurity: the work is described as contingent, vulnerable, non-standard, atypical and precarious. Although often used in similar ways, these terms do not necessarily mean the same thing. The LCO uses the term “precarious work” to capture certain features of insecurity. Those features of insecurity are often said to include low wages, a lack of benefits, an atypical employment contract and a greater risk of illness and injury.<sup>16</sup>

The notion of “precariousness” is employed in contrast to the “standard employment relationship” which underpins the major forms of legislated employment protections. The understanding of “standard employment” developed in relation to post-World War II social and economic restructuring. Fordism, of which the automotive sector served as the paradigmatic example, although the concept applies to many manufacturing and other concepts, refers to large-scale production firms employing a large workforce who possess a standard set of skills which are utilized in an assembly-line process. Typically, these employees were located within a single worksite with little or no spatial dispersion. Within Fordist production there existed little, if any, serious legal dispute over who the actual employer was. This was true even for subsidiary or branch plant firms located in Canada but headquartered elsewhere, usually the United States. Spatial dispersion may have occurred in terms of corporate executive structure,

and perhaps with respect to lower levels of management. However, a single, known employer was the norm.

Over time and through struggle and engagement, the ideal of the standard employment relationship was transformed into concrete realities of full-time, continuous and life-long or permanent work with decent pay.<sup>17</sup> The bundle of benefits that eventually accompanied employment in this model included important social benefits and entitlements in addition to a level of earnings that contributed to the livelihood of workers, their households and the wider community.<sup>18</sup>

A key assumption was that the social safety net would provide protections for workers, and by extension for members of their household, during exceptional periods of layoff or short-term job loss.<sup>19</sup> In addition, the social safety net was meant to support Canadians “from the cradle to the grave”, even if not at the level of their employment income. The idea was not guaranteed security of livelihoods, nor was it a basic guaranteed income. Rather, the safety net was perceived to bridge the gap between periods of steady and unsteady employment for the Canadian labouring population and at the end of one’s employment life.

That said, the standard employment relationship and the accompanying safety net never applied to all workers or all forms of paid work. Agricultural workers, for instance, were excluded from the full protective coverage of standard employment for reasons related to the preservation of the family farming model and the pressures of peak harvest. Nor, fundamentally, did the standard employment model capture unpaid labour within households. This meant that, by implication, paid domestic work also was situated outside the scope of standard employment. Today, one estimate is that thirty-eight percent of paid work is performed outside the standard employment norm.<sup>20</sup>

The initial assumptions of the standard employment norm were formulated around a certain type of occupation, blue-collar manufacturing, and over time were broadened to

incorporate resource extraction such as mining and other blue-collar work, including construction. Later, the norm was extended to white-collar public sector work and spread from waged employment to corporate salaried work as well. It rested on several fundamental, if implicit, assumptions about labouring persons connected to gender (male), racialization (dominant group or white), sexuality (heteronormativity), marital status (opposite-sex marriage), ability (able-bodied) and citizenship status (Canadian). Thus, what typically is referred to as the male breadwinner norm in actuality incorporated much broader assumptions.

In sum, the standard employment relationship which emerged around World War II in Canada assumed a white, heterosexual, able-bodied male worker who, as the primary breadwinner in a household, received decent wages and benefits sufficient to support the family. Accordingly, the norm also assumed a female caregiver who performed the daily upkeep of the household, and who was dependent upon the male breadwinner for income and benefits.<sup>21</sup> This model did not contemplate a situation in which both belonged to the dominant (or market or public-oriented male “class”) or both belonged to the subordinate (domestic or private-oriented) female class. The worker was typically employed by one employer in continuous full-time employment on the employer’s premises or under its explicit supervision.

The assumptions of the standard employment norm clearly cannot, and to a large extent historically, could not be maintained. Still, gaining a solid understanding of the assumptions that grounded the standard employment norm assists in understanding the meaning of precarious work because it reveals whom the legal regimes of employment were designed to cover or protect and thus who are likely to be “left out” of these protections. This is particularly significant since today’s “employment relationship” is increasingly unlike the standard employment relationship and since “employment” does not describe the legally acknowledged relationship of some so-called (in)dependent contractors with their “contractors”. The workforce increasingly includes those who have been omitted from the protections.

Precariousness has been increasing in Canada and elsewhere since the 1970s.<sup>22</sup> The rise in precarious employment calls into question long-standing assumptions about paid work.<sup>23</sup> The detrimental effects of increasing precariousness, however, are felt not only in employment, but also in wider social relationships and in areas of people's lives other than their work.

Although the term itself is new, aspects of precarious employment have been persistent features of employment in most western economies. In its contemporary usage, the concept of precariousness captures general and specific trends in the labour market. Generally, there has been an erosion of secure forms of paid work typically associated with the standard employment relationship, discussed below. Increasingly, people are employed in part-time, temporary and own-account self-employment. This phenomenon has been observed throughout industrialized countries and throughout various labour sectors.

In Canada, these general trends have perhaps been exhibited most prominently in the automotive manufacturing sector of southwestern Ontario where the erosion of standard employment intensified in the 1990s and the 2000s. This erosion is not limited to manufacturing in core sectors, however. Other productive sectors, including service, also have experienced a comparable phenomenon. Service sector employment examples include nursing, high technology and office administrative work.

A crucial point is that the dramatic reorganization of the labour market has meant that even paid work most closely associated with the standard employment relationship now is becoming more insecure. This shift has created "the boundaryless workplace" with a different understanding of the employment relationship, one far less often based on an expectation of employment for one's working life with the same employer.<sup>24</sup> By implication, this calls into question the utility of the standard employment norm both as an ideal type on which to model legal regulatory reforms, and as a basis of comparison. For relatively well paid workers with high demand skills, the relationship has changed on both sides. Thus although work may be less secure, there are factors intended to offset the concern, such as increased training



opportunities provided by the employer.<sup>25</sup> In short, work arrangements and expectations have changed for many workers. For some workers, however, there are not reciprocal benefits to offset the non-standard characteristics of their work. These are workers who engage in work that has always been characterized by conditions of precariousness.

More specific trends have emerged within the labour market especially affecting employment considered low-skilled. A growing sense of insecurity characterizes diverse forms of employment in sectors such as agriculture, door-to-door sales, hospitality and hotel, and healthcare, particularly the support service work of cleaners, food service and clerical workers. Insecurity in these forms of paid work is not new. Paid work of a seasonal nature, for instance, represents an enduring example of chronically insecure employment.

The desire for labour flexibility serves as the leading rationale for contemporary shifts toward greater insecurity in employment. Labour flexibility is regarded as an important way in which employers maintain competitiveness in increasingly globalized consumer markets. Indeed, critics point out that, although workers have demanded greater flexibility, especially to accommodate household demands, labour flexibility overwhelmingly serves the interests of employers.<sup>26</sup>

## **2. *Measures of Precariousness***

Whereas the “good jobs/bad jobs” approach conceives of standard and non-standard employment as categories separate and distinct from each other, in the multidimensional approach employment is characterized on a continuum in which workers can be employed in more or less precarious work. This approach relates the form of employment to four key dimensions of precarious employment: earnings, social wage, regulatory protection and control.<sup>27</sup> The security dimensions of employment may also be described as “life/social security”, referring not only to negotiated and statutory benefits, but also support for family needs, health care access and other social factors; job security (or provisions relating to

termination of employment); employment security or capacity to move within and between market sectors; income security (during and post-employment) and voice representation security and process-based security to participate in decisions affecting the workplace, including remedies for violations.<sup>28</sup>

The first and perhaps leading dimension relates to level of earnings. Poorly paid workers include those earning the minimum wage and less, and also those earning above the minimum standard but below a designated level such as the defined poverty line (for instance Statistics Canada's Low Income Cut-Off or LICO), the median industrial wage, community-defined levels of fairness, a yearly earnings threshold and related factors.<sup>29</sup> Further, the calculation of income earnings is not necessarily straightforward.<sup>30</sup>

The second dimension of precariousness accounts for the non-wage component of compensation. The idea of a social wage is to encompass not just earnings, but also the level of benefits provided by the employer. Benefits include a pension, dental and extended medical coverage and life/disability insurance. A low or non-existent social wage has important implications beyond individual workers. It affects all members of a worker's household, and may influence the distribution and allocation of responsibilities and risks.

The third dimension of precariousness relates to the extent or degree of regulatory protection afforded to workers. It is concerned with the statutory protections available to workers, such as minimum employment standards, the existence of trade union coverage and the difficulties with enforcing available protections.<sup>31</sup>

Finally, the fourth dimension is the degree of control or influence within the labour process, and in the labour market more generally. Because of the difficulty in measuring control, indicators associated with the fourth dimension, especially union coverage, serve as proxies for an assessment of relative control.<sup>32</sup>

Taken together, the dimensions of precariousness produce a picture of paid work that includes low or unstable wages, a lack of benefits, weak or non-existent statutory protection and enforcement, a non-unionized work setting and little or no control within the workplace. These dimensions, in turn, must be situated within a broader social context.<sup>33</sup> For example, it is important to account for the “social location” of workers, especially their gender and “race”, as well as the occupational contexts.<sup>34</sup>

### **3. Major Types of Precarious Work**

Major forms of precarious employment include self-employment, part-time and temporary. Solo or “own-account” self-employment refers to self-employed people who do not employ workers and who do not control the risks of the production process or accumulate capital. Thus the category of own-account self-employment more closely resembles employment than entrepreneurship.<sup>35</sup> The rise in own-account self employment, noted below, stems from both the increasing use of subcontracting, such as where an employer inserts an intermediary between itself and the worker, and the misclassification of employees to sidestep employment, tax and other legal obligations.<sup>36</sup> Subcontracting in particular transforms employment into a triangular relationship.

Part-time employment, in capturing both temporary and permanent employment, overlaps with temporary employment, discussed below. The distinction between part-time and full-time employment tends to be drawn by hours of work per week. Although a standard definition of what constitutes part-time work does not exist, it is evident that temporary part-time employment represents the most precarious form along multiple dimensions.<sup>37</sup>

Temporary or non-permanent employment also accounts for part of the rise of precarious employment. Temporary employment stems from the growth in temporary help agencies and staffing firms which have risen dramatically since the 1990s. It also encompasses the special forms of employment stemming from temporary labour migration schemes and from

immigration policies generally, including certain work performed by “non-status” workers.<sup>38</sup> A distinction should be noted between temporary long-term contracts and short-term, perhaps casual, work and between temporary *work* (such as a special project contract) and *workers* hired temporarily for work that is on-going. At the same time, it may be less the duration of the work than the conditions attached to it: thus workers in the federal foreign worker program may come to Canada for two years, longer than many temporary workers have on-going work, but their status is determined by the program and they are in most cases unable to apply for permanent residence (with the exception of live-in caregivers and immigrants under some high skilled worker programs).

Temporary employment permits employers faced with highly competitive or fluctuating markets to avoid certain obligations found in employment statutes that apply to longer-term or “permanent” employees.<sup>39</sup> For example, if an employer uses a temporary employment agency, it will not be required to return an injured worker to the job.

At the same time, temporary employment may provide workers with important benefits. It is seen as a viable way for newcomers to gain Canadian work experience,<sup>40</sup> for migrants to secure employment and much-needed wages more difficult to secure in sending countries, for older workers to maintain continuity in employment and for younger workers to secure experience in the labour market.

Temporary labour migration schemes are a prominent example of temporary employment. Unlike other temporary workers, migrant workers do not only hold jobs temporarily, they also hold a temporary status in Canada. The development of migrant worker schemes in Canada dates back to Confederation. Contemporary schemes emerged early in the twentieth century. A short description of various federal programs is helpful in appreciating the diversity in conditions facing foreign workers.

Since 1910, Canada has developed various live-in nanny or caregiver recruitment schemes to entice migrant workers (overwhelmingly female) from the Caribbean, and now predominantly from the Philippines. In its current incarnation, the federal Live-In Caregiver Program (LCP) permits caregivers to serve as domestic workers in Canadian households for two years with the option to extend their stay and, unusual for foreign worker programs, to apply for permanent resident status.<sup>41</sup>

A farm worker recruitment scheme, the federal Seasonal Agricultural Worker Program (SAWP), began in 1966 with the use of workers brought from Jamaica. The SAWP expanded to include workers from most other countries within the Commonwealth Caribbean and, today, particularly Mexico. Working in Canada for up to eight months each year, and neither permitted to extend their stay nor apply for permanent residence while in the country, this mostly male workforce harvests tobacco and other horticulture, fruits and vegetables most notably in southwestern Ontario.<sup>42</sup>

In 2003, a new federal temporary migration scheme, the Temporary Foreign Worker Program (TFWP), was developed to recruit workers for diverse economic sectors such as agriculture, construction, hospitality and meat packing. Workers from Guatemala, Thailand and elsewhere work in Canada for two year stints, but are not permitted to stay after the expiration of their work visas.<sup>43</sup> As of April 2011, new regulations provide that workers may participate in this program for periods totaling no more than four years at which point they must wait another four years before being eligible for the program again.<sup>44</sup> The purpose of the restriction is to make it clear that this is a temporary program and is not intended to be a path to permanent residence.

## **B. The Meaning of “Vulnerable Worker”**

### **1. Economic Characteristics**

The rise in precariousness in employment relationships reflects the shifting of business costs, including work-related health and other risks, more solidly onto workers generally and more specifically onto workers who have the least protection or who wield little power to object.<sup>45</sup> Agricultural workers provide both an historical and ongoing example of vulnerable employees. As the Supreme Court of Canada noted in *Dunmore*, the “[d]istinguishing 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; ... agricultural workers are ‘poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility’”.<sup>46</sup> Arthurs states that in the federal context “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 characteristics are markers that help to identify them as ‘vulnerable’”.<sup>47</sup>

Although there is an in-built vulnerability of people in employment, this Paper employs the concept of vulnerable employees to refer to people most affected by the multiple dimensions of precarious employment (low pay, low or no benefits, lack of protective standards or difficulty accessing protective standards and lack of control), and whose vulnerability is underlined by their “social location”, discussed below. This includes workers who are excluded from a full complement of social protections and entitlements and who, because they wield very little power in the labour market, struggle to enforce existing protections and entitlements. The relative lack of power also inhibits the efforts of these workers to broaden or extend regulatory protections with a view to improving conditions within their workplaces, and gaining control over their working lives.

## **2. The Relevance of “Social Location”**

Workers engaged in precarious work or who may be described as “vulnerable” may be found among a full range of ethnic groups and of all national origins. Both men and women perform precarious work. Workers whose employment illustrated “standard” employment may find themselves unemployed with not easily transferable skills or at an age when finding employment is more difficult. It is nevertheless important to make the link between precarious employment and the “social location” of those who perform it, characterized as the interaction between political and economic conditions and social relations.<sup>48</sup> Social location includes gender, “race”, immigrant status, age, ability and other sources of marginalization.<sup>49</sup> Although all interactions between precarious employment and social location are important, this Project is most concerned with how precariousness intersects with gender and the process of racialization, as informed by immigration status.<sup>50</sup>

One reason for this focus is that the LCO has undertaken other projects which focus on other “cohorts”, particularly persons with disabilities and older adults.<sup>51</sup> Two prominent examples of the interplay between paid work and disability are employment accommodation and income support and security.<sup>52</sup> The Ontario government has programs designed to assist persons living with disabilities to obtain employment and to encourage employers to hire persons with disabilities.<sup>53</sup> Older workers may not want or are less likely to find “regular” employment, but are reliant on contract work, part-time work or employment through temporary help agencies. With the decline of mandatory retirement, workers may be subject to greater oversight as they age. Some government initiatives recognize the increased vulnerability of workers as they get older.<sup>54</sup> Because the LCO has initiated separate projects aimed at developing a framework for the law as it relates to persons with disabilities and a framework for the law as it affects older adults, this Paper does not explicitly address the distinctive issues facing persons with disabilities and older adults.<sup>55</sup>

The measure of the specific trends of precarious employment can occur with an emphasis on the exclusion of certain people, certain productive activities, or both. The inclusion and exclusion from regulatory protection of certain people is not coincidental but is in fact the outcome of ongoing social processes. This Paper emphasizes those processes through which social significance is assigned to human characteristics of identity. Understanding these processes helps to explain the disproportionate impact of precarious employment on certain people and communities compared to others. Because these processes are central to the differential impacts of precarious employment, the need for conceptual clarity is vitally important.

*a) Gender*

Although women and men both experience precarious employment, especially among younger segments of the labour force, women are more deeply concentrated in the most precarious forms.<sup>56</sup> Gender inequalities in employment have persisted as the formal participation of women in the labour force has grown over the past few decades. A key explanation for the persistence of these gender inequalities is unacknowledged linkages between households and the labour market. Although there have been changes in recent years, there remain real disparities between women and men in responsibilities and duties within families or households.<sup>57</sup>

The disproportionate burden borne by women within households is reproduced within the labour market, translating into disparities in employment relations. In one sense those disparities stem from the construction of many jobs or occupations in gendered ways. The “gendering of jobs” is a term used to identify “the downgrading of jobs to resemble work associated with women and other marginalized groups assumed to have access to alternative sources of subsistence beyond the wage”.<sup>58</sup> Most commonly, these include temporary, seasonal and part-time employment. As the gendered division of labour reinforces a gendered construction of labour and occupations in the labour market, the outcome is that women are



concentrated in care work, such as home care and child care, and in service occupations, such as clerical and retail.

On this formulation, the gendering of jobs portrays sexual differences and identity as fixed.<sup>59</sup> In this Paper, gender is understood as, to some extent, a fixed identity; but more broadly and profoundly, as a social relation. The impact of sexual difference on the employment relationship remains important to this understanding.<sup>60</sup> In this respect, the gendering of jobs reveals the assumptions embedded within the standard employment norm. Of particular note is that, regardless of the reality of participation of men and women in the workplace today, the standard employment norm rests on the assumption of a male breadwinner and a female caregiver in which women access wages and benefits through the employment of a male partner. However, the concept of gendering of jobs is broadened to capture and reflect enduring processes through which gender relations intersect with other social relations – namely racialization and immigration – to play out in the context of employment.

#### *b) Racialization*

Generally speaking, the concept of racialization refers to an ongoing and dynamic process whereby physical or observable human characteristics are assigned social significance for the purposes of categorization and differentiation.<sup>61</sup> Utilizing the notion of “race”,<sup>62</sup> categories of group identity constantly are being re-made through implicit and explicit social processes, practices and policies.<sup>63</sup>

There is divergence on the meaning of racialization which is reflected in both popular and academic discourses. The typical but not exclusive popular usage of the concept of racialization refers, either implicitly or explicitly, to social processes affecting non-white people or people not perceived as members of dominant groups. A competing usage of the term racialization assumes a broader application. As one scholar puts it, “[r]acialization embodies all subjects, not

only those identified as racially ‘other’, including members of dominant groups who may be treated as the ‘unraced’ standard against which others are judged”.<sup>64</sup>

Although this Paper continues to use the term racialization in the way it is most commonly employed in popular and academic discourse, it is more precise, analytically speaking, to think of racialization as a process related to inclusion and exclusion within dominant and non-dominant groups. Further, the phrases “racialized as dominant” and “racialized as non-dominant” capture a key aspect of the continual and persistent social process of constructing group identities and in turn the use of group identity construction to slot people into categories which are used to determine relative worth in the labour market.

What are the human characteristics to which social significance is being assigned, and are these captured within the meaning of racialization? Racialization is thought to occur in response to observable or biochemical characteristics, most prominently skin colour, and to socio-cultural characteristics such as religion or language (referred to separately as “ethnicization”). The process of assigning social significance to human traits is multi-faceted and complex, and, although the use of dual concepts of racialization and ethnicization may make good analytical sense, in practice it is quite difficult to uphold these distinctions. The existing official empirical data on employment in Canada do not easily break down into discrete categories of social significance. Neither do the experiences of workers in the labour market neatly break down in this way. People may sense they are being differentiated or categorized for reasons connected to their personal characteristics but because it can be difficult to decipher which specific characteristics are in question, they may classify it in different ways.

That said, the allocation of finite resources such as job and post-secondary educational opportunities, and the experiences of people within employment and educational institutions, reflect the deleterious impact of these socially exclusionary processes. Even if the conceptual distinctions of racialization and ethnicization are difficult to sustain, it still is necessary to develop conceptual tools which help to explain the disproportionate impact of precarious

employment on people who, for varied reasons, are not perceived to fit within dominant groups. The LCO, therefore, employs the concept of racialization to capture both observable and socio-cultural traits.

Racialized communities are disproportionately engaged in diverse forms of precarious employment. This concurs with empirical data which show immigrants groups are more likely to live in poverty in Ontario and throughout Canada.<sup>65</sup> Further, racialization is connected to the historical and ongoing project of nation-building.<sup>66</sup> This is evident in Canada's treatment of Indigenous peoples and in its immigration policies. Although racialization is said to have considerable impact on the experiences of many Aboriginal peoples, a distinction typically is drawn between Aboriginal peoples and other racialized communities and, indeed, there are those who question whether "race" (particularly conflated as it is with "minority") is an appropriate categorization for Aboriginal or First Nations persons.<sup>67</sup> The basis of that distinction rests with the historical and to some extent divergent experiences of Aboriginal communities in Canada. This distinction serves as the most prominent rationale for distinguishing research and analysis on non-Aboriginal people and non-Aboriginal persons. Yet this approach may be criticized as reinforcing or re-inscribing difference and exclusion within the labouring population of Canada. There is a pressing need to engage the specific historical experience of Aboriginal peoples within the context of the legal regulation of employment and community development in Canada. The LCO seeks specific feedback on meaningful ways to incorporate the situation of Aboriginal workers into its project on precarious employment and into its future initiatives.

### *c) Immigration Status*

Racialization also has an important relationship to the global phenomenon of migration and specifically to the continual flows of people into Canada. Moreover, factors influencing the social location of workers, including immigrant status, increasingly have come to shape the employment experiences of new immigrant or newcomer workers and temporary migrant workers to Canada. Immigration policies explicitly affect the precariousness of employment and the vulnerability of workers, including the sheer number of vulnerable employees in the labour force. In the post-World War Two period, and especially after significant policy shifts in the 1960s, Canada's immigration policies became, explicitly at least, far less racially driven. Whereas official migration policy prior to 1962 made explicit reference to preferred and non-preferred immigrant source countries, which corresponded with official and unofficial notions of Canada as a white British settler society, by the late 1960s policy relied on a point system to facilitate the migration of mostly skilled people. In addition, temporary migration schemes, such as the precursors to the Live-In Caregiver program which pre-dated the 1960s, grew in importance. In 2008, some 66,000 temporary workers entered Ontario and by the end of 2008, over 91,000 foreign workers lived in Ontario.<sup>68</sup>

"Immigration" for the purpose of precarious work includes not only the various categories of permanent and temporary immigration status, but also the category of non-status residents. Non-status refers to people who, for a variety of reasons, lack the official legal status that would allow them to live and work in Canada. Non-status can occur when a person's refugee claim has been rejected, when a student's or visitor's visa or work permit expires or alternatively when a person is recruited to work in Canada under false pretense, such as when a foreign recruiter erroneously claims to possess a valid permit for the worker, or when a person does not possess official identity documents. It can also occur when a sponsored immigrant is abandoned by or leaves (because of abuse, for example) the sponsor. The diversity of persons without official immigration status is illustrated in microcosm by the Brazilian community: they

include “men and women, aged 22 to 60, coming from over 15 Brazilian states, with an education ranging from high school to graduate studies, and who have lived in Canada from 1 year to over 16 years”.<sup>69</sup>

Taken together, gender, racialization and immigrant status function to shape employment and wider social relations. The stubborn persistence of these inequalities marks relations within the labour market, households and communities. Thus, as one prominent scholar concludes, there is a growing dynamic of “racialized gendering” in paid work generally and within precarious employment specifically.<sup>70</sup> For newcomer, temporary migrant, and non-status workers, immigration status intersects with gender and the process of racialization to deepen labour market insecurity.

### **III. THE LEGISLATIVE AND POLICY FRAMEWORK**

#### **A. Constitutional Jurisdiction**

In the Canadian system of complex federalism, the regulation of employment mostly falls under provincial jurisdiction over “property and civil rights”.<sup>71</sup> Nevertheless, there are outstanding jurisdictional questions and challenges for employment regulation and policy. For example, any consideration of Ontario’s capacity to address issues of precarious employment must consider the impact of federal policies and programs, such as those on temporary migrant workers, on the authority of the Ontario government to act. The satisfactory resolution of these jurisdictional conflicts over policy matters lies at the heart of addressing the problems of precarious employment.

It is therefore crucial that the federal and provincial levels work together in addressing the situation for workers who enter Canada under the various programs. As with other provinces, Ontario has entered into arrangements with Canada with respect to temporary foreign

workers. Ontario signed the first Canada-provincial immigration agreement in November 2005 with the goal of a transfer of federal monies to the province to assist with the integration of newcomers. A subsequent agreement specifically covering temporary foreign workers provides that “Ontario may recommend TFWs whose presence in Ontario will promote economic development priorities in Ontario”, including business or industrial investments and competitiveness and scientific and the commercialization of research, in other words highly skilled and/or financially well-off immigrants.<sup>72</sup> In addition, Canada, Ontario and Toronto have entered into a Memorandum of Understanding with the goal of “improving outcomes for immigrants through several areas of interest to all three governments, including citizenship and civic engagement, and facilitating access to employment, services, and educational and training opportunities”.<sup>73</sup> The MOU notes that in the previous five years, “up to 50% of all immigrants to Canada have arrived in the Toronto area alone each year”, a proportion that may be decreasing as more immigrants settle elsewhere in Canada.

Although federal immigration policies may be highly influential in creating the conditions or extent of “precarious work” and increasing the numbers of vulnerable workers, it should be noted that the LCO’s mandate is in relation to provincial law and policy. It can, however, consider the extent to which federal law and policy affect the province’s capacity to act and the ways in which the federal and provincial jurisdictions may work together to address the situation of vulnerable workers.

It should also be noted that the *Canadian Charter of Rights and Freedoms*<sup>74</sup> may have relevance, not only in regard to exclusions from collective bargaining, but also to differential treatment by or effect of minimal employment standards, for example, where the workers involved are disproportionately women or of particular ethnic, national or racialized groups, or some combination thereof.

## **B. International Law**

This Background Paper will not consider the application of international law, but an analysis of international law will form part of the interim report with recommendations to be prepared following the consultations and further research in this project. While Canada is not a signatory to all international conventions that address the situation of workers, these conventions do provide a standard against which the treatment of vulnerable workers may be considered. One example is the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, to which Canada is not a signatory.<sup>75</sup> The International Labour Organization has enacted eight fundamental conventions that address the rights of workers,<sup>76</sup> of which Canada has ratified five.<sup>77</sup> The 1998 ILO Declaration on Fundamental Principles and Rights at Work provides that all ILO members have an obligation “to respect, to promote and to realize...the principles concerning the fundamental rights which are the subject of those Conventions” even if they have not ratified them.<sup>78</sup> Among the categories of rights are freedom of association and the effective recognition of the right to collective bargaining and the elimination of discrimination in respect of employment and occupation.

## **C. Domestic Regimes Governing Employment and Labour Relations**

### ***1. Historical Development***

In North America, legal practitioners, scholars and others typically distinguish between “employment law” and “labour law”, with employment law referring to relations between employers and individual employees and labour law referring to the relations between employers and trade unions. Specifically, labour law addresses the circumstances leading to certification of a union as sole representative of a defined set of employees and the terms and conditions of employment under a collective agreement between the employer and the union.<sup>79</sup> Thus the employment law-labour law distinction is often thought to produce distinct sets of legal rules of employment for non-unionized and unionized work settings, respectively.

However, a more accurate understanding is that employment law statutes apply to both non-unionized and unionized employees, although in some cases, such as for minimum standards, they may have greater applicability to non-unionized employees than to those in unionized work settings. Taken together, these legal regimes of employment comprise a complex area with many applicable and interdependent statutes and an intricate regulatory framework.

A focus on precarious employment requires analysis that crosses the orthodox non-unionized/unionized workplace distinction. It also requires analytical engagement at various levels including those of the job, person, household and community.<sup>80</sup> It is important not to regard the discussion of the legal regulation of the labour market as one divorced from the real or material circumstances of people. Relations of employment are of central importance to individual identity, the functioning of households and social and community life.

The common law contract of employment, the cornerstone of the standard employment norm, was codified in Ontario in the *Master and Servant Act* of 1847.<sup>81</sup> In regulating the exchange of wages for labour power, the employment contract is premised on a consensual or voluntary agreement between formally equal and freely bargaining parties. It establishes mutual commitments and obligations enforceable through common law courts. In contrast, the most pressing criticism of the contract of employment, well established within labour market policy, is that an inequality of bargaining power exists between the contracting parties.<sup>82</sup> By virtue of the dominant position held by employers, and the related asymmetrical flow of information within the employment relationship, most employees are at a disadvantage in the contractual bargaining process. This bargaining power inequality is understood to exist as a general proposition covering most employment relationships,<sup>83</sup> but is most evident where the terms of a contract are unreasonably one-sided or unconscionable.<sup>84</sup>

The inadequacies of the common law employment contract led to the enactment of statutory protections to guard against employer abuses. For example, in an early statutory intervention, Ontario's mid-nineteenth century master and servant legislation included



provisions for wage recovery claims against employers. These claims tended to lead to awards of damages with no guarantee of payment in contrast with more severe penalties of fines and imprisonment for employees found in breach of contract.<sup>85</sup>

The province's first explicit minimum standards employment statute emerged nearly four decades after the initial development of standards. The *Ontario Factories Act*, enacted in 1884, established minimum age and maximum hours of work for the employment of children and women in factories.<sup>86</sup> Other standards followed<sup>87</sup> and throughout the twentieth century, particularly during the decades following the first comprehensive employment standards legislation, additional statutory protections were added to address several important aspects of working conditions, such as workplace health and safety, discrimination in employment, and a particular form of discrimination, equal pay for work of equal value. For example, the precursor to the *Workplace Safety and Insurance Act*, introduced in 1914, structured compensation and rehabilitation for work-related injuries and illnesses.<sup>88</sup>

A further series of statutory interventions in the area of labour relations occurred to offset the countervailing power of employers. Over time, and through often bitter contestation and negotiation, a specific legal regime termed "industrial pluralism" emerged.<sup>89</sup> This regime incorporated freedom of association in the form of collective bargaining into a formally acceptable dispute resolution mechanism in the workplace. The trade union was now embedded as a legitimate institution within labour relations and, in exchange, stringent obligations were imposed on union officials to ensure the responsible actions of the rank and file. Within this context an associated model of collective worker organization and representation, industrial unionism, also emerged.<sup>90</sup> The model of industrial unionism was grounded in collective organization of workers in an industry, as opposed to skill or occupational, basis.

The legal regime of industrial pluralism is said to have marked an historic compromise within labour relations.<sup>91</sup> That compromise has translated into key features reflected in the

current Ontario *Labour Relations Act, 1995* (LRA, 1995):<sup>92</sup> the requirement that an employer recognize and bargain in good faith with a union certified under the Act on the basis of majority support; the requirement that an employer deduct union dues from all employees within a bargaining unit and remit those dues to the union;<sup>93</sup> limitations on strikes and lockouts; and the implementation of an internal grievance process.

Variations on this model have since occurred in, for instance, the construction sector and the public service. Generally speaking, however, these have not strayed far from this basic legal structure. As more or less the only model of unionization on offer, industrial unionism proved an all or nothing proposition. The legislation thus channels worker collective organization and representation into a certain, predictable form. What is essential to emphasize is that, just as the standard employment relationship did not apply universally to all workers, most workers have not benefitted from collective bargaining rights. Even at its peak, more than fifty percent of Canada's labouring population fell outside the regime of industrial pluralism.<sup>94</sup>

To recap, the post-war period saw increased access to minimum employment standards, compensation for certain industrial accidents and occupational diseases and the development of a formal collective bargaining regime. Of considerable significance in considering remedies to the situation of vulnerable workers, is the on-going evolution of protective and regulatory labour and employment standards to reflect changing circumstances and societal expectations.

## **2. Contemporary Legislative Regimes**

The current regulation of employment is composed of three elements: the common law contract of employment, statutory minimum standards and statutorily-enacted collective bargaining. An overview of the existing structure of employment law in the province, including the recent statutory amendments, is necessary to appreciate the extent to which the current legal framework fails to address precarious employment and the extent to which it may be able to respond to future changes in the labour market or workforce.

*a) Common Law Contract of Employment*

Under the common law, there is a reliance on civil litigation to enforce the contract of employment. Employees who wield considerable control within the workplace, for example, due to specialized expertise in high demand in the labour market, may have the opportunity to pursue litigation or even negotiation. For most other workers, enforcement through common law courts is cost prohibitive. The relatively high economic costs of pursuing judicial enforcement, in addition to other “access to justice” limitations, tend to preclude vulnerable employees.

Further, the common law contract of employment puts workers in an inherent position of insecurity. This is most evident in the common law understanding of dismissal within the employment relationship. The legal issue surrounding dismissal is whether an employer owes obligations in the form of reasonable notice or pay in lieu of notice.<sup>95</sup> The common law does not provide a dismissed employee with the remedy of reinstatement. With respect to precarious employment, there have been few, if any, relevant innovations in the common law interpretation of the contract of employment.

*b) Minimum Standards*

By imposing minimum standards on workplaces, these statutory protections function to construct a floor of rights to solidify the bargain between the parties in the employment relationship. In this way, employment statutes contain important protective elements in the form of entitlements and obligations.

**Employment Standards**

The current Ontario *Employment Standards Act, 2000* (“ESA, 2000”) establishes employee entitlements to minimum wage rates, the payment of wages, overtime pay, vacation pay,

statutory holidays and maternity, parental and emergency leave protections.<sup>96</sup> The 2000 Act reflects a significant overhaul of the previous statute, most notably in the areas of hours of work and anti-reprisal provisions.

Hours of work are an important aspect of precarious employment. While some workers cannot get enough hours at any one job, and are forced to patch together a living by holding multiple jobs, other workers are obliged to work longer days and more hours in a week than they would otherwise choose. Limited access to leaves is another important aspect of precariousness. For example, the ESA, 2000 provision for a ten-day unpaid emergency leave in situations of family emergencies and personal illness is available only to those employed in workplaces with fifty or more employees.<sup>97</sup>

The ESA, 2000 has been strengthened with respect to temporary agency work.<sup>98</sup> A temporary help agency under the ESA, 2000 generally had been deemed to be the employer of persons it sends to client businesses; however, section 74.3 of the ESA, 2000 now explicitly provides that the agency is the employer. Temporary agency employees are also eligible for new protections. The Act prohibits temporary help agencies from charging fees to workers for the completion of job preparation tasks such as writing resumés and imposes a requirement on agencies to provide employees with information about their new rights under the ESA, 2000. The Act also ensures temporary help agency workers are not prevented from accessing permanent jobs when employers want to hire them from agencies and guarantees that they are provided with information about their job assignments, such as pay schedules and job descriptions. These workers are now entitled to termination and severance pay, as well as holiday pay (a previous change under the Employment Standards Regulations).

The Ontario government has also enacted legislation to provide protections to live-in caregivers with respect to their employers and recruitment agencies and potentially to other foreign workers.<sup>99</sup> Inspectors will target employers to enforce these laws.<sup>100</sup>

## **Health and Safety Protections**

The Ontario *Occupational Health and Safety Act* (“OHS”) <sup>101</sup> emphasizes prevention of workplace accidents, injuries and diseases. Adopting an approach termed the “internal responsibility system”, the OHS holds all parties in the workplace jointly responsible for ensuring health and safety. Workers receive the right to participate in the resolution of health and safety issues, either through a health and safety representative or a committee, depending on the number of employees beyond five. Workers are permitted the right to refuse work they deem unsafe or dangerous. Workers also have the right to know about potential hazards to which they may be exposed.

In June 2006, the Ontario government extended the OHS to include coverage for paid farm workers in specified types of provincial farming operations, although not all the regulations under the statute apply. <sup>102</sup> However, the OHS does not apply to workers performing work in a private residence or lands connected to it. <sup>103</sup>

## **Compensation for Illness and Injury**

The Ontario *Workplace Safety and Insurance Act, 1997* (“WSIA, 1997”) <sup>104</sup> regulates provision of compensation and rehabilitation for work-related injuries and illnesses, through a no-fault insurance scheme paid for by employers, based on a system of industrial classification that accounts for rates of injury and risks specific to the industry. The Workers Safety and Insurance Board (“WSIB”) administers the workers’ compensation system, adjudicating compensation claims, paying benefits and overseeing rehabilitation and re-employment. WSIA, 1997 imposes a requirement on an employer to report to the WSIB immediately following a work-related injury or illness.

While most workers in the province receive automatic protection under the statute, certain workers, such as independent contractors, do not. Independent contractors may opt into the scheme but they must cover their own premiums.

While the statistics relating to lost time injuries and non-lost time injuries allowed by the Workplace Safety and Insurance Board (the statistics are released jointly by the Ministry of Labour and the WSIB) have gone up and down since 1999, there has been a decrease since 1999 overall.<sup>105</sup>

### **Pay Equity**

Striving to “redress systemic gender discrimination in compensation”, the *Pay Equity Act* (“PEA”) obligates public sector employers and private sector employers with more than ten employees to provide equal pay for work performed by employees in female dominated job classes of equal value to work performed by persons in male dominated job classes.<sup>106</sup> The actual extent of the obligation depends on the size of the employer. The PEA provides a complaint mechanism for individual employees, group of employees or their bargaining agent, if any, with respect to the implementation of the plan or that changed circumstances make the plan inappropriate.<sup>107</sup>

The idea of pay equity does not attempt to address why certain jobs are male or female dominated in the first place, including the underlying stereotypes and social relations, such as the de-valuing of unpaid domestic work, and the fact that much of female-dominated work is in the nurturing or support occupations, considered to rely on “natural” female qualities.

### **Prohibition on Discrimination in Employment**

The Ontario *Human Rights Code* (“HRC”) prohibits discrimination in employment along fifteen grounds, including race, colour, place of origin, ethnic origin, citizenship and sex.<sup>108</sup> The prohibition applies to all aspects of employment from recruitment to termination. The Code also imposes on employers a duty to accommodate workers with a disability to the point of undue hardship.<sup>109</sup>

### c) *Approaches to Enforcement*

Enforcement forms a key aspect of the statutory floor of rights. Most employment statutes in Ontario adopt approaches to enforcement driven by individual employee complaints, although certain statutes go beyond the complaints-based approach to provide additional ways to trigger enforcement.

The ESA, 2000's complaints-based approach is administered through the Employment Standards Branch of the Ministry of Labour. The process is initiated when an employee files a complaint against an employer alleging a violation of one or more of the standards set out in the statute. Once a complaint is filed, an Employment Standards Officer is charged with investigation and adjudication of relevant disputes. With respect to proactive enforcement, Ministry of Labour officials initiate targeted workplace inspections, especially of high-risk sectors and repeat violators.<sup>110</sup> Between 2003 and 2007, individual complaints investigations averaged over 15,000 per fiscal year.<sup>111</sup> In 2007-2008 and 2008-2009, complaint-driven investigations rose to 18,533 and 21,304 respectively. In contrast, targeted inspections between 2003 and 2009 ranged from a low of 151 (the 2003-2004 fiscal year) to a high of 2,713 (the 2006-2007 fiscal year), with 2,135 in 2008-2009. The top reason for complaints and for violations resulting from the targeted inspections in 2007-2008 was unpaid wages.<sup>112</sup> In 2008, the Ministry prosecuted 480 persons, including corporations, for offences under the ESA, 2000. This had increased from five in 2003 and reflected a steady increase except for 2007.<sup>113</sup> The Employment Standards Branch also began an employer education program in April 2009 to advise employers about their obligations under the ESA, 2000<sup>114</sup> and in August 2010 established an Employment Standards Task Force to deal with the backlog of employment standards complaints.<sup>115</sup>

Certain employment statutes use proactive enforcement measures more explicitly. The *Pay Equity Act* combines a complaints-based approach with a proactive approach, imposing obligations on medium and large employers to redress discrimination in compensation even

before an employee files a complaint.<sup>116</sup> Under the OHSA, the Ministry of Labour has approximately 430 full time health and safety inspectors, double the number in 2005, and has announced that “[s]ince the launch of the Safe at Work Ontario in 2008, ministry inspectors have conducted over 130,000 proactive field visits, issued more than 200,000 compliance orders and conducted 18 proactive enforcement blitzes.”<sup>117</sup> “Blitzes” focus on different industries and particular hazards.<sup>118</sup>

The OHSA’s internal responsibility system incorporates elements of proactive enforcement. Grounded in the idea of individual responsibility, the internal responsibility system requires workers, supervisors and the employer to anticipate and address all foreseeable health and safety issues in a workplace, including the recently added harassment and violence in the workplace provisions.<sup>119</sup> In addition, the OHSA devotes attention to proactive inspections to supplement the largely complaints-driven right of refusal of unsafe work.

One of the most “notorious” instances of recent health and safety-related accidents occurred in December 2009 when four migrant workers were killed and one seriously injured when they fell from scaffolding as they were working on the balcony of an apartment building. In May 2010, the Ontario government announced an increased review of construction sites and enforcement of the health and safety requirements on construction sites.<sup>120</sup> In August 2010, the Ministry of Labour pressed charges under the OHSA against two companies and against individuals<sup>121</sup> and criminal charges were laid in October 2010.<sup>122</sup>

In the context of anti-discrimination, the regime largely is complaints based. The new Human Rights Tribunal of Ontario receives and decides all relevant complaints, while the newly created Human Rights Legal Support Centre provides legal advice, support or representation for individual complainants, including temporary and casual workers.<sup>123</sup> However, since the changes introduced in 2008, the province’s human rights regime now also includes an active educational component.<sup>124</sup> The Human Rights Commission develops public education and other proactive measures such as policy research, analysis and development.



Complaints-based enforcement of minimum standards can only be effective for workers if they do not fear reprisals from employers. There are specific provisions which protect workers against reprisals for exercising statutory rights contained in all of these statutes. For instance, the current ESA, 2000 incorporates a robust anti-reprisal provision to prohibit employers from intimidating, dismissing or imposing other penalties on employees for inquiring about or exercising rights under the statute.<sup>125</sup> Anti-reprisal provisions also exist in other statutes (see section 50 of the OHSA, for example). Despite the existence of these provisions, however, workers continue to face reprisals.<sup>126</sup> The threat of reprisals affects workers more broadly than those in precarious employment and yet the ESA, 2000's anti-reprisal provision rarely has been used since it was introduced in 2001.<sup>127</sup>

### **3. *Collective Bargaining***

The mechanisms of collective bargaining impose a general obligation on employers to recognize a union that has achieved certification. And while a duty to bargain in good faith exists, the substance of the bargain is open to the parties to determine within the boundaries of the statutory regime, with the exception of first contract arbitration.<sup>128</sup>

A key dimension of precarious employment is the lack of control within the labour process. A key indicator of this lack of control is union coverage. With unionization rates in Ontario hovering below thirty percent, most workers do not receive the protection of statutory collective bargaining.<sup>129</sup> Further, the revision of the trade union certification process in 1995 perhaps has made it more difficult for workers in precarious employment to organize and bargain collectively. Card-check certification, a process in which it was sufficient that fifty plus one percent of workers within a workplace had signed union membership cards to certify the union to receive formal coverage under the LRA, 1995, introduced in 1950, was ended in 1995. This was changed to require that at least forty percent of prospective union members sign cards and then, after a period of time, the holding of a supervised vote in which fifty plus one percent of workers had to agree to support the union. Although card-based certification was restored in

construction in 2005, workers covered by the *Labour Relations Act, 1995* continue to face the possibility of intimidation and coercion by employers in the certification process.<sup>130</sup>

#### **4. Other Regimes**

This section of the Paper has reviewed the legal framework governing paid work in Ontario. That said, other provincial and federal laws influence precarious employment. For example, social assistance benefits available through the provincial welfare system and, similarly, employment insurance benefits available federally, are key supports for workers. Further, as discussed briefly in this Background Paper, federal immigration law and policies play a significant role in shaping precarious employment for temporary migrant workers, new immigrant workers and non-status workers. In these respects, the analysis is not a comprehensive review of all sources of law and policy that influence precarious employment, but is intended to provide the backdrop for Ontario law.

## **IV. THE LEGAL REGIMES AND FORMS OF PRECARIOUS WORK**

### **A. Specific Forms of Precarious Employment**

Ontario's legal framework does not impose limits on the use of precarious forms of employment. Indeed, the framework provides considerable opportunity for labour flexibility. As discussed above, the legal regimes of employment have differential impacts on workers according to the form of employment, specifically temporary employment, own-account self-employment and part-time employment.

## **1. Temporary Employment**

Temporary employment constitutes 12.5% of all employment in Canada<sup>131</sup> and there are about 700,000 temporary jobs in Ontario.<sup>132</sup> According to one account, workers engaged in temporary employment in clerical, manufacturing and high technology sectors receive around half the pay of permanent employees in those sectors. The percentage of temporary workers who have access to benefits is low, with less than ten percent receiving extended health care; that number drops to two percent for dental benefits. Moreover, temporary employment has one of the higher rates of workplace injury.<sup>133</sup>

Temporary employment can be broken down into different types including contract or term, agency, seasonal and casual or “on-call” employment.<sup>134</sup> The level of precariousness varies across these types and, therefore, the impact of temporary employment is not uniform. Temporary forms of employment associated with Canada’s temporary migration schemes may also be included. These include the Seasonal Agricultural Worker Program, the Temporary Foreign Worker Program and the Live-In Caregiver Program (even though the last is a vehicle for obtaining permanent residency, it is based on predetermined work arrangements). There have been increases in all these programs. For example, in 1974, the first year of the program, 264 workers came to Canada on the SAWP program; by 2009, the number of workers entering Canada under SAWP was 17,000, with the majority working in Quebec and Ontario.<sup>135</sup> The prominence of temporary labour migration to Canada has risen over the past few years: between 2004 and 2008, the number of temporary foreign workers entering Canada increased over 75%.<sup>136</sup>

Many temporary workers receive their employment through temporary help agencies. Increasingly, businesses are turning to these agencies to fulfill their human resource needs. In the 1990s some 1,300 temporary staffing and employment agencies were in operation in Canada generating revenues of \$1.5 billion. By 2004, the number of agencies surpassed 4,200 with revenues in excess of \$6 billion, sixty percent of which was generated in Ontario.<sup>137</sup>

Temporary help agency employees, like term contract employees, work on a transient basis; they might work for a period of a few days, weeks, months or, in a few cases, even years, but the work assignment is, ostensibly at least, provisional in character. The difference between the two types of employees is that while the term contract employee performs work for her or his employer, the temporary help agency employee performs work for her or his employer's (that is, the agency's) client.

The protections offered through the legal framework often are unattainable for temporary workers. These workers often lack access to extended medical and other benefits, and paid sick leave.<sup>138</sup> Other statutes that grant employees rights or accord them protection, such as the *Human Rights Code*, OHSIA, 1997, the *Pension Benefits Act* ("PBA")<sup>139</sup> and the PEA do not distinguish between temporary and permanent employees. Under certain provisions in some statutes, however, the fact that an employee is in a temporary position may have an impact on their statutory rights even if the provisions in question do not explicitly make such a distinction. Many rights under the ESA, 2000, for example, depend on the employee's length of service. While such qualifying periods apply equally to permanent and temporary employees, temporary workers who are employed only for a short term often will have greater difficulty meeting them. For example, employees employed for fewer than three months are not entitled to notice of termination;<sup>140</sup> those employed for fewer than five years are not eligible for severance pay.<sup>141</sup> Pregnancy and parental leave entitlements are available after having been employed for thirteen weeks.<sup>142</sup>

Similarly, while neither WSIA, 1997 nor the PBA explicitly denies protection to temporary employees, access to certain rights under those statutes is dependent upon satisfying length of employment thresholds that may tend to exclude those working on short-term contracts. Thus a worker who has recovered from a workplace injury has no right to be reinstated in employment under WSIA, 1997 if she had not been continuously employed for at least one year as of the date of the injury,<sup>143</sup> and an employee has no right to join an employer-provided

pension plan under the PBA until she has been continuously employed for at least twenty-four months.<sup>144</sup>

Just as several statutory rights and protections are dependent upon meeting a length of employment qualification, there may also be contractual entitlements that are available only to those employees who meet a specified service threshold, such as increased vacation time once certain employment milestones are crossed. Employers are, of course, under no obligation to offer employees more than is required by statute (which in the case of annual vacation time is two weeks, with no escalation based on length of service).<sup>145</sup> Therefore, these above-the-minimum contractual rights, where they are provided, will vary from employer to employer, and they may also vary according to whether an employee is temporary or permanent, since Ontario law does not require equal treatment between these employees and those hired on an indefinite basis.

Even where they are not excluded outright, temporary workers may find it difficult or impossible to meet eligibility requirements, particularly if these are based on continuous rather than total service. A long-serving “temporary” employee who experiences even brief interruptions in his work with an employer might thus never become entitled to more than the two weeks’ vacation required by the ESA, 2000, notwithstanding that his employer, like many, offers additional vacation time to all but the most junior staff. If he has had term contracts with a number of different employers over time, his right to vacation will be based on his service with his current employer only,<sup>146</sup> so that even if that employer does offer enhanced vacation entitlements to temporary employees, she may never qualify.

With respect to collective bargaining rights, the LRA, 1995 does not draw distinctions based on temporary status. Although arguments have sometimes been made that permanent and temporary employees do not have a sufficient community of interest to be placed in the same bargaining unit, and although such arguments have succeeded before the labour relations tribunals of some other Canadian jurisdictions,<sup>147</sup> the Ontario Labour Relations Board has not

found it inappropriate to include both permanent and temporary employees in the same unit.<sup>148</sup>

## **2. *Own-Account Self-Employment***

In 2000, self-employment constituted 16% of employment in Canada.<sup>149</sup> There is a tendency to treat entrepreneurship and self-employment as synonymous. However, recent empirical data demonstrate that “[t]here is no generic category of self-employment”.<sup>150</sup> Across developed countries, rates of self-employment rose in the 1980s and escalated during the 1990s.<sup>151</sup> In the 1990s, over forty percent of new employment emerged in the form of own-account self-employment.<sup>152</sup> This growth in self-employment was accompanied by a deeper concentration of women in own-account self-employment, with perhaps a disproportionate number of immigrant women engaged in self-employment.<sup>153</sup> In 2006, 11% of women with jobs were self-employed, an increase of 2% since 1976 and “women accounted for 35% of all self-employed workers [in 2006], up from 31% in 1990 and 26% in 1976”.<sup>154</sup> Although self-employment is often equated with entrepreneurship, with control of the risks of the production process or the accumulation of capital, self-employment often resembles employment rather than entrepreneurship.

There is difficulty in determining the legal status of self-employed workers. In many employment statutes protections are available only for “employees” or “workers” and not for the self-employed or (in)dependent contractors. Workers who are not “employees” in the conventional legal sense are covered by some statutes in the legal framework, such as the LRA, 1995, but not others, such as the ESA, 2000 and the WSIA, 1997 (though they can opt in to the latter). Thus, the categorical exclusion of “the self-employed” from statutory protections denies workers who are not truly self-employed the benefits of those protections, which increases the precariousness of their employment.

### **3. Part-Time Employment**

Although the idea of part-time employment is reasonably clear, the number of hours of work per week at which an employee would be considered a “part-time” as opposed to “full-time” employee vary significantly. In many instances, the term “part-time” is not defined within employment statutes. For example, the Ontario Labour Relations Board, which historically tended to put part-time and full-time employees in separate bargaining units on the view that there is a lack of community of interest between the two groups, has used twenty-four hours per week as the dividing line.<sup>155</sup> Statistics Canada considers anyone who is required to work fewer than thirty hours a week to be engaged in part-time employment.<sup>156</sup>

If views as to what constitutes part-time employment vary, so do the motivations of employees to take part-time employment and the motivations of employers to offer it. This is especially important as part-time employment is often performed by women.<sup>157</sup> Almost three-quarters of those who work part-time apparently do not want to work full-time; their reasons include family responsibilities, school attendance and simple preference for fewer hours of work.<sup>158</sup> Indeed, there may be some individuals in full-time positions who would rather be working part-time. In other cases, however, the part-time worker would prefer full-time employment (or at least more part-time hours) but be unable to get it. From the perspective of employers, offering part-time work may be a way of retaining a valued employee who no longer wishes to work full time; it may also be a means of handling demand at peak periods. However, the impetus may also lie in the fact that part-timers tend to be a relatively inexpensive option, as part-time workers, like certain temporary workers, typically receive lower wages and fewer benefits than full-time employees.<sup>159</sup>

Part-time workers do fare marginally better than temporary employees insofar as rights under Ontario’s legal regimes of employment are concerned.<sup>160</sup> There are no statutory entitlements denied to workers simply because of their part-time status. For example, while at one time some part-time workers were denied full public holiday rights,<sup>161</sup> the public holiday

provisions in the current ESA, 2000 do not exclude any employees on the basis of the amount of working time they have completed.<sup>162</sup>

While part-time employees are in a stronger legal position than temporary employees, there is still a large scope for differential treatment.<sup>163</sup> The most obvious and important gap in protection against discrimination is that Ontario law does not require part-time workers be paid at the same wage rate as full-timers, nor, pensions aside, that they receive the same benefits as full-time employees. Further, some have argued that since overtime pay entitlements are based on a weekly threshold (forty-four hours in the case of the ESA, 2000),<sup>164</sup> they implicitly exclude part-time employees. The part-time worker who works very long hours over the course of only a few days each week is denied overtime pay because the threshold is never met. Similarly, if the same worker holds multiple part-time jobs with different employers, and the total number of hours worked exceeds the threshold, the worker still will be denied overtime pay as the number of hours worked for any one employer is not sufficient.<sup>165</sup>

The Ontario Labour Relations Board has reversed its historical position that part-time employees and full-time employees must generally be placed in separate bargaining units. Despite the repeal of short-lived statutory provisions deeming a unit that includes both as a unit appropriate for collective bargaining,<sup>166</sup> the Board allows them to be put in the same unit. There is an ongoing debate as to whether this is of benefit to part-time workers. On the one hand, a larger bargaining unit generally implies greater bargaining power for the union representing the employees concerned. On the other hand, there are questions about whether the two groups share a “community of interests” which has traditionally been offered as a reason for placing part-timers and full-timers in separate units.

## **B. Differential Treatment of Categories of Workers**

Differential treatment under Ontario’s legal regimes of employment occurs not only around forms of employment. Certain categories of workers also are differently affected. For instance,



agricultural workers receive limited coverage under employment statutes. Under the ESA, 2000, for example, the category of agricultural workers is divided into sub-categories which receive varying degrees of statutory coverage.<sup>167</sup>

With respect to collective representation, agricultural workers also are excluded from coverage under the LRA, 1995 and instead receive coverage under a separate regime of collective organization. That regime permits workers to form an association, but denies them the right to bargain collectively and to take collective action through strike activity.<sup>168</sup>

Domestic workers also receive differential treatment under the legal regimes of employment. Domestic workers, defined as individuals employed directly in private homes (not by a business or agency) performing housekeeping duties or providing child, elder or support care and assistance, are entitled to the broad range of protections under the ESA, 2000. However, for these workers, enforcing their rights under the ESA, 2000 and other applicable statutes, is complicated by their specific vulnerability *vis-à-vis* their employer. This vulnerability stems from their employment within the home. It also may arise from such factors as their immigration status, language and gender. Domestic workers are precluded from taking collective action as a result of their exclusion from coverage under the LRA, 1995.<sup>169</sup>

Homeworkers also receive differential treatment. Not to be confused with *homemakers*, who perform homemaking services in a householder's private residence,<sup>170</sup> *homeworkers* are people who conduct paid work in their own homes for a business or agency. The work includes online research, telephone soliciting and sewing. While they receive many of the protections of the ESA, 2000,<sup>171</sup> their position of relative insecurity derives from their invisibility and isolation. Again, enforcement is a major obstacle.

### **C. The Threat of Reprisals and Ontario Workers**

Reprisals represent another source of differential impact. The insecurity of precarious employment reduces the impact of anti-reprisal provisions in employment statutes. Reprisals (or the threat of them) act as a deterrent to the enforcement of rights through established legal channels. Temporary agency workers find it particularly difficult to prove they have faced reprisals for exercising a statutory right when a client company, which bears no formal responsibility for terminating the employment contract, can assert that an assignment has ended. Workers referred by temporary help agencies are vulnerable to not being referred again if they attempt to enforce their rights.<sup>172</sup>

The threat of reprisals is real for temporary migrant workers as well.<sup>173</sup> By virtue of the restrictions on labour market circulation and the authority granted to employers to repatriate workers without justification, seasonal agricultural workers are hard pressed to utilize statutory protections against reprisals.<sup>174</sup> In effect, therefore, specific federal migration policies interfere with provincial jurisdiction over employment by restricting the functioning of anti-reprisal provisions.

### **V. WHO IS MOST AFFECTED?**

Applying the multidimensional approach to precarious employment means that the analysis must take account not only to types of work, but also the impact on the people who do the work. As discussed earlier, precarious employment is over-populated with racialized people, especially women, and newcomers, and temporary migrant workers and non-status workers. Racialized people, especially racialized women, are much more likely to hold precarious employment or to be unemployed. Thus, racialized women, in addition to disproportionately bearing the burden of domestic work within their own household, are more likely to be slotted into precarious employment relationships of paid domestic work. It is not only more likely that

women will hold precarious employment, and that they will not hold full-time permanent employment, but also that they will hold the most precarious forms of employment stemming from part-time temporary paid work. The “racialized gendering of jobs”, therefore, is a prominent feature of the labour market.<sup>175</sup>

Younger workers, both men and women, are entering the labour market in precarious employment. Older workers often find employment through temporary agencies.<sup>176</sup> Persons with disabilities, especially those who are affected by multiple aspects of social location, are less likely to be employed and therefore vulnerable to precarious work.<sup>177</sup> HRSDC reports that the employment rate for persons with disabilities increased from over 46% in 2001 to over 53% in 2006, however.<sup>178</sup>

Well over 60% of the country’s population growth occurs through immigration.<sup>179</sup> Indeed, Canada’s growth in population and economy has now assumed a greater dependence on immigration than throughout much of the last century.<sup>180</sup> With one in five residents born outside the country, not since the early 1930s have newcomers made up such a considerable proportion of the total population. Increasing numbers of immigrants come from Asia, including the Middle East (the source countries of the largest proportion), with the proportion from Central and South America and the Caribbean and from Africa slightly increasing between 2001 and 2006. Over half of immigrants come to Ontario.<sup>181</sup> In the face of a declining birth rate and aging populace, Canada has relied on permanent and temporary immigration, including non-status labour, to address national labour shortages.<sup>182</sup> Increasingly, immigration – and immigration from certain countries – accounts for the people doing precarious employment in Canada.

Statistics Canada’s recent study examining 280,000 immigrants to Canada revealed that poverty rates are three times greater for new immigrants than for Canadian citizens.<sup>183</sup> During much of the 1990s almost one in five new immigrants lived in a state of chronic low income which has been estimated to lead to annual losses of five billion dollars in the national

economy.<sup>184</sup> A not uncommon pattern for immigrants has been that they find short-term, low paid jobs when they arrive in Canada, but that within five years or even less, they have moved to more stable work that is better paid with benefits. At the macro level, this pattern has changed. A Statistics Canada study found that “[m]ore than half (54%) of the 5.0 million people in non-standard jobs in 1999 maintained this form of employment throughout the following two years”.<sup>185</sup>

## **VI. THE IMPACT OF PRECARIOUS WORK ON WORKERS’ LIVES**

Precarious employment imposes real and significant costs on vulnerable employees, their households and the wider community. These related costs are often hidden because they can be difficult to quantify and the linkages with employment may be indirect. Although greater public and scholarly scrutiny is needed, mounting evidence points to costs associated with precarious employment in such areas as health, personal and community development, as well as education and training.<sup>186</sup> More difficult to assess is the development of a mindset over time that reinforces the notion that nothing different is possible.

The impact of the low wage dimension of precarious employment is especially telling. To combat low wages, precariously employed workers must either work long hours to secure an adequate income or assume greater responsibility by holding multiple jobs. Temporary migrant workers encounter even more difficult circumstances. Seasonal agricultural workers, for instance, are bound to an individual employer, and not permitted to circulate within the labour market; thus these workers are even denied the inadequate mitigation strategy of multiple job holding.

## A. The Strain on Health Outcomes

Precarious employment is linked to negative physical and mental health outcomes.<sup>187</sup> With respect to physical health, vulnerable workers tend to be at greater risk for injuries and illnesses in the labour market.<sup>188</sup> Recent immigrant workers, for instance, are more likely to be engaged in physically demanding work relative to Canadian born workers, and therefore they face increased work-related health risks.<sup>189</sup> Moreover, the dimensions of precarious employment, among other variables, have the potential to raise the occupational health and safety risk burdens of vulnerable employees.<sup>190</sup>

Vulnerable employees may have little practical or perceived access to the complaints processes of their work organization, and to the protective coverage of employment law regimes, making them more susceptible to poor health outcomes.<sup>191</sup> Similarly, the lack of access to health benefits and paid sick days through precarious employment imposes burdens on vulnerable employees to ignore injuries and illnesses and to not seek medical treatment. For migrant workers, admitting sickness may be coupled with fear of 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.<sup>192</sup> Without paid sick days, vulnerable workers may impose added strain on co-workers and, over a longer term, on the healthcare system.

This understanding appears to extend to mental health issues as precarious employment puts employees under greater workplace stress ranging from tension to exhaustion to depression.<sup>193</sup> Furthermore, the heightened insecurity of precarious employment means workers are forced to live day-to-day not knowing whether they will work enough hours in a day or week to meet basic needs. Workers employed through temporary agencies complain that their contracts can end on very short notice.<sup>194</sup>

## **B. The Impact on Inter-Personal Relationships**

The impact of precariousness in employment can often extend beyond the individual worker to affect his or her personal and community relationships. The insecurity associated with precarious employment results in hidden costs related to strained personal relationships. For many people engaged in precarious employment, time for family and friends is limited. Whether due to working multiple jobs, conflicting work schedules, working long hours or spending free time searching for additional employment, many precariously employed workers enjoy little time to interact with others outside their employment. This can create negative feelings of self-worth and erode personal integrity resulting in an individual worker withdrawing from meaningful non-work social relationships. For others, the instability of precarious employment, both practical and emotional, has become part of the reason that they have not started a family. This is a matter of concern considering that family and friends can serve as a strong support system, which for various reasons may not be available to precariously employed workers.<sup>195</sup> The impact of precarious employment is felt within wider community relationships as well. Precarious employment may leave less opportunity for workers to engage in the development of their community.

## **C. Limited Access to Education and Training**

The limited opportunity available to adults in precarious employment relationships to upgrade their skills or acquire language skills has been cited as a key factor that contributes to long-term economic vulnerability.<sup>196</sup> Temporary migrant workers, because they are not expected to establish permanent residency in Canada, but who may nevertheless eventually do so, do not have access to settlement services that are designed to assist integration into Canadian society.<sup>197</sup> Accessibility to training programs is out of reach for many workers in precarious employment who because of job classification systems are excluded from employer provided training. Often workers are left to pay for their own training in an effort to sustain employment, or raise their chances of securing a better job.<sup>198</sup> Even those with the means to

pay for training, a related issue is finding enough time to attend training sessions. Some of them are forced to train while they work multiple jobs – a practice which has negative health impacts and contributes to employment strain.<sup>199</sup>

#### **D. As Vulnerable Workers Age**

Workers who have engaged in precarious employment during their working life will suffer ramifications as they become older: they may have to continue to work past the point at which they would otherwise retire; they may be less healthy because of access to fewer health benefits than employees in less insecure employment; they may not have been able to save or to contribute to an RRSP and they are not likely to have a private pension.<sup>200</sup> They may also develop a “mind set” that mitigates against long-term planning, thinking that life could be anything other than “hand to mouth” or that suggests that even when opportunities arise, there are reasons not to take advantage of them.

### **VII. A REVIEW OF PROPOSED POLICY AND LEGAL RESPONSES**

As global competitiveness and labour market flexibility continue to be dominant features of government policy, new forms and arrangements of precarious employment continue to emerge. This dynamic has led to greater complexity in employment relationships affecting persons born in Canada, permanent residents and “new” citizens and migrant workers which existing labour market policy and regulation are not yet prepared to address. It is clear that precarious employment gives less protection against unpaid wages and poorer working conditions, for example, but there are a variety of perspectives on what reforms are necessary to address these problems, and there are a variety of evaluative criteria upon which we may judge those proposed reforms.

This section reviews policy and legislative responses to the impact of precarious work on workers that have been proposed by others, but are not LCO recommendations at this stage (and may not be recommendations).

## **A. Policy Considerations**

### **1. *Establishing Evaluative Criteria***

There are a myriad of potential regulatory responses to the problem of precarious employment. An initial task in moving forward is to generate a set of criteria by which we may evaluate various options. The LCO seeks feedback specifically as to what these evaluative criteria should be. For example, we might look to stated policy objectives of the provincial government such as the Ontario Government's Poverty Reduction Strategy. Alternatively, or in addition, we could look to the goal of "flexibility" as expressed by members of the business community or the desire of employees collectively or individually. Finally, criteria could be generated by drawing on outside sources, such as the international conception of "decent work" as articulated by the International Labour Organization.

The internationally-recognized norm of decent work may assist in efforts to construct evaluative criteria. In the federal employment context the "decency principle" has been stated as follows:

Labour standards should ensure that no matter how limited his or her bargaining power, no worker ... is offered, accepts or works under conditions that Canadians would not regard as 'decent'. No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.<sup>201</sup>



The concept of decent work takes a positive approach to employment, in that it sets out desired characteristics, whereas the concept of precarious employment, at least in this respect, can be termed a negative approach.<sup>202</sup>

## **2. Ontario Government Policy: Poverty Reduction**

There is a longstanding association between legal regulation of employment and poverty reduction initiatives in Ontario,<sup>203</sup> including the Poverty Reduction Strategy, launched in December 2008.<sup>204</sup> In May 2009, the *Poverty Reduction Act, 2009*, received Royal Assent.<sup>205</sup> “The Government’s poverty reduction strategy”, according to the Act’s preamble, “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”. The Act “[r]ecogniz[es] that the reduction of poverty supports the social, economic and cultural development of Ontario”. A central feature of the provincial strategy is an acknowledgement of “the heightened risk among groups such as immigrants, women, single mothers, people with disabilities, aboriginal peoples and racialized groups”.<sup>206</sup> Poverty reduction was a key public policy objective behind the legislation to extend statutory protections to low-income temporary help agency workers passed in May 2009.

## **3. Need for Flexibility**

The proliferation of precarious employment in Canada and elsewhere sometimes is regarded as a product of market forces which impose demands on employers for, most notably, flexibility in human resource allocation. From this perspective, flexibility is used to characterize the perceived human resource needs of employers during contemporary economic restructuring. The emphasis here is on how labour flexibility facilitates competitiveness in hyper-competitive globalized markets of goods, services and labour.

Labour flexibility may also help people who do not want full-time or permanent employment. For example, part-time and self-employment is sometimes regarded as a choice made by employed women to facilitate a better work/life balance, by assisting with the fulfillment of household responsibilities such as childcare. Labour flexibility has developed in response to the desire to exercise greater independence in the performance of paid work, or to juggle household and job responsibilities. While this may be a real choice for some women, others may feel compelled to limit their workplace involvement in order to satisfy their domestic responsibilities, particularly when their children are young, perhaps because of the lack of alternate childcare options or a parental helpmate.<sup>207</sup>

Those who see part time work as the employee's choice tend to view concern for the impact of labour flexibility as overstated; they are concerned that policy intervention may conflict with labour market strategies to enhance the economic prospects of firms. The fear is that regulatory adjustments will be stifling, to economic and employment growth, and to adaptability of firms and workers within the labour market.

From a contrasting perspective, labour flexibility is regarded as largely beneficial to employers, not employees.<sup>208</sup> Although diverse forms of flexible labour exist, some of which are beneficial to individual workers, most of these arose primarily to fulfil the needs of employers. Proponents of this view point to intensifying pressures and incentives to either overwork or underwork. Moreover, they note a strong shift in the allocation of risks within the labour market. The costs, liabilities and overall risks within the employment relationship have shifted more considerably onto workers and especially onto those who least can afford it.

Labour flexibility may be described more aptly as a question not about whether or not to regulate labour markets. Even the most flexible labour markets require legal rules.<sup>209</sup> Rather, the fundamental issue is what form of legal regulation best suits broader public policy objectives. In recognizing the importance of both employer and employee flexibility and employee security, Arthurs set out the provisions need for what he calls "flexicurity":

“contributions from the employer, from social insurance programs...and from public or employer-funded programs designed to prepare workers for new jobs”.<sup>210</sup>

## **B. Specific Policy Proposals to Address Precarious Employment**

Once a set of evaluative criteria are selected, and policy imperatives identified, they may be applied to the proposed policy reforms. In this section, the Paper outlines specific proposals that have been raised in the literature and by experts and advocates in the area to address precarious employment. Because of the wide range of existing proposals, only a modest selection of proposed reforms is reviewed here. They are meant to illustrate options that have been proposed by various commentators and are not to be taken as LCO recommendations.

Legal proposals intended to address precarious employment tend to fall into three categories, contractual, statutory and collective representation, which correspond to the legal regimes of employment. These categories are used as an organizing tool to facilitate reflection and not to foreclose the potential of an integrated or multi-pronged approach. The problems presented by precarious employment are not limited to any one category.

Although categories of this nature have the potential to reinforce orthodox thinking about the employment law-labour law distinction discussed above, what is needed is a policy agenda which can transcend those discrete boundaries or limitations. In this respect, these categories of proposals are not exclusive of each other. The task is one of constructing a comprehensive set of recommendations designed to ameliorate the characteristics and ramifications of precarious work and thus improve the lives of vulnerable workers.

What is ultimately needed are policies and actions which, in assessing legal proposals, not only contemplate intended consequences, but just as importantly anticipate unintended consequences. The ability to be able to fall back on sound, well-articulated evaluative criteria

will, in the end, facilitate the development of future policy responses to those unintended consequences.

### **1. *Enhancement of Existing Protections***

One option is to enhance existing standards or protections. The improvement of key employment standards has been suggested as a way to improve work-life balance and to account for unpaid labour within households. More specifically, vulnerable workers appear most at risk of violations of their rights to minimum wages, hours of work and other basic standards. The Ontario *Employment Standards Amendment Act (Temporary Help Agencies), 2009* addresses some of the differential treatment in law between employees hired through temporary agencies and those through the client firm, although often engaged in work that is comparable if not the same. One area of confusion that has been eliminated since January 2009 has been the entitlement to holiday pay for temporary agency workers.<sup>211</sup> The extension of statutory coverage will have a limited effect without effective enforcement mechanisms, however. Even if key employment standards are extended, it can be argued that serious concerns remain for certain precariously employed people. The multidimensional nature of precariousness detracts from efforts to selectively identify and narrow down key standards.

### **2. *The Extension of Statutory Protection***

A considerable number of academic commentators and worker advocates question whether the *status quo* in the employment relationship is sustainable for vulnerable employees. Among this group there is wide consensus that strengthening or universalizing statutory protections of employment can help to reduce insecurity within the labour market.

One way to extend statutory protections is to expand or broaden the definition of “employee” or “worker” in employment statutes. For instance, the definition of worker as set out in the OHSA, which takes a more inclusive approach than other statutes, such as the ESA,

2000, could be used to re-fashion the definitions in those other statutes, including own-account self-employment within those definitions.<sup>212</sup>

A similar approach calls for the definition of employee or worker to be harmonized across the legal regimes. This, it is suggested, could conform with definitions established in other contexts such as under federal income tax law. Alternatively, employment statutes could be revised to include provisions allowing for determinations on the definition of employee in one context be made applicable in other contexts.

There is also a need to address the link between own account self-employment and subcontracting, described earlier. The existence of subcontractors creates a triangular employment relationship which raises the issue of the liability of employers. Proposals have been advanced to introduce statutory provisions covering joint liability of employers, especially subcontractors.<sup>213</sup>

A strong argument can be made that the broadest possible coverage guarantees equal treatment in employment.<sup>214</sup> For instance, the final report of the Quebec review on precarious employment accepts that statutory protections must be accessible to as many workers as possible.<sup>215</sup> It also finds that, in public policy terms, disparity in treatment based on employment status is socially unacceptable. From this perspective, a principled starting point would be that all individuals performing paid work in Ontario are entitled to full coverage of all employment statutes regardless of the form or status that work takes. The fact that statutory protections provide a floor of rights for non-unionized and unionized workers alike, suggests that those statutes ought to apply broadly, if not universally, to guarantee that no employment falls below the minimum standards. Exceptions to this would need to satisfy a very high standard or threshold.

### **3. Increased Social Assistance Protections**

Some advocates of corporate flexibility take the view that precarious employment stems from discrete as opposed to systemic market failures and thus, although it constitutes an undesirable labour market outcome, the most effective response is not through explicit regulatory or policy intervention that interferes with labour flexibility. Rather, this view suggests, a more appropriate regulatory response would be to grant employers considerable flexibility in hiring and dismissing employees and at the same time to provide all employees with broad social assistance protections. A prominent example of this kind of social assistance is “insecurity pay”, also known as “precarity pay”, described as a premium paid to temporary workers in recognition of the insecurity of precarious employment. (“Precarity” is the term used in some countries to refer to the conditions of vulnerable workers.) One example is the payment of end-of-contract bonuses or precarity pay of 10% of the remuneration earned during the contract for temporary workers in France who are not offered a permanent position.<sup>216</sup> This would be most useful for older workers, workers with wages that fall below a living wage, workers who did not choose their employment situation, workers in non-unionized work environments, and workers not covered by group or private insurance and not contributing to an RRSP. A guaranteed income would be another option.

#### **C. Enforcement of Employment Statutes**

A discussion of legal approaches to the mitigation of precarious employment cannot occur independently of the issues of enforcement and compliance. From the perspective of employers, the existence of stronger and more effective enforcement mechanisms counters unfair competition. All employers benefit through a levelling of the playing field. For workers, more effective enforcement is the basis for attainment of their rights and entitlements.

A popular call is for stronger, more explicit commitment to proactive enforcement measures. According to one recent estimate, the Ministry of Labour employs only twenty

officers to conduct proactive employment standards inspections of over six million workers in over 350,000 workplaces in the province.<sup>217</sup> However, since 2003-2004, when the Ministry of Labour conducted 153 targeted inspections, the number of inspections undertaken at the initiative of the Ministry has increased to over 2,000<sup>218</sup> and prosecutions have increased from five in 2003 to 480 in 2008.<sup>219</sup>

Possible ways to improve enforcement are to emphasize proactive inspections, increased auditing of recurring offenders and the extension of claims investigations to cover co-workers or multiple employees of an impugned employer. This requires a far greater commitment of economic and human resources to enforcement services within the Ministry of Labour. One way to accomplish this may be through increased fines, especially for chronic offenders. A re-allocation of enforcement and compliance costs could assist in sharpening the effectiveness of the existing enforcement machinery. In other provincial jurisdictions, such as British Columbia and Alberta, an employer found to have violated the employment standards requirements is required to pay any costs incurred by the Director in connection with inspections and extended claims investigations.<sup>220</sup> The increased revenue from those fines would then be directed toward employing more comprehensive proactive enforcement measures.

The task of strengthening enforcement requires not just more considerable devotion of resources but also the political will to innovate in the ways enforcement is carried out. An enhancement of the legal tools available to enforcement officers and frontline or field investigators, for instance, to intensify pursuit of offending employers who have subsequently disposed of their business, could assist in this regard. A meaningful commitment to creative innovation in the approaches and techniques of enforcement would serve all employers and employees in the province well and especially the most vulnerable employees.

How best to guard against reprisals is a crucial aspect of enforcement. Although employment statutes already include explicit protections against reprisals of job loss, the question remains whether these provisions capture the full realm of reprisals or punishments

inflicted on workers. The disguising of reprisals in the form of dismissal is said to be an obstacle to the functioning of the anti-reprisal provisions. One proposed response to this is the creation of a statutory provision related to unjust dismissal, for instance along the lines of the *Canada Labour Code*.<sup>221</sup>

For migrant workers employed through temporary migration schemes the issue of reprisals is even more acute. Seasonal agricultural workers, for example, are subject to the repatriation decisions of employers, an authority which develops from the structure of the federal migration scheme. The right of an employer to repatriate a worker, and the limits imposed by the federal foreign workers program on worker mobility within the labour market, effectively exclude migrant farm workers from the protection of the anti-reprisal statutory provisions.<sup>222</sup> Similarly, the private nature of the employment relationship under the Live-In Caregiver Program has rendered the anti-reprisal provisions of the employment statutes largely ineffective. Further, for non-status workers whose immigration status represents a lever by which to impose discipline and threaten reprisal, the existing anti-reprisal provisions provide little assistance. Although the Ministry of Labour will enforce the ESA, 2000, vulnerable workers, perhaps particularly migrant workers, and certainly non-status workers, face practical difficulties in making the complaint or do not appreciate that they are able to file a complaint.

#### **D. Collective Representation**

Another legal approach to mitigating precarious employment is through collective representation. As an instrument of labour market regulation, statutory collective bargaining provides a countervailing power which may assist workers who otherwise lack control within their work setting.

The LRA, 1995 excludes certain workers such as domestic workers employed in a private home from statutory collective bargaining.<sup>223</sup> Others are excluded from the LRA, 1995, but are subject to a separate regime of collective organization, not collective bargaining. Agricultural



workers receive coverage under the *Agricultural Employees Protection Act, 2002* which does not provide full collective bargaining rights.<sup>224</sup> A decision determining whether the lack of collective bargaining rights constitute a breach of the Charter's right to freedom of association is under reserve by the Supreme Court of Canada.<sup>225</sup> In November 2010, the ILO ruled that the *AEPA, 2002* is a violation of human rights under the UN Conventions on Freedom of Association and Protection of the Rights to Organize and the Right to Organize and Collective Bargaining.<sup>226</sup>

These exclusions from the LRA, 1995 may run counter to recent articulations of the importance of formal collective bargaining, in the context of the constitutional right to freedom of association, to "the human dignity, liberty and autonomy of workers".<sup>227</sup> "The right to bargain collectively with an employer", as the Supreme Court of Canada recently asserted, provides workers with "the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work".<sup>228</sup>

Regardless of the form of work, it is necessary to consider whether the existing structure of statutory collective bargaining under the LRA, 1995 is suitable to the specific vulnerabilities of these workers. This calls for individualized analysis of the specific circumstances of different categories of workers and different forms of precarious employment. For own-account self employment in which work is performed for multiple employers at multiple locations, and who bear the heightened risk of contracting out, the existing model under the LRA, 1995 likely is not suitable.<sup>229</sup> For domestic workers who are employed within homes on a one-to-one basis with their employer, and for agricultural workers who are employed on farms with a relatively small labour force, or who are migrants only in Canada on a temporary basis, workplace-by-workplace collective bargaining may be an inappropriate model.<sup>230</sup> Innovations in collective representation, which take seriously specific vulnerabilities, would be necessary. It has been argued, for example, that permitting "minority" forms of collective representation, not contingent on support from the majority of workers in a given workplace, would address the difficulties for certain workers posed by the current collective bargaining regime,<sup>231</sup> although this might be thought to divide workers and diminish the power of unions in the workplace, on

the one hand, or complicate bargaining and workplace organization for employers, on the other.

#### **E. Other Strategies of Mitigating Precarious Employment**

The LCO seeks input on potential strategies and policies which could mitigate precarious employment aside from those discussed above, including those that could supplement major legislative initiatives. Within certain unionized work settings, for instance, employers and unions have agreed to policies to convert categories of vulnerable employees to less insecure forms of employment. Temporary agency workers may receive an opportunity to become permanent. Temporary migrant workers may receive employer nominations to the Provincial Nominee Program as a fastrack to permanent resident status.

Although this Paper emphasizes law-based responses to precarious employment, we also wish to solicit input on employer best practices, real or proposed, to facilitate the recruitment and retention of workers most affected by precarious employment. An example is the posting of available job postings in ethnic community newspapers.

### **VIII. CONCLUSION**

The rising insecurity within the employment relationship in Ontario and elsewhere poses urgent and difficult challenges which the existing legal framework is ill-suited to confront. Certain workers in jobs who, in the past, enjoyed full-time, permanent employment with decent wages and a range of benefits, and even for some a modicum of control within their working lives, are finding their employment relationships are eroding. For vulnerable employees who dwell in precarious forms of employment, the challenges appear even more pressing.

The task of confronting precarious employment is not whether legal regulation of the labour market is necessary. As a group of prominent academics put it, “the decision to leave matters to be determined by market forces is a political one, made by the state, for which a legal [framework] is required”.<sup>232</sup> Rather, the fundamental questions are: what form should the legal and policy framework take, and who should decide?

## **IX. NEXT STEPS AND HOW TO PARTICIPATE**

The LCO encourages comments about and submissions based on this Background Paper and accompanying Consultation Paper with the objective of better understanding the reality of precarious work and the situation of vulnerable workers and of developing responses to difficulties that exist. Responses may be in relation to labour and employment legislation and practices or other areas affecting the lives of vulnerable workers.

Additional steps to be completed in this project are as follows:

- Creation of a project advisory group;
- Pro-active consultation of relevant and interested stakeholders;
- Commissioning of research papers;
- Preparation of an interim report with recommendations, disseminated for feedback; and
  - Preparation of the final report with recommendations, informed by the previous steps, and subject to approval by the LCO Board of Governors.

You can mail, fax, or e-mail your comments by **April 1, 2011** to:

Law Commission of Ontario

276 York Lanes, York University

4700 Keele Street

Toronto, ON, Canada, M3J 1P3

Fax: (416) 650-8418

E-mail: [LawCommission@lco-cdo.org](mailto:LawCommission@lco-cdo.org)

You may also post comments online at: <http://www.lco-cdo.org/en/content/get-touch>

Those who wish to participate in the consultation process other than by written submission should contact the LCO

416.650.8406

TTY: (416) 650-8082

Toll Free: 1 (866) 950-8406

Toll Free TTY: 1 (877) 650-8082

Email: [LawCommission@lco-cdo.org](mailto:LawCommission@lco-cdo.org)

We will be pleased to discuss the most appropriate way to engage you in the consultation process.

## ENDNOTES

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- <sup>1</sup> Adrian Smith, Independent Researcher, prepared the initial draft of this Background Paper for the Law Commission of Ontario.
- <sup>2</sup> Economic Council of Canada, *Good Jobs, Bad Jobs: Employment in the Service Economy* (Ottawa: 1990).
- <sup>3</sup> Ron Saunders, *Making Work Pay: Findings and Recommendations from CPRN's Vulnerable Workers Series, Research Highlights*, Number 6 (May 2006); Law Commission of Canada, *Is Work Working?: Work Laws That Do A Better Job: Discussion Paper* (Ottawa: Law Commission of Canada, 2004); Kerry Rittich, *Vulnerable Workers: Legal and Policy Issues in the New Economy* (Ottawa: Law Commission of Canada, 2004); Judy Fudge, Eric Tucker and Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Ottawa: Law Commission of Canada, 2002).
- <sup>4</sup> J. Bernier, G. Vallée and C. Jobin, *Social Protection Needs of Individuals in Non-Standard Work Situations*, Synopsis of Final Report (Quebec, Ministry of Labour, 2003).
- <sup>5</sup> Leah Vosko ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's, 2006).
- <sup>6</sup> Judy Fudge, "Beyond Vulnerable Workers: Towards a New Standard Employment Relationship" (2005) 12:2 Canadian Labour & Employment Law Journal 151, 159.
- <sup>7</sup> *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 [*Dunmore*].
- <sup>8</sup> For example, the Ministry uses the term to refer to young workers entering the employment market for the first time, particularly in the context of training, and workers who have greater health and safety risks.
- <sup>9</sup> Jason DeParle, "A World on the Move" *New York Times (Week in Review)* (June 27, 2010) 1, 4. Also see United Nations, *International Migration Report 2006: A Global Assessment* (New York: UN, 2009), online: [http://www.un.org/esa/population/publications/2006\\_MigrationRep/report.htm](http://www.un.org/esa/population/publications/2006_MigrationRep/report.htm). This Report shows that international migrants constituted 19% of the population in Canada (second only to Australia with 20% among countries with at least 20 million people): xv. Canada ranked 9<sup>th</sup> in 1990 and 7<sup>th</sup> in 2005 in the percentage of international migrants of the total numbers of international migrants worldwide among the top 20 countries: xvi. For an extensive description of the situation of migrant workers in a number of countries, see International Labour Office, *International labour migration: A rights-based approach* (Geneva: ILO, 2010).
- <sup>10</sup> This situation is not uncomplicated, since many early retirees obtain other employment.
- <sup>11</sup> Ray Barton Associates Ltd., *Final Report: Trends and Patterns in Skills and Labour Shortages*, prepared for the Council of Deputy Ministers [Responsible for Transportation and Highway Safety] Secretariat (Ottawa, 2008), 7, online: <http://www.comt.ca/english/LabourSkills.pdf>.
- <sup>12</sup> Ray Barton Associates, note 11, 19.
- <sup>13</sup> Julie Ann McMullin and Martin Cooke, *Labour Force Ageing and Skill Shortages in Canada and Ontario* (Ottawa: Canadian Policy Research Networks, August 2004), online: [http://www.cprn.org/documents/31517\\_en.pdf](http://www.cprn.org/documents/31517_en.pdf).
- <sup>14</sup> Ray Barton Associates, note 11, 19.
- <sup>15</sup> This Paper emphasizes private sector employment, but should not preclude interventions and feedback relevant to public and quasi-public sector employment. For instance, the impact of "contracting out" on employment is a discussion which has been shown to have detrimental effects on the precariousness of employment. See, for example, Pat Armstrong and Kate Laxer, "Precarious Work, Privatization, and the Health-Care Industry: The Case of Ancillary Workers" in Leah F. Vosko ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's, 2006) 115.
- <sup>16</sup> Vosko, note 5, 3-4.
- <sup>17</sup> Vosko note 5, 7.
- <sup>18</sup> Vosko note 5, 6-7.
- <sup>19</sup> After persistent social pressure, social benefits became supported by employers and reinforced by the post-World War II emergence of a social welfare scheme, the social safety net, which provided a robust regime of protections and entitlements. Two major examples of these social benefits are unemployment insurance (now employment insurance) and public pensions.
- <sup>20</sup> Costa Kapsalis and Pierre Tourigny, *Duration of Non-standard Employment* (Statistics Canada, Ottawa, 2004), online: <http://www.statcan.ca/english/freepub/75-001-XIE/11204/high-1.htm>. See also Leah F. Vosko,

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“Temporary Work in Transnational Labour Regulation: SER Centrism and the Risk of Exacerbating Gendered Precariousness” (2008) 88 *Social Indicators Research* 131.

<sup>21</sup> The general erosion of the standard employment relationship also imposes a greater burden on the breadwinner to sustain employment and to avoid workplace absences whether due to sickness or speaking out against work injustices.

<sup>22</sup> Mark Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal & Kingston: McGill-Queen’s, 2009) 22.

<sup>23</sup> An important distinction exists between “work” and “employment”. Whereas the idea of work captures in broad terms all productive activities, the idea of employment or paid work refers to a specific way of organizing work. A central feature of employment is the contract of employment which facilitates the sale of labour or labour power in exchange for wages (and other inducements) in a labour market. Employment therefore is a subset of work. Work captures historical shifts from different systems of organization of productive activities. A defining – if deeply problematic – feature of employment is the distinction upheld between unpaid duties and responsibilities performed in households and paid tasks performed within the labour market.

<sup>24</sup> Katherine Stone, “The New Psychological Contract: Implications of the Changing Workplace for Labour and Employment Law” (2001) 48 *UCLA Law Review* 519. Also see Judy Fudge, “The New Workplace: Surveying the Landscape” (2009) 33 *Manitoba L.J.* 131.

<sup>25</sup> This is not the case with the current recession in countries where long-term unemployment among previously relatively secure employees has been high.

<sup>26</sup> See, for example, Thomas note 22, chapter 1.

<sup>27</sup> Vosko, note 5, 15-16. For a variation on the multidimensional approach see also Gerry Rodgers, “Precarious Employment in Western Europe: The State of the Debate” in G. Rogers and J. Rogers, eds., *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Geneva: International Institute for Labour Studies, 1989) 1.

<sup>28</sup> Jamie Baxter, “Federal-Provincial Gaps Affecting Precarious Workers in Ontario” (December 2009) (on file with the LCO).

<sup>29</sup> Cynthia J. Cranford and Leah Vosko, “Conceptualizing Precarious Employment: Mapping Wage Work Across Social Location and Occupational Context” in Vosko, note 5, 49.

<sup>30</sup> For instance, one approach is to emphasize the main source of income, but this raises the issue of the relevance of multiple job holding. How an individual is paid, and in what form they receive payment, also may prove relevant to an assessment of precariousness. For instance, how do we account for people who, contrary to the *Employment Standards Act*, receive cash payment for work performed? For an assessment of precarious employment accounting for varying forms of pay see Luin Goldring and Patricia Landolt, “Immigrants and Precarious Employment: Brief One”, online: <http://www.arts.yorku.ca/research/ine/research/publications.html>.

<sup>31</sup> Cranford and Vosko, note 29, 49-50.

<sup>32</sup> Vosko note 5, 49-50.

<sup>33</sup> Vosko note 5.

<sup>34</sup> Vosko note 5.

<sup>35</sup> Cynthia Cranford, Judy Fudge, Eric Tucker and Leah Vosko, *Self-Employed Workers Organize: Law, Policy, and Unions* (Montreal & Kingston: McGill-Queen’s, 2005).

<sup>36</sup> Workers’ Action Centre, *Working on the Edge* (Toronto: Workers Action Centre, 2007), 27-34.

<sup>37</sup> Cranford and Vosko, note 29.

<sup>38</sup> Non-Status workers refers to people who, for a variety of reasons discussed below, work and live in Canada without proper immigration approval (work visas).

<sup>39</sup> Sylvia Fuller and Leah F. Vosko, “Temporary Employment and Social Inequality in Canada: Exploring Intersections of Gender, Race and Immigration Status” (2008) 88:1 *Social Indicators Research* 31, 31-32.

<sup>40</sup> Fuller and Vosko, note 39, 34; Law Commission of Canada, note 3.

<sup>41</sup> See, for example, Maria Deanna P. Santos, *Human Rights and Migrant Domestic Work* (The Netherlands: Martinus Nijhoff, 2005); Daiva K. Stasiulis and Abigail B. Bakan, *Negotiating Citizenship: Migrant Women in Canada and the Global System* (Toronto: University of Toronto, 2005); Agnes Calliste, “Canada’s Immigration Policy and Domestic Workers From the Caribbean: The Second Domestic Scheme” in Jesse Vorst *et al.* eds., *Race, Class, Gender: Bonds*

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and Barriers (2<sup>nd</sup> rev.ed., (Canada: Between the Lines, 1991) 136. There have recently been changes to the requirements live-in caregivers must meet to apply for permanent residence status: see the Citizenship and Immigration Canada website: <http://www.cic.gc.ca/english/work/caregiver/index.asp>. The live-in caregiver program's permanent residence/citizenship track has been called "good practice" by the ILO in its report on a rights-based approach to labour migration: note 9, 93.

<sup>42</sup> See, for example, Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada Since 1945* (New York: Routledge, 1991); Irving Andre, "The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada" (1990) 28 Osgoode Hall Law Journal 244; Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters* (Montreal & Kingston: McGill-Queen's University Press, 2002); Kerry Preibisch, "Foreign Workers in Canadian Agriculture: Not an All-Male Cast" FocalPoint (May-June 2007) 8; Ellen Wall, "Personal Labour Relations and Ethnicity in Ontario Agriculture," in V. Satzewich ed., *Deconstructing the Nation: Immigration, Multiculturalism and Racism in 90s Canada* (Toronto: Garamond, 1992) 261.

<sup>43</sup> The Economist, "Canada's Guest Workers: Not Such A Warm Welcome" The Economist (November 22, 2007), online: <http://www.economist.com>; "Welcome to Canada: hope you aren't planning on staying" Report on Business (October 2007) 66; Nicholas Keung, "Guest labour program raises troubling questions", *Toronto Star* (March 15, 2008a), online: <http://www.torontostar.com>; Nicholas Keung, "Ottawa expands work program", *Toronto Star* (February 12, 2008b) A15.

<sup>44</sup> Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers), SOR/2010-172, P.C. 2010-959, s.2(1) (August 4, 2010), online: <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-08-18/html/sor-dors172-eng.html>. Other aspects of the changes are designed to ensure the genuineness of offers to work under the TFWP and to encourage employers to meet the conditions of employment as offered. For the federal government's explanation, see the Regulatory Impact Analysis Statement, online: <http://canadagazette.gc.ca/rp-pr/p1/2009/2009-10-10/html/reg1-eng.html>.

<sup>45</sup> Workers' Action Centre, note 36, 5.

<sup>46</sup> *Dunmore*, note 7.

<sup>47</sup> Federal Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* (Canada, October 2006) 232, online: [http://www.hrsdc.gc.ca/eng/labour/employment\\_standards/fls/pdf/final\\_report.pdf](http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/final_report.pdf) (Commissioner, Harry W. Arthurs) [Arthurs].

<sup>48</sup> Vosko note 5, 59.

<sup>49</sup> Vosko note 5, 45.

<sup>50</sup> The dimensions of social location should be regarded not as independent or compounding, and not in isolation, but rather in intersecting relationship to each other (For a rationale for this, see Fuller and Vosko, note 39, 48).

<sup>51</sup> Both these projects recognize the diversity among these "cohorts": see <http://www.lco-cdo.org/projects>.

<sup>52</sup> See, for example, Gail Fawcett, *Bringing Down the Barriers: The Labour Market and Women with Disabilities In Ontario* (Ottawa: Canadian Council on Social Development, 2000); The Roeher Institute, *Labour Force Participation and Persons with Disabilities Who Are Severely Disadvantaged in the Ontario Labour Market: Background Papers for the Working Group on Employment Equity and Persons with Severe Disabilities* (North York, Ont.: The Roeher Institute, 1993).

<sup>53</sup> Ministry of Community and Social Services, "Don't Waste Talent", online: <http://www.mcsc.gov.on.ca/talent/>.

<sup>54</sup> Human Resources and Skills Development Canada, "Targeted Initiatives for Older Workers", online: <http://www.rhdcc-hrsdc.gc.ca/eng/cs/sp/hrsd/eppd/tiow.shtml>. The program is cost-shared with the provinces and territories. Ontario is a participant with programs targeting workers between 55 and 64 who live in areas "hard hit by the recession", specifically communities "with high unemployment, largely dependent on a single employer or industry and [with] a population of 250,000 or less": Ministry of Training, Colleges and Universities, "The Targeted Initiative for Older Workers", online: <http://www.edu.gov.on.ca/eng/tcu/employmentontario/olderworkers.html>.

<sup>55</sup> The relationship between precarious employment and precarious old age is an area of particular concern considering the aging Canadian population. The next 20 years are expected to result in a significant demographic shift where the number of Canadians over the age of 65 is expected to almost double from 13.2% to 24.5%. Just as

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younger workers are entering the workforce in precarious employment, older workers increasingly are maintaining paid work through precarious employment: Martin Turcote and Grant Schellenberg, *Portrait of Seniors in Canada* (Ottawa: Statistics Canada, 2006), online: <http://www.statcan.gc.ca/pub/89-519-x/89-519-x2006001-eng.pdf>.

<sup>56</sup> Cranford and Vosko, note 29, 48.

<sup>57</sup> In particular, domestic work performed within the household, ranging from child care to elder care to grocery shopping to other aspects of social reproduction. With respect to unpaid work doing housework, caring for children and caring for seniors, see Statistics Canada, “Data on unpaid work by sex for Canada”, online: <http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/tbt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=92100&PRID=0&PTYPE=88971,97154&S=0&SHOWALL=0&SUB=0&Temporal=2006&THEME=74&VID=0&VNAMEE=&VNAMEF=>.

This has consequences for health, leisure time and other aspects of life. For example, more women provide informal health care for a long-term condition than do men and women spend less time on social activities, more often cancel holiday plans, spend less time with their spouse, spend less time with children and postpone their education plans. Men and women in different age groups have additional expenses. See Statistics Canada, 2007 General Social Care Tables, Table 5-4 (Population of caregivers by selected consequences of providing informal care for a long-term health condition or physical limitation, by sex and age — Ontario), online:

<http://www.statcan.gc.ca/pub/89-633-x/2008001/t043-eng.pdf>.

<sup>58</sup> Cranford and Vosko, note 29, 64.

<sup>59</sup> Cranford and Vosko, note 29, 64.

<sup>60</sup> In this respect, disparities in experiences and treatment of women and men within the employment relationship are important as systemic gender discrimination exacerbates precarious employment: Judy Fudge and Leah Vosko, “Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy” (2001) 22:2 *Economic and Industrial Democracy* 271.

<sup>61</sup> Grace-Edward Galabuzi, *Canada’s Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Toronto: Canadian Scholars’ Press, 2006); Gillian Creese, “Racializing Work/Reproducing White Privilege” in Vivian Shalla and Wallace Clement eds., *Work in Tumultuous Times: Critical Perspectives* (Montreal & Kingston: McGill-Queen’s, 2007) 192.

<sup>62</sup> The prevailing social scientific view is that “race” is socially, not biologically, real. Race relates to racialization in that it is used as the basis through which people are slotted into categories corresponding to perceived racial identity. Racialization, then, attempts to capture this process of categorization without reference to, or reinforcement of, the notion of race understood in the biological sense. Racism refers to a specific form of racialization, that is institutionalized, in which the process of categorization is done in a negative and deleterious way. There has been a tendency within dominant discourse to perceive racism quite narrowly: as conscious and isolated beliefs in racial hierarchy held by lone individuals, which only rarely lead to aggressive acts or provocations. If acknowledged as a past problem, racism is perceived as one that in contemporary times exists infrequently, if at all. Beliefs in racial hierarchy, however, do still exist and these inform behaviour in overt and covert ways. For a recent example of overtly racist practices and policies in employment see *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Centre maraîcher Eugène Guinois JR inc.*, 2005 CanLII 11754 (QC T.D.P.) in which farm workers of Haitian origin, referred to informally as the “Longueuil workers”, faced countless examples of racial discrimination on the job, including being forced to eat in a segregated lunch space separate from other workers.

<sup>63</sup> For an elaboration on these ideas, see Vic Satzewich, “The Political Economy of Race and Ethnicity” in Peter S. Li ed., *Race and Ethnic Relations in Canada* (2d ed.) (New York: Oxford University Press, 1999); Galabuzi, note 61, especially chapter 2.

<sup>64</sup> Creese, note 61, 193.

<sup>65</sup> Statistics Canada data showed that immigrants in “economic families” (a group of two or more related people living in the same location) arriving in the preceding five years had a low-income rate of 32.6% in 2005, compared to the rate of 6.9% for their non-immigration counterparts, with a low-income rate of over 58% for unattached individuals compared to over 26% for non-immigration unattached individuals: Chantal Collin and Hilary Jensen, *A Statistical Profile of Poverty in Canada* (Ottawa: Library of Parliament, 2009) 22, online:

<http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0917-e.pdf>. The authors also refer at 24 to studies



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showing that “individuals who belong to visible minority groups are more likely to experience poverty than those who do not”; for example, “[i]n 2004, 86% of recent immigrants with low incomes were members of a visible minority”, citing Dominique Fleury, *A Study of Poverty and Working Poverty Among Recent Immigrants to Canada, Final Report* (Human Resources and Skills Development Canada, 2007).

<sup>66</sup> Creese, note 61, 194.

<sup>67</sup> See, for example, Richard Spaulding, “Peoples as National Minorities: A Review of Will Kymlicka’s Arguments for Aboriginal Rights from a Self-Determination Perspective” (1997), 47 *University of Toronto Law Journal* 35.

<sup>68</sup> Citizenship and Immigration Canada (CIC), “Facts and Figures: Immigration Overview – Permanent and Temporary Residents” (2008): Citizenship and Immigration Canada, online: <http://www.cic.gc.ca/english/pdf/research-stats/facts2008.pdf> [CIC, “Facts and Figures 2008”], 62: cited in Jamie Baxter, “Precarious Pathways: Evaluating the Provincial Nominee Programs in Canada” (March 2010) (unpublished paper on file with LCO).

<sup>69</sup> Brazil-Angola Community Information Centre, *The Many Faces of Brazilian Immigrants in Ontario* (Toronto, 2009) 40, online: [https://tspace.library.utoronto.ca/bitstream/1807/24744/1/The%20Many%20Faces%20of%20Brazilian%20Immigrants%20in%20ON\\_English\\_2009.pdf](https://tspace.library.utoronto.ca/bitstream/1807/24744/1/The%20Many%20Faces%20of%20Brazilian%20Immigrants%20in%20ON_English_2009.pdf).

<sup>70</sup> Cranford and Vosko, note 29, 64-65.

<sup>71</sup> *Toronto Electric Commissioners v. Snider*, [1925] AC 396. The exception to this are federally regulated industries which fall under the *Canada Labour Code*. Employment is subject to federal or provincial and territorial jurisdiction depending upon the type/character of productive activity.

<sup>72</sup> The Canada-Ontario Immigration Agreement (Original signed November 21, 2005), online: <http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/ont-2005-agree.asp>; the agreement was extended in May 2010. More recently, more immigrants have been settling elsewhere in Canada. As a result, the federal government has reduced funding for Toronto settlement groups: Jennifer Pagliaro and Jill Mahoney, “Funding cuts threaten immigrant agencies,” *The Globe and Mail* (December 23, 2010), online: <http://www.theglobeandmail.com/news/politics/ottawa-cuts-funding-for-immigrant-settlement-groups/article1848219/>. The Agreement now has a specific part applying to temporary foreign workers: Annex G (Temporary Foreign Workers) of Appendix “A” of The Canada-Ontario Immigration Agreement, online: [http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/can-ont-amend\\_agree.asp](http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/can-ont-amend_agree.asp). Temporary foreign workers may shift their work status to one leading to permanent residency through the Canadian Experience Class program. The requirements for the Canadian Experience Class program conform to the interest in “skilled work”, that is, managerial, professional or technical and skilled trades: Citizenship and Immigration Canada, “Canadian Experience Class: Who Can Apply”, online: <http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp>.

<sup>73</sup> Canada-Ontario-Toronto Memorandum of Understanding on Immigration and Settlement (Original signed September 29, 2006), online: <http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/can-ont-toronto-mou.asp>.

<sup>74</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 (“Charter”).

<sup>75</sup> Adopted by General Assembly resolution 45/158 of 18 December 1990, online:

<http://www2.ohchr.org/english/law/cmw.htm>. For a list of signatories, see United Nations Treaty Collection, online: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-13&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en).

<sup>76</sup> See a list of conventions at International Labour Organization, online: <http://actrav.ilo.org/actrav-english/telearn/global/ilo/law/lablaw.htm>. The fundamental conventions relate to forced labour, freedom of association, discrimination and child labour.

<sup>77</sup> Ratifications of the ILO Fundamental Conventions (as of September 29, 2010), online: (<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?lang=EN>).

<sup>78</sup> ILO Declaration on Fundamental Principles and Rights at Work (June 1998), online: <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

<sup>79</sup> For a discussions of dominant approaches to the study of labour law in Canada, see Harry Arthurs, “National Traditions in Labour Law Scholarship: The Canadian Case” (2005) 23 *Comp. Labour Law & Pol’y J.* 645, online:

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<http://www.law.uiuc.edu/publications/cll%26pj/archive/vol%5F23/>; Eric Tucker, "Locating Labour Law: The Regulation of Occupational Health and Safety" in Elizabeth Comack ed., *Locating Law: Race/Class/Gender/Sexuality Connections*, 2nd ed., (Halifax: Fernwood, 2006) 152.

<sup>80</sup> Cranford and Vosko, note 29, 48.

<sup>81</sup> Eric Tucker, "Shareholder and Director Liability for Unpaid Workers' Wages in Canada: From Condition of Granting Limited Liability to Exceptional Remedy" (2008) 26 *Law and History Review*, np, online: <http://www.historycooperative.org/journals/lhr/26.1/tucker.html>.

<sup>82</sup> For context, see Geoffrey England, *Individual Employment Law* (Toronto: Irwin Law, 2000); Brian Langille, "Labour Law's Back Pages" in Guy Davidov & Langille, eds., *Boundaries and Frontiers of Labour Law* (Oxford & Portland: Hart, 2006) 13.

<sup>83</sup> See *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

<sup>84</sup> England, note 82, 33.

<sup>85</sup> Paul Craven, "Canada, 1670-1935: Symbolic and Instrumental Enforcement in Loyalist North America" in Douglas Hay and Paul Craven eds., *Masters, Servants, and Magistrates in Britain & the Empire, 1562-1955* (Chapel Hill & London: University of North Carolina, 2006) 175, 177.

<sup>86</sup> For historical background, see Thomas, note 22, especially chapter 2.

<sup>87</sup> These included the *Minimum Wage Act* (1920), which set hourly minimum wage and overtime standards, and the *Hours of Work and Vacations with Pay Act* (1944). The various minimum standards were amalgamated under the *Ontario Employment Standards Act* (ESA), which was first enacted in 1968 and took force the following year.

<sup>88</sup> *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A [WSIA, 1997].

<sup>89</sup> For an argument which puts the industrial pluralist regime in Canada into historical perspective, see Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: Oxford, 2001).

<sup>90</sup> Judy Fudge and Eric Tucker, "Pluralism or Fragmentation?: The Twentieth-Century Employment Law Regime in Canada" (2000) 46 *Labour/Le Travail* 251.

<sup>91</sup> The Wartime Labour Relations Regulations or PC 1003, an executive order passed in 1944 by the Mackenzie King-led Federal government, served as the framework for post-war labour relations legislation throughout Canada. Modeled in part on the United States' Wagner Act of 1935, PC 1003 remained an exceptional wartime measure until 1948 when it was made permanent through the enactment of the *Industrial Disputes Investigation Act*. This latter statute laid the groundwork for a new legal regime of labour regulation of industrial legality in Canada. Earlier in the same year the Ontario government of Leslie Frost enacted the *Labour Relations Act*, designed to defer to the (soon-to-be enacted) federal *Industrial Disputes Investigation Act*. This was followed by the "home-made" *Labour Relations Act* in 1950. See, for example, Fudge and Tucker note 90; Thomas, note 22, especially chapter 2.

<sup>92</sup> *Labour Relations Act, 1995*, S.O. 1995, c.1, Sched. A [LRA, 1995].

<sup>93</sup> This is referred to as the Rand Formula or compulsory checkoff and emerged following a 1946 arbitration decision settling a Ford automotive strike in Windsor. The Rand Formula provided an important level of financial security for unions.

<sup>94</sup> On the changing composition of unions, see Jacques Rouillard, "Union Structure and Strategy in Australia and Canada" *Labour/Le Travail* (September 22, 1996), online: <http://www.allbusiness.com/services/religious-grantmaking-civic-professional/598159-1.html>. The complexity of unionization (by sex, age, public and private sectors and type of industry) and the decline in unionization from 1981 to 2004 are described in René Morissette, Grant Schellenberg and Anick Johnson in "Diverging Trends in unionization", *Statistics Canada*, 6 (April 2005) *Perspectives*, online: <http://www.statcan.gc.ca/pub/75-001-x/10405/7827-eng.htm> Also see Human Resources and Skills Development Canada, "Indicators of Well-being in Canada: Work-Unionization Rates [in 2008]", online: <http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=17> and Human Resources and Skills Development Canada, "Union Membership in Canada-2009", online: [http://www.hrsdc.gc.ca/eng/labour/labour\\_relations/info\\_analysis/union\\_membership/index2009.shtml](http://www.hrsdc.gc.ca/eng/labour/labour_relations/info_analysis/union_membership/index2009.shtml).

<sup>95</sup> The common law also requires employees to mitigate damages caused by an employer's fundamental breach of the employment contract.

<sup>96</sup> *Employment Standards Act, 2000*, S.O. 2000, c.41 [ESA, 2000].

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<sup>97</sup> ESA, 2000, note 96, s.50(1).

<sup>98</sup> *Employment Standards Amendment Act (Temporary Help Agencies)*, 2009, S.O. 2009, c.9.

<sup>99</sup> *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, S.O. 2009, c.32. The Act has not yet been extended to other workers under federal migrant workers programs. Manitoba's *Worker Recruitment and Protection Act*, S.M. 2008, c.23, addresses the recruitment of a broad range of foreign workers (and child performers).

<sup>100</sup> Ministry of Labour, "Dedicated Team to Enforce New Laws that Protect Ontario's Vulnerable Workers", online: [http://www.labour.gov.on.ca/english/es/pubs/es\\_det.php](http://www.labour.gov.on.ca/english/es/pubs/es_det.php).

<sup>101</sup> *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 [OHSa].

<sup>102</sup> Ontario Regulation 414/05, ss.3 and 4. For a critique of the extension of the OHSa to agricultural workers, see Eric Tucker, "Will the Vicious Circle of Precariousness Be Unbroken? The Exclusion of Ontario Farm Workers from the Occupational Health and Safety Act" in Vosko, ed., note 5, 256.

<sup>103</sup> OHSa, note 101, s.3(1). The Ontario Ministry of Labour website sets out the protections available to live-caregivers: "Your Employment Standards Rights: Foreign National Live-in Caregivers", online: [http://www.labour.gov.on.ca/english/es/pubs/is\\_fn\\_esa.php](http://www.labour.gov.on.ca/english/es/pubs/is_fn_esa.php).

<sup>104</sup> WSIaWSIA, 1997, note 88.

<sup>105</sup> WSIB, "Health and Safety Statistics for Ontario", online:

<http://www.wsib.on.ca/wsib/wsibsite.nsf/public/CurrentStatistics>. The information and process for reporting injuries is available in "several" languages, online:

<http://www.wsib.on.ca/wsib/wsibsite.nsf/public/MultilingualServices>. The information on this website is provided in 11 languages in addition to English and French.

<sup>106</sup> *Pay Equity Act*, R.S.O. 1990, c. P.7, ss. 3(1) and 4(1) [PEA].

<sup>107</sup> PEA, note 106, s.22(2).

<sup>108</sup> *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1 [HRC].

<sup>109</sup> HRC, note 108, s.17(2). The Ontario Human Rights Commission has issued guidelines on the duty to accommodate persons with disabilities: "Disabilities and the Duty to Accommodate: Your Rights and Responsibilities", online: <http://www.ohrc.on.ca/en/issues/disability>.

<sup>110</sup> Ministry of Labour, "Enforcement Activities: Investigations and Inspection Statistics" (2009), online: [http://www.labour.gov.on.ca/english/es/report\\_card/rc\\_1.html](http://www.labour.gov.on.ca/english/es/report_card/rc_1.html).

<sup>111</sup> Ministry of Labour, note 110.

<sup>112</sup> Ministry of Labour, note 110. For historical inspections data, see Thomas note 22, 103. In 2003, there were 15,000 claims against employers and only one prosecution initiated. Richard Mackie, "Ontario To Get Tough on 'Bad Employers'" *The Globe and Mail* (27 April 2004). In 2005-2006, the Ministry of Labour found that employers violated worker rights in 11,358 claims totaling almost \$37million in unpaid wages. It prosecuted four companies and two directors.

<sup>113</sup> Ministry of Labour, "Prosecution and Conviction Statistics" [to October 2010], online, <http://www.labour.gov.on.ca/english/es/pubs/enforcement/convictions.php>.

<sup>114</sup> Ontario Ministry of Labour, "Education, Outreach and Partnership", online:

<http://www.labor.gov.on.ca/english/es/eop/index.php>. There were 318 prosecutions in 2005, 456 in 2006 and 345 in 2007. The website lists the convictions for April and May 2010 under the *Provincial Offences Act*.

<sup>115</sup> Ontario Ministry of Labour, Employment Standards Task Force, online:

[http://www.labour.gov.on.ca/english/es/pubs/is\\_estf.php](http://www.labour.gov.on.ca/english/es/pubs/is_estf.php). The Task Force is the first step in the Employment Standards Modernization Strategy to address all outstanding claims, shorten wait times for new claims and "better assist employers to comply with their obligations through education and awareness".

<sup>116</sup> The ESA, 2000 also contains provisions dealing with equity, requiring employers to pay women and men equal pay for equal (or substantially the same) work: ESA, 2000, note 96, s.42. The HRC addresses equal treatment with respect to employment. Pay equity (equal pay for work of substantially equal value) remains the subject of heavy criticism. See, for, example Tom Flanagan, "Another Bad Idea: Equal Pay for Work of Equal Value" *The Globe and Mail* (February 24, 2009), A15.

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- <sup>117</sup> Ministry of Labour, “Making Construction Sites Safer”, online: <http://news.ontario.ca/mol/en/2010/05/making-construction-sites-safer.html>.
- <sup>118</sup> Ministry of Labour, “Inspection Blitzes”, online: <http://www.labour.gov.on.ca/english/hs/sawo/blitzes/index.php>.
- <sup>119</sup> *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)* 2009, S.O. 2009 C.23.
- <sup>120</sup> Ministry of Labour, “Making Construction Sites Safer”, note 117.
- <sup>121</sup> “Christmas Eve scaffolding collapse leads to charges,” CBCnews (August 14, 2010), online: <http://www.cbc.ca/canada/toronto/story/2010/08/14/toronto-scaffold-accident-charges.html>.
- <sup>122</sup> Anthony Reinhart, “Three charged in deaths of migrant workers who fell 13 storeys from scaffold”, *The Globe and Mail* (October 14, 2010) A12. This is the first prosecution in Ontario under the amendments to the Criminal Code enacted as Bill 45 six years ago. Since the substantial completion of this Background Paper, Ontario has announced that it will appoint a single person to oversee workplace health and safety training (a “Chief Prevention Officer”), now the responsibility of several different agencies: Ari Altstedter, “Ontario acts to prevent worker deaths”, *The Globe and Mail* (December 17, 2010) A16; Ontario, “New Chief Prevention Officer to Oversee Workplace Safety” (December 16, 2010), online: <http://news.ontario.ca/mol/en/2010/12/new-chief-prevention-officer-to-oversee-workplace-safety.html>.
- <sup>123</sup> See information about the Human Rights Legal Support Centre at <http://www.hrlsc.on.ca/>.
- <sup>124</sup> *The Human Rights Code Amendment Act*, 2006, S.O. 2006, c. 30.
- <sup>125</sup> ESA, 2000, note 96, s. 74.
- <sup>126</sup> Workers’ Action Centre, note 36.
- <sup>127</sup> Workers’ Action Centre, note 36, 73.
- <sup>128</sup> LRA, 1995, note 92, s. 43.
- <sup>129</sup> Statistics Canada, “Unionization” Perspectives on Labour and Income (August 2007), online <http://www.statcan.gc.ca/pub/75-001-x/commun/4211933-eng.pdf>.
- <sup>130</sup> Section 11(2) of the LRA, 1995 provides that the Labour Relations Board may certify a trade union without a vote or if the vote is not likely to represent the wishes of the employees as a result of employer contraventions of the Act.
- <sup>131</sup> Fuller and Vosko, note 39, 31.
- <sup>132</sup> Laurie Monsebraaten, “Fighting for dignity on the job” *The Toronto Star* (11 July 2009), online: <http://www.thestar.com/article/664487>
- <sup>133</sup> Ontario Federation of Labour, *Temporary Work in Ontario* (2002).
- <sup>134</sup> Fuller and Vosko, note 39, 32.
- <sup>135</sup> Government of Canada, Seasonal Agricultural Workers Program, online: <http://www.canadainternational.gc.ca/mexico-mexique/work-travail/sawp-ptag.aspx?lang=en>.
- <sup>136</sup> Naomi Alboim and Maytree, *Adjusting the Balance* (Maytree, 2009) 18, online: <http://www.maytree.com/wp-content/uploads/2009/07/adjustingthebalance-final.pdf>.
- <sup>137</sup> Workers’ Action Centre, note 36, 18.
- <sup>138</sup> Further, people employed in temporary work find it more difficult to satisfy the qualifying hours of work threshold in order to receive employment insurance. For instance, workers in Toronto need 595 hours of work in the previous 26 weeks to qualify for EI. First-time applicants need 910 hours – roughly six months of full-time work. See Noor Javed, “‘Outdated’ EI traps temp workers”, *The Toronto Star* (13 June 2009), online: <http://www.thestar.com/article/650314>.
- <sup>139</sup> *Pension Benefits Act*, R.S.O. 1990, c. P.8 [PBA].
- <sup>140</sup> ESA, 2000, note 96, s. 54. It should be noted that workers who are now employees of a temporary employment agency are in a different position with respect to many rights from workers who obtain their own temporary employment.
- <sup>141</sup> ESA 2000, note 96, s. 64(1). It should be noted that while length of employment for purposes of the right to notice is generally based on continuous service, it is cumulative service that is relevant for severance pay purposes ESA, 2000, note 96, s. 65(2).

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<sup>142</sup> See ESA 2000, note 96, ss. 46(1) and 48(1). There is one other ESA, 2000 entitlement that is sometimes cited as one dependent on meeting a length of service qualification, that being the right to an annual vacation with pay. Under section 33, an employee is entitled to two weeks' vacation after each year of employment, which means that an employee who leaves his employment before a year is completed will not receive vacation. However, in such circumstances, s. 38 entitles the employee to the vacation pay that accrued during the part year; s.35.2 provides that the amount of vacation pay is equal to 4 % of the wages earned by the employee.

<sup>143</sup> WSIA, 1997, note 88, s. 41(1).

<sup>144</sup> PBA, note 139, s. 31.

<sup>145</sup> ESA, 2000, note 96, s. 33.

<sup>146</sup> Guylaine Vallée, *Towards Enhancing the Employment Conditions of Vulnerable Workers: A Public Policy Perspective* (Canadian Policy Research Network, Ottawa, 2005), 17 n. 21, 12.

<sup>147</sup> *United Steelworkers of American and Cominco Ltd.*, [1997] C.L.R.B.D. No. 11, 35 CLRBR (2d) 187.

<sup>148</sup> See *Graphic Communications International Union, Local 500M v. Quebecor World Islington, Quebecor World Inc.* [2001] O.L.R.D. No. 4732 and *Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newspaper Guild v. Metroland Printing, Publishing and Distributing Ltd.* [2003] O.L.R.D. No. 514, 90 C.L.R.B.R. (2d) 97, [2003] CLLC para. 220-060. It should be noted, however, that the recently-enacted *Colleges Collective Bargaining Act*, 2008, S.O. 2008, c. 15. (CCBA), which governs labour relations in the community college system and which grants sessional teachers access to a collective bargaining regime denied to them under the predecessor statute, requires sessionals and permanent teachers to be placed (initially at least) in different bargaining units.

<sup>149</sup> Cranford, Fudge, Tucker and Vosko, note 35, 9.

<sup>150</sup> Cranford, Fudge, Tucker and Vosko, note 35, 8.

<sup>151</sup> OECD, *Partial Renaissance of Self-Employment*, *OECD Employment Outlook*, 2000, online: <http://www.oecd.org/dataoecd/10/44/2079593.pdf>; Cranford, Fudge, Tucker and Vosko, note 35.

<sup>152</sup> Alice de Wolff, *Breaking the Myth of Flexible Work: Contingent Work in Toronto* (Contingent Workers Project, 2000).

<sup>153</sup> Immigrant Women's Center, "Women and Self Employment", online:

<http://www.stjosephwomen.on.ca/index.php?page=self>.

<sup>154</sup> Marcia Almey, *Women in Canada: Work Chapter Updates* (Statistics Canada, 2006), online:

<http://www.statcan.gc.ca/pub/89f0133x/89f0133x2006000-eng.htm#8>.

<sup>155</sup> Jeffrey Sack, C. Michael Mitchell and Sandy Price, *Ontario Labour Relations Board Law and Practice*, 3<sup>rd</sup> ed., (Markham: LexisNexis, 1997) §3.305. Nowadays, the Board takes a more flexible approach to the question and in fact as a general matter does not consider that there is any reason not to place part-time workers and full-time workers them in the same bargaining unit; see the Board's statements to that effect in, for example, *International Union of Operating Engineers, Local 793 v. TWD Roads Management Inc.*, [2008] O.L.R.D. No. 2995, [2008] OLRB Rep. July /August 582. The Board determined in the *TWD Roads* case that the bargaining unit should consist only of full-time employees because both the union and the employer had agreed to that configuration.

<sup>156</sup> Katherine Marshall, "Part-time by choice", (2000) 1:2 Perspectives on Labour and Income, online:

<http://www.statcan.gc.ca/pub/75-001-x/00200/5608-eng.html#SrcDef>.

<sup>157</sup> For a statistical breakdown, see Vosko, note 5, 23, table 1.2. Also see Almey, note 154. According to Almey, "[i]n 2006, more than 2 million employed women, 26% of all women in the paid workforce, worked less than 30 hours per week at their main job, compared with just 11% of employed men. In fact, women have accounted for about seven in 10 of all part-time employees since the late 1970s."

<sup>158</sup> 2008 figures provided by Statistics Canada show that over 73% of part-timers gave as their reasons for wanting part-time work caring for children, other family responsibilities, attending school or personal preference: Statistics Canada, *Reasons for part-time work by sex and age group*, 1, online:

<http://www40.statcan.gc.ca/l01/cst01/labor63a-eng.htm>.) Of course, some of the reasons given suggests reasons that are not entirely voluntary from the employee's perspective; the point, however, is that the individuals concerned were not in the position of wanting to be in full-time employment, but being unable to find it.

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<sup>159</sup> Geoffrey England and Roderick Wood, *Employment Law in Canada*, 4<sup>th</sup> ed. (Markham: LexisNexis, 2005) 8-135; Dave Broad, *Hollow Work, Hollow Society?* (Halifax: Fernwood Publishing, 2000), 20 n. 129.

<sup>160</sup> The PEA has a provision that is anti-discriminatory in nature but subject to some qualification. Subsection 8(3) states that an employer can designate a position as one that “provides employment on a casual basis” and such positions may be excluded from a job class in determining whether the job class is male or female. Further, incumbents to the position are not entitled to any compensation adjustments that may be required in order to achieve pay equity. Subsection 8(4) limits the potentially discriminatory impact by providing that a position cannot be designated if the work requirements amount to at least one-third of the work involved in a full-time position or if the work in question is performed on a “regular and continuing” basis.

<sup>161</sup> The former *Employment Standards Act* provided for a right to a public holiday off with pay only to employees who worked at least twelve days in the four work weeks preceding the public holiday.

<sup>162</sup> ESA, 2000, note 96, s.24(1)(a) provides that an employee’s public holiday pay entitlement is equal to the wages earned in the four work weeks preceding the holiday divided by twenty. The calculation is based on an employee who works a five-day work week, and who has not been absent in the four weeks in question. Following the calculation, the employee will receive pay equivalent to one eight-hour day of work for the public holiday. However, in the case of a part-time employee the effect of the calculation is to pro-rate the entitlement.

<sup>163</sup> Statutory limits on hours of work are perhaps more helpful to part-time employees, in that there are daily as well as weekly maxima (eight per day and forty-eight per week in the case of the ESA, 2000). These limits, however, apply only in respect of working time for a given employer: ESA, 2000, s.17(1). The employee working in two or more part-time jobs for different employers could find herself working more than eight hours per day or even forty-eight hours per week in total without bumping up against the limits. If the employer establishes a regular work day of more than eight hours, the daily limit becomes the number of hours in that regular work day. The daily limit can be exceeded if the employee agrees in writing and the weekly limit can be exceeded if agreed to in writing and with the approval of the Director: ESA, 2000, note 96, ss. 17(2) and (3)).

<sup>164</sup> ESA, 2000, note 96, s. 22(1).

<sup>165</sup> Jean Bernier, *The Scope of Federal Labour Standards and Nontraditional Work Situations (Submission to the Federal Labour Standards Review)* (Quebec City, 2005), 24 n. 5.

<sup>166</sup> *Labour Relations Act*, R.S.O. 1990, c. L.2, s.6(2.1), added by the *Labour Relations and Employment Statute Law Amendment Act, 1992*, S.O. 1992, c. 21, s. 7(1). The *Labour Relations Act* was repealed by the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, subsection 1(2), which replaced it with the current LRA, 1995, note 92, which does not contain any corresponding provision.

<sup>167</sup> O. Reg 285/02 under the ESA, 2000, note 96.

<sup>168</sup> Existing exclusions from protective coverage under the LRA, 1995 include agricultural workers, horticultural workers, and domestic workers employed in private homes. Agricultural workers are covered under the *Agricultural Employees Protection Act*, S.O. 2002, c. 16 [AEPA, 2002], the constitutionality of which is currently under reserve at the Supreme Court of Canada.

<sup>169</sup> LRA, 1995, note 92, s.3(a).

<sup>170</sup> O. Reg. 285/01, s.11(1) under the ESA, 2000, note 96.

<sup>171</sup> Ontario Ministry of Labour, “Homeworkers”, online:

[http://www.labour.gov.on.ca/english/es/pubs/factsheets/fs\\_homeworkers.php](http://www.labour.gov.on.ca/english/es/pubs/factsheets/fs_homeworkers.php). Their statutory minimum rate of pay is 110% of the minimum wage: O. Reg. 285/01, s.5(1)4, under the ESA, 2000, note 96.

<sup>172</sup> Workers’ Action Centre, note 36, 19.

<sup>173</sup> Evelyn Encalada Grez, “Migrant Workers Reap Bitter Harvest In Ontario”, *The Toronto Star* (28 October 2008), online: <http://www.thestar.com/article/525483>; Vik Kirsch, “Migrant Workers to Address Firing”, *Guelph Mercury* (10 December 2008), online: <http://news.guelphmercury.com/printArticle/414262>.

<sup>174</sup> The ILO takes the position that the sending and destination countries both have responsibility for ensuring that migrant workers’ rights are enforced: International Labour Organization, *Protecting the Rights of Migrant Workers: A Shared Responsibility* (Geneva: ILO, 2009), online:

[http://www.ilo.org/public/english/protection/migrant/download/brochure\\_migrant\\_rights.pdf](http://www.ilo.org/public/english/protection/migrant/download/brochure_migrant_rights.pdf). As the ILO says, “Virtually all countries are countries of origin, transit, and destination”.

<sup>175</sup> Cranford and Vosko, note 29, 64-65.

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<sup>176</sup> Workers' Action Centre, note 36.

<sup>177</sup> One study showed that employment rates of persons with disabilities ranged from about 23.5% for persons with a memory-related disability to nearly 46% for persons with a hearing related disability (noting that the employment rate for those with a severe or total loss of hearing was 32%): Canadian Centre for Disability Studies, *CCSD's Disability Sheet No. 19 (2005)*: <http://www.ccsd.ca/drip/research/drip19/index.htm>. The data were based on the 2001 Participation and Activity Limitation Survey (PALS).

<sup>178</sup> Human Resources and Skills Development Canada, *Indicators of Well-being in Canada, Work – Employment Rate*, online: <http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=13>.

<sup>179</sup> Statistics Canada, *Report on the Demographic Situation in Canada: 2005 and 2006 Edition* (Ottawa: Statistics Canada, 2008), online: <http://www.statcan.ca/english/freepub/91-209-XIE/91-209-XIE2004000.pdf>.

<sup>180</sup> Anthony Reinhart, "A nation of newcomers", *The Globe and Mail* (December 5, 2007) A1.

<sup>181</sup> Tina Chui, Kelly Tran and Hélène Maheux, *Statistics Canada, 2006 Census: Immigration in Canada: A Portrait of the Foreign-born Population, 2006 Census: Findings*, online: <http://www12.statcan.ca/census-recensement/2006/as-sa/97-557/index-eng.cfm>.

<sup>182</sup> Many of these workers take up residence in Ontario. In 2008, 66,875 temporary foreign workers alone arrived in Ontario: Citizenship and Immigration Canada, "Facts and Figures: 2008 Immigration Overview" RDM 4th Quarter (2008), online: <http://www.cic.gc.ca/english/resources/statistics/facts2008/temporary/01.asp>.

<sup>183</sup> Marina Jiménez, "Immigrants battle chronic low income", *The Globe and Mail* (January 31, 2007) A5.

<sup>184</sup> Jiménez note 183.

<sup>185</sup> Kapsalis and Tourigny, note 20.

<sup>186</sup> Wayne Lewchuk, Alice De Wolff, Andy King and Michael Polanyi, "The Hidden Costs of Precarious Employment: Health and the Employment Relationship" in Vosko, ed., note 5, 141. For a brief statement of some of the health concerns associated with migrant workers, see Kerry Preibisch, "The Second Generation of Permanently Temporary Workers," Presentation at Permanently Temporary: Temporary Foreign Workers and Canada's Changing Attitude to Citizenship and Immigration Community Research Symposium (February 4, 2010) 14, online: <http://ceris.metropolis.net/research-policy/CommunityResearchSymposium2010/PermanentlyTemporary.pdf>. For the impact on hotel housekeepers, primarily immigrant women of colour, see Serena Liladrie, "Do Not Disturb/Please Clean the Room: The Invisible Work and Real Pain of Hotel Housekeepers in the GTA", *Policy Matters* (January 2010), online: [http://ceris.metropolis.net/frameset\\_e.html](http://ceris.metropolis.net/frameset_e.html).

<sup>187</sup> Lewchuk, De Wolff, King and Polanyi, note 186.

<sup>188</sup> Galabuzi, note 61. Nursing provides an example of a highly gendered and racialized occupation in Canada in which its workers face significant negative health effects. Nursing in Canada is an occupation overwhelmingly (ninety-five percent) held by women and with a high concentration of racialized women. According to the National Survey of the Work and Health of Nurses, the first national study of its kind, nurses experience higher rates of work-related injuries and illnesses than workers in other occupations: André Picard, "Nurses' Jobs Bad for their Health", *The Globe and Mail* (December 12, 2006), A7.

<sup>189</sup> Institute for Work & Health, "New Canadian immigrants face less than ideal working conditions" (July 2008), online: <http://www.iwh.on.ca/media/2008-jul-09>. The death of seasonal agricultural worker Ned Peart is one of numerous stories reflecting the dangers faced by temporary migrant workers in Canada. The Jamaican-born Peart died on a Brantford Ontario tobacco farm after being crushed by a kiln in August 2002: Damion Mitchell, "Farm Worker Danger - Canadian Lobby Group Wants Enquiry Into Death of Jamaican" *Jamaica Gleaner* (December 20, 2004), online: <http://www.jamaica-gleaner.com/gleaner/20041220/lead/lead1.html>.

<sup>190</sup> Recent research has used a framework of "employment strain" to analyze the relationship between health and precarious employment. The employment strain framework allows for a broad analysis of experiences related to employment uncertainty, workload (effort to find work, balancing multiple employer demands), relational support (union presence, workplace support) and household insecurity (low income, health benefits and gender dependency). Research using this framework is particularly useful because it recognizes that the precarious nature of employment relationships can often have an impact beyond just the individual worker, and can extend to personal and community relationships: Lewchuk, De Wolff, King and Polanyi, note 186.

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<sup>191</sup> de Wolff, note 152.

<sup>192</sup> Janet McLaughlin, “Challenges and Considerations: Providing Accessible Health Care for TFW”, Permanently Temporary: Temporary Foreign Workers and Canada’s Changing Attitude to Citizenship and Immigration Community Research Symposium (Toronto, February 4, 2010) 32, online: <http://ceris.metropolis.net/research-policy/CommunityResearchSymposium2010/PermanentlyTemporary.pdf>.

<sup>193</sup> Wayne Lewchuk, Alice de Wolff, Andy King and Michael Polanyi, “From Job Strain to Employment Strain: Health Effects of Precarious Employment” (2003) 3 Just Labour 23.

<sup>194</sup> Workers’ Action Centre, note 36, 17.

<sup>195</sup> Workers’ Action Centre note 36.

<sup>196</sup> Saunders, note 3.

<sup>197</sup> See, for example, the persons eligible to take English or French language classes under the services sponsored by the Ontario government: Ontario Ministry of Citizenship and Immigration, “Learn English or French”, online: <http://www.citizenship.gov.on.ca/english/keyinitiatives/language.shtml>.

<sup>198</sup> Workers’ Action Centre, note 36.

<sup>199</sup> Workers’ Action Centre, note 36.

<sup>200</sup> Law Commission of Ontario, *The Law as it Affects Older Adults, Consultation Project: Shaping the Project* (May 2008), online: [www.lco-cdo.org](http://www.lco-cdo.org).

<sup>201</sup> Arthurs, note 47, 47.

<sup>202</sup> On the application of “decent work” to the study of Caribbean and Latin American newcomers to Canada in precarious employment, see Luin Goldring and Patricia Landolt, “Immigrants and Precarious Employment: Brief One”, online: <http://www.arts.yorku.ca/research/ine/research/publications.html>.

<sup>203</sup> In 1965, for instance, the Ministry of Labour (then the Department of Labour) issued a report entitled Labour Standards and Poverty. According to the report, “labour standards legislation attempts to deal with various aspects of poverty by raising wages, improving working conditions, and opening up employment opportunities”: Ontario Department of Labour, *Labour Standards and Poverty in Ontario* (November 22, 1965), cited in Mark P. Thomas, “Setting the Minimum: Ontario’s Employment Standards in the Postwar Years, 1944-1968” (2004) 54 *Labour/Le Travail* 49.

<sup>204</sup> See Government of Ontario, *Breaking the Cycle: Ontario’s Poverty Reduction Strategy* (December 2008), online: <http://www.growingstronger.ca/english/default.asp>.

<sup>205</sup> *Poverty Reduction Act*, S.O. 2009 c.10 (“PRA”).

<sup>206</sup> PRA, note 205, s. 3.

<sup>207</sup> See Susan Sachs, “Liberty, equality, paternity”, *The Globe and Mail* (November 4, 2010) A16, explaining the difference in father leave take up in a number of countries, including Canada (low, but increasing) and Sweden (high), as a result of financial other incentives.

<sup>208</sup> For a very recent review of the range of meanings attributed to the concept of flexibility in employment see Thomas, note 22, 13-16. The fundamental question, as Thomas, among many others, notes, is: flexibility for whom?

<sup>209</sup> Stephanie Bernstein, Katherine Lippel, Eric Tucker and Leah F. Vosko, “Precarious Employment and the Law’s Flaws: Identifying Regulatory Failure and Securing Effective Protection for Workers” in Vosko, ed., note 5, 203, 211.

<sup>210</sup> Arthurs, note 47, 49. For a more extended discussion of “flexicurity”, see Arthurs, note 47, 254-256.

<sup>211</sup> On the changes, see Ontario Ministry of Labour, *Complying with Employment Standards: What Temporary Help Agencies and Client Businesses Need to Know*, online:

[http://www.labour.gov.on.ca/english/es/pubs/brochures/br\\_tempagencies.php](http://www.labour.gov.on.ca/english/es/pubs/brochures/br_tempagencies.php) and Your Employment Standards Rights: Temporary Help Agency Assignment Employees, online:

[http://www.labour.gov.on.ca/english/es/pubs/is\\_tha.php](http://www.labour.gov.on.ca/english/es/pubs/is_tha.php).

<sup>212</sup> One suggestion for a legal test to distinguish own-account self-employed workers and entrepreneurs calls for the examination of the amount of capital invested, amount of income or number of workers the person in question employs: Judy Fudge, Eric Tucker and Leah F. Vosko, “Changing Boundaries in Employment: Developing a New Platform for Labour Law” (2003) 10 *Canadian Labour and Employment Law Journal* 361, 396. Other suggestions include borrowing concepts from competition law, such as product differentiation and barriers to entry, to draw the distinction.



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<sup>213</sup> Workers' Action Centre, note 36, 64-65. Quebec's *An Act Respecting Labour Standards*, R.S.Q. c. N-1.1, art. 95 provides for joint liability of companies engaging subcontractors.

<sup>214</sup> In other provinces, statutory protections have been extended to certain vulnerable workers. For instance, the *Employment Standards Code*, C.C.S.M. c. E110, of Manitoba, as of June 2008, extends to agricultural workers protections such as proper termination notice, vacation pay, days off, work breaks, unpaid leaves and overtime and statutory holiday pay for workers at indoor factory farms: Manitoba Labour and Immigration. "Changes to Employment Standards in Agriculture" (June 2009), online: <http://www.gov.mb.ca/labour/standards/doc,changes-agriculture,factsheet.html#q760>.

<sup>215</sup> Bernier, Vallée and Jobin, note 4, 15.

<sup>216</sup> Code du travail, Première Partie, Livre II, Titre IV, Ch. III, art. L1243-8, online: Legifrance.gouv.fr, <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006901219&cidTexte=LEGITEXT000006072050&dateTexte=20100929&oldAction=rechCodeArticle>. The treatment of temporary workers in France can be discerned from the conditions imposed on foreign employers who second their employees to France: Ministère du Travail, de la Solidarité et de la Fonction Publique: <http://www.travail-solidarite.gouv.fr/informations-pratiques,89/fiches-pratiques,91/detachement-de-salaries,407/temporary-posting-of-workers-in,8988.html>. In light of recent efforts to change French working conditions to respond to the impact of the recession, the French example is complicated. At least some changes would be to what might be called "standard" employment, such as the raise in the retirement age from 60 to 62 which has passed the lower house: CBCnews, "French retirement age inches to 62", online: <http://www.cbc.ca/world/story/2010/09/15/france-retirement-age.html>. As this story indicates, the age at which a worker could obtain a full pension even if he or she has not paid in for the full required period would rise from 65 to 67 and Germany also plans to increase its retirement age from 65 to 67.

<sup>217</sup> Workers' Action Centre, note 36, 51-52.

<sup>218</sup> See statistics as of June 2009 on the Ministry of Labour's website: "Investigations and Inspections", online, <http://www.labour.gov.on.ca/english/es/pubs/enforcement/investigations.php>.

<sup>219</sup> Ministry of Labour "Prosecution and Conviction Statistics", online: <http://www.labour.gov.on.ca/english/es/pubs/enforcement/convictions.php>.

<sup>220</sup> *Employment Standards Act*, R.S.B.C 1996, c. 113, s. 79(1)(f); *Employment Standards Code*, R.S.A. 2000, c. E-9 and *Employment Standards Regulation*, Alta. Reg. 14/1997, Part 7. The Ontario ESA, 2000, note 96, provides for the imposition of administrative costs under some circumstances: see, for example, s.103(2) which provides for administrative fees when the employer pays the Director in trust for wages owing to an employee (rather than directly to the employee).

<sup>221</sup> *Canada Labour Code*, R.S.C. 1985, c. L-2, ss.240-242.

<sup>222</sup> In addition, the authority granted to employers to "name" employees whom they desire to return the following year, also represents a source of vulnerability rendering anti-reprisal provisions ineffective.

<sup>223</sup> LRA, 1995, note 92, C. 1, Schedule A, s.3(a). Agriculture workers are excluded by s.3(b.1).

<sup>224</sup> AEPA, 2002, note 168.

<sup>225</sup> The Supreme Court of Canada has reserved its judgement in *Attorney General of Ontario v. Fraser* (32968), on appeal from the Ontario Court of Appeal which held that the *Agricultural Employees Protection Act, 2002* was unconstitutional: *Fraser v. Attorney General (Ontario)* 2008 ONCA 760, (2008), 92 O.R. (3d) 481. For a summary of the case before the SCC, see the Supreme Court of Canada website: <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=32968>.

<sup>226</sup> For the Interim Report of the ILO Committee on Freedom of Association, see online: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_146695.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_146695.pdf).

<sup>227</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, para. 82 [BC Health Services].

<sup>228</sup> BC Health Services, note 227, para. 82.

<sup>229</sup> A group of scholars argue that "there is no single form of workplace representation or collective bargaining that meets the needs of the wide range of types of self-employed workers": Cranford, Fudge, Tucker and Vosko, note 35, 28.

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<sup>230</sup> Unionization of agricultural workers has occurred in two provinces where they are permitted to bargain collectively, Manitoba and British Columbia. For example, the UFCW was successful in negotiating a collective agreement to cover seasonal migrant workers at a farm in Manitoba: UFCW Canada, “Ratification of UFCW Canada first-contract at Manitoba farm historic breakthrough for migrant workers” (June 23, 2008): <http://www.ufcw.ca/Default.aspx?SectionId=af80f8cf-ddd2-4b12-9f41-641ea94d4fa4&LanguageId=1&ItemId=7a46affd-9f50-40a4-9ccf-d3b917af6fa0>. The workers subsequently voted to decertify the union, however, although there were reports of threats of repatriation for supporting the union: for two different reports, see Jennifer deGroot, “How clean are your carrots?” *Winnipeg Free Press* (August 14, 2009), posted on the website of the National Union of Public and General Employees, online: <http://www.nupge.ca/node/2490> and Aldo Santin, “Manitoba farm workers vote to leave union”, *Winnipeg Free Press* (August 8, 2009), online: canada.com: <http://www.canada.com/business/Manitoba+migrant+farm+workers+vote+leave+union/1871739/story.html>.

<sup>231</sup> See, for example, Roy J. Adams, “Fraser v. Ontario and International Human Rights: A Comment” (2009) 14 *Canadian Labour and Employment Law Journal* 377.

<sup>232</sup> Bernstein, Lippel, Tucker and Vosko, note 209, 211. Similarly, a prominent international law scholar asserts: “There is no labour market without rules...the critical issue is not whether to have rules but what kinds of rules and who creates them”: W. Sengenberger, “International Labour Standards in a Globalized Economy: The Issues” in Sengenberger and D. Campbell, eds., *International Labour Standards and Economic Interdependence* (Geneva: International Labour Office, 1994) 3,11, cited in Judy Fudge, “Beyond Vulnerable Workers: Towards a New Standard Employment Relationship” (2005) 12:2 *Canadian Labour & Employment Law Journal* 151. For an historical perspective, see Fudge and Tucker, note 89.