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COMMISSION DU DROIT DE L'ONTARIO

Vulnerable Workers and Precarious Work

INTERIM REPORT

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

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

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EXECUTIVE SUMMARY

I. INTRODUCTION

The nature of employment is evolving and the standard employment relationship based on full-time, continuous employment, where the worker has access to good wages and benefits, is no longer the predominant form of employment, to the extent it ever was. Today more work is precarious, with less job security, few if any benefits and minimal control over working conditions. Precarious work may be contract, part-time, self-employment or temporary work. While this change has affected all groups of workers, women and recent immigrants are more likely to be “vulnerable workers” engaged in precarious work. In particular, certain workers under foreign worker programs undertake precarious work.

The LCO’s Vulnerable Workers/Precarious Work Project assesses the protections available to these workers in Ontario and coverage of this type of work under provincial legislation designed to protect workers, such as the *Employment Standards Act* and the *Occupational Health and Safety Act*.

The draft recommendations made in this Interim Report may change as a result of feedback to the Interim Report and any final recommendations are subject to approval by the LCO’s Board of Governors.

II. IDENTIFYING VULNERABLE WORKERS AND PRECARIOUS WORK

This Chapter discusses the rise of precarious work, the economic backdrop, as well as forms of precarious work and the disproportionate impact on particular groups. Factors such as increased reliance by employers on self-employed contract workers, the decline of the manufacturing industry, the information revolution, dramatic technological advances and the demand for higher educational levels have all played a part in the increased precariousness of work.

Precarious work is characterized by job instability, lack of benefits, low wages and degree of control over the process. It may also involve greater potential for injury. This Chapter provides more detailed information about the kinds of precarious work being considered in this Project, including the forms this work takes (such as contract work) and the types of work that can often be described as precarious (such as agricultural activity).

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

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

Chapter II provides an overview of the law with respect to precarious work and the impact of the *Canadian Charter of Rights and Freedoms*, the *Ontario Human Rights Code*, domestic statutes and international law and policy initiatives in this area.

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

This Chapter discusses possible reforms to the *Employment Standards Act* (ESA) and related legislation, including policy considerations, establishing a broader floor of basic minimum rights and expanding knowledge of employee rights and employer obligations. It also addresses issues related to enforcement.

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

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

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

We stress the importance of *ensuring that both workers and employers are aware of their rights and obligations* and make a recommendation towards that goal. (Recommendation 7) This includes a recommendation that *employers provide the ESA information poster in document format to all new employees (in the language of the employees, if possible) and provide all employees of written notice of their employment status and terms of their employment contract and education for employers.* (Recommendations 8, 9 and 18)

This Chapter also considers issues arising from enforcement of the ESA, including concerns with the existing primarily complaint-based and voluntary compliance model; there is also some proactive enforcement. We recommend *continuation of various methods of enforcement, with an increased emphasis on proactive enforcement, particularly in high risk industries.* (Recommendations 10 and 16) One particular issue is the extent to which employees must approach the employer to resolve concerns prior to making a claim under the ESA and the application of exemptions to the requirement; we recommend *a review of this policy and process to determine whether there are negative effects and, if so, whether the policy should be reversed and greater communication about available exemptions.* (Recommendations 11 and 12) We also recommend ways of *providing assistance to workers to assist them in the claims process.* (Recommendation 13) We encourage *the involvement of companies that are leaders in compliance in addressing non-compliance issues and the creation of an Innovative Solutions for Precarious Work Advisory Council that would include all relevant stakeholders to develop initiatives to improve the enforcement process.* (Recommendation 21 and 28)

Other recommendations in relation to enforcement include *expanding the time limits and increasing the monetary cap, providing for third party complaints in a way that ensures unfounded complaints do not trigger inspections and providing that employers in violation of the ESA be responsible for covering the costs of investigations and inspections.* (Recommendations 14, 15 and 17)

We discuss work councils and recommend that the *Ministry of Labour create a joint labour-management employment standards work council as a pilot in non-unionized workplaces.* (Recommendation 20)

The Chapter also discusses the specific concerns facing many temporary foreign workers, in particular fear of repatriation. We recommend *expediting hearing complaints of reprisals and that they be heard prior to repatriation, as well as other changes that might help reduce the fear of repatriation or help workers in making claims.* (Recommendations 22, 23, 24 and 25)

Agricultural workers are exempted from the Ontario *Labour Relations Act* and their right to organize and make representations to their employer is covered instead by the *Agricultural Employees Protection Act, 2002* which has been held by the Supreme Court of Canada to be constitutional. In doing so, the Supreme Court read bargaining in good faith into the statute and we recommend that *the Ontario government explicitly amend the AEPA by including the elements of bargaining in good faith identified by the Supreme Court of Canada.* (Recommendation 26) We also suggest that it would be helpful if *academics and relevant stakeholders undertake a review of alternative means to traditional unionization for vulnerable workers.* (Recommendation 27)

Ontario has enacted the *Employment Protection for Foreign Nationals Act* but so far has applied it only to live-in caregivers, even though it contemplates coverage of other temporary foreign workers. We recommend it be extended to all temporary foreign workers. (Recommendation 29) We also recommend that *the Ontario government negotiate an information-sharing agreement with Human Resources and Skills Development Canada and Citizenship and Immigration Canada with the goal of increasing protections for temporary foreign workers.* (Recommendation 30)

IV. SELF-EMPLOYMENT

About 15 per cent of Ontario's workforce is self-employed. This group includes both those who operate businesses and may employ others and those called "own-account" self-employed workers" who may resemble employees more than self-employed entrepreneurs, for example. Women and members of visible minorities are more likely to be in the own-account category than in other forms of self-employment and part-time employment rates for own-account self-employed workers are high, particularly for women. Self-employed workers are not covered by the ESA and therefore the challenge is to determine whether a worker is self-employed or an employee. *We recommend that the Ministry of Labour undertake efforts (which we specify) to reduce misclassification and the Ontario government consider extending some ESA protections to highly vulnerable low-wage self-employed persons or identifying other forms of protection or*

requiring employers or contractors to provide information about the status of their employment to workers. (Recommendations 31, 32 and 33)

V. HEALTH AND SAFETY

In Chapter V, we discuss the *Occupational Health and Safety Act (OHSA)* and the *Workplace Safety and Insurance Act (WSIA)* and their application to vulnerable workers. The OHSA requires either the creation of a joint health and safety committee or the designation of an individual to address workplace safety concerns. We believe that it would be helpful if *enforcement of the OHSA includes proactive inspection to ensure that the joint committees or individuals have been put in place. (Recommendation 34)*

We note that a number of the recommendations in the Dean Report resulting from the Advisory Panel on Occupational Health and Safety have been implemented or that implementation is underway. We recommend that *the Ontario government implement a number of Dean Report recommendations that do not appear to have been made subject to implementation (Recommendation 39)*. While we agree with the intent of the Dean Report Recommendation to increase proactive inspection and enforcement campaigns at workplaces and sectors where vulnerable workers are concentrated, we refine the recommendation to provide that *sectors where vulnerable workers are concentrated be identified as agriculture, hospitality and cleaning and workplaces with temporary staffing agency workers and that temporary foreign workers in all sectors be a priority for proactive OHSA enforcement activities. (Recommendation 36)* We also agree with the Dean Report's recommendation that *a special Vulnerable Workers advisory committee be created under s.21 of the OHSA and we specify areas that we believe should be a priority for the committee. (Recommendation 38)*

There appears to be some question about the application of WSIB/OHSA policies and practices on temporary agency workers and we recommend that *the Ontario government assess the impact of these policies and practices on temporary agency workers, particularly the practice of not recording health and safety incidents on the client employer's records. (Recommendation 40)*

We discuss supply chain regulation relating to health and safety and the ESA and make a recommendation that *consideration of health and safety performance be included in assessing vendors' work proposals, including implementation of the Dean Report recommendations in this regard. (Recommendation 41)*

Our research indicated that temporary foreign workers may not access WSIB benefits or are repatriated before they are able to do so. We recommend that *the Ontario government*

implement a pilot mobile medical clinic for migrant workers to provide care or assistance in filing claims, preferably in the language of the migrant worker. (Recommendation 42) We also recommend that employers, F.A.R.M.S (which performs an administrative role in relation to the Caribbean and Mexican seasonal agricultural workers program), local governments and community and worker advocacy groups work together to provide various forms of support to migrant workers. (Recommendation 43)

VI. TRAINING AND EDUCATION

Entry level jobs have increased, but they are not the path to better paying, more secure middle level positions that they were in the past; the increase in knowledge level jobs also does not benefit those who do not have the appropriate training. Employers appear to have less attachment to lower-skilled workers. The Canadian Manufacturers Association has emphasized the need to train workers and itself provides training in certain skills in association with Human Resources and Skills Development Canada and with the Canadian Labour Council to encourage increased participation in skills development. We recommend that *Ontario take advantage of the College of Trades to develop skills recognition criteria and also work with the federal government to develop accreditation systems for industry skills learned on the job, as well as other ways to increase training opportunities consistent with labour market needs and taking into account the particular needs of women, racialized persons and recent immigrants. (Recommendations 44-51)*

VII. A COMPREHENSIVE PROVINCIAL STRATEGY

The challenges arising from precarious work and affecting vulnerable workers and thus Ontario society at large are multidimensional and affect stakeholders from a broad range of sectors. We believe that an effective response requires *a provincial strategy engaging multiple ministries and stakeholders in comprehensive, coordinated initiatives, following the principles of the Poverty Reduction Strategy. (Recommendation 52)*

VIII. HOW TO PARTICIPATE

The LCO welcomes feedback on the Interim Report and its draft recommendations from workers, employers, advocacy organizations and service organizations, among others. You may provide comments in writing by fax, email or through our online comment box. We will also speak with people in person. For additional information, see Chapter VIII.

I. INTRODUCTION

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

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

The LCO has limited its recommendations to matters within Ontario's jurisdiction. However, it is difficult to consider the situation of some vulnerable workers without also considering the immigration context which influences their lives in Ontario. Accordingly, some recommendations address Ontario's role in immigration policies and the consequences of these policies for Ontario workers.

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

The LCO engaged in an initial literature review and consultation prior to issuing its Background and Consultation papers at the beginning of 2011. The LCO subsequently received written submissions and engaged in consultations. In preparing this Interim Report, the LCO

commissioned two research papers on the extent of labour market insecurity and on approaches to enforcement and compliance.⁴

This Interim Report is the product of extensive research, consultations with and submissions from a broad range of stakeholders and advice from a Project Advisory Group.⁵ The Project Advisory Group is comprised of employers' and workers' organizations, academics, government and others to provide feedback, advice and expertise. Project Advisory Group members participated in meetings and phone calls and their expertise was a significant factor in drafting this Interim Report. The LCO wishes to thank and acknowledge the members of the Project Advisory Group for their time and ongoing valuable contributions to this Project. The diversity of views provided by the Project Advisory Group and those stakeholders consulted has enabled the LCO to appreciate the delicate balance required to make effective and nuanced responses to the issues addressed in this Interim Report.

The LCO seeks feedback from the public on this Interim Report to assist in developing the Final Report. Details for sending feedback can be found in Chapter VIII.

II. IDENTIFYING VULNERABLE WORKERS AND PRECARIOUS WORK

A. The Rise of Precarious Work

Over the past several decades there has been a significant increase in part-time, temporary and casual forms of work. This type of work lacks security and has limited benefits. This phenomenon has been a contributing factor in the rising rates of income inequality in many OECD countries, as well as a contributor to social unrest in some.⁶ While some workers in higher wage categories have benefited by the flexibility brought on by these changes, workers at the lower end of the wage and skill spectrum are struggling in insecure employment to make a decent wage. The nature of precarious work has also been affected by the global migration of workers that provide challenges to many countries including Canada.⁷

Although the changing nature of work and related migration of workers have been developing for several decades, the global economic crisis has brought it into sharper focus. Canada's economic position may have weathered the economic downturn better than many other countries. Nevertheless, Canada faces large deficits, lower revenues, high unemployment and low economic projections.⁸ The current state of the economy is affecting businesses and therefore jobs.⁹ Governments are seeking to reduce deficits while at the same time continuing to stimulate business and create jobs. Against this backdrop, initiatives to improve supports for vulnerable workers are not only imperative but must be feasible and cost-effective.

In this project, the LCO is considering the impact of the law on workers engaged in precarious forms of work ("vulnerable workers"). Both "precarious work" and "vulnerable worker" are defined in the LCO's Background Paper:

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

....

It has been said that "the sector in which workers are employed, the size of the enterprise in which they work, the non-standard nature of their employment contract and their demographic circumstances are markers that help to identify them as 'vulnerable'". In this paper, vulnerable workers are those whose work can be described as "precarious" and whose vulnerability is underlined by their "social location" (that is, by their ethnicity, sex, ability and immigration status).¹⁰

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

Among the characteristics of precarity identified in the description above, earning low wages is key. For example, a high wage self-employed person working contract to contract (such as a consultant) would not be considered a “vulnerable worker”. On the other hand, the project is concerned with the increasing numbers of working poor in Canada (3.6% of the overall working population in 1996, rising to 5% in 2008), many of whom work in precarious conditions.¹¹ Low wage jobs often have few, if any, benefits, such as extended medical benefits.

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

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

...in many countries, at least a quarter of the adult population is in the precariat. This is not just a matter of having insecure employment, of being in jobs of limited duration and with minimal labour protection, although all this is widespread. It is being in a status that offers no sense of career, no sense of secure occupational identity and few, if any, entitlements to the state and enterprise benefits that several generations of those who saw themselves as belonging to the industrial proletariat or the salariat had come to expect as their due.¹²

The LCO’s consultation process in this project reinforced themes surrounding vulnerable workers and precarious work, as identified by many commentators, including: i) a lack of knowledge by both employers and employees of employee rights and employer responsibilities; ii) the lack of an expeditious method of complaint resolution; iii) barriers to the enforcement of workers’ rights; and iv) the need for more broadly applicable basic minimum employment rights. There is significant concern, in particular, about the lack of representation for workers or workers’ “voice” among those in precarious work.¹³ There is awareness of the changing nature of work, but some question as to whether the existing regulatory regime is responsive to this change.

For employers, the standard employment relationship may no longer be the normative model for jobs, but many workers are still searching for stable, well-paid, permanent jobs with benefits.

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

B. The Economic Backdrop

In their paper commissioned for the LCO, Noack and Vosko found remarkable stability in the overall structure of the Ontario labour force during the period from 1999-2009. The distribution of certain forms of employment (self-employed and part-time) remained unchanged, leading them to conclude that Ontario is experiencing “persistent precarity”. However, looking more broadly over the last few decades, it appears that precarious forms of employment are on the rise.¹⁴ This section describes some of the pressures being experienced in the economy and labour market that contribute to this rise in precarious employment.

Ontario’s labour market is influenced by economic trends which have transformed the way business is carried out. Globalization and free trade have resulted in the creation of global markets. Increasingly, Ontario businesses must compete with emerging economies which have the advantage of lower wage labour and relatively few regulatory controls. Furthermore, the technological revolution that has occurred over the past three decades has resulted in sharply reduced communications and transportation costs. For example, in the LCO’s consultations, Ontario vegetable farmers reported competing with producers in Central and South American countries in addition to their traditional competitors in California.¹⁵

These trends, accompanied by the global recession in 2007, have exerted a heavy pressure on businesses to set lower consumer prices which, in turn, have caused businesses to restructure their workforce as a cost-cutting strategy. Maintaining a flexible workforce allows businesses to quickly respond to competitive pressures. Flexibility is achieved by relying on more temporary or part-time employees and hiring fewer full-time permanent employees. In some cases, employers may offer job-sharing arrangements to existing employees in order to prevent lay-offs.¹⁶ Or businesses may outsource some functions altogether, thereby reducing the overall size of their workforce but increasing their reliance on self-employed contract workers (often former employees).¹⁷ The result has been the fissuring of the labour market.¹⁸ The increase in smaller,

fragmented workplaces means that there are fewer in-house opportunities for employees to advance, leaving them stuck in entry-level positions.¹⁹

The information revolution and dramatic technological advances of the last 30 years, as well as the gradual shift from a manufacturing-based economy to one that is services-based, have also affected the labour market. Automation in the workplace has reduced the overall demand for workers and the remaining demand is increasingly for more highly-educated/highly-skilled workers. According to Harry Arthurs in *Fairness at Work*, more than 70% of new jobs require post-secondary education, 25% require a university degree and only 6% of jobs do not require a high school certificate.²⁰ The result is a relatively smaller pool of jobs available to vulnerable workers and decreased job security for unskilled workers. Canadian immigration policy has reacted to this development by prioritizing the immigration of high-skilled workers.²¹

The mix of workers in Canada's labour market has also been affected by the global trend in international migration. Part of this trend is the increased movement of "guest workers". Many of these are unskilled workers from third world countries who migrate looking for work that pays a higher wage than is available domestically. Industrialized countries including Canada are grappling with an aging population and a workforce no longer willing to undertake difficult and often low-paying jobs such as agricultural work and care-giving. In order to fill these labour needs, these countries have modified their immigration policies to allow temporary entry to guest workers.²²

The increased proportions of entry-level jobs at one end of Ontario's labour market spectrum and knowledge jobs at the other end of the spectrum have tended to squeeze out the middle-level jobs. This phenomenon has been labelled the "hourglass economy" and it has contributed to a polarization not only of occupations and incomes but, also, to a social polarization.²³

These developments have also impacted unionization rates. Managerial and professional jobs make up a growing proportion of the labour market and these jobs are less frequently unionized. It is also speculated that the smaller size of firms resulting from the fissuring of the labour market has made it more difficult to organize workers.²⁴

Labour market conditions, the changing workforce and the increase in precarious work have all contributed to a significant rise in income inequality in Canada over the past 20 years.²⁵ Over this period, the richest group of Canadians increased their share of total national income relative to that of poor and middle-income Canadians. Part of the problem is a growing disparity in wages paid to the top 10% of earners relative to those paid to the bottom 10% of earners. However, earnings inequality also depends upon the type of jobs that people hold and their work

arrangements. For example, women workers represent a larger percentage of the workforce than they did 20 years ago. But women are more likely to work part-time and earn lower wages.²⁶ Similarly, increases in self-employment relative to standard employment relationships may play some role in rising inequality because the self-employed also tend to be concentrated in the lower income groups.²⁷ Although globalization and technological advancements have brought increased productivity and opportunities, these benefits have been disproportionately enjoyed by high-skilled workers rather than low or unskilled workers.

Although it is clear that income inequality has been rising in Canada, the broad implications of this phenomenon for society are less clear. Some argue that inequality affects the well-being of all levels of society, not only the poor.²⁸ According to Richard Wilkinson, more equal societies have better social relations. Communities are stronger and there are higher levels of trust and lower levels of homicide, hostility and discrimination.²⁹ In addition, less equal societies have lower than average health standards and shorter life expectancy.³⁰ Others such as the Fraser Institute, argue that economic freedom (defined as personal choice, voluntary exchange coordinated by markets, freedom to enter and compete in markets, and protection of persons and their property from aggression by others) is key to higher levels of prosperity, well-being and longer life expectancy, as well as improved well-being for women.³¹ There is wide consensus, however, that the growth in precarious employment in Ontario over the past 30 years requires a careful legislative and policy response; one that protects the interests of workers while ensuring that Ontario businesses remain competitive in the new global economy.

C. What Does Precarious Work Look Like?

Noack and Vosko have assessed the prevalence of precarious work in Ontario in relation to certain dimensions of labour market insecurity including low income, little control over the labour process and limited access to regulatory protections. The authors adopt four indicators from the available data as measures of precarity: low income (defined as less than 1.5 times the minimum wage), no pension plan, small-sized firm and no union coverage.³² Although other significant indicators of precarious work exist, including a lack of extended health, vision and dental benefits, there are insufficient data to allow these to be measured.³³

Taken separately, each of the four indicators affects a significant portion of Ontario workers. Approximately 75% of workers lack union coverage. Just less than 50% of workers lack an employee-sponsored pension plan. Approximately 33% of workers consistently earn a low wage, and 20% of workers work in a small firm.³⁴ However, it is the combination of these circumstances that amounts to precarious employment. The authors consider workers to be precariously

employed where they are subject to at least three of the four criteria. Based on this measure, their study found that approximately 33% of jobs in the Ontario workforce are precarious. But this figure reflects jobs combining *any* three of the four criteria, including almost 11% of jobs that do not have low wages (but combine the other three criteria). While this latter category of jobs may be precarious in the sense that the jobs are less secure, discontinuous, or do not have pensions or unions, these workers are not vulnerable in the framework set out by the LCO. For the purposes of this Interim Report, it is more relevant to consider the approximately 22% of jobs in Ontario that are characterized by low wages plus two of the other three indicators of precariousness: no pension, no union and/or small firm size.

Noack and Vosko found that form of employment is linked to precariousness. For example, full-time employees are less likely to be in precarious work than part-time employees. About 33% of part-time workers are in positions with low wages, no union and no pension, as compared to almost 9% of full-time employees.³⁵ Although jobs may be described as part-time, in some cases workers may be working at more than one part-time job and so not properly described as part-time workers.³⁶

Similarly, temporary workers are more likely to be in precarious work than permanent workers.³⁷ This is significant because, at present, temporary employees may not fully benefit from Ontario employment standards provisions requiring a minimum length of tenure (such as vacation, termination notice and severance pay).³⁸ Furthermore, once a worker accepts a temporary job, it becomes more difficult to advance and the worker is likely to earn reduced income for many years.³⁹ The uncertainty associated with temporary employment makes these jobs precarious by definition. However, different forms of temporary work also have unique characteristics that add to their precarious nature.⁴⁰ One example is work performed by temporary migrant workers as discussed in the next section of this Interim Report. Another example is work performed by temporary agency workers.

Temporary agency workers are a growing phenomenon in the labour market. Unlike temporary workers who find work on their own, temporary agency workers are employed by an agency which places them in temporary positions. The agency is their employer although they work for the agency's clients.⁴¹ At one time, employers hired temporary agency workers in order to temporarily fill positions while regular employees were ill or away. Increasingly, however, employers view temporary agency work as a permanent strategy for maintaining a flexible labour force.⁴² These employees tend to be less integrated into the workplace community. This may have health and safety consequences, such as where they are not given the same safety training provided to regular employees.⁴³ In some cases, temporary agency workers are hired for the express purpose of carrying out dangerous work so that regular employees need not do so.⁴⁴

Although the temporary agency is legally the employer in this scenario, the agency is not on-site and has limited ability to ensure safe work conditions.⁴⁵

Temporary agency workers may also be disadvantaged by Ontario's workplace safety re-employment policy. In certain circumstances, employers have an obligation to re-employ injured workers and they are given financial incentives to comply.⁴⁶ However, temporary employment agencies meet this obligation simply by placing the worker back on the employment placement roster. Thereafter, there is no protection to ensure that workers are actually offered jobs suitable for their skill set.⁴⁷

According to an ongoing study by the Institute for Work and Health, there are approximately 1,300 temporary work agencies, employing a portion of the 700,000 temporary employees in Ontario.⁴⁸ Temporary agency workers tend to have lower wages than permanent employees and lower unionization rates than other temporary employees.⁴⁹ In 2003, temporary agency workers earned 40% less than permanent employees.⁵⁰

Workers may seek work through temporary agencies in order to maintain a flexible work life or in order to find work quickly. These agencies are also an option for workers such as recent immigrants who have qualifications that are not recognized by regular employers.⁵¹ However, the three-way relationship between worker, temporary work agency and client may leave workers unaware of their legal rights and more vulnerable to dangerous work or unsafe working conditions.⁵² Temporary agency workers have less control over their workplace and, as a result, are less likely to complain about safety conditions.⁵³ They are disproportionately subject to other risk factors for workplace injuries such as poor supervision, inadequate training and experience, youth and few qualifications, and exposure to high risk tasks.⁵⁴ Furthermore, the regulatory environment is currently structured such that the temporary agency as employer pays the premiums for workers' workplace safety insurance.⁵⁵ Some employers are shifting the cost of high-risk work by hiring temporary agency workers and thereby avoiding the increased premiums for injuries occurring at the workplace.⁵⁶

Another growing trend is for companies to outsource specialized functions to external companies who provide workers directly or subcontract with a third organization for workers. This results in a contracting chain where client employees, contract employees and subcontract employees may all work in the client's workplace. Outsourcing is associated with decreased employment in large companies, increased employment in small or medium companies and an increase in non-standard employment such as self-employment and temporary work.⁵⁷

As is the case with temporary agency workers, contract and subcontract employees are vulnerable in a number of respects. First, outsourcing work often allows a company to distance itself from regulatory responsibility for these workers, resulting in fewer workplace protections. Contract chains tend to create fragmented responsibilities and confusion that undermines accountability for occupational health and safety.⁵⁸ Second, the decision to contract out work is often adopted as a cost-savings measure.⁵⁹ By treating labour as a commodity, companies are more competitive. However, the result for workers is lower income and reduced benefits.

Some forms of self-employment are also precarious. Although self-employment is traditionally associated with small businesses, many self-employed workers do not employ others. These “own-account self-employed” sell their own services in a wide spectrum of circumstances. For example, own-account self-employed professionals such as accountants and doctors have a high degree of control over their work and typically earn a high income.

On the other hand, own-account self-employment also includes workers such as personal care workers who may rely on one or a few clients, work in their clients’ homes and earn a subsistence level income. In 2000, 30% percent of own-account self-employed workers worked in client locations and 18% reported that a previous employer was among their clients.⁶⁰ In such circumstances, particularly where there is only one client, the level of dependence may create precarity or, alternatively, what a client characterizes as self-employment may, in fact, be an employment relationship.

Self-employed women tend to be concentrated in more precarious forms of self-employment.⁶¹ They often “choose” self-employment for the flexibility it allows balancing work and family. While this may suggest that these women have control over their work life, the fact is that women remain primarily responsible for unpaid labour in the home. The decision to adopt precarious work in order to meet that responsibility is not really a choice but a practical necessity for many.⁶²

Self-employed immigrants are also disproportionately engaged in more precarious forms of self-employment. They are more likely than Canadian-born workers to be self-employed involuntarily, that is, due to difficulty finding paid employment.⁶³

In spite of the wide continuum of own-account self-employment, the average income of own-account self-employed workers is significantly less than that of self-employed employers. For women, visible minorities and immigrants who are own-account self-employed, average income is lower still.⁶⁴ Furthermore, self-employed workers generally work longer hours than employees and they are less likely to have access to training or benefits.⁶⁵ For all these reasons, own-account

self-employed workers are at risk of being precariously employed.⁶⁶ And those in a relationship of dependence are even more likely to be precariously employed.⁶⁷

According to Noack and Vosko, certain types of jobs are also more likely to be precarious. In 2008 in the food services and accommodation industries, for example, they found about three-quarters of jobs to be precarious. These industries typically employ women with a high school diploma or less, many of whom are racialized or are newcomers to Canada. Many of these jobs are part-time.⁶⁸ Similarly, the agricultural industry, on Noack and Vosko's measures showed a high proportion of precarious jobs (80.5% in 1999; 64.7% in 2008). Here, though, the typical worker is male and almost 2 in 5 are temporary or seasonal employees.⁶⁹ Service industries such as repair, maintenance services, laundry, personal care, and business and building support services were also disproportionately made up of precarious jobs.⁷⁰

In contrast, jobs in the public sector are the least likely to be precarious. Many of these jobs are unionized and employers are more likely to be large organizations, such as governments or universities, and subject to stringent employment standards.⁷¹ However, creeping privatization throughout several sectors has reduced the number of such jobs that are available to Ontario workers.

Lack of access to education and skills training is another factor linked to precarious employment. On Noack and Vosko's definition, just over 60% of Ontarians without a high school diploma were in precarious jobs in 2008. This is reduced to 43% for those with a high school diploma but no post-secondary education, and is further reduced to 17% for those with university degrees.⁷² The trend is partly explained by the fact that the types of jobs more likely to be precarious (services and agricultural, for example) are also those that do not require advanced educational credentials. However, Noack and Vosko found that even within the category of full-time permanent jobs, those with lower levels of education are more likely to be precariously employed.⁷³

The link between precarity and temporary and part-time work, as well as work in certain low-skill job categories, also illustrates the gendered and racialized nature of precarious work. Women, immigrants and racialized persons are each over-represented in these forms and types of jobs.⁷⁴

D. Identifying Vulnerable Workers

Although anyone may be precariously employed, precarity is more likely to affect workers in “already marginalized social locations”.⁷⁵ This includes women, single parents (who are disproportionately women), racialized groups, new immigrants, temporary foreign workers, Aboriginal persons, persons with disabilities, older adults and youth. The link between marginalized workers and precarious employment is partly explained by their difficulty accessing higher education and skills training.⁷⁶ It is also significant that they are more often employed in temporary and/or part-time jobs. However, even among those in full-time permanent positions, women, visible minorities and recent immigrants are more likely to hold precarious jobs than others.⁷⁷

This Project cannot hope to do justice to the unique experiences and circumstances of all vulnerable groups of workers. Therefore, the LCO has chosen to focus on the gendered and racialized nature of the precarious workforce. The LCO has examined a wide range of circumstances of persons with disabilities, as well as older adults, in separate projects.⁷⁸ And there is a brief discussion of persons with disabilities and youth below. However, the emphasis of this Interim Report is on the experiences of women, immigrants and racialized persons in the workforce.

1. Women and Single Parents

Canadian studies show that women are more likely to be engaged in precarious work than men.⁷⁹ For example, women are over-represented in part-time and temporary work.⁸⁰ Although 50% of Ontario workers are women, 72% of permanent part-time workers are women.⁸¹ They are also over-represented in the lowest income-earning groups such as minimum wage earners.⁸² Even in full-time work, women are more likely to earn less than their male counterparts and this general wage disparity exacerbates the problem of women in precarious work.⁸³

In the context of Ontario, Noack and Vosko found that the most highly precarious industry, food and accommodation, typically employs women with a high-school diploma or less. Both racialized and recently immigrated women are overrepresented in this industry. The industry also employs the highest proportion of part-time workers, about a third of whom are temporary.⁸⁴

In some cases, women choose part-time or temporary jobs since it allows them the flexibility to fulfill home and care-giving responsibilities—although this choice is illusory where it is made necessary by employers’ or society’s failure to accommodate these responsibilities.⁸⁵ In other cases, women work part-time only because they are unable to find full-time employment.⁸⁶

The high numbers of women in precarious work are, in some measure, the result of their traditional social role as caregivers.⁸⁷ Under the “gender contract” that typified the 1950s middle class, men were primarily responsible for financial support and women stayed home to care for the family. (Women in many working-class families have always worked outside the home, caring for other women’s children, cleaning homes and working in factories and shops, for example.) Today, current social and economic conditions no longer support a 1950s-style division of labour for any socio-economic group other than the very wealthy. Two incomes are often necessary to support a family and women’s choices and involvement in many spheres of life have expanded. The majority of women have joined the workforce. The family unit is also more varied with increasing numbers of single parents. And yet women continue to bear primary responsibility for care-giving. In 2005, Canadian women spent two more hours per day on unpaid work than did men.⁸⁸ In 2010, Canadian women spent an average total of 50 hours per week caring for household children, double that spent by men (24 hours).⁸⁹ In 2008, just over 9% of women reported working part-time because of childcare responsibilities as compared to less than 1% of men.⁹⁰ As a result, the precarity of women’s jobs is partly influenced by public policy on maternity benefits and childcare.⁹¹

2. Racialized Persons

Racialized workers also suffer a disproportionate degree of hardship in the labour market.⁹² Racialized workers experience higher unemployment rates and the work they are able to get is “much more likely to be insecure, temporary and low paying.”⁹³ In general, racialized men and women earn less than non-racialized men and women respectively.⁹⁴ Gender also plays a role here with racialized women forming one of the most vulnerable groups.⁹⁵ Further, racialized families were three times more likely to live in poverty in 2005 than non-racialized families.⁹⁶

Studies indicate that racialized workers commonly experience attitudinal and systemic discrimination in the workplace.⁹⁷ Racial segregation has also been found to occur in the agricultural industry where temporary migrant workers from countries such as Mexico work separately from Canadian workers.⁹⁸

3. Newcomers to Canada and Established Immigrants

Newcomers to Canada are also disproportionately found in precarious employment. Once again, form of employment is significant here. While recent immigrants make up approximately 10% of Ontario workers, they make up almost 16% of temporary part-time workers.⁹⁹

Recent immigrants “have borne the brunt of the recession’s impact” and have been “disproportionately affected by rising unemployment, reductions in full time work, and a declining manufacturing base.”¹⁰⁰ One might expect recent immigrants to find themselves temporarily in less stable and lower paid jobs upon their arrival to Canada but to progress to better jobs with the passage of time, particularly if they are educated. While this may have been the case in the past, a Statistics Canada report reveals that, between 1991 and 2006, the percentage of university-educated immigrants in jobs with low educational requirements increased for both recent and established immigrants.¹⁰¹ For recent immigrants, the percentage increased from 22% to 28% for men and from 36% to 44% for women. For established immigrants, the percentage increased from 12% to 21% for men and from 24% to 29% for women. In contrast, the percentage of university-educated Canadian-born workers in jobs with low educational requirements remained stable at 10% over the same time period. The report concludes that

the increases for established immigrants suggest that the difficulties, which have long plagued recent immigrants, are today affecting established immigrants, which also suggests that difficulties experienced by recent immigrants are not necessarily temporary.¹⁰²

Similarly, another study compared the incomes of university-educated racialized immigrants and university-educated non-racialized immigrants based on their immigrational generation status. The study found that a significant income gap existed between first-generation racialized and non-racialized workers and that this gap persisted into the second generation.¹⁰³ This income gap is due in part to a phenomenon called “deskilling”. It may occur when immigrants have limited English skills or lack Canadian work experience, or employers fail to recognize foreign credentials or engage in discrimination.¹⁰⁴ Deskilling is also gendered. Jobs not requiring Canadian experience and tolerant of foreign accents often involve manual labour more suitable for male rather than female workers.¹⁰⁵

For individual workers and their families, deskilling has both financial and emotional consequences.¹⁰⁶ In particular, workers express frustration about their inability to provide their children with the standard of living enjoyed by Canadian children.¹⁰⁷ In some cases, workers may gradually internalize a lower sense of self-worth and second-class status.¹⁰⁸ Most studies show

that unskilled workers or those with lower levels of education are among the most vulnerable, whether born in Canada or not.

Having an education does provide immigrants with some protection against precarious employment. While a Statistics Canada report in 2010 found that immigrants with university degrees, and especially recent immigrants, had significantly higher unemployment rates than those of Canadian-born university graduates, university-educated immigrants fared better than less-educated immigrants and slightly better than average for the total population in Canada.¹⁰⁹ This report also showed improvements over time for immigrants. In fact, Noack and Vosko's study found that established immigrants (living in Ontario for ten years or more) have job outcomes relatively similar to their Canadian-born counterparts.¹¹⁰

Poor working conditions experienced by recent immigrants are often exacerbated by language barriers. For example, workers may be unable to read safety notices posted in the workplace and they may be unaware of their rights under the *Occupational Health and Safety Act*.¹¹¹

4. Temporary Migrant Workers

Workers may legally enter Canada and work in lower skilled jobs for limited periods of time through three federally-administered temporary foreign worker programs. According to 2011 statistics, there were more than 106,000 temporary foreign workers in Ontario on December 1, 2011 and more than 67,000 entries in 2011 of such workers.¹¹² A breakdown of categories of these workers indicates that close to 25,000 are managerial/professional or skilled and technical (National Occupational Classification (NOC) levels O, A and B) while about 20,500 are lower skilled (NOC level C) many of whom include seasonal agricultural workers (including the Seasonal Agricultural Workers Program described below) and live-in caregivers while about 800 are level D lower skilled workers. For approximately 4,600, the workers' level is not indicated and close to 17,000 have open authorization work permits and are not included in these NOC categories.¹¹³

The Live-in Caregiver Program permits caregivers to serve as domestic workers for two years with the option to apply for permanent residence after the qualifying period.¹¹⁴ The Pilot Project for Occupations Requiring a Lower Level of Formal Training for jobs within the federal National Occupational Classification systems C and D (NOC C and D) allows qualified foreign workers to obtain work permits for 24 months renewable to a maximum of 4 years to work in occupations such as clerical, health, sales and service, transportation and manufacturing and agriculture.¹¹⁵

The Seasonal Agricultural Workers Program (SAWP) allows workers from Mexico, Jamaica and a number of Caribbean countries, to stay and work up to eight months each year for a single designated employer (unless transferred).¹¹⁶ Administered by the Foreign Agricultural Resource Management Services (F.A.R.M.S.), SAWP allows approximately 1,400 Ontario farmers to employ from 15,000 to 20,000 workers each year – more than any other Canadian jurisdiction.¹¹⁷ SAWP provides for liaison officers from the workers’ home country to maintain oversight and liaison services between the workers and employers while in Canada.

Canada’s immigration policy is being revised to respond more nimbly to employers’ needs and immigrants’ capacity to integrate into Canadian society.¹¹⁸ This has resulted in an increased focus on high skilled immigrants. Recent changes to federal law and policy have provided for more rigorous scrutiny of temporary foreign worker programs including, for NOC C and D and Live-in Caregivers, standard form contracts and more in-depth assessments of the genuineness of the employer’s offer to employ these workers.¹¹⁹ While SAWP has always had a high degree of regulation and oversight, which is reflected in its contract terms, contracts for NOC C and D agricultural workers and live-in caregivers have been strengthened and now include stricter protections than those for other NOC C and D workers.¹²⁰

Workers’ advocates have been critical of temporary migrant worker programs in general due to the vulnerability that workers experience as a result of their temporary work and immigration status. One area of debate has been SAWP’s provision for “naming” workers, that is, allowing farmers to identify specific workers to return to the same farm, a common practice occurring in up to 80% of cases.¹²¹ F.A.R.M.S. considers the practice to be a major advantage for employers who wish to re-hire good workers, and for the named employees themselves. On the other hand, the Agricultural Workers Alliance is critical of naming, arguing that the power it gives to employers contributes to workers’ reluctance to complain about substandard conditions.

Although some workers’ advocates believe that temporary worker programs should be discontinued, internationally, SAWP has been regarded favourably and as a standard for some best practices.¹²² In fact, when the federal government strengthened contract terms for NOC C and D agricultural workers, it seemed to be moving toward bringing the program in line with SAWP terms. Philip Martin for the International Labour Organization has taken the position that guest worker programs are here to stay:

In considering how to make the current system better, three widely shared principles need to be kept in mind. First, government policies, even if they do not work perfectly, do make a difference in the how and how many migrants arrive, how they are treated within the country, and whether they return or stay. Second, the overall economic benefits of moving workers over borders are positive, as individual migrants and their

employers are better off, and world GDP rises as more workers have higher wage jobs. Third, in a world of laws and rights, [] it is best for everyone if labor migration is legal and orderly.¹²³

In the LCO's consultations, workers themselves described the long term benefits of these programs. They reported that SAWP provides them with a much higher source of income than is available in their home countries, allowing them to better support their families and educate their children.¹²⁴ Workers reported returning year after year and many enjoyed positive and mutually beneficial relationships with their employers. They were paid in accordance with their contractual terms and hours worked, health and safety laws were respected, housing conditions were comfortable and they enjoyed a productive working relationship with their employer. Many workers also commented on long-standing friendships and personal connections they had made with their employer and people in the communities where they worked. They consistently expressed gratitude for the opportunity to earn an income in Canada.

However, we also heard from some workers about their fear of repatriation, employer reprisals in response to complaints, health and safety concerns, insufficient hours, insufficient time off, substandard housing and insufficient transportation. Many of these complaints are repeated in research studies. Under the SAWP contracts, employers are responsible for providing SAWP workers with "adequate clean living accommodation" without cost and are subject to health standards and oversight by liaison officers.¹²⁵ Under the NOC C and D program, the standard contract terms require that employers arrange for housing that has been inspected and meets National Minimum Standards for Agricultural Accommodations. Employers may deduct payment for accommodation. Workers' advocates raised issues during our consultations such as overcrowding, inadequate kitchen facilities, bedbugs, leaks, mould and lack of heat.¹²⁶ In some cases we were advised that local housing inspectors would only inspect one bunkhouse at a farm, and not the remaining ones, allowing for inadequate facilities to go undetected.¹²⁷

For temporary migrant workers, keeping their job is essential to their limited immigration status in Canada. There are high stakes associated with job loss – their ejection from Canada, the need to find a job in their home country (which will pay a fraction of what they were earning in Ontario), the consequences for their family income, and the likelihood that they will not be accepted back into Canada. Therefore, these workers experience a particular brand of job insecurity that may discourage them from exercising their legal rights.

Migrant workers are more likely than resident workers to be in unskilled employment.¹²⁸ They are also at higher risk for occupational injuries, diseases and death, and they have more difficulty accessing health care and compensation for injuries.¹²⁹ They also earn less than Canadian-born

workers, established immigrants and new immigrant workers and are over-represented among the working poor.¹³⁰ Female migrant workers are particularly disadvantaged in this respect. According to one 2006 study, female migrant workers are often employed in jobs for which they are over-qualified, while male migrant workers more often have jobs commensurate with their education.¹³¹ Female migrant workers are also at risk for workplace sexual harassment.¹³²

5. Persons with Disabilities

Persons with disabilities have long been disadvantaged in the labour market.¹³³ In 2006, only 51% of persons with disabilities aged 15 to 64 were employed as compared to 75% of persons without disabilities. Put another way, the unemployment rate for working age persons with disabilities was over 10% whereas it was under 7% for persons without disabilities.¹³⁴

Even when persons with disabilities are employed, they are more likely to have temporary or part-time jobs with characteristics of precarity.¹³⁵ These jobs tend to pay lower salaries than average, even after taking into account fewer hours worked.¹³⁶ In 2006, the average income in Ontario for persons with disabilities was \$25,304 as compared to \$38,358 for those without disabilities.¹³⁷ The low income available in employment can be a disincentive for persons with disabilities to enter the workforce, particularly where they are eligible for income support through the Ontario Disability Support Program (ODSP). Furthermore, these jobs often do not offer extended health benefits which may be an important consideration for persons with disabilities who require ongoing medication or treatment.¹³⁸

For persons with disabilities, precarity may be closely linked to systemic discrimination in the workforce. Persons with disabilities may “choose” non-standard employment only because appropriate accommodation of their disability is not available to them in a permanent, full-time position.¹³⁹

6. Youth

Ontario youth (aged 15 to 24) have a significantly higher unemployment rate than older workers.¹⁴⁰ In January 2012, this rate was 16.6% as compared to 6.6% for workers 25 years and over.¹⁴¹ The difficulty youth experience entering the labour force has caused many youth to accept non-standard forms of employment such as temporary, seasonal or part-time employment and unpaid internships.¹⁴² In 2011, over 50% of young workers were in part-time employment in comparison to just under 14% of workers aged 25 and over.¹⁴³ Youth are also

over-represented in temporary forms of employment.¹⁴⁴ Of course, many youth continue to pursue education in addition to working and this partly explains their tendency to accept non-standard employment.¹⁴⁵

Youth are also more likely to be precariously employed in other respects. Young workers consistently have higher than average rates of workplace injuries. The Ontario Workplace Safety Insurance Board reports that, each year, 10,000 young workers are injured such that they are unable to return to work the following day.¹⁴⁶ There are several reasons for this. Youth are more likely to be inexperienced and those in temporary or part-time jobs are less likely to receive safety training.¹⁴⁷ Since they are just beginning their working lives, they may also be intent on impressing their employer and unwilling to report safety concerns.¹⁴⁸

The Ontario Ministry of Labour has identified workplace safety for young workers as a priority.¹⁴⁹ Education initiatives, public awareness campaigns and targeted enforcement through workplace inspection blitzes have been successful in reducing injury rates.¹⁵⁰

7. *Non-Status Workers*

Non-status or undocumented workers do not have immigration status to be in Canada. These workers are highly vulnerable to exploitation by employers since they are often unable or unwilling to enforce employment standards or health and safety protections.¹⁵¹ The issues surrounding workplace protections for non-status workers are complex and fall beyond the scope of the LCO's project which addresses vulnerable workers and precarious work more generally. Nevertheless, many of the LCO recommendations for improving conditions for vulnerable workers will also assist non-status workers.

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

E. The Negative Effects of Precarious Work on Vulnerable Workers

1. *Physical and Mental Health*

Studies consistently link precarious employment to negative physical and mental health outcomes.¹⁵² In fact, the World Health Organization has identified the global dominance of precarious work as a significant contributor to "poor health and health inequities."¹⁵³ This heightened health risk is the result of several factors, some of which are briefly described here.

Risk of Injury and Illness

Precarious work is more likely to be physically demanding work and is more likely to involve health and safety risks.¹⁵⁴ This is particularly the case for newcomers to Canada who are more likely than Canadian-born workers to be engaged in physically demanding work.¹⁵⁵ According to Ontario's Expert Advisory Panel on Occupational Health and Safety ("Dean Report"), this increased risk may be due, in part, to a lack of experience or training that is job or hazard-specific; a lack of knowledge about occupational health and safety rights; and the fear of losing one's job or, in some cases, being deported.¹⁵⁶ In its 2010 Report, the Advisory Panel made several recommendations for addressing these concerns, including mandatory health and safety awareness training for new workers and supervisors and improved protections from reprisals when vulnerable workers speak up about health and safety concerns.¹⁵⁷ These recommendations are discussed further in this Interim Report's Chapter on Health and Safety.

Effect of Low Income

Precarious workers may also suffer health consequences as a result of their lower income. Low pay often means that workers must work at more than one job or must work long hours. In turn, long hours mean that they are more susceptible to illness or injury. Low wages may also affect workers' access to "safe transportation and sufficient nutritious food."¹⁵⁸ Without safe transportation, workers expose themselves to riskier forms of transportation or are unable to go to access health care.¹⁵⁹

Job Insecurity and Stress

The job insecurity associated with precarious work may cause workers to experience significant stress. Although the flexibility afforded by self-employment and temporary and part-time employment may allow some vulnerable workers to juggle family responsibilities, quite often these arrangements are unpredictable. Workers are often not given advance notice of their work schedule, they are required to work split shifts or they are chronically "on call".¹⁶⁰ The heightened insecurity of precarious employment means that workers may live day-to-day not knowing whether they will work enough hours in a day or week to meet basic needs. This job strain, the pressure of holding multiple jobs, irregular or long hours, insecure visa status and a lack of legal protections all may contribute to stress.¹⁶¹ For temporary migrant workers, this may be exacerbated by loneliness due to family separation, social and geographic isolation, and few leisure activities.¹⁶² In the LCO's consultations, there were reports of workers experiencing mental health problems including tension, exhaustion and depression.¹⁶³ Job strain has also been found to have consequences for one's physical health.¹⁶⁴

In some cases, the fragmented and isolated nature of precarious work prevents workers from experiencing a sense of job satisfaction and from developing rewarding work relationships. For example, temporary or part-time employees may not be given sufficient hours to fully integrate into the workplace nor the continuity of employment to see the results of their work.¹⁶⁵ This may lead to a decline in mental health. Similarly, the trend of recent immigrants working in jobs for which they are over-qualified has also been associated with mental health decline.¹⁶⁶

Lack of Access to Medical Treatment and Medicine

In its consultations, the LCO heard that precarious workers have difficulty accessing medicine, particularly prescription medicine. They generally do not have benefits and, because their wages are low, drugs are relatively costly.¹⁶⁷ For example, less than 10% of temporary workers receive extended health care and only 2% receive dental benefits.¹⁶⁸ This lack of access to health benefits and paid sick days encourages vulnerable employees to ignore injuries and illnesses rather than seek medical treatment. For newcomer workers and temporary foreign workers, there are often language and other cultural barriers to accessing health care.¹⁶⁹ Particular concerns were expressed that a lack of health benefits may compromise the health of pregnant women. According to one advocate, pregnant women without immigration status do not have health coverage and must save their money in order to receive check-ups and assistance in the delivery of their child. These women may miss check-ups where they do not have adequate funds or they cannot afford to lose hours at work.¹⁷⁰ Also, pregnant women in workplaces with fewer than 50 people are not covered by the personal emergency leave provisions in the *Employment Standards Act* and these women may not be given enough time off to attend necessary medical appointments.¹⁷¹

Finally, the lack of health benefits associated with precarious work may make it unfeasible for vulnerable persons receiving social assistance to take a job in the first place. The Commission for the Review of Social Assistance in Ontario (CRSAO) noted in its Discussion Paper, “with the growth in part-time and low paid work, it is increasingly difficult for people to obtain sufficient earnings and health benefits through employment to replace social assistance benefits.”¹⁷²

2. Family and Community Relationships

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

personal integrity. Over time, the individual may lose the informal support network of family and friends.¹⁷³

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

3. Training and Education

Precarious workers have limited opportunities to access training or education allowing them to upgrade their skills. Without training, they are less likely to find more stable and better paid work. This contributes to long-term economic vulnerability and perpetuates the cycle of precarious work.¹⁷⁴

Employment support programs currently available in Ontario are not well designed to target the needs of the most vulnerable workers. Many Employment Ontario programs are available only to those receiving federal employment insurance (EI) benefits. Yet workers in non-standard employment relationships are less likely to meet the eligibility requirements for EI.¹⁷⁵ Dependent self-employed workers are excluded from the program altogether and temporary and part-time workers may not be able to accrue the minimum hours of insurable employment necessary for eligibility.¹⁷⁶ According to a recent report, only 25% of unemployed workers in the City of Toronto are eligible for EI.¹⁷⁷

Even those with the means to pay for training must find enough time to attend training sessions. Some workers attempt to train while working multiple jobs – a practice which has negative health consequences and contributes to employment strain. Temporary foreign workers may be prohibited from vocational training as a condition of their limited immigration status in Canada.¹⁷⁸

4. Aging

The impact of a lifetime of precarious employment increases with age. Without access to sufficient savings or a private pension, vulnerable workers may continue to work when others would retire, or they may face poverty in retirement. This contributes to negative health impacts and it increases reliance and cost pressures on state-funded assistance in retirement, such as the

Old Age Security Program and the Guaranteed Income Supplement for low-income older adults. This will affect more women than men, due to both the higher numbers of women in precarious work and the longer-life expectancy of women.¹⁷⁹ For a broader discussion of some of the challenges facing older adults in Ontario, and particularly those with low income, see the LCO's project on the Law As It Affects Older Adults.¹⁸⁰

5. Intergenerational Costs

Finally, the nature of precarious work is also likely to have intergenerational costs. There do not appear to be studies that specifically examine the consequences to children when a parent is precariously employed. However, there are studies that show that poverty has high intergenerational costs.¹⁸¹ Growing up in a low income household appears to affect a child's educational achievements and chances in life.¹⁸² Although this transmission of poverty is not well-understood, low income does impose limits on the amount parents can spend on "nutritional food, educational fees, fitness and other extra-curricular activities."¹⁸³ Furthermore, precarious work is likely to limit family time and the stress of this type of employment is likely to have a negative effect on family life.¹⁸⁴ If parents also have precarious legal status in Canada, this will likely disadvantage their children, even where the children have been born in Canada.¹⁸⁵ Nevertheless, Canada has a relatively high rate of intergenerational mobility. Only about 20%-25% of Canadian children growing up in poverty will remain poor in adulthood as compared to 40%-60% in the United States.¹⁸⁶

F. Contemporary Debate about Precarious Work

The increase in precarious work has led to increased attention to and debate on the need to protect vulnerable workers.¹⁸⁷ There have been a wide variety of studies and reports including two important papers described here.¹⁸⁸

1. Law Commission of Canada Review

Of particular note is the project commenced by the Law Commission of Canada (LCC) on vulnerable workers in 2004.¹⁸⁹ This project was not yet complete when the LCC's funding was eliminated. Nevertheless, its Discussion Paper offers insights into the ways in which the current

regulatory framework fails to protect and support vulnerable workers, noting the following problems:

- the regulatory framework has not kept up with the rise in precarious work and the more flexible forms of work being offered by employers;
- enforcement of existing laws and regulations is not adequate to protect vulnerable workers;
- supports provided to vulnerable workers are inadequate to enable them to transition to more stable and higher paying employment; and
- existing laws and policies do not accommodate unpaid work obligations adequately.¹⁹⁰

The Discussion Paper goes on to identify several possible directions for reform including increasing the incomes of low-paid workers, expanding labour laws to provide more protection for vulnerable workers, and connecting eligibility for benefits (such as Employment Insurance or Canada Pension Plan) to factors other than the employment relationship.¹⁹¹

2. The Arthurs Report

The 2006 Arthurs Report, *Fairness at Work*, also provides invaluable insight into the issues of the changing nature of work. Arthurs was commissioned by the federal government to review the labour standards contained in Part III of the *Canada Labour Code*.¹⁹² Many federally-regulated workplaces in Canada are large organizations such as banks, telecommunications firms, transportation and pipeline companies. As a result, there are relatively fewer low-paid and otherwise vulnerable workers under federal jurisdiction than under provincial jurisdiction.¹⁹³ This fact, paired with the different regulatory regime governing federal workplaces, limits the degree to which Arthurs' recommendations inform the LCO's project. However, the Report does provide a comprehensive picture of the modern workplace and the social and economic trends influencing it.

Just as this Report considers the changing demographics of the Ontarian workforce over the past several decades, the Arthurs Report conducts a similar review in the federal context. It notes that the workforce is more diverse with women working in increased numbers such that "the two-income household has become the norm." In 1961, both partners worked in only 19% of households, whereas in 2001 that was the case in 62% of households. Family structures have become more diverse and "immigration has transformed the ethnic, racial, cultural and religious make-up of Canadian...workplaces."¹⁹⁴ Groups that were historically under-represented in the workforce, such as Aboriginal persons and persons with disabilities, are increasingly present in

significant numbers. In general, the workforce is better educated and there has been a shift towards knowledge-based occupations. As a result, both workers and employers have placed increasing emphasis on education and training. More people are opting for self-employment - whether by choice (either real or illusory) or because they have not been able to find traditional forms of employment). This has resulted in “increasingly ambiguous relationships between these workers and the people they work with and the enterprises they serve.”¹⁹⁵

The Report also notes the difficulty of addressing the needs of vulnerable workers solely from a labour standards perspective and in isolation from broader social supports such as income support, affordable housing and affordable childcare.¹⁹⁶

G. Precarious Work and the Law

In the Chapters that follow, the LCO examines the *Employment Standards Act* and the *Occupational Health and Safety Act*, the two legislative schemes which play a central role in addressing the problem of precarious employment in Ontario.¹⁹⁷ This section provides context for the discussion by briefly identifying some of the other laws, regulations and policies which may affect precarious employment in Ontario.¹⁹⁸

1. The Charter and Human Rights Law

The constitutional rights enshrined in the *Charter* apply only in relation to the exercise of government power and to activities engaged in by organizations if there is a sufficient nexus with government.¹⁹⁹ Therefore, the *Charter* is generally not engaged in relation to private sector employers or trade unions. However, *Charter* rights may affect private actors indirectly, such as where a law fails to provide certain employees with the same protection or benefits provided to others.²⁰⁰ For example, the exclusion of agricultural workers from the collective bargaining regime in Ontario’s *Labour Relations Act* and the specific regime covering agricultural workers have been the subject of several important *Charter* challenges.²⁰¹

The Ontario *Human Rights Code* does extend to private sector employers and trade unions. It prohibits employment discrimination on the basis of a number of personal characteristics including (but not limited to) race, gender, age, disability and citizenship.²⁰² As discussed above, workers who are socially marginalized as a result of one or more of these characteristics are more likely to be engaged in precarious work. The *Code* does not define “employment” but, according to the Human Rights Commission, this term would include most forms of precarious work including contract work and temporary agency work.²⁰³ The *Code* does recognize that some jobs

have *bona fide* occupational requirements and employers may make distinctions on this basis but *only* where it is not possible to reasonably accommodate the needs of the employee.²⁰⁴ The *Code* also recognizes the right to enforce one's rights under the *Code* (i.e., the right to be free from discrimination) without fear of reprisal.²⁰⁵ This is analogous to the *Occupational Health and Safety Act* and the *Employment Standards Act* which similarly prohibit reprisals for enforcing one's rights under those Acts.²⁰⁶

2. International Law

Internationally, there are several conventions that address vulnerable workers and precarious employment. A number of these have been ratified by Canada and, accordingly, are binding on Ontario. These reflect international standards on the treatment of workers and they have proved to be important tools in interpreting domestic law including the *Charter* and the *Human Rights Code*.²⁰⁷

International law has been particularly influential in recent jurisprudence interpreting freedom of association under subsection 2(d) of the *Charter*. In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, the majority of the Supreme Court of Canada looked to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Covenant on Civil and Political Rights* (ICCPR) and the International Labour Organization's (ILO)'s *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize* (Convention No. 87) in holding that the right to bargain collectively is protected as part of freedom of association in subsection 2(d).²⁰⁸ McLachlin C.J. and LeBel J. observed that:

...Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.²⁰⁹

More recently, the Supreme Court reaffirmed its commitment to international law as an interpretive tool in *Ontario (Attorney General) v. Fraser*.²¹⁰

Canada acceded to the ICESCR in 1976. This Convention recognizes a right to work and a corresponding state obligation to create programmes and policies that will "achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."²¹¹ It further recognizes rights to "just and favourable conditions of work" including fair wages, equal pay for equal work, "a decent living", safe and healthy working conditions and rights to rest periods,

limited work hours and holiday pay.²¹² Trade unionization and the right to strike are also provided for in the *ICESCR*.²¹³ These principles are binding on both the federal and provincial governments although there are limited means for enforcing them.²¹⁴ In particular, the “decent living” principle has gained traction in the literature and was relied on by Arthurs in his *Fairness at Work* report. It has similarly informed the LCO’s own inquiry into precarious work by importing into our analysis of Ontario legislation a concern for basic fairness and health and safety in the workplace, as well as the opportunity for workers to balance work, family and community life.²¹⁵

The ILO has also enacted a number of fundamental conventions addressing the rights of workers, including Convention No. 87. This Convention gives workers and employers the right “without distinction whatsoever...to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”²¹⁶ It further requires that nations “take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.”²¹⁷ In *Health Services*, the Supreme Court of Canada noted that Canada’s ratification of Convention No. 87 indicated “not only international consensus, but also principles that Canada has committed itself to uphold.”²¹⁸ The Court relied on Convention No. 87 in interpreting freedom of association in the *Charter* to include the right of union members to bargain collectively.

There are, however, several ILO Conventions that Canada has not ratified, including another freedom of association convention, *Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and Bargain Collectively*.²¹⁹ Nor has Canada ratified several ILO and UN conventions protecting the rights of migrant workers.²²⁰ There is debate over the extent to which these conventions are binding on Canada simply by virtue of its membership in the ILO. Whether binding or not, the Supreme Court has relied on un-ratified conventions as providing “a normative foundation” for interpreting domestic law.²²¹

3. Domestic Law and Policy Initiatives

A legislative initiative with potential to impact many vulnerable workers is Ontario’s Poverty Reduction Strategy, launched in 2008.²²² The preamble to the *Poverty Reduction Act, 2009* recognizes that the “reduction of poverty supports the social, economic and cultural development of Ontario”.²²³ It also explains that

...[t]he Government's poverty reduction strategy is guided by the vision of a province where every person has the opportunity to achieve his or her full potential, and contribute to and participate in a prosperous and healthy Ontario.²²⁴

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

...untapped potential in Ontario's population that needs to be drawn upon by building and establishing supports for, and eliminating barriers to, full participation by all people in Ontario's economy and society and, in particular, persons who face discrimination on the grounds of their race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.²²⁵

The Strategy also recognises the heightened risk of poverty among groups such as immigrants, women, single mothers, people with disabilities, Aboriginal peoples and racialized groups.²²⁶

The Poverty Reduction Strategy includes initiatives regarding education, after school programs, the child tax benefit, the social assistance review, legislation to protect live-in caregivers and workers at temporary agencies and enhanced employment standards enforcement.²²⁷ These initiatives illustrate the government's awareness and concern about tackling this issue. For example, the Social Assistance Review's mandate is to determine how to improve Ontario's social assistance system, in particular by improving job opportunities for those who rely on social assistance and are able to undertake paid employment. The CRSAO has noted the need for simplified and integrated employment and training services, as well as a wider range of supports (housing, childcare or health-related services) for those who face additional barriers to employment.²²⁸ Ontario's current income support policy is to move recipients back into the workforce as soon as possible. This pressure to take the first available job, whether or not it is suitable, may lead individuals into precarious employment and, ultimately, back onto social assistance.²²⁹

Other Ontario government initiatives, such as increases to the minimum wage and its commitment to implementing the Dean Report on Occupational Health and Safety, are also significant developments responding to the needs of vulnerable workers.²³⁰ Ontario has also emphasized proactive enforcement of employment standards for certain groups of vulnerable workers. For example, when new standards for temporary help agencies were legislated in 2009, the government established a dedicated team to conduct targeted inspections to ensure compliance.²³¹

The Ontario government is also working to attract investment and create jobs in Ontario particularly in the face of the significant decline in Ontario's core manufacturing sector.²³²

The federal government has signalled its concern for workers in less secure forms of employment with initiatives aimed at developing ways for the self-employed to opt into special employment insurance benefits and for private sector employees to participate in self-funded group registered retirement plans.²³³ The federal government has also recently strengthened regulations relating to temporary foreign workers that will provide them with additional protections.²³⁴

Government responses to the rise of precarious employment must weigh the need to protect workers against the need to attract businesses providing employment and longer term economic benefits for all. This is a delicate balancing act, particularly in the face of the global economic situation occurring at the time of the writing of this Interim Report. However, this is precisely the time when the need for an effective response is greatest. In the following Chapters, the LCO assesses Ontario's key legislative and policy responses to the problem of precarious employment and makes suggestions for ways to improve worker protection while maintaining this balance.

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

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

A. Broad Policy Considerations

Employment standards in Ontario are regulated through the *Employment Standards Act, 2000* (ESA) which sets out the minimum rights of workers and the obligations of employers.²³⁵ The ESA regulates a wide variety of work-related issues, including minimum wages, employment records, hours, vacation, leaves of absence, termination and severance and includes relevant enforcement provisions as well as special protections for workers at temporary help agencies. Although the legislative framework provides for basic minimum protections for many workers, extensive exemptions and special rules for workers in specific industries have been enacted, primarily through regulations. The ESA applies to all workers; however, it is most significant for non-unionized employees, since unionized workers often have higher standards and mechanisms to enforce contracts.

The ESA came into force in Ontario in 1969, combining several work-related statutes.²³⁶ Since its enactment, it has frequently been amended. Legislative changes in the 1970's to early 1990's mostly expanded legislative protections for workers with the introduction of termination notice requirements, severance pay provisions, pregnancy leave and bankruptcy protection.²³⁷ Not all changes made during this period expanded rights, however, as lower minimum wage rates were introduced for servers in the hospitality industry.

Reforms introduced in the mid-1990s promoted increased “flexibility” for employers with shorter limitation periods and limits on the amount that could be claimed for lost wages. The Ontario government imposed a multi-year minimum wage freeze over this same period.²³⁸ Government statements at the time of these legislative changes emphasized flexibility, but also highlighted

the need to protect the most vulnerable workers. As well, certain leave provisions were expanded and clarified.

When the *Employment Standards Act, 2000* was introduced, major changes were put in place with the introduction of increased parental leave provisions, anti-reprisal protections and personal emergency leave.²³⁹ Some restrictions were removed for eligibility for public holidays and certain enforcement provisions were introduced. At the same time, the maximum number of hours worked per week could be increased by agreement between employee and employer, breaks and vacation periods could be divided into smaller time periods, and overtime could be averaged over a four-week period.

In response to the growth in temporary help agencies, new protections for temporary help agency workers were introduced through the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*.²⁴⁰ These provisions require agencies to provide workers with information about the agency, the assignment and working conditions and they prohibit workers from being charged fees. Temporary help agency workers are now covered under the ESA provisions relating to public holiday pay, termination and severance. As well, restrictions have been removed from client employers entering into employment contracts with workers.

The ESA saw further amendments in 2010 under the *Open for Business Act, 2010*.²⁴¹ The Act created a number of obligations for employees seeking to make a claim under the ESA with the result being that claimants are now usually required to approach their employers before an ESA claim will be investigated, although in certain cases, such as vulnerable employees, the obligation may be waived. Employment Standards Officers (ESOs) were also given the ability to facilitate settlements at an early stage in the proceedings upon consent of the parties. According to Vosko *et al*, up to 80% of cases are resolved at the early stage through compliance with an ESO determination of wages owing, settlement, withdrawal or denial of complaint. Workers' advocates are concerned that claimants feel pressured to settle for less than is owed. Further, they regard negatively any pre-order activities that do not result in a formal finding against the employer. From their perspective, it is important that formal records be kept of non-compliant employers for future enforcement proceedings.²⁴²

Much has been written and said about the workplace relationship regulatory scheme. While the following comments heard by the *Fairness at Work* panel relate to the *Canada Labour Code* system, they are reflective of the two divergent views that have emerged about the ESA.²⁴³

In hearings, briefs and research reports, two broad views of the workplace relationship emerged. On the one hand, many employers tended to emphasize its contractual,

consensual, bilateral character. “Let us work these matters out with our employees,” they might say, or, “Our employees are happy with their working conditions,” or even, “Terms and conditions should be a matter of contract between employer and employee.” On the other hand, many unions, workers and advocacy groups tended to emphasize the inherent imbalance of power between workers and employers that, in their view, prevents fair dealing in the labour market in general, and in most employment relationships in particular. They argue that regulation is needed to undo the results of this imbalance, from which no fair consensual or contractual understandings could possibly emerge. The first position may be somewhat closer to the way the law has historically regarded employer-employee relations; the second may often be closer to the realities of the contemporary world of work. However, neither perspective can be ignored. In life, as in law, workplace relations are shaped both by contract and by regulation.²⁴⁴

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

Since the enactment of the original ESA, government has been cognizant of the need to balance workers’ and employers’ interests. In 1968, at the introduction of the legislation, the Minister of Labour made the following comments: “when it comes down to considering improvements in standards of employment, we must improve but also maintain a balance that will help us to keep industry and to attract new industries to the province.”²⁴⁵

This balancing act has been the driving force behind the multiple amendments to the ESA over the years. The result is an Act that sets out broad employment protections but limits them through special rules and exemptions. Some sections of the Act do not apply to smaller businesses. Sector specific rules or exemptions have been enacted for certain industries such as agriculture, construction, residential care workers and restaurants and accommodation. In other cases, casual, temporary or part-time workers may not qualify for certain protections due to

insufficient hours or the discontinuous nature of their employment. The result is a legislative framework that, some argue, no longer meets its objective in providing a basic floor of minimum rights for all workers.

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

What, then, to make of the argument that state regulation also has its limits, that if regulation places excessive burdens on business and cripples the economy, we will all be worse off - vulnerable workers, their employers and all the rest of us? This is not merely a legitimate concern; it is a crucial question. Nonetheless, most people agree that at some undefined point this concern must be set aside, and moral or normative concerns must be allowed to trump economic or business concerns. In this day and age, in a country with Canada's affluence and moral aspirations, we are not likely to tolerate certain kinds of working conditions.²⁴⁶

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

B. Basic Floor of Minimum Rights

1. Reducing and Updating Exemptions

As we have noted, the ESA purports to legislate minimum employment standards but contains a multitude of special rules and exemptions. In some cases, exceptions are industry specific, where the ESA sets out differential treatment for certain categories of workers.²⁴⁷ For example, there are four categories of agricultural workers: farm workers, harvesters, near farmers and landscape gardeners. All but farm workers are entitled to minimum wage. Harvesters are entitled to public holidays but farm workers, near farmers and landscape gardeners are not. There are special rules set out for construction workers and many other industries. Hours of work, eating periods and overtime pay are other areas where there are specific exemptions for certain industries. Farm workers and harvesters are exempt from all of these.

In other cases, non-standard workers do not qualify for certain protections of the Act because of discontinuous employment or insufficient time worked. While precarious employment is not "synonymous with non-standard employment", labour insecurity is often associated with engagement in non-standard and/or discontinuous forms of work.²⁴⁸ As it stands, most provisions of the ESA do not explicitly exclude non-standard employees. In fact, there are a number of provisions that explicitly take into account discontinuous periods of employment.

There are, however, instances where ESA coverage is dependent upon a qualifying period. For example, persons holding multiple part-time positions may work 60 hours a week but never qualify for overtime pay as they do not work more than 44 hours a week for any individual employer. Similarly, persons in successive temporary positions may never qualify for two weeks' vacation as they may never work 12 months at any given position. Termination notice requires at least three months employment. Severance pay requires five years of employment and the employer must have a payroll of \$2.5 million or the discontinuance must be part of a mass termination. In this case, not only does length of service determine eligibility but size of the business enterprise is a determinative factor in qualifying for protection. While these qualifying periods may serve those in standard employment relationships, the growing numbers of workers in non-standard employment may need additional types of coverage.

An example of legislative amendments recognizing new work realities were the changes that made termination and severance provisions applicable to employees of temporary employment agencies. Under *The Employment Standards Amendment Act (Temporary Help Agencies), 2009* that came into force on November 6, 2009, workers who obtain work through temporary help agencies are deemed to be the assignment employees of the agency, who is the employer. As a result, severance and termination provisions under the *Employment Standards Act* are applicable to these employees as long as the employment relationship between the agency and employee continues, whether or not the employee is working on an assignment with a client of the agency.

The web of special rules under the ESA are so complex that the Ministry of Labour has developed extensive interpretive material to assist in identifying which standards are applicable to any given work situation. It is likely that each industry specific exemption was put in place in response to a perceived industry need relevant at the time of enactment. From workers' advocates point of view, however, "most of the exemptions relate to the regulation of overtime pay, hours of work and minimum wage, enabling a regulatory regime that allows employers to minimize the costs and scheduling of labour."²⁴⁹

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

Public policy considerations should take into account a modern understanding of the new economy and of the negative implications of precarious work and particularly its disproportionate impact on racialized persons, women, the disabled, Aboriginal persons, youth, recent immigrants and those working in certain sectors. Each exemption should be reviewed with these considerations in mind with the overall objective of reducing vulnerability and providing a more uniform and broadly available set of minimum rights for Ontario's workers. An Innovative Solutions for Precarious Work Advisory Council as recommended at Recommendation 28 could provide the Ministry of Labour with advice on the relevance, justification and impact of sector specific exemptions and special rules.

The Law Commission of Ontario recommends that:

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

The ESA would benefit from a broad policy statement in a preamble to the Act to underscore the government's commitment to ensure basic minimum employee protections, support compliance and foster public, employer and employee awareness and education. A similar amendment was made to the *Occupational Health and Safety Act* in response to the Dean Report, in which a new section was added outlining the Minister of Labour's powers in regard to the promotion of occupational health and safety and prevention of diseases, promotion of public awareness, fostering a commitment to health and safety among employer and workers and education.²⁵⁰

The Law Commission of Ontario recommends that:

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

2. Minimum Wage

As the legislative framework for minimum employee protections, the ESA is the source of minimum wage determinations. According to Statistics Canada, in 2009, 8.1% of Ontario workers earned minimum wage. The Canadian average was 5.8%.²⁵¹ As of March 31, 2010, the rate in Ontario for minimum wage is \$10.25 an hour for most jobs, the highest provincial minimum wage in Canada (along with British Columbia), with only Nunavut and the Yukon being higher at \$11.00 and \$10.30 an hour, respectively.²⁵² The minimum wage has been raised by approximately 50% from \$6.85 in early 2004 in part to offset earlier freezes and to ensure minimum wages were outpacing inflation.²⁵³ For some years leading up to the increases, advocates had called for bringing the minimum wage up to \$10.00. After seven increases, in February 2011, the government announced that it would not raise the minimum wage further but instead would “appoint a committee representing both business and workers to provide advice on the minimum wage in advance of the 2012 budget.”²⁵⁴ However, the budget has since been tabled and this Committee appears not to have been convened.

Some workers’ advocates and academics are continuing to call for additional increases to minimum wage, in some cases up to \$14.55 per hour.²⁵⁵ Other suggested possibilities have included tying the minimum wage to the low income cut-off (LICO) index, with annual cost of living adjustments or regulating the rate through a body independent of government or having the minimum wage adjusted for inflation.²⁵⁶ Employers and others have cautioned about the negative impacts of steep increases.²⁵⁷ In its 2011 report, the Canadian Federation of Independent Business took the position that substantial increases in minimum wages tend to hurt rather than help low income employees in small and medium businesses where employers must absorb the additional costs through reduced hours, reduced training or job cuts.²⁵⁸ Many minimum wage earners are employed in such enterprises and they would bear the costs of such increases. The work of the proposed Committee would have been instructive had it been implemented. In the absence of any clear direction on minimum wage, we are of the view that it is crucial that such work be commenced by this minimum wage Committee.

The Law Commission of Ontario recommends that:

3. The Ontario government convene the minimum wage Committee, or similar body, to review minimum wage issues and recommend a transparent and fair process for determining future adjustments to minimum wage that balances business, economic, labour and poverty issues.

3. *Same Pay for Equal Work*

The LCO's consultations and research revealed the need for a response to the situation of part-time workers receiving lower pay than full-time workers. While there are often legitimate business reasons to hire part-time employees, some employers appear to use part-time employment to hire workers at a lower rate.²⁵⁹ Unless there is a justification for the difference based on skill levels, experience or job description, Arthurs argues that such discrepancies are unfair to part-timers and, ultimately, will reduce the standards of full-time workers as well.²⁶⁰ The negative impacts of this situation are exacerbated by the fact that part-time work is highly gendered and that, among part-time workers, women are more likely to be low-paid.²⁶¹ As noted earlier, while choice is a factor for many women engaging in part-time work, the choice is frequently illusory where women are bound by home and care-giving responsibilities.

Findings also suggest that single parents, often women, racialized workers and recent immigrants are more likely to find themselves in part-time, temporary work.²⁶² Paying part-time workers at a lower rate than full-time workers disproportionately creates vulnerability in traditionally disadvantaged groups. Within the Project Advisory Group, some members commented upon the need for such provisions to be extended to all workers including casual, temporary and part-time. This would appear to be justifiable in the absence of some clear basis for distinguishing the work done on the basis of experience, skill or job description.

The Law Commission of Ontario recommends that:

4. The Ontario government consider amendments to the ESA to require all workers in equivalent positions to be paid at least at the same rate as their permanent full-time equivalents.

4. Benefits

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

Whatever is the right model, some way must be found to provide benefits coverage for vulnerable workers who do not now have access to it. Moreover, it would be better if the solution were found sooner rather than later. As unionization rates decline, as more workers move from large firms to small firms, as more workers move from regular employment to non-standard contracts or self-employment, the case for a new approach to benefits insurance comes to rest on a new basis: not only do vulnerable workers need protection, but so too does a growing proportion of the entire workforce.²⁶³

One proposal that has been suggested to address temporary workers' need for benefits is to require employers to pay a premium for short term contracts. Whether this notion, which is in place in France for temporary agency workers and fixed term contract workers, who receive an additional percentage of their pay (10% and 6% respectively) at the completion of the work assignment, could be adapted for some or all short term workers to compensate for the lack of benefit, may be a future consideration for the government after consultation with employee and employer stakeholders. We recognize that such an innovation would have significant cost implications for employers. Therefore consideration of such an initiative would necessarily require an extensive analysis of the costs and benefits to all parties in order to determine the best course of action. A review of the initiative's experience in France in the face of the recent economic turmoil would also be warranted. The Innovative Solutions for Precarious Work Advisory Council (Recommendation 28) could consider these issues.

The Law Commission of Ontario recommends that:

5. The Ontario government, in consultation with labour, management and insurance representatives, explore options for the provision of benefits for non-standard and other workers without benefits coverage, with consideration given to the concepts of a benefits bank and mandatory short-term contract premium for temporary workers, among other options.

5. Emergency/Medical Leaves

Personal Emergency Leave for Non-Standard Employees

The personal emergency leave provisions of the ESA provide for an annual 10 days of unpaid leave for illness, injury, medical emergency, bereavement or urgent situations related to close relatives. These provisions are only applicable to employees whose employer regularly employs 50 or more employees. While not explicit in the Act, the Ministry of Labour indicates that part-time employees are eligible for the full 10 days annually even where the employment has commenced part-way through the year.²⁶⁴ The ESA Policy and Interpretation Manual is silent about the eligibility of temporary employees for personal emergency leave. By contrast, the manual is explicit that family medical leave, for example, is available to contract employees.²⁶⁵

Family medical leave is an eight week leave to provide care or support to prescribed family members for serious medical conditions with a significant risk of death. Unlike personal emergency leave, it is not restricted to larger businesses. Family caregiver leave, another eight week leave introduced in the Legislature in December 2011 will, if passed, provide up to eight weeks of unpaid job protected leave for employees to provide care and support to a sick or injured family member with “a serious medical condition”. Death need not be imminent and there is no restriction for those working in small businesses. Family caregiver leaves represent a relatively recent legislated recognition of workers’ family responsibilities. Yet these leaves are not dependent upon the size of the employer’s enterprise as is the case with personal emergency leave.

In the LCO’s consultations, respondents noted that the lack of access to personal emergency leave is particularly difficult for vulnerable workers who often work in smaller businesses.²⁶⁶ The example of pregnant women attending medical appointments was raised as a particularly critical gap. Some employer organizations noted that the leave provisions did not necessarily benefit lower wage workers as the provisions were primarily accessed, and in some cases inappropriately used, by workers in higher-skilled positions. Some members of the Project Advisory Group supported extending personal emergency leave to all employees and enacting provisions for paid sick leave.

The LCO believes that personal emergency leave should be available to all workers notwithstanding the size of the enterprise. We are aware, however, that smaller enterprises may be operating with much less flexibility than larger ones. Employers have also raised concerns about their ability to maintain competitiveness in the face of lower regulations in neighbouring jurisdictions.²⁶⁷ One suggested possibility is to legislate extended personal emergency leave while, at the same time, categorizing available leaves into more defined categories as is the case in Prince Edward Island. Prince Edward Island’s employment standards legislation provides three days per year for illness and injury; in addition, after five years of employment, one day of paid

sick leave is available. Three unpaid days of leave are available for bereavement, one day of which is paid in the case of the death of an immediate family member.²⁶⁸ The downside for workers is that more defined limits would be placed on the amount of leave that could be taken for any given category; however, the protection would be extended to all. We note that Prince Edward Island is the only Canadian province to have introduced provisions for paid sick leave in employment standards legislation and the provisions are very limited. Project Advisory Group members raised the issue about how to ensure that part-time, temporary and casual workers are extended some form of these benefits and that such availability is clearly communicated to employees.

The Law Commission of Ontario recommends that:

6. The Ontario government review personal emergency leave provisions in the ESA to determine ways to extend the benefit to workers in workplaces with fewer than 50 employees (including part-time, casual and temporary employees.)

Extended Medical Leave

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

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

prepared to recommend that employers be required to provide benefits to non-standard workers unless and until I am convinced it is practicable for them to do so.²⁶⁹

C. Knowledge of Rights and Obligations

1. Public Awareness, Education and Outreach

In *Fairness at Work*, Arthurs observed

the best prospects for securing compliance with labour standards involve programs to educate workers and employers concerning their rights and responsibilities...Where possible, these programs ought to be undertaken in cooperation with employer, worker or advocacy organizations.²⁷⁰

Lack of workers' and employers' knowledge about their rights and responsibilities was a frequent theme raised in the LCO's consultations by government, employers, workers, community service providers, workers advocates and academics alike.²⁷¹

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

Further efforts to increase public education would be an effective method for getting the message out. As an example, *Working on the Edge* proposed the promotion of employees' rights and employers' responsibilities through a Ministry of Labour public education campaign.²⁷² A campaign featuring ads, posters and information sessions would raise the profile of the legislation for both workers and businesses highlighting government support for protecting vulnerable workers and for supporting employers with ESA compliance. Based on the information we received during our consultations, the LCO notes the importance of active rather than passive public education. Emphasis by the Ministry of Labour on actively bringing the information to workers and employers rather than reliance primarily on the Ministry's website would have a greater impact. Both employer and worker stakeholders noted concerns about over-reliance on the internet for disseminating public information. Not everyone has access to the internet and

rural Ontario does not always have access to high speed internet. Public education materials and sessions should be situated where the workers and employers are, in public places such as subways, buses, television and in workplaces. Existing government-employer-employee committees can be another way to disseminate information. Such a campaign could be initiated as part of a larger provincial strategy that we recommend in Recommendation 52.

The Ministry of Labour currently conducts some outreach information sessions with worker and employer groups. Programs like these, particularly those that feature person-to-person contact between the Ministry and the employment community, should be supported and expanded. Increasing ESA access through direct personal contact as well as partnerships between the Ministry and employment community have been proposed by various commentators.²⁷³ The Ministry of Labour is well-positioned to continue to expand its current outreach programs and to develop community partnerships through the implementation of initiatives aimed at workers in industries and groups that are disproportionately affected by precarious employment including temporary foreign workers, recent immigrants, youth, the disabled, racialized persons, Aboriginal persons and women.

A number of commentators have advocated a model based on the New York Wage Watch Program, initiated as a pilot in 2009 by the New York State's Department of Labour.²⁷⁴ This Program is a formal partnership program between government and community agencies to hold workers' rights sessions, provide employers with compliance information, distribute literature and refer cases of encountered violations to the Department of Labour. It is an innovative project that trains community members who work closely with workers and employers on the ground and with government agencies tasked with administering labour laws. The program has attracted some controversy in that it is framed as an information and education program, yet opponents have expressed concerns that it is, in reality, a form of community enforcement that is being used as a mechanism for union organization.²⁷⁵ Further, opponents contend that the program was implemented without consulting the employer community. In our view, a program that builds community-government partnerships to increase knowledge of rights and responsibilities would be beneficial. Consistent with the Drummond Report's recent recommendation for more stakeholder and community group involvement in policy development, implementation of any such program would require consultation with employer and workers' organizations and careful study of the effectiveness and impacts of New York's program.²⁷⁶

As recommended in Recommendations 13 and 24, expansion of the workers' rights services of the Legal Aid Ontario clinic system and/or community agencies serving vulnerable workers would be another option for enhancing capacity for educational sessions and the development of government-community partnerships. The objective would be to heighten ESA awareness. It

would have the potential for decreasing fear among workers in pursuing legitimate ESA claims resulting in increased access to justice.

The Law Commission of Ontario recommends that:

7. The Ministry of Labour:

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

2. *ESA Handout at Outset of Working Relationship*

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

The Law Commission of Ontario recommends that:

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

3. Setting Out the Terms of the Employment Relationship

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

reminding employers of their obligation to obey the law, and by alerting employees to the possibility of taking remedial action if the law is violated...Clear understandings will facilitate legal recourse for the injured party and perhaps make the job of the defendant easier....²⁷⁷

Temporary agency workers must receive information describing work assignment, hours of work and rate of pay under s.74.6 of the ESA.²⁷⁸ Now, pursuant to the new federal requirements, temporary foreign workers (NOC C and D and live-in caregivers) must receive this type of information in standard form employment contracts. This suggests government awareness of the protective effect of this type of written record for vulnerable workers. In our view, the requirement should be extended to all employees. A clear description of the terms of the employment received at the outset of the relationship has the potential for increased compliance and, if necessary, assistance in asserting ESA rights. In the Chapter on self-employment, a similar recommendation for independent contractors will be discussed.

The Law Commission of Ontario recommends that:

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

D. ESA Enforcement

1. *The Existing Model: A Critique*

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

Ontario's ESA regulation model has been described as "a mix of 'hard' and 'soft' law approaches" with "soft" referring to the "government's reliance on voluntary employer compliance or self-regulatory behaviour from firms" and the "hard" law approach including "orders to pay, compliance orders, and fines or prosecution".²⁷⁹ Arthurs observed that worker activists and academics tend to view the employment relationship as essentially an unequal power imbalance rather than one of equal parties to a contract, and because of this, they support a system which primarily focuses on investigation and prosecution of employment standards violations as public responsibilities similar to the criminal justice system. Such advocates reject the idea of a self-enforcement model that places, in their view, too much responsibility on individual claimants. However, the reality is more complex. A purely public enforcement system such as the criminal justice system focuses on the public interest objective of achieving justice for society as a whole. Individual compensation to the harmed party plays a lesser role. In our view, a purely public law model is not workable for employment standards because a key objective must be compensating individuals for their loss. Therefore, the system must, necessarily, retain elements of the civil justice process. As Arthurs points out, the system is a hybrid of regulation and contract, of public and private law.²⁸⁰

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

Labour standards ultimately succeed or fail on the issue of compliance. Widespread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law.²⁸¹

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

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

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

The Education, Outreach & Partnership (EOP) initiative began formally in 2009. Yet engagement with employers and employees covered by the Employment Standards Act, 2000 (ESA) has been part of the Employment Standards Program from its early history. It has long been recognized that education and compliance go hand in hand.²⁸²

Information is provided through a multi-lingual phone service administered through Employment Ontario which served 350,000 people in 2009-2010. The Ministry responded to 9,000 email inquiries in 2010 and the Ministry's website has very extensive tools, videos and explanatory materials with many resources available in 23 languages.²⁸³ The Ministry also engages in direct informational sessions with groups of employers and employees.

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

...many employers weigh the costs of compliance against the relatively low probability of being found in non-compliance and the weak penalties associated with a breach, and make an economic decision not to comply...The MOL already provides considerable resources on its various websites, and offers telephone assistance to provide advice to workers. However, few vulnerable employees know how to find these websites or even to look for them, even assuming that they have access to the Internet, or know about the telephone service. While the MOL has done a good job of translating some of the information into multiple languages, the general MOL website is in English and difficult for non-English speaking workers to navigate. More fundamentally, a model intended to aid vulnerable workers that places the burden on employees to conduct internet research and then claim their legal entitlements will always be ineffective.²⁸⁴

Our consultations revealed frequent reports of a lack of employment standards enforcement.²⁸⁵ We heard about wages below minimum wage for temporary help agency and temporary foreign workers. Temporary foreign workers reported unpaid wages. Temporary agencies were reported as continuing to charge fees despite the new provisions prohibiting this practice.²⁸⁶ Non-status workers were subject to multiple violations.²⁸⁷ The LCO was made aware of "agents" who place temporary foreign agricultural workers with employers, creating a triangular employment

relationship similar to the temporary help agency relationship. Employers do not pay more than minimum wage of \$10.25 per hour to the agent, and the worker receives less from the agent (as low as \$7.50 per hour).²⁸⁸ Issues related to unpaid wages, vacation pay, termination pay, overtime and public holidays were the main complaints reported to the Ministry of Labour.²⁸⁹ Some suggest that ESA violations are widespread.²⁹⁰

What is strikingly clear from workers' experiences is the "everydayness" of substandard working conditions. Workers do not come forward with just one experience of employer violations. When reviewing previous job experiences, it becomes clear that people in low-wage and precarious work experience violations of labour standards in job after job...workers go from one bad job to the next with no protection against employers' violations.²⁹¹

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

These findings do not indicate that all or most employers violate ES [employment standards]. Many employers do comply with the ESA. However, the prevalence of violations undermines employers who do comply with minimum labour standards and contributes to a downward pressure on wages and working conditions.²⁹²

Advocates have pointed out, accurately, in our view, that the current process overemphasizes investigating individual complaints of employer violations.²⁹³ Detection of violations is largely through workers' self-enforcement and individual claims. This approach has been described as "expensive and risks overloading available capacity."²⁹⁴

There is general consensus that proactive enforcement is a much more effective mechanism for ensuring the protections of the ESA than the reactive system of responding to individual complaints. It has been suggested that the value of proactive inspections is demonstrated by the fact that violations were found in 40% to 90% of such inspections.²⁹⁵ The success of this method is also attributed to the fact that 92% to 99% of confirmed unpaid wages are recovered through proactive processes whereas only about half are recovered through the individual claims process.²⁹⁶

In *Fairness at Work* Arthurs said

I received many submissions to the effect that the [federal] Labour Program's enforcement strategy ought to be more proactive. Instead of concentrating on processing workers' complaints, inspectors ought to take the initiative randomly auditing sectors or

enterprises that exhibit a profile of non-compliance, or making a concerted effort to enforce particular provisions of Part III [of the Canada Labour Code] that seem to be violated with unusual frequency. These submissions make good sense, and I accept them.²⁹⁷

The occupational health and safety regime has been identified as a system that places stronger emphasis on proactive enforcement activities than the ESA system.²⁹⁸ In arguing for more proactive enforcement under the ESA regime, Vosko *et al* make the point that although it may seem reasonable to prioritize stronger protection for health and safety over employment protections which can be remedied through financial compensation, the differences should not be overstated, given the negative impacts on quality of life associated with prolonged precarious work.²⁹⁹

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

Compliance is likely to be secured through a range of strategies. Strategies should include information, education, persuasion and proactive monitoring - all designed to encourage compliance without coercion. But they should also include effective remedies and sanctions - administrative, civil and criminal - with gradations of severity. Sanctions should be used when non-coercive strategies fail to produce the desired results, especially in the case of egregious violations. Compliance strategies should operate proactively for the most part, rather than being invoked when violations have already occurred. And they should address root causes and patterns of persistent non-compliance as well as isolated violations.³⁰⁰

....Still, it is very difficult to turn away a complainant with a seemingly meritorious case.³⁰¹

The Law Commission of Ontario recommends:

10. The Ministry of Labour's ESA enforcement continue to use a range of strategies including voluntary compliance, proactive inspections and responding to individual complaints. However, there should be greater emphasis on proactive enforcement processes.

2. Specific Issues Arising from Current Enforcement

Approaching Employer Prior to Claim

As we have noted, the primary method of enforcement under the ESA's current structure, the individual claims process, has been the subject of considerable negative commentary. The views of most academics and advocates are in line with Professor Eric Tucker's comments: "most workers are unlikely to be assertive protagonists".³⁰² In other words, vulnerable workers, in insecure employment, are not well-placed to make complaints. It has been suggested that the individual claims system is made more problematic by the fact that historically the Ministry of Labour has encouraged employees to attempt recovery of wages on their own.³⁰³ Not surprisingly, workers' advocates have taken a very dim view of the enactment of changes under the *Open for Business Act* that had the effect of imposing further obligations on many claimants before an investigation is commenced.³⁰⁴ Pursuant to the amendments that took effect in January 2011, the Director of Employment Standards can require the complainant to take certain steps such as communicating with the employer about the violation, and providing information about the employer's response. While not explicit in the legislation or the *ESA Policy and Interpretation Manual*, it is apparent from statements on their website that the Ministry of Labour has made a general policy decision to require all claimants to contact their employers about the violation unless a decision is made to waive the requirement.³⁰⁵ The Ministry of Labour materials make clear that exceptions can be made for vulnerable workers such as live-in caregivers, youth, persons with disabilities, workers with language barriers, those who fear their employers, those with reasons relating to the *Human Rights Code* or those with other appropriate reasons.³⁰⁶ Exceptions can also be made for such situations as when the claim is close to the six month limitation period or the employer cannot be located. These exceptions can be granted, upon request, presumably as an exercise of the Director's (or delegate's) discretion. It is unknown how frequently these exceptions are requested and/or granted.

While the LCO did not hear of any instances in which the Ministry had declined to exercise its discretion in appropriate cases, it is apparent from the materials we reviewed that workers' advocates believe that the process is a strong disincentive to workers making a claim. As a case in point, the Color of Poverty Campaign and Metro Chinese and Southeast Asian Legal Clinic supported the removal of all mandatory requirements for workers to attempt self-enforcement of ESA violations with employers prior to filing an ESA claim.³⁰⁷ We are not clear whether advocates are basing their objections on actual situations where the Ministry failed to waive the requirement for vulnerable workers or whether they believe workers are simply discouraged at the outset from bringing claims by even the possibility of having to approach the employer. It is also possible that the Ministry's willingness to waive the requirement for vulnerable workers is not well known among employee and worker-side stakeholders. While the Ministry of Labour website refers to the exceptions, elsewhere it is emphasized that most employees must approach employers. Online commentary and information about the ESA among stakeholders revealed

that the exceptions are often not mentioned.³⁰⁸ In any event, it may be that, as a matter of principle, advocates object to a requirement that workers request special protection as an exception rather than having it granted as of right.

Whatever the specific basis for their objections, workers' advocates have little confidence in the current system. The LCO was unable to determine whether there had been any impact on claims since the implementation of the *Open for Business Act* (OBA). Data available from the Ministry of Labour are not yet available for the relevant period. In our view, this issue is significant enough to warrant a review. Consistent with the findings of the Drummond Report recommending ministries improve data collection and engage in evidence-based policy development, we are of the view that an evaluation should be undertaken to assess the impact of the OBA changes with the goal of determining whether claims had declined during the post-OBA period and, if so, whether the policy change was the precipitating factor.³⁰⁹ If so, this would justify reconsideration of the policy decision requiring, as a general rule, that employees approach their employers before embarking on an ESA claim.

The Law Commission of Ontario recommends that:

11. The Ministry of Labour:

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

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

Expediting and Facilitating ESA Claims

Lengthy time periods for resolution of ESA claims were identified as problematic in the consultations.³¹⁰ In an effort to improve, the Ministry of Labour launched a task force in August 2010 to deal with a backlog of 14,000 employment standards complaints. Completion was targeted for March 2012. This process has been criticized by some for encouraging workers to accept settlements for less than they are owed, a method that is viewed negatively by workers' advocates.³¹¹

Person-to-person assistance for workers preparing their claims has been promoted as a means of increasing ESA accessibility and potentially expediting the claims-making process, thereby counteracting the effects of lack of internet access and/or language barriers. Appropriate claims information may ultimately assist adjudicators in the decision-making process.³¹² A related proposition by Professor David Doorey envisioned the concept of one-stop shopping for employees seeking advice and assistance with ESA matters and a corresponding office for employers, or alternatively, a properly resourced office offering service to both.³¹³ Direct personal assistance could take the form of additional resources for legal aid clinics or government funded offices serving workers and employers functioning in a similar role to that played by the Office of the Worker Advisor and the Office of the Employer Advisor in workplace safety and insurance matters. However the service is structured, it would be important to provide workers with assistance in asserting their claims and to employers in responding, ensuring that the requisite information, in the proper format, is submitted to the Ministry. Properly documented claims and responses would work to expedite and improve the quality of the claims process. As Professor Doorey highlights, support for employers is also important. In our view, small enterprises could particularly benefit from this service.

The Law Commission of Ontario recommends that:

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

Limitation Period and Monetary Cap

Section 111 of the ESA sets out a six month limitation period for bringing claims related to wages. The limitation periods for recovery of wages are longer for cases of repeat violations and for recovery of vacation pay. For contraventions where reinstatement/compensation are sought as a remedy, the general limitation period is two years under s.96(3). The mandatory time limits may be extended in exceptional cases of fraudulent concealment where the employee has been misled.³¹⁴ The ESA also imposes a monetary cap of \$10,000.

The shorter limitation period for recovery of wages may expedite the bringing of claims which could have benefits for all parties. Earlier claims are likely to be easier to investigate. Employers benefit from having claims outstanding on their books for a much shorter term. But claimants

who delay have no recourse under the ESA and are left to seek relief in the civil courts. Many will be unable to navigate the small claims court process. Furthermore, as others have observed, most claims are made after workers leave the job and some workers leave jobs being owed “substantial amounts of unpaid wages and entitlements. However, the \$10,000 cap on monies recoverable under the ESA leaves these workers without remedy through the [employment standards] claim process.”³¹⁵ “Job dislocation and difficulties learning how to pursue ES rights” make the six month limitation period a significant obstacle to accessing ESA protections.³¹⁶

These obstacles coupled with recent increases in minimum wages suggest justification for expanding the ESA’s six month limitation period to two years for recovery of wages and increasing the monetary cap to \$25,000.³¹⁷ This would bring the ESA cap in line with the small claims court cap. In our view, there does not appear to be a sufficiently strong justification for capping the ESA at a lower rate than the small claims court cap and for imposing shorter limitation periods on recovery of wages than for vacation pay or other ESA remedies. Providing for a two-year limitation period for all claims would create consistency with other limitation periods within the Act and would respond appropriately to concerns about obstacles faced by workers due to the limitation caps.

The Law Commission of Ontario recommends that:

14. The Ontario government:

- a) expand time limitations to two years for all ESA remedies; and
- b) raise the ESA monetary cap to \$25,000.

Third Party and Anonymous Complaints

Hardly any nonunion *employees* file ESA complaints. The ESA enforcement mechanisms are used almost exclusively by unionized employees who can file grievances under a collective agreement and by *former* employees, who have been dismissed by their employer or who have quit.³¹⁸

The Auditor General made a similar point.³¹⁹ This is evidence of a system that does not meet the needs of protecting workers while they are still employed. As a partial remedy, it has been proposed that the Ministry of Labour accept third-party and anonymous complaints

to initiate inspections in order to minimize threats to workers whose rights are being violated. Implementing this recommendation would mean that the most precariously

employed workers, facing heightened threats of reprisal, are not obliged to take on their employers....³²⁰

We agree. We believe it desirable that the Ministry of Labour arrange for a mechanism to accept third party information. Such information could be used as a basis to determine where proactive inspections should be targeted. Accepting third party or anonymous complaints would also be one way to respond to the many serious concerns we have heard regarding reprisals. Any system developed would require built-in checks and balances to ensure that unfounded complaints did not trigger costly and unwarranted inspections. It would be important to develop policy criteria for determining whether information supplied by third parties either on its own or together with other information available to the inspectors was a sufficient foundation to warrant launching an inspection.

The Law Commission of Ontario recommends that

15. The Ministry of Labour:

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

Reporting on ESA enforcement practices in 2004, the Auditor General expressed concern that the Ministry of Labour was focusing its efforts almost entirely on investigating individual complaints against former employers even though previous proactive inspections had uncovered violations in 40% to 90% of cases. As mentioned earlier, this concern has been echoed by others.³²¹ The Auditor General found there had been no significant improvements since a 1991 audit had revealed deficiencies in investigations, proactive inspections and prosecutions. The 2004 Report recommended increased proactive inspections, improved guidance to ESOs on enforcement and that the Ministry assess the impact of making employers pay for investigations when violations are found. In its follow-up 2006 Report, the Auditor General found progress in some areas but found no implementation of the recommendation that non-compliant employers pay for inspections. However, the Ministry committed to consider this change in future legislative reviews. The Auditor General noted that the Ministry of Labour had increased proactive inspections from 151 in 2003-2004 to 2,355 in 2004-2005 and 2,560 in 2005-2006. The Auditor General considered these to be the new benchmarks “upon which to establish future targets”.³²² However, these inspections have since dropped to fewer than half that amount. There were only 1,093 for 2010-2011.³²³ The Ministry of Labour currently indicates:

- The Dedicated Enforcement Team will conduct a minimum of 1800 proactive inspections in 2011-12 (up from 1100 in 2010-2011) and will focus on repeat violators and high risk sectors for vulnerable workers.
- As the ES Program moves into a more proactive compliance model, the ES Program will consult with stakeholders about our inspection activities and sector plans.³²⁴

The prioritization of high-risk industries with vulnerable workers has been recommended in workplaces where intervention will have a high impact and deterrence will take effect.³²⁵ Enforcement sweeps and educational campaigns are supported, targeting “fissured” industries where decisions are downloaded from major employers to a complex network of smaller employers such as are found in the hospitality, janitorial, construction and agricultural sectors.³²⁶

As mentioned, it would be effective for the Ministry of Labour to ensure that the disproportionate representation of vulnerable workers in certain industries and groups are considered in identifying areas for targeting increased proactive inspections. For example, our consultations revealed reports of temporary foreign workers being regularly required to work late and on weekends without receiving either overtime or vacation pay. In some instances, migrant workers who worked alongside Canadian workers reported that the Canadian workers were rarely asked to work overtime and, we were advised, they were generally treated better. We heard of instances where migrant workers’ attempts to raise such concerns with employers resulted in employers’ retaliation by insisting they work additional hours with the threat of termination if they refused. We heard accounts of sexual abuse of women employees in the workplace.³²⁷

The 1991 audit specifically identified the lack of expanded investigations as a major issue. It noted that when violations were detected, the investigation was not extended to determine whether other employees had experienced similar violations. In its 2004 report, the Auditor General found no significant increase in the number of expanded investigations for confirmed violations.

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

Greater ministry emphasis on extending investigations of a substantiated claim to cover other employees of the same employer to determine whether additional violations had taken place would be an effective means of enforcing the employment standards legislation.³²⁸

However, as of 2006, there had been no significant improvements in the number of expanded investigations conducted by the Ministry.³²⁹ We are not aware of any significant improvement since that time.

The Law Commission of Ontario recommends that:

16. The Ministry of Labour:

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

17. The Ontario government consider amending the ESA to allow for orders requiring employers found in violation of the ESA to cover the costs of investigations and inspections.

3. Penalties

There are a variety of sanctions that may be engaged to respond to ESA violations. They include orders to pay wages, orders for compensation, compliance orders, notice of contravention and prosecution. Employment Standards Officers have the discretion to use or not use the above options.³³⁰

The Auditor General noted that in the five years leading up to 2004, there had been only 63 convictions under the ESA. Prosecutions were not commenced even when the amounts owing were high. In its 2004 Report, the Auditor General recommended that the Ministry of Labour provide better direction to employment standards officers regarding the appropriate use of enforcement measures, including notices of contravention and prosecutions, and better monitor the use of these measures for consistency of application. After the Auditor General's Report, prosecutions reached a high of 594 in 2006-2007 and 505 in 2008-2009 but dropped to 196 in 2010-2011, only 4 of which were prosecutions under Part III of the *Provincial Offences Act* resulting in more serious fines.³³¹ The prosecutions are overwhelmingly of the Part I type,

resulting in fines of \$360.00 or less.³³² Workers' advocates are of the view that "tickets are not an effective cost for violations in the first place, nor will they act as a deterrent to ongoing or future violations."³³³

Commentators agree that the system must have and utilize effective penalties and sanctions.³³⁴ Some observers promote stronger policy or legislative standards with less discretion placed in the hands of ESOs.³³⁵ Other suggestions include set legislated fines for confirmed violations even in the settlement process and increased prosecutions. In general, the consultations revealed dissatisfaction with the existing use of penalties that were considered to be ineffective at deterring non-compliant employers. Advocates do not support the current widespread use of tickets under Part I of the POA which are perceived as providing inadequate incentives to compliance. Instead, they advocate for fines that double or triple the amount owed and for the payment of interest on all unpaid wages, a power which ESOs currently do not have. Advocates consider the 10% administrative fee levied on orders to pay wages to be an insufficient motivation for non-compliant employers to repay wages.³³⁶

The LCO agrees that effective sanctions must be utilized to achieve compliance. The 196 prosecutions in 2010-2011 resulted from approximately 17,000 complaints.³³⁷ The ESA Policy and Interpretation Manual that is directed at ESOs, lawyers, human resource professionals and others explains the legislation and case law. This manual, however, provides very little specific policy direction to ESOs in terms of use of the various sanctions. While, on the one hand, ESOs must have flexibility to be able to respond appropriately to the myriad of individual circumstances they encounter, they also need clear policy direction on when to initiate prosecutions, particularly where deterrence is required in the case of repeat offenders and wilful non-compliance with payment orders. Some commentators have called for mandatory prosecution policies. We do not agree. Such policies can have unanticipated negative consequences by injecting unnecessary rigidity into the system. We do, however, believe that ESOs should be provided with specific policy direction and education emphasizing deterrence in selecting penalties and sanctions, particularly for repeat violations and wilful non-compliance.

The Law Commission of Ontario recommends that:

18. The Ministry of Labour strengthen ESO policy direction with supporting education to emphasize deterrence in terms of prosecution, penalties and sanctions for repeat violators and those who wilfully fail to comply with payment orders.

4. Resources

In the long-run, better front-end enforcement may work to decrease individual claims by increasing compliance. In the meantime, increased proactive enforcement will require resources. However, this raises the question, as others have noted, about the adequacy of funding for Ontario's ESA enforcement.³³⁸ The majority of resources continue to be devoted to responding to individual complaints rather than compliance or proactive activities. Ontario's 2011 budget indicated,

...[S]ince 2009, the government has invested 4.5 million annually to increase the number of employment standards officers in the province. The government has also invested an additional \$6 million over two years to help reduce the backlog of employment standards claims and improve the protection of Ontario's employees, thereby reducing hardship for workers and their families.³³⁹

According to the Ministry of Labour, more resources will be shifted to inspections once the backlog is dealt with, which was anticipated to have been completed by March 2012.³⁴⁰ However, the \$6 million in backlog funding to employ more employment standards officers was provided for a specified two year period that ended in March 2012. This raises questions about the extent to which adequate resources will be available going forward for effective proactive inspections and other enforcement activities.

The Law Commission of Ontario recommends that:

19. The Ontario government ensure adequate resources for ESA compliance and enforcement, with a particular emphasis on proactive enforcement.

E. Mechanisms to Support Compliance and Enforcement

1. Employee Voice and Participation

Professor Anil Verma argues that "employee voice can be a powerful tool in ensuring better labour standards."³⁴¹ Other commentators agree. Building upon this concept, the LCO has considered ways to increase ESA awareness and compliance by way of improved "employee voice" through joint employee-employer work councils. This framework exists in Ontario under the *Occupational Health and Safety Act* in the form of the joint health and safety committee

scheme.³⁴² Importing such a system into the ESA could be beneficial for enhancing compliance particularly in non-unionized workplaces populated by low wage workers.

Roy Adams proposes implementing the German model of employee work councils.³⁴³ Under the German model, work councils are a mandatory, elected body in German workplaces with five or more employees. The council has legislated rights regarding consultation, information and participation. Participation rights, referred to as co-determination, allow for joint decision-making jurisdiction over a wide variety of issues, including hours, occupational health and safety, training, job classification, and individual and mass dismissals. Work councils co-exist with unions.³⁴⁴ Unless approved by the collective agreement, work councils do not engage in bargaining over wages.³⁴⁵ Adams suggests this model is considered successful by both management and unions; he offers its resilience following economic downturns in the 1980s and 1990s as a marker of this success.³⁴⁶ In his 2006 paper, Professor Verma noted that while the European Union had used this model to design various measures to increase worker participation, the German government had been evaluating the work council system in the face of increased international competition and has made legislative changes to adapt it to changing circumstances.³⁴⁷ In many cases, the changes have strengthened the system. The election procedure was simplified, work councils could now be set up for more types of business relationships such as joint work councils operating across related businesses, or divisional councils could be created for specific products or business types. The scope of council activities has been increased and equity and discrimination policies have been introduced. Professor Verma concluded that “work councils were not perfect vehicles for dealing with the pressures of globalization” nor could there be a wholesale transfer of the German model to the Canadian workplace. However, he noted the value of the principles upon which work councils are founded for joint workplace decision-making.³⁴⁸

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

Project Advisory Group members had a mixed reaction to the general idea of introducing work councils and specifically, to utilizing the existing OHS scheme for their implementation. Some

members representing labour interests indicated that OHS committees are not operative or effective in many workplaces, while employer members noted that health and safety committees work well in non-unionized environments and that most employees do not operate in a state of fear of the employer. However, they raised concerns about the costs of such councils. Some members of the Project Advisory Group representing labour interests were of the view that introducing a work council scheme into non-unionized workplaces could create issues of intimidation and reprisal. However, they suggested that these could be addressed with well-enforced, anti-reprisal processes.

In our view, work councils present an opportunity to introduce a beneficial mechanism that is adaptable to the changing nature of the modern workplace. To test their effectiveness, we propose the implementation of an ESA work council pilot project. We suggest the model would be most beneficial in the non-unionized workplace in a sector with high concentrations of vulnerable workers. Implementation through a partnership of government, employers and employees would increase the likelihood of a successful pilot and province-wide expansion into non-unionized workplaces.

The Law Commission of Ontario recommends that:

20. The Ministry of Labour:

- a) implement a joint labour-management employment standards work council as a pilot in a number of select non-unionized workplaces with high concentrations of vulnerable workers;
- b) evaluate the pilot; and
- c) if successful, implement ESA work councils in non-unionized workplaces.

2. Focusing on the Top Echelon of Industry

David Weil's 2010 report on Strategic Enforcement to the U.S Department of Labor's Wage and Hour Division recognized that, because of the extreme effects of competition, companies were shifting away from direct employment to subcontracting, use of temporary workers and temporary agency workers, resulting in a weakening of the impact of traditional approaches to enforcement. This "fissuring" of employment by using external workers, in Weil's view, requires a response directed at "higher levels of industry structures in order to change behaviour at lower levels, where violations are most likely to occur."³⁴⁹ The report supports a coordinated approach to strategic enforcement, identifying and prioritizing workplaces with high concentrations of

vulnerable workers, who are unlikely to complain, and in sectors where employer behaviours are likely to be changed. One strategy discussed is government reaching out to the top echelons of the industry or company through non-confrontational communications highlighting the government's commitment to employment standards and the important role played by the top level of industry.

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

Weil's report proposes the coordination of enforcement activities among branches or franchises of a branded company. In situations where violations are detected, Weil recommends that part of the resolution could involve a comprehensive agreement covering all outlets/branches of a particular company. Communications about enforcement targets and resolutions such as the above could be made highly visible within industries that employ vulnerable workers. In this way, pressure to comply could be brought to bear on supply chains. To be effective, deterrent penalties would be required when violations are detected.³⁵⁰ Other ways to engage supply chains are discussed under the Chapter on Health and Safety.

The Law Commission of Ontario recommends that:

21. The Ministry of Labour:

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

3. Responding to Temporary Foreign Workers: Fear of Repatriation

Temporary foreign workers have specific concerns due to the fact that their ability to work in Canada is often directly tied to an individual employer. If an employee is terminated, some temporary foreign worker programs allow for the employee to find other employment within a specified period, although there are significant limitations on their ability to transfer. The SAWP contract provides for repatriation when the employer, in consultation with the government agent, terminates the employment based on non-compliance, refusal to work or any other sufficient reason. While there are processes in place to avoid early termination (described below in more detail), when and if these processes fail, SAWP workers must return immediately to their home countries. Reports and studies from researchers, academics and advocates have found that concerns about termination, repatriation or non-contract renewal can act as an effective disincentive for workers to access legal remedies intended to protect such workers.³⁵¹ Repatriation need not be expressly threatened by the employer, it can be implicit in the conduct of employers. Or, the fear arises simply from the migrant workers' temporary status; workers know they can be sent home or not asked back. This, we were told, effectively mutes any worker's complaints about breaches of employment standards, health and safety legislation or housing standards.³⁵²

If repatriation is achieved without an opportunity for an appeal or independent review, it effectively denies the worker avenues of legal redress available under Ontario law, such as seeking protection from the anti-reprisal provisions found in the ESA.³⁵³ When workers are no longer in Ontario, it is difficult to exercise these legal rights.

Concerns about repatriation were also raised in the Dean Report in its review of Occupational Health and Safety.³⁵⁴ In response, the Report recommended expediting the hearing of reprisal complaints at the Ontario Labour Relations Board which could order interim reinstatement. This is being accomplished through recent legislative changes to the OHSA. In our view, a similar process should be made available in the context of the *Employment Standards Act*. This would assist all workers facing reprisal but most particularly temporary foreign workers whose vulnerability is more acute.

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

Despite concerns about repatriation, rates of actual termination of SAWP workers are not high. Of the approximately 15,000 SAWP workers in each of 2009 and 2010, F.A.R.M.S. advised that only 73 and 120 respectively were repatriated for breach of contract and for all reasons only about .5% are repatriated.³⁵⁵ Therefore, F.A.R.M.S. and liaison officers did not perceive termination as a tool used by SAWP employers to exercise undue control over workers. Furthermore, they considered termination as an avenue of last resort. Before termination is exercised, we were advised that employers will often try to resolve issues directly with workers. Where that is unsuccessful, employers will often contact F.A.R.M.S., who will work with the employer and liaison officer to seek to resolve the issue or to negotiate a transfer of the worker to another employer (with the approval of Human Resources and Skills Development Canada [HRSDC]). However, we were advised that transfers did not occur frequently.³⁵⁶ F.A.R.M.S. noted that termination has negative consequences for employers in terms of administrative costs, travel and other costs to hire a SAWP worker and they emphasized the role of liaison officers in resolving workers' issues.³⁵⁷ Liaison Services supported these views advising that termination and repatriation, at will by the employer, does not occur. Under the employment contract, the Liaison Officer must be consulted before termination occurs and, where an employer is acting unreasonably, F.A.R.M.S. will intercede and discuss the matter with the employer. It is also possible that workers will no longer be made available to that employer, although this has occurred only rarely.

Even though there appear to be clear mechanisms in place under SAWP to minimize terminations and rates of termination are very low, our consultations and research nevertheless revealed significant concerns about job loss and repatriation among these workers.³⁵⁸ It is the fear itself that has been identified in the research as the primary barrier to workers asserting their rights, making them vulnerable to exploitation by non-compliant employers.³⁵⁹ Compared to SAWP, NOC C and D workers may have slightly more mobility in that they are eligible to initiate job transfers if they can find another eligible employer who is willing and able to obtain a labour market opinion (LMO) and engage successfully in the process for hiring a temporary foreign worker.

In our view, the most effective response to workers' fear of repatriation would be to formalize a process of independent decision-making prior to repatriation. Given that actual instances of termination occur infrequently under SAWP, such a process should not create a significant challenge for SAWP employers. Since repatriation statistics do not appear to be readily available for the NOC C and D program, it is not known to what extent it occurs under this program, but, clearly, this type of process could be beneficial for these employees who lack the processes and oversight of the SAWP program and are therefore likely most in need of protections. Moreover, the implementation of an added level of oversight may be a way to improve confidence and

reduce fear among temporary foreign workers. In our view, an independent decision-making body made up of Ministry of Labour and/or HRSDC representatives and worker and employer representatives would help to ensure that repatriation is not being utilized as a reprisal for workers attempting to access their rights or is otherwise unjustified. Such a process is particularly important for NOC C and D workers.

While we support interim reinstatement provisions for appropriate circumstances, we recognize there are challenges in a process that puts employers and employees back into a relationship that is no longer workable for one or both.³⁶⁰

The Law Commission of Ontario recommends that:

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

Agencies that provide legal service to temporary migrant workers should be fostered. An independent decision-making process prior to repatriation, as described above, would be an area where legal representation could play a valuable role. In general, availability of legal and other support for workers could increase knowledge of and access to workers rights for temporary foreign workers and other vulnerable workers. In our consultations, we met with several organizations and became aware of others that provide support, assistance, advocacy and outreach to migrant workers.³⁶¹ For example, the Agricultural Workers Alliance (AWA) Support Centres operate four centres in Bradford, Leamington, Simcoe and Virgil and are ventures of the United Food and Commercial Workers Union and the Agricultural Workers Alliance. These centres provide direct or referred assistance to migrant farm workers dealing with repatriation

concerns and claims for workers' compensation, parental leave benefits, Canada Pension Plan, Employment Insurance and health insurance.³⁶² In the Niagara Region, Community Legal Services of Niagara South has partnered with the Niagara Migrant Workers Interest Group, a group of community organizations and volunteers, to provide legal and other supports to migrant workers. We met with organizations that support live-in caregivers such as the Caregivers Action Centre. For non-agricultural NOC C and D workers, we heard of several incidents in which the legal clinics had played a crucial role in providing support.

The Law Commission of Ontario recommends that:

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

4. Enforcing Vulnerable Workers Rights through Association

Many commentators are of the view that one of the most effective means of reducing worker vulnerability and enforcing workers' rights is through unionization. Unionization's benefits have been described as important social values, related to workers' well-being and providing a forum for airing grievances.³⁶³ The Supreme Court of Canada has noted that:

It is widely accepted that labour relations laws function not only to provide a forum for airing specific grievances, but for fostering dialogue in an otherwise adversarial workplace. As P. Weiler has written, unionization introduces a form of political democracy into the workplace, subjecting employer and employee alike to the "rule of law".³⁶⁴

Despite unionization's benefits for workers, unions have never been a panacea. Even at the height of unionization in Canada, only about 35% of Ontario workers were unionized.³⁶⁵ While many workers' advocates are pressing for increased unionization as the remedy to precarious work, the prospect of increased unionization may be out of step with global trends. Unions themselves are assessing their appropriate role in today's and the future's economic and social conditions.³⁶⁶ Ontario, in common with much of the industrialized world, is experiencing a gradual decline in unionization rates.³⁶⁷ While Canadian unions remain strong relative to the United States and, in fact, in absolute numbers, union membership is increasing in Canada, union density (the percentage of the Canadian workforce that is unionized) decreased between 1997

and 2010 from 33.7% to 31.5%.³⁶⁸ And among Canadian jurisdictions, Ontario had the second lowest unionization rate, at 27.9%, in 2010.³⁶⁹ Interestingly, while national rates for men have declined over the past decade, women's unionization rates have increased to 32.7% beyond the national average. This tracks a trend starting in 2006 when unionization rates for women first surpassed that of men.³⁷⁰

As 2010 data indicate, unionization rates are much higher in the public sector (74.9%) as compared to the private sector (17.5%).³⁷¹ Private sector rates in Canada have declined over the past decade from approximately 19.9% in 2001.³⁷²

The declines that have occurred have been attributed to the radical economic, technological and social changes that have taken place over the past 30 years.³⁷³ Competitive pressures brought about by globalization, free trade and economic downturns diminish the bargaining power of unions, and in an environment of financial insecurity, workers are less willing to organize. The decline of the manufacturing industry has also been an important contributing factor in Ontario. It is significant that the role of most unions in Canada has traditionally been a narrow one, focused on bargaining for wages, job security and working conditions in the immediate workplace rather than on broader issues of training, hiring and career development.³⁷⁴ With the rise of precarious and non-standard forms of work, this model is in decline. The Wagnerian collective bargaining model adopted in the Ontario *Labour Relations Act* (LRA) was developed in the context of a traditional workplace with one employer and many employees carrying out standardized skills in a single workplace, a scenario which is becoming ever less common in the modern economy.³⁷⁵

Commentators have suggested that unions must adopt a broader focus that is responsive to the unique needs of workers in non-standard employment relationships.³⁷⁶ The issue of unionization is always a highly politicized one, but it is particularly delicate in this period of economic uncertainty. On the other hand, others argue that "union membership is central to limiting precarious employment."³⁷⁷

One area where the debate about vulnerable workers has been centered is the express exclusion of agricultural workers from Ontario's traditional labour relations regime. A 1992 Task Force considering the issue of extending collective bargaining rights to agricultural workers looked to other jurisdictions and observed that providing agricultural workers with the right to bargain collectively had not resulted in organizing to any significant degree nor did it have an undue negative impact on farms in those jurisdictions.³⁷⁸ The Task Force proposed a collective bargaining regime that included provision for an exclusive bargaining unit and a collective bargaining process that emphasized negotiation and prohibited strikes, but provided for binding

arbitration in the event of an impasse. This model was adopted in the *Agricultural Labour Relations Act, 1994* (ALRA). It should be noted that the ALRA excluded from its scope the most vulnerable agricultural workers in Ontario – temporary foreign workers and other seasonal workers.³⁷⁹ The ALRA was short-lived, being repealed by the newly elected government in 1995. In response to the repeal, the United Food and Commercial Workers (UFCW) and individual agricultural workers in *Dunmore et al. v. Ontario (Attorney General)* challenged the exclusion of agricultural workers from the labour relations scheme as a violation of their freedom of association and equality rights as guaranteed in the *Canadian Charter of Rights and Freedoms*.³⁸⁰

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

Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J. [at trial], agricultural workers are “poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility”.³⁸¹

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

...[t]he Attorney General has demonstrated that unionization involving the right to collective bargaining and to strike can, in certain circumstances, function to antagonize the family farm dynamic. The reality of unionization is that it leads to formalized labour-management relationships and gives rise to a relatively formal process of negotiation and dispute resolution; indeed, this may be its principal advantage over a system of informal industrial relations. In this context, it is reasonable to speculate that unionization will threaten the flexibility and cooperation that are characteristic of the family farm and distance parties who are otherwise ... ‘interwoven into the fabric of private life’ on the farm.³⁸²

...I am satisfied both that many farms in Ontario are family-owned and operated, and that the protection of the family farm is a pressing enough objective to warrant infringement of s. 2(d) of the *Charter*. The fact that Ontario is moving increasingly towards corporate farming and agri-businesses does not, in my view, diminish the importance of protecting the unique characteristics of the family farm; on the contrary, it may even augment it. Perhaps, more importantly, the appellants do not deny that the protection of the family farm is, at least in theory, an admirable objective.³⁸³

But where the employment relationship between farmer and workers was already formalized, the Court noted that “preserving ‘flexibility and co-operation’ in the name of the family farm is not only irrational, it is highly coercive.”³⁸⁴

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

I disagree with the appellants that the ‘Government has provided no evidence that the Ontario agricultural sector is in a fragile competitive position or that it is likely to be substantially affected by small changes in the cost and operating structure of Ontario farming.’³⁸⁵

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

agriculture occupies a volatile and highly competitive part of the private sector economy, that it experiences disproportionately thin profit margins and that its seasonal character makes it particularly vulnerable to strikes and lockouts...these characteristics were readily accepted by the Task Force leading to the adoption of the *ALRA*.³⁸⁶

However, the Court in *Dunmore* noted that this same rationale could be extended to many industrial sectors that experience thin profit margins and unstable production cycles (due to consumer demand or international competition, for example).³⁸⁷

In *Dunmore*, the Court held that “the total exclusion of agricultural workers from the *LRA* violates s. 2(d) of the Charter and cannot be justified under s. 1.”³⁸⁸ It should be noted that only the right to associate and not the right to collective bargain was at issue in *Dunmore*.³⁸⁹ The Court went on to hold

at minimum the statutory freedom to organize in s. 5 of the *LRA* ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.³⁹⁰

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

...protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including but which is not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.³⁹¹

Under the AEPA, agricultural workers have the right to join an employees' association and to make representations to their employers through the association, respecting the terms and conditions of their employment. They also have the right to protection against interference, coercion and discrimination in the exercise of their rights.³⁹² The AEPA utilizes the Agriculture, Food and Rural Affairs Appeal Tribunal to rule on disputes over the application of the Act.³⁹³

The AEPA does not provide for majority representation, a limit on the number of associations that may represent a particular segment of the workforce, the right to strike or arbitration. In short, it provides for the formation of employee associations but does not provide the full Wagner model labour relations process available under the LRA. As a result, the UFCW and three agricultural workers challenged the constitutionality of the AEPA in *Fraser v. Attorney General of Ontario*.³⁹⁴

In *Fraser*, the Supreme Court reviewed in general terms the meaning of its previous holding in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*³⁹⁵ It affirmed that s.2(d) protects “good faith bargaining on important workplace issues ...not limited to a mere right to make representations to one’s employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer.”³⁹⁶

Fraser went on to say that *Health Services* represented the view that the good faith negotiations required by s.2(d) constituted a requirement for “the parties to meet and engage in meaningful dialogue”, avoid unnecessary delays and make reasonable efforts “to arrive at an acceptable contract”. It did not “require the parties to conclude an agreement or accept any particular terms”, nor did it “guarantee a legislated dispute resolution mechanism in the case of an impasse”. Section 2(d) protected the right to a general process of collective bargaining but not to a particular model.³⁹⁷

Fraser went on to hold that the AEPA was constitutional by finding that “properly interpreted”, the Act imposed “a duty on agricultural employers to consider employee representations in good faith.”³⁹⁸ The Court found that the AEPA was not intended to deny agricultural workers collective bargaining rights within the meaning of s.2(d), but only that the AEPA did not extend Wagner model collective bargaining to farm workers.

These considerations lead us to conclude that s.5 of the AEPA, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer.³⁹⁹

The majority concluded: “The bottom line may be simply stated: Farm workers in Ontario are entitled to meaningful processes by which they can pursue workplace goals.”⁴⁰⁰

This decision has been highly criticized by those in the labour movement who contend that it did not take into account the social reality and unique vulnerabilities of agricultural workers. In particular, the Court’s statement that s.2(d) must provide a process that allows for “the right of an employees’ association to make representations to the employer and have its views considered in good faith” is viewed as a retreat from the emphasis in *Health Services* on a duty of good faith bargaining to “a much paler right to ‘good faith consideration’”.⁴⁰¹ This is viewed by workers’ advocates as wholly inadequate, unworkable and unrealistic. From their perspective, agricultural workers are so vulnerable that nothing short of statutory protection for the full labour relations scheme as provided in the LRA will be effective.

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

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

In the immediate term, the AEPA should be reconsidered in light of *Fraser*. As noted, the Court in *Fraser* in affirming *Health Services* used language such as “good faith negotiations” to describe s.2(d) protections and later in the decision when applying the facts specifically to the AEPA, referred to “good faith consideration of employee representations.” While some observers view this as a partial retraction of the s.2(d) protections articulated in *Health Services*, such an interpretation is not explicit in *Fraser*. Rather, the Court in *Fraser* affirms the *Health Services* ratio

that s.2(d) protects “good faith negotiations”. The Court makes explicit that this includes the “right to make representations to one’s employer” and a duty on agricultural employers to consider employee representations in good faith, including the requirement that the employer “engage in a process of consideration and discussion” in relation to those representations.⁴⁰² Parties must “meet and engage in meaningful dialogue”. They must “avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract”.⁴⁰³ In our view, these elements have been expressly identified as protected by s.2(d) in both *Fraser* and *Health Services*.

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

There has been no use of the mechanics of the *AEPA* as to bringing a case before the Tribunal; the Applicants stated that it would be fruitless to bring a useless application before a useless Tribunal. I am of the view that this condemnation is premature. A successful application would do one of several things: be effective positively as to action; or morally give the wrongdoing employer a “bloody nose”; or if truly an empty process it would demonstrate the need for strengthening by legislative amendment.⁴⁰⁴

While the AEPA does not provide for union certification or majoritarianism, nothing in the legislation prevents unions from assisting workers to form employee associations. In our view, agricultural workers could benefit from union support for the AEPA employee associations. While this may not be satisfactory to unions and workers’ advocates because they might believe this would impede the development of a fully realized collective bargaining regime, there does not appear to be a significant likelihood of achieving this objective in the near future. The role unions could play in assisting workers to access the rights articulated in the AEPA as interpreted by *Fraser* would be highly beneficial for these workers. Unions could also play an important role in assisting workers to utilize the Tribunal in appropriate cases particularly in view of the elements of good faith bargaining now read into the AEPA. The Supreme Court in *Fraser* supported Justice Farley’s cautious hope that the AEPA Tribunal would be effective in resolving disputes.⁴⁰⁵

Section 11 of the *AEPA* specifically empowers the Tribunal to make a determination that there has been a contravention of the Act, and to grant an order to remedy with respect to that contravention. The Tribunal may be expected to interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way. Labour tribunals enjoy substantial latitude when applying their constituent statutes to the facts of a given case.⁴⁰⁶

Codification of *Fraser* in the manner we recommend coupled with serious efforts to form employee associations, engage in good faith bargaining and utilize the Tribunal may contribute to improving of the lives of vulnerable agricultural workers and if not, these efforts will provide

a concrete evidentiary basis for future government or judicial consideration of the effectiveness of the legislation.

The Law Commission of Ontario recommends that:

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

Even where unionization is available, migrant and other vulnerable workers are frequently unwilling to join unions for fear of displeasing their employer, endangering their job and, for some, risking limited immigration status. While other provinces, except Alberta, have brought agricultural workers into their labour relations schemes, unionization rates of farm workers in other provinces are not high, although in Tucker's view there has been a positive impact.⁴⁰⁷ The inherent limitations of Ontario's traditional collective bargaining process as applied to agricultural workers, as well as other vulnerable workers highly dependent on their employer, suggests that new models of labour support should be developed to respond to changing realities.

There are several different forms of unionization that have emerged globally, as well as other forms of non-union association. Community unionism expands the focus of the union beyond the conditions of employment. It involves "the formation of coalitions between unions and non-labour groups in order to achieve common goals."⁴⁰⁸ This model developed, in part, in response to rising unemployment rates as a means of supporting unemployed workers who did not have a workplace within which to organize.⁴⁰⁹ Unlike the traditional model of industrial unionism, it reaches workers who tend to move frequently among different workplaces such as temporary agency workers or dependent self-employed workers.

Sector-based unionism in Canada has taken two dominant forms: craft unionism and labour market unionism. Craft unions, prominent in Canada prior to the rise of industrial unionism, "seek to provide their members with employment security by controlling the supply of labour and establishing a monopoly over skills."⁴¹⁰ For instance, a union may collectively bargain for all workers in an industry with all potential labour users and become the sole provider of a certain form of skilled labour through the use of hiring halls, a form of union-run employment referral centre. Although difficult to organize, craft unionism has been used successfully in skilled sectors in Canada, with the construction industry serving as its most notable example.⁴¹¹ Labour market unionism facilitates collective organizing and bargaining for workers located on multiple

worksites who may be working with multiple employers.⁴¹² Sectoral bargaining overcomes the problem of small shops and high turnover that typify many low-wage industries.

International trade unionism facilitates international cooperation between unions as a response to the multinational nature of work in the globalized marketplace. With the establishment of the International Trade Union Confederation in the 2000s, member unions agree to take international policy into account when making domestic decisions and to provide the Confederation with both financial support and regular updates on the trade union's activity.⁴¹³ In exchange, they receive "solidarity and assistance" from the Confederation.⁴¹⁴

Outside the Confederation framework, other international unions act across borders. For example, in the Canadian construction industry, labour relations are dominated by the 14 international building trades unions, headquartered in the United States with offices throughout Canada.⁴¹⁵ Another example is the UFCW which has entered into agreements with Mexican governments and advocacy groups to provide support to Mexican agricultural workers working in Canada under temporary foreign worker programs. It also supports these workers following repatriation.⁴¹⁶ Cross-border action by a national union is a unique alternative function for unions, consistent with community unionism as outlined above.

Unionization is not the only model available for supporting vulnerable workers. Other models of employee associations have sprung up, including non-profit hiring halls, cooperatives and mandatory employment councils. Still other models may emerge that better adapt to the changing nature of work in the 21st century. Worker organizations need to continue to adapt themselves to new situations. It may be useful for academics and/or a public policy think tank to consider a project to assist in the development of ideas for new forms of worker representation.

The Law Commission of Ontario recommends that:

27. Academics and/or a policy think tank in consultation with relevant stakeholders undertake a review of possible alternative models to traditional unionization and the Wagner model of collective bargaining to support and assist vulnerable workers in the workplace, including consideration of emerging models for representing worker interests in various forms of precarious work in Ontario, including agricultural work, domestic work, temporary agency work and others.

5. Innovative Solutions for Precarious Work Advisory Council

Some of our recommendations such as those involving the implementation of partnerships, those related to targeting high-risk industries and the modernization of ESA exemptions will require extensive consultation by government with workers and employer organizations, community agencies, government and experts. In the context of responding to the unique needs of vulnerable workers in the Occupational Health and Safety setting, the Dean Report recommended the use of an advisory committee appointed under s.21 of the OHSA which provides that “the Minister may appoint committees...or persons to assist and advise...on any matter that the Minister consider advisable.”⁴¹⁷ The government has committed to implementing this recommendation.⁴¹⁸

The Dean Report suggests:

an advisory committee appointed under section 21 of the OHSA would improve the OHS system’s ability to respond to the needs of vulnerable workers. It would be a standing forum for consulting parties who are knowledgeable about vulnerable workers and have a role in protecting them. Such a committee could include representatives of labour and employer groups from sectors with precarious employment; immigrant and refugee support agencies; community and social service agencies; legal clinics; other ministries; and federal and municipal programs. Specific matters about which the committee could provide advice include implementing the Panel’s recommendations, improving enforcement strategies and developing and distributing awareness materials.⁴¹⁹

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

For such an advisory council to operate successfully, participants must be willing to put aside differences and find ways to move forward on the issues; the right people must be chosen. This will require identification of individuals interested in reducing precarious work within current economic realities in government, academia, the business, labour and non-profit communities

who have demonstrated balanced and creative thinking and an ability to engage in productive dialogue with participants representing opposing sides of the argument.

The Law Commission of Ontario recommends that:

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

F. Employment Legislation Protecting Temporary Foreign Workers

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

...the Government of Canada has become increasingly aware of instances where employers, or third-party agents working on their behalf, are failing to abide by commitments made to workers. Prior to these amendments, no provisions existed in the Regulations to hold employers accountable for their actions regarding TFWs [temporary foreign workers]. Breaches that could occur include employers paying TFWs less than promised; providing TFWs with poor working conditions or giving them different occupations from those agreed upon in the offer of employment; inadequate accommodations for some TFWs; and third-party agents charging fees to workers, rather than employers, in contravention of any existing provincial/territorial legislation.⁴²⁰

Employers seeking to hire temporary foreign workers must now demonstrate compliance with past offers of employment to such workers, including wages, working conditions, housing, health insurance, transportation and federal-provincial laws regulating employment. Failure to comply can result in denial of the Labour Market Opinion and a two year ban on hiring. In addition, the employer's name may be posted on Citizenship and Immigration Canada's website. It should be noted, however, as of the date of this Interim Report, no employers' names are posted.⁴²¹ As previously mentioned, there are now standard form employment contracts for NOC C and D workers and live-in caregivers that employers must use covering wages, accommodation, benefits, hours of work, duties, vacation and sick leave entitlements. They require that health

care insurance be provided at the employer's expense until the worker is eligible for provincial health care coverage and a one week termination notice must be given to workers who have worked for longer than 3 months. Recruitment fees may not be recovered from the employee and transportation costs must be covered by employers and, unlike SAWP, which allows some cost recovery, transportation costs may not be recovered from the worker.

The contract makes clear that terms are subject to provincial employment and health and safety standards. To respond to the need to provide greater protection for temporary foreign workers in the lower skilled NOC C and D Program there are more detailed and specific contract terms required for NOC C and D agricultural workers. Live-in caregivers, also in need of greater protection, have specific contract terms. Agricultural employers are required to provide appropriate housing (in accordance with guidelines and which may be at a cost to the employee), a Record of Employment and, at the employer's expense, chemical and pesticide safety equipment.⁴²² Other federal changes limit the time that workers may remain in Canada to four years after which they must wait an additional four years before applying under the program again.⁴²³ The intention is to reinforce the temporary nature of the work permits. SAWP workers are exempt from these limits.

The live-in caregiver program provides for the option to obtain permanent residence at the completion of the service period. While this is a major advantage, it has caused some to refer to the live-in caregiver program as a "carrot and stick" approach to permanent residency requiring participants to remain working and living in their employers' homes for the qualifying period during which workers are highly unlikely to risk termination of employment to complain about infringements of their rights.⁴²⁴ Instances of exploitation and abuse have been well-documented: live-in caregivers have been required to work excessive hours, denied time-off, paid inadequate wages, physically and psychologically abused and had their passports confiscated.⁴²⁵ With the location of the workplace inside private residences, monitoring and enforcement of employment standards is very difficult.⁴²⁶

Women coming to Canada under the Live-in Caregiver Program (LCP) face unique difficulties because they are confined to live and work in their employers' homes for at least two (2) years. During this time, they are dependent upon their employers for wages, food, shelter, health care, and a good work reference to help them gain permanent resident status. Their dependent and temporary worker status puts live-in workers and caregivers at risk of unfair treatment and abuse by their employers. It also makes them less likely to complain, leave, or report the abuse for fear of losing the opportunity to gain permanent resident status.⁴²⁷

In recognition of live-in caregivers' need for special protection, in 2009 Ontario enacted the *Employment Protections for Foreign Nationals Act (EPFNA)*.⁴²⁸ This Act

- prohibits recruiters from charging any fees to foreign live-in caregivers, either directly or indirectly.
- prevents employers from recovering placement costs from the live-in caregiver.
- prohibits employers and recruiters from taking a live-in caregiver's property, including documents such as a passport or work permit.
- prohibits a recruiter, an employer, or a person acting on their behalf from intimidating or penalizing a live-in caregiver for asking about or asserting their rights under the Act.
- requires recruiters and, in some situations, employers to distribute information sheets to live-in caregivers setting out their rights under the EPFNA and those provisions of the *Employment Standards Act, 2000 (ESA)* considered to be of particular relevance.⁴²⁹

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

In addition to federal protections outlined above that have been implemented for temporary foreign workers, genuineness assessments for offers of employment to live-in caregivers now have additional criteria beyond those for other migrant workers.⁴³⁰ Employers must demonstrate the "need for the live-in caregiver, the provision of adequate accommodation, and the ability to pay the wages offered".⁴³¹ Effective December 11, 2011, live-in caregivers who have completed the requirements for permanent residency receive open work permits while awaiting finalization of their status. This permits them to move out of the employer's home sooner and seek work in other fields.⁴³²

In our consultations, we were advised that the main areas of concern for live-in caregivers are non-payment of wages, unresolved claims with the Ministry of Labour, performing non-caregiver tasks (e.g., nursing, housework and similar tasks) and little control over working hours. Some workers' advocate groups have suggested that EPFNA protections have been ineffective. They suggest that the Ministry's enforcement efforts have been directed solely at recruiters and otherwise have been inadequate. In their view, workers need more knowledge of rights, more support for asserting their rights, less fear of reprisal, the ability to make anonymous complaints to the Ministry of Labour and proactive enforcement.⁴³³

In our consultations during 2011, we met with workers in the NOC C and D program who reported paying between \$5,000 to \$12,000 to a recruiter to come to work in Canada. To pay these amounts, each had to take significant loans for at least half of the recruiter's fee, with the balance paid from the worker's savings. The work that was made available paid minimum wage (\$10.25/hr).⁴³⁴ The payment of the recruiter's fee and the debt incurred played a significant role in the decision of these workers to stay in very unfavourable working conditions. While the new federal standard form contract aims to negate employers passing on recruiter fees to workers through contractual terms, it remains to be seen whether it will be effective. In our view, there would be a greater chance of success if the province supported the federal initiative with a clear message of denouncement against unscrupulous recruitment fees by extending the *Employment Protection for Foreign Nationals Act (EPFNA)* to all temporary migrant workers.⁴³⁵

Manitoba's response to exploitive recruitment fees, workers arriving to find no job available and the developing underground economy was the *Worker Recruitment and Protection Act (WRAPA)* which came into effect April 1, 2009.⁴³⁶ The Act requires employers seeking to hire temporary migrant workers to register with the Manitoba government before seeking an LMO with HRSDC. With cooperation from the federal government, an employer must show proof of registration in Manitoba before an LMO application can proceed. Registration under the WRAPA requires employers to

provide information on their company, the types of positions they want to fill and, if applicable, the third parties that will be involved in the recruitment process. Third parties must be licensed as foreign worker recruiters by the Manitoba Employment Standards Branch or exempt from the legislation.⁴³⁷

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

The Manitoba Ministry of Labour maintains a database for employers to assess compliance history. The legislation has resulted in approximately 2,000 business registrations each year and there are currently more than 50 recruiters registered.⁴³⁸ While initial start-up resources were higher, currently the program utilizes five full time equivalent positions for its operation including enforcement. Manitoba received approximately 3,000 entries of foreign workers in 2010, while Ontario received 66,000. Translating this program to Ontario, we could expect resource requirements to be very high compared to Manitoba. The question is whether it would be a good use of very substantial resources given other concerns we have identified regarding the need for

increased proactive enforcement, for example. The LCO received mixed reaction from those we consulted about the feasibility of this type of regulatory scheme for Ontario. In general, respondents were of the view that, while helpful, it would not be a complete response to concerns about migrant labour. Without effective enforcement and the requisite resources behind it, some were concerned that such legislation would become a registration only on paper.

In our view, rather than enacting another statute, it would be preferable for Ontario to build upon what is already in place. EPFNA currently applies only to live-in caregivers. But it has a structure in place to permit its extension to other classes of migrant workers by way of regulation. Prescribing all temporary migrant workers under EPFNA would extend protections against unscrupulous recruitment. Coupled with the federal protections described above regarding genuineness assessments, these measures could provide a substantial level of protection to migrant workers.

The Law Commission of Ontario recommends that:

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

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

with federal-provincial/ territorial governments for the purpose of the administration and enforcement of relevant legislation and regulations (e.g. employment standards, occupational health and safety, immigration, and third party recruitment).⁴³⁹

To support federal decision-making on LMOs and genuineness assessments, Ontario needs to have a clear process for communicating to the federal government on non-compliant employers. The flow of such information requires a Canada-Ontario information-sharing agreement. The federal government has indicated its desire to negotiate such agreements and other provinces, including Manitoba, have had them in place for a number of years.⁴⁴⁰ However, despite ongoing discussions, no such agreement yet exists between Ontario and the federal government. Information-sharing agreements by their very nature raise complex issues about privacy and the use of personal information, and therefore they are also time-consuming and challenging for

governments to negotiate. However, in the absence of such an agreement, information about the names and whereabouts of employers and foreign workers obtained by the federal government will not be available to Ontario for enforcement mechanisms. Moreover, federal efforts to protect migrant workers through the genuineness assessment will be much less effective.

The Law Commission of Ontario recommends that:

30. The Ontario government negotiate an information-sharing agreement with Human Resources and Skills Development Canada and Citizenship and Immigration Canada to permit information to flow between Ontario and the federal government for the purpose of increasing protections for temporary foreign workers by:
- a) strengthening federal-provincial oversight over temporary foreign worker contracts;
 - b) increasing enforcement of temporary migrant workers' rights under provincial legislation; and
 - c) imposing consequences upon employers who violate provincial legislation or breach contractual agreements with temporary foreign workers.

In the LCO's consultations, some workers' advocates expressed the view that temporary foreign worker programs should never be utilized to respond to labour needs. In their view, these programs create too great a power imbalance between employer and worker due to the dependency of the workers' immigration status on the employment relationship. This, they say, lays the foundation for the risk of exploitation, creating a situation in which workers will never feel sufficiently secure to assert their rights. These observers believe that the federal government should refocus its efforts away from temporary labour and invest in making long term immigration decisions to secure a sufficient workforce for Canada's needs. In other words, Canada's immigration policies should include provision for accepting lower skilled workers on a more permanent basis.

However, temporary labour has its benefits. Canada and Ontario obtain labour for the period it is needed but do not have to support the worker over periods of unemployment. Workers who need employment can obtain it, supporting themselves and their families in their home country. Workers' countries of origin receive benefits in the form of the self-sufficiency of their citizens. Our immigration system emphasizes a preference for skilled and educated workers as permanent residents rather than workers for low skilled employment. Given that there are very few new jobs created in Canada for the workers in lower skilled jobs, there may be some sense to this. The

Fraser Institute, in contrast, suggests that the lower skilled work currently performed by temporary foreign workers should be performed by permanent residents or citizens.⁴⁴¹ In our view, this overlooks the reality that employers have been unable to find suitable local employees for these positions although recent federal initiatives to make changes to the Employment Insurance program requiring unemployed Canadians to accept a broader range of work may perhaps be targeted at this issue.⁴⁴² At this point, Ontario's agricultural industry is highly dependent upon the temporary foreign worker labour force. We import it every year. It may be that the time has come for an acceptance and a greater appreciation of the contribution made by lower skilled migrant workers.

IV. SELF-EMPLOYMENT

A. The Extent of Self-Employment

Until the 1970s, self-employment rates in Canada had been on a downturn due to decreased agricultural employment.⁴⁴³ From that point, however, self-employment rose steadily for almost two decades reaching a peak of approximately 17% in 1998 before falling back to about 15% in 2002.⁴⁴⁴ Levels remained relatively stable in the 2000s.⁴⁴⁵ In 2009, self-employment constituted 16% of employment in Canada.⁴⁴⁶ Ontario's experience is reflective of Canada's as a whole; self-employment has remained relatively stable over the past decade, with data suggesting that approximately 15% of the Ontario workforce was self-employed from 1999-2009.⁴⁴⁷

B. Own-Account Self-Employment

The main area of vulnerability among the self-employed occurs among the own-account self-employed. Own-account self-employed people are those who “do not employ workers and who do not control the risks of the production process or accumulate capital.”⁴⁴⁸ Unlike traditional self-employment, it more closely resembles employment than entrepreneurship.⁴⁴⁹ In some cases, these workers may qualify as an employee under the *Employment Standards Act*. In other instances, workers may be self-employed but have only one client and be in a state of significant dependency upon that client, making them vulnerable to exploitation. Not all own-account self-employed workers are vulnerable, but own-account self-employment can be an indicator of precarity, particularly when coupled with low wages because it does not include the protections associated with employment (e.g., protection under the *Employment Standards Act, 2000*).

Canadian rates of own account self-employment grew dramatically between 1976 and 2000, from 4% to nearly 9% of total female employment and from 7% to 12% of total male employment.⁴⁵⁰ In the 1990s, nearly 45% of new employment emerged in the form of own-account self-employment.⁴⁵¹ According to one research team, the “increase in own-account self-employment accounted for the entire increase in self-employment during the 1987–98 period”.⁴⁵² This is consistent with findings across industrialized nations where growth in self-employment in the 1980s and 1990s was concentrated in own-account self-employment.⁴⁵³ Own-account self-employment also played a significant part in the more recent recessionary growth of self-employment.⁴⁵⁴

Own-account self-employed workers generally earn less than employees or employers.⁴⁵⁵ This is exacerbated by the fact that self-employed workers are less likely to have benefits coverage.⁴⁵⁶ Women and members of visible minorities are more likely to be found in own-account self-

employment as compared to other forms of self-employment.⁴⁵⁷ While the category of self-employed employers has a higher concentration of men and highly educated individuals, the own-account self-employed are more often women and workers with lower levels of education.⁴⁵⁸ Part-time employment rates for the own-account self-employed are high, particularly among female workers.⁴⁵⁹ Female own-account self-employed workers are often engaged in service jobs. In 2000, one third of female own-account self-employed workers were in the service industry.⁴⁶⁰ Nineteen percent of immigrants, compared to 15% of Canadian-born workers, were engaged in self-employed work and more immigrants were likely to report that they had entered self-employment because of a lack of suitable paid jobs (33% of immigrants, compared to 20% of Canadian-born workers).⁴⁶¹

Noack and Vosko found that approximately 15% of Ontario's workforce are self-employed (5% of the Ontario workforce are self-employed employers and about 10% are own-account self-employed). The Ontario experience is similar to the Canadian experience as a whole in that Ontario women were less likely to be self-employed as compared to men; however, when they were self-employed, it was in own account self-employment, much of this work being in a low income category.⁴⁶²

C. The Legal Framework

Self-employed workers are not covered under the ESA which requires the existence of an employment relationship where the worker and employer fall within the Act's definition of "employee" and "employer". For workers in precarious forms of work, classification as an employee is a condition of enjoying ESA protections and basic minimum standards. According to Parry and Ryan, the definitions of employee and employer have attracted more attention and controversy than any others under the ESA.⁴⁶³

"employee" includes

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

"employer" includes:

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and (b) any persons treated as one employer under section 4, and includes a person who was an employer⁴⁶⁴

As Ryan and Parry point out, the Ontario Labour Relations Board has indicated that distinguishing employee from independent contractor can be very difficult.⁴⁶⁵ Because the definitions are broadly drafted, employment standards officers (ESOs) trying to distinguish between legitimate independent contractors and those who should be classified as employees must go beyond the text of the statute and apply common law tests.⁴⁶⁶ However, a clear test for determining whether a worker is an employee or an independent contractor remains elusive. As Fudge, Tucker and Vosko report, “[s]ince the 1950s, prominent employment and labour scholars have concluded that the English common law did not have a unified conception of employment or a coherent method for distinguishing between employees and independent contractors.”⁴⁶⁷

The ESA Policy and Interpretation Manual states that “it is the existence of the relationship between the employer and the employee that defines an employee for the purposes of the Act”.⁴⁶⁸ The definition of the employment relationship in other statutes has not been found to be of great relevance to the determination under the ESA.⁴⁶⁹ However, a number of approaches to making the determination have emerged within the common law.

In a 2003 decision, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, the Supreme Court of Canada explicitly rejected a single test approach.⁴⁷⁰ It did, however, review the prevailing tests and present a non-exhaustive list of relevant criteria for making a determination as to whether a worker “engaged to perform...services is performing them as a person in business on his own account.”⁴⁷¹ These factors include:

- Whether the worker has control over his or her own activities,
- Whether the worker owns his or her own tools,
- Whether the worker hires other workers to help, and,
- Whether the worker has i) an opportunity for profit or ii) takes on either financial risk or “responsibility for investment and management held by the worker”.⁴⁷²

Sagaz reviewed the fourfold test set out in *Montreal (City) v. Montreal Locomotive Works Ltd.*, [1946] 3 W.W.R. 748, [1947] 1 D.L.R. 161 (Canada P.C.): control, ownership of tools, chance of loss or profit and integration. Following the direction in *Sagaz* that there is no single definitive test, employment standards officers, adjudicators and courts must draw upon the factors in

Sagaz, the fourfold test in *Montreal* and other tests that have emerged: the “organization test” that focuses on whether the worker was part and parcel of or integral to the organization, the “enterprise test” that examines the degree of control and risk taken by the employer and the “business practices test” that looks at the intention of the business arrangement between the parties.⁴⁷³ Each test offers an approach to the central question: “is the person who has been engaged to perform services performing them as a person in business on his or her own account?”⁴⁷⁴

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

“Dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.⁴⁷⁵

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

D. The Key Issue: Misclassification

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

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

to secure some form of income. In other cases, workers erroneously believe that they are self-employed simply because of an assertion made by the employer.⁴⁷⁶ However, these are not the governing factors in determining whether an employment relationship exists. Some advocates are concerned with what is referred to as “creative classification” by employers. Practices of misclassification have been identified in industries such as cleaning and trucking. In our consultations, we heard about examples of some pizza delivery persons and workers in the catering industry being misclassified as independent contractors to enable employers to avoid employment standards obligations.⁴⁷⁷

Employers indicated that contracting out may be seen as a necessity for companies to compete in the global market in areas such as manufacturing. Workers’ advocates, however, do not accept globalization as the primary cause.

Employers argue that these strategies are necessary because of global economic integration. While it may be that some local manufacturers struggle to drive down their costs in order to compete against firms located elsewhere, globalization does not explain new employer practices in Ontario. Many employers and industries engaged in outsourcing, indirect hiring, and misclassifying workers that have been documented by the WAC [Workers Action Centre] are in sectors that have a distinctly local market - restaurants, janitorial services, business services, construction, trucking, and home health care, warehousing, packaging and manufacturing of locally consumed goods.⁴⁷⁸

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

E. Possibilities for Reform

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

determinations on the definition of employee in one context to be made applicable in other contexts.”⁴⁷⁹

Another line of thinking suggests that definitional reform is insufficient. Fudge, Tucker and Vosko suggest abolishing the distinction between employees and independent contractors and extending protection to all workers, not only in the employment standards context, but also with respect to collective bargaining and income tax law, maintaining at least that “[t]he starting-point should be that all workers dependent on the sale of their capacity to work be covered, unless there are compelling public policy reasons for a narrower definition.”⁴⁸⁰ Rather than relying on an expanded or broadened definition of employee as the basis for protection, Fudge, Tucker and Vosko suggest protection as a default, regardless of how one labels the sale of labour. On a similar note, the Wellesley Institute argues for extended ESA coverage without regard to classification. Arguing on the basis of equality and human rights legislation, it suggests

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

The ESA has a role in establishing a framework for equality among workers doing comparable work. The government should not enable employers to impose inferior conditions on workers (who end up being primarily women, racialized workers, immigrant workers and young workers) simply because of the form of employment or employment status. This measure would help bring the ESA in line with the Human Rights Code.⁴⁸¹

While the LCO supports the general view that workers, such as those in part-time positions, should be paid the same as their counterparts in full-time positions for equivalent work, self-employed persons are in a different category. Suggestions that any distinction between the self-employed and the employed be collapsed in all regulation would have far-reaching consequences and would potentially have negative impacts for self-employed persons. In any event, it would require broad policy considerations at both the provincial and federal level that are beyond the scope of this Project.

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

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

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

Our consultations revealed a sense that those who work with vulnerable workers were not confident that Ministry of Labour determinations on classification of employee versus self-employed were consistently made appropriately. In the ESA Policy and Interpretation Manual, ESOs are provided with information about the various legal tests. However, no substantive policy direction is provided.⁴⁸² Policy direction on an approach to the determination based on the common law tests may be a way to provide more transparency and confidence among stakeholders in the decision-making process. We have discussed the merits of public awareness campaigns earlier in this Interim Report. In our view, highlighting the practice of misclassification and educating on the appropriate definition of employee and self-employment through public awareness posters, ads and information sessions targeted at the general public and at high-risk industries would increase the likelihood of compliance and build a foundation for improved enforcement.

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

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

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

Beyond considerations of consistency, extending protection to workers in relationships of dependency (i.e., low-wage contractors with one client) presents unique challenges. For example, a state of dependency may be fluid in that some such workers may be dependant upon one client at one point in time and have several clients at another time. Consideration of a definition of “employee” that extends itself to include such workers would need to balance the needs of independent and/or high wage self-employed persons who benefit from flexibility and control over their working arrangements. Appropriate drafting could leave room for the recognition of new and emerging forms of employment and a broad range of individual situations. Recognizing that such changes cannot anticipate all impacts, any such policy and legislation should be evaluated after a reasonable period of time to determine effectiveness and whether adjustments are required.

The Law Commission of Ontario recommends that:

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

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

At Recommendation 9, we recommend that the Ministry of Labour enact a requirement that employers provide all workers with written notice of their employment status and terms of their employment contract at the outset of the working relationship. We believe this step would have particular benefits for workers misclassified as self-employed. It would create a situation requiring all parties to turn their minds to the issue of the employment relationship. Some concerns were raised about the possibility that requiring a written contract could increase the risk of deliberate or erroneous misclassification of employees as self-employed.⁴⁸³ As we have noted, sometimes simply a written assertion that a worker is self-employed is accepted as sufficient when, in law, it is not the case. However, if forms developed by the Ministry of Labour for this purpose set out the appropriate definition of employee versus self-employed, the forms themselves could provide guidance and education on proper definitions. Inclusion of Ministry contact information would encourage individuals to seek clarification from the Ministry on grey areas. The forms themselves and the requirement to complete them would have the effect of improving knowledge and voluntary compliance. It would also benefit decision-makers later should a dispute arise. Coupled with an effective public education campaign, this simple low-cost step would be a valuable strategy for confronting the issue of misclassification.

The Law Commission of Ontario recommends that:

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

V. HEALTH AND SAFETY

A. The Legislative Framework for Health and Safety

Ontario's regulatory scheme for health and safety is primarily governed by two statutes: the *Workplace Safety and Insurance Act* (WSIA) and the *Occupational Health and Safety Act* (OHSA).⁴⁸⁴ The WSIA is administered through the Workplace Safety and Insurance Board (WSIB). Workplace safety insurance provides an employer funded compensation and rehabilitation insurance plan for work-related injury/illness.

The legislative mechanism by which workers' health and safety is protected is governed by the *Occupational Health and Safety Act* and its regulations. The OHSA is based on the principle of the internal responsibility system under which the workplace parties share responsibility for occupational health and safety. Employers are required to have a health and safety policy and must ensure there is a joint health and safety committee (and in smaller workplaces, OHSA representatives). The OHSA sets out the four basic rights of workers: a) the right to participate in identifying and responding to workplace health and safety concerns; b) the right to know and have training and information about any potential hazards; c) the right to refuse work that is dangerous or exposes the worker to workplace violence; and d) the right to stop work by certified members of a joint health and safety committee. The OHSA sets out the obligations of those who have control over the workers, workplace, materials or equipment. The Act imposes a general duty on employers to take all reasonable precautions to protect the health and safety of workers and specifically defines the employers' responsibilities. Workers are required to work safely and comply with the Act and its regulations. If the internal responsibility system fails, the Ministry of Labour has the authority to enforce the OHSA and it does so through inspections both proactive and reactive, compliance orders and charges.

A more detailed description of historical developments in Ontario's health and safety system are outlined in the Dean Report and by Vosko *et al.*⁴⁸⁵

Amendments to the OHSA in 2011 explicitly define the Minister's powers and duties to include the promotion of health and safety and the prevention of injuries, public awareness, education and the fostering of a commitment to occupational health and safety among workers and employers.⁴⁸⁶

1. Reprisals and 2011 Amendments

Section 50 of the OHS Act prohibits reprisals against workers for acting in compliance with or seeking enforcement of the Act or regulations. A worker who believes they have been penalized because they exercised their rights and responsibilities under the Act can file a complaint with the Ontario Labour Relations Board (OLRB). At the OLRB, the onus is on the employer to prove that no reprisal took place.⁴⁸⁷ In response to the Dean Report, under 2011 amendments to the OHS Act that became effective April 1, 2012, Ministry of Labour inspectors, on consent of the worker, may refer a worker's reprisal complaint to the OLRB.⁴⁸⁸ Also effective April 1, 2012, a new regulation under the OHS Act prescribed the functions of the Office of the Worker Advisor (OWA) and Office of the Employer Advisor (OEA) in respect of reprisal complaints. These are discussed further in the discussion section on reprisals leading up to Recommendation 37.

2. Joint Health and Safety Committees (JHSCs)

Joint health and safety committees/representatives provide a process for identifying and resolving workplace health and safety concerns. This mechanism provides a forum for worker voice and participation, functioning as a partnership between management and workers to fulfill an advisory role for workplace safety.⁴⁸⁹ In most workplaces with at least twenty employees, committees must be established. In smaller workplaces, individual representatives are appointed by workers or, where applicable, the trade union. Representatives have essentially the same powers as the joint committee. In larger workplaces, at least one worker and one management representative of the committee must be "certified". As of April 1, 2012, the Ministry of Labour, through the Chief Prevention Officer, has the mandate to set standards for the certification and training of joint health and safety committees, and to certify members who meet the standards. Committees identify hazards by conducting workplace inspections and obtaining information from employers.⁴⁹⁰ Committees can make written recommendations on health and safety improvements to which the employer must respond.⁴⁹¹ Any work refusals and serious injuries can be investigated by the committee. Some Project Advisory Group members suggested that in some cases employers did not set up operational joint health and safety committees/representatives or, in some cases, they were in place in name only. Through our consultations, we were advised that the Ministry of Labour assesses the functioning of the joint health and safety committee as part of an inspection or investigation.⁴⁹² Accordingly, this is an area that would benefit from increased proactive enforcement.

The Law Commission of Ontario recommends that:

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

Under the OHSA system, compliance and enforcement are achieved through a combination of an internal responsibility system which relies on the worker-employer partnership and an external responsibility system which relies on formal enforcement strategies through inspections, proactive and reactive to complaints, critical injuries, fatalities and refusals.⁴⁹³ Confirmed violations can result in the issuance of compliance orders and/or stop work orders or prosecutions under Part I (tickets) or for more serious matters, Part III, of the *Provincial Offences Act*.⁴⁹⁴ In very rare circumstances, in proceedings separate from the OHSA, following police investigation and the laying of criminal charges, offenders are prosecuted under the *Criminal Code*.⁴⁹⁵

The OHSA applies to most workplaces but there are certain exemptions and limitations. For example, persons hired directly by homeowners and working in their private residences are excluded, including live-in caregivers. Originally, farming operations were exempt but in 2006 farming operations were brought under the OHSA, with some limitations.⁴⁹⁶ Farming employers have the same legal obligation to take every precaution reasonable in the circumstances for the protection of workers as employers in other industries. Farming supervisors and workers also have the same obligation as those working in other industries to take appropriate steps to identify and address all workplace hazards. The inspection and enforcement regime also applies. While the OHSA requires a joint health and safety committee to be set up at a workplace with 20 or more regularly employed workers, the application of this requirement is limited to mushroom, greenhouse, dairy, hog, cattle and poultry farming. For other types of and smaller farms (i.e. 6-19 regularly employed workers), health and safety representatives are required. In workplaces with temporary agency workers, some stakeholders are of the view that certain employers are misinterpreting “regularly employed workers” to exclude temporary agency workers in order to circumvent the requirement to have a joint health and safety committee.⁴⁹⁷ As part of the recommendation above, proactive enforcement activities should include targeting this type of activity to ensure proper compliance.

Rather than regulations specifying hazards, there are Safety Guidelines for Farming Operations in Ontario which have been jointly developed by representatives of the farming community, the Farm Safety Association, the Ministry of Agriculture, Food and Rural Affairs and the Ministry of

Labour.⁴⁹⁸ These guidelines are a “starting point for the workplace parties to think about how to fulfill their obligations under the OHSA.”⁴⁹⁹ In our consultations we heard concerns raised from labour-side commentators about the importance of worker participation in any stakeholder discussions, such as technical advisory committees regarding farm health and safety issues. On the other hand, we also heard that stakeholder consultation of both labour and employer-side interests are consistently undertaken in the development of OHSA regulations, legislation, policies and sector plans.⁵⁰⁰ It is unclear to us whether consultations on worker-side concerns are currently sufficient, but we are clear that they are necessary. Such consultation could include workers themselves, their organizations, legal representatives or other experts and representatives.

The Law Commission recommends that

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

B. The Dean Report

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

The Dean Report found that there was wide-spread commitment for the internal responsibility system.⁵⁰¹ The existing model presents a balance between internal and external enforcement. We support the continued commitment to that balance.

As a result of the Panel’s recommendations, amendments were made to the *Occupational Health and Safety Act* and the *Workplace Safety and Insurance Act*, establishing the Ministry of Labour as the lead for prevention of illness and injury.⁵⁰² The changes resulted in the appointment of Ontario’s first Chief Prevention Officer to coordinate the prevention system and will permit the appointment of a new Prevention Council as well as the establishment of standards for health and safety associations, workplace education and training, and the promotion of workplace safety. The Dean Report and the Chief Prevention Officer have noted the importance of

prioritizing vulnerable workers and small businesses.⁵⁰³ Given that precarious work can often be found in small and medium sized enterprises, this is an important development, in our view.

Highlighting the protection of vulnerable workers as a priority, the Dean panel defined vulnerable workers as “those who have a greater exposure than most workers to conditions hazardous to health or safety and who lack the power to alter those conditions.”⁵⁰⁴ Worker vulnerability was recognized as arising from

not knowing one’s rights under the OHSA, such as the right to refuse unsafe work; having no work experience or training that is job - or hazard - specific; and being unable to exercise rights or raise health and safety concerns for fear of losing one’s job, or in some cases, being deported.⁵⁰⁵

The Report pointed to particular subgroups, including young workers; recent immigrants; workers new to their jobs or workplaces; low-wage workers in multiple part-time jobs; temporary agency workers; and temporary foreign workers who are employed in agriculture, hotel/hospitality and construction.⁵⁰⁶ Dean also commented upon the vulnerability of temporary agency workers, undocumented workers and refugees and those employed in the underground economy of industries such as construction, building cleaning, restaurant, transportation, farming and the garment trade.

The Ontario government’s efforts since 2000 were acknowledged in prioritizing the protection of young workers through targeted enforcement, education and aggressive public awareness campaigns producing “a 45 percent decline in the lost-time injury rate for teenagers since 2008.”⁵⁰⁷ However, providing outreach, locating vulnerable workers, and providing meaningful information, services and legislative enforcement present ongoing challenges to protecting vulnerable workers, particularly in the case of those with language barriers.⁵⁰⁸

Recommendations 29-35 in the Dean Report are specifically aimed at vulnerable workers; several other recommendations pertaining to all workers were identified as having particular advantages for vulnerable workers (Recommendations 10 and 14-17). The Minister of Labour has committed to fully implementing the Dean Report and, to date, important changes have already been made. We highlight below and support the implementation of those recommendations we consider to be most significant for vulnerable workers. In some cases, we also provide additional recommendations to augment or guide the implementation of the relevant Dean Report recommendations. We have been advised that a number of Dean Report recommendations are in the process of being implemented. These are noted in the appropriate sections below. The Dean Report’s recommendations will be phased in over time allowing for workplace parties to

prepare for changes and allowing for further consultation with stakeholders and the Prevention Council, once it is established. Some of this work will proceed in consultation with the Prevention Council, once it is established.⁵⁰⁹

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

Training would cover rights and responsibilities, the internal responsibility system, recognizing and responding appropriately to hazards and the role of joint health and safety committees/representatives. The Panel appreciated the need to consider the literacy and language challenges in developing training programs and the need for broad accessibility through delivery in multiple formats at non-traditional venues such as Employment Ontario, settlement and community offices. Implementation of these recommendations is underway.⁵¹⁰

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

Hazard-specific training would help address and lower the higher rate of injuries known to occur among new workers, and also benefit young workers and recent immigrants who tend to be disproportionately employed in physically demanding or hazardous jobs.⁵¹¹

In recognition of the particular need for protection in the agricultural industry, the Panel recommended that any new regulations requiring mandatory training for workers apply also to farms. Implementation of these recommendations is underway.⁵¹²

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

This recommendation is meant to highlight proactive investigation and enforcement. Our consultations and research also revealed the need for greater enforcement. The Ministry of Labour's response to the Dean Report's recommendation has included engaging in the development of sector specific plans for increased safety blitzes and proactive workplace inspections.⁵¹³ Increases in inspections have led to increased exercise of enforcement powers over recent years making them an effective strategy for compliance.⁵¹⁴ Through our

consultations, we were advised that the Ministry of Labour takes the presence of vulnerable workers into account when deciding where to carry out enforcement blitzes.⁵¹⁵

While we support the Dean Report's Recommendation 30, we believe that a recommendation providing more specific guidance would be useful. Our consultations revealed that among agricultural workers, temporary migrant workers have significant health and safety concerns. The Dean Report recognized the dangers in farming. A number of respondents to our consultations suggested that farms are infrequently subjected to OHS inspections, while representatives of the farming industry pointed out that other industries had similar or higher levels of danger. A review of the Ministry of Labour's information on Ontario's critical injuries and fatalities demonstrates that, between 2008 and 2010, farming reported 11 fatalities and 29 critical injuries. The rate of fatalities was the second highest among 29 of Ontario's industrial subsectors after tourism, recreation and hospitality that reported 15 fatalities. Twenty other subsectors reported higher numbers of critical injuries compared with agriculture. It should be noted that the number of OHS inspections conducted were much lower than most other sectors. Out of 29 subsectors, there were only 5 others that had lower rates of inspection than farms and all of these had much lower fatality rates (0 or 1) over the same time period compared to agriculture.⁵¹⁶ We do not have clear information as to why this is the case, but the situation suggests a need for review. The agricultural industry is an area where proactive enforcement activities could have a significant positive impact on workers and particularly migrant workers who, as we have noted earlier, are in a situation with unique vulnerabilities due to their reluctance to report injuries or assert their rights on their own initiative.

Consultation participants identified other industries including hospitality and cleaning as susceptible to workplace injuries as well as gradual onset repetitive injuries among factory-based garment workers due to the need to work quickly.⁵¹⁷ Consultation participants emphasized enforcement concerns. Members of the Project Advisory Group identified the temporary staffing industry as an area of significant concern for health and safety issues.

The Law Commission of Ontario recommends that:

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

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

The Panel's recommendation of a poster of key rights and responsibilities was founded on the evidence it heard that many workers had "little to no understanding of the *Occupational Health and Safety Act* or their rights as workers or the obligations of employers. This was particularly the case with vulnerable workers."⁵¹⁸ We note that a draft poster of workplace rights and responsibilities was made available for feedback on the Ministry of Labour's website until January 2012. Submissions received during the consultation period are being reviewed.⁵¹⁹

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

The Panel recommended that basic OHS Act and WSIA information be developed in multiple languages and formats for distribution in ways that would reach vulnerable workers at the community level. The Report found that new distribution avenues, such as agencies and services for newcomers, government websites aimed at new immigrants, advertisements, libraries and public transportation would better serve vulnerable workers and reach out to those who do not visit government offices and those with language or literacy barriers.⁵²⁰ As noted, the Panel recognized the challenges, also echoed in the LCO's consultations, to protecting workers who do not speak English as a first language or at all.⁵²¹

While some of our respondents expressed criticism of the Dean Report for over-emphasizing training at the expense of enforcement, in our view the Panel's recommendations regarding the development of informational materials, their dissemination and education on health and safety rights and responsibilities are responsive to the issues that were raised in our consultations regarding the need for workers' increased knowledge of rights.⁵²² We heard about temporary foreign workers lacking training, knowledge of rights and who to contact to enforce them, particularly following repatriation.⁵²³

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

The Dean Report commented upon the dangers associated with the agricultural industry and as we have noted, in Ontario between 2008-2010, farming had the second highest number of reported fatalities.⁵²⁴ Injuries most often reported to WSIB result from overexertion, falls,

repetitive motion and part of the body caught/compressed by equipment. In our consultations, we heard from workers about these types of injuries resulting in back pain, hernias, hand/toe amputations from equipment, heat exposure and exhaustion, repetitive strain and exposure to chemicals and pesticides. Representatives from the farming industry highlighted the improved health and safety training that is now given to workers. Among other things, they noted developments such as the Pesticide Safety Training Requirements of Agricultural Assistants and the Ontario Pesticide Education Program that is available to farm workers. In addition, the Farm Safety Association offers free or minimal charge health and safety training available to its members. F.A.R.M.S. also noted that migrant workers are provided with Ontario health and safety information through brochures from their respective countries. In LCO consultations, many temporary foreign farm workers reported receiving some training on such topics as WHMIS and pesticide use, although many others had not.⁵²⁵

The Dean Report recommended stronger protection for farm workers through extending some existing regulations to farms and/or development of new regulatory provisions specific to farms to cover key hazards that are currently addressed by the farming guidelines.

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

Section 50 of the OHSA prohibits reprisals. Yet our consultations revealed that workers' fear of reprisal continues to be an impediment to enforcement of health and safety legislation with the problem being particularly acute in the temporary foreign worker context where workers expressed fear of being sent home or excluded from returning in the future.⁵²⁶ The Dean Report Panel recognized these concerns as a problem, finding that fear of reprisal was a significant point of vulnerability for temporary migrant workers.

As solutions, the Dean Report recommended expediting reprisal complaints under the OHSA; giving the Ontario Labour Relations Board (OLRB) the ability to order interim reinstatement; enhancing prosecution policies for reprisals emphasizing deterrence; and providing independent third party support for reprisal complainants through an organization such as the Office of the Worker Advisor. Recent amendments to the OHSA include a new process by which inspectors may refer reprisal matters to the OLRB. The OLRB has amended its rules to allow for the expedited handling of these matters and has the authority to remove or change any penalty imposed by the employer, reinstate or compensate the worker.⁵²⁷ The Ontario government has also enacted regulations to prescribe the functions of the Office of the Worker Advisor (OWA) and Office of the Employer Advisor (OEA) to educate, advise and, in the case of the OWA, to represent non-unionized workers before the OLRB and, in the case of the OEA, to represent

employers of fewer than 50 employees before the OLRB.⁵²⁸ These are important achievements. Yet it is also important to recognize that, for temporary foreign workers, such amendments will have limited benefit unless these processes are available while the workers are still in Ontario. We urge the OLRB to take into account the strict time limitations for such workers so that effective expedited hearings and discussions are made available to any temporary foreign workers that make their way to the Board through this process. Our recommendation regarding an independent decision-making process regarding repatriation for temporary foreign workers as made in the Chapter on employment standards would be responsive to these concerns.

The Law Commission of Ontario recommends that:

37. The Ontario Labour Relations Board, the Ministry of Labour and the Office of the Worker Advisor ensure that systems are in place for temporary foreign workers to access the expedited OLRB processes when pursuing s.50 complaints.

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

The Dean Report recommended the implementation of a special Vulnerable Workers advisory committee under s. 21 of the OHSA. The committee would be a standing forum for consulting with knowledgeable parties regarding vulnerable workers providing advice to the Ministry on how the Dean Report recommendations should be implemented, improving enforcement and developing and distributing educational materials.⁵²⁹ The Chief Prevention Officer has indicated that work is underway to establish this committee. It is anticipated to be implemented in 2012.⁵³⁰ The LCO strongly supports the creation of this Committee. In our view, in addition to implementation issues, there are a number of pressing matters that this Committee could address. For example, the Panel suggested the Committee could be a source of information for identifying workplaces and sectors where vulnerable workers are concentrated for the purpose of targeting sectors for enforcement campaigns. We agree.

The Law Commission of Ontario recommends that:

38. a) The Ontario government implement the s. 21 Vulnerable Workers Committee as recommended by the Dean Report;
- b) Among other issues, the Committee address the following:
- i. prioritizing health and safety training, both basic and hazard specific, for migrant workers and their supervisors;
 - ii. determining ways to provide access to basic rights training and hazard specific training to migrant workers either prior to arrival in Canada through consulates or immediately upon arrival; and
 - iii. identifying sectors where there are concentrations of vulnerable workers so that proactive enforcement activities are directed at these sectors.
39. The Ontario government implement recommendations 10, 14, 15, 16, 17, 29, 30, 31 and 32 of the Dean Report.

C. Health Care and Workplace Safety Insurance Issues

According to Lippel *et al*, temporary employment agency workers employed in a triangular relationship of employee, client (the worksite) and temporary employment agency (the deemed employer) raise unique workplace safety insurance issues. WSIB premiums are payable by employers. Premium rates are determined based on an “experience rating system” that takes into account the employer’s WSIB history and the assessed risk presented by the type of employment. The authors note that the three-way work relationship creates a situation where workplace injuries occurring at the client worksite are not recorded as part of the client’s WSIB history. They should appear on the temporary employment agency’s records but it is unclear how frequently this happens.⁵³¹ This creates a potential incentive for employers to contract out more dangerous work to temporary agencies avoiding higher WSIB premiums.⁵³² This type of risk shifting to the temporary agency may also negatively impact smaller temporary employment agencies by raising their premiums. Lippel *et al* raise other issues such as the undervaluing by WSIB of the earning capacity of temporary and part-time employees, disincentives for client employers to bring injured temporary agency workers back to work and worker reluctance to report injuries.

Some workers clearly feel expendable and uneasy about exercising their rights. When injured, their loss of earning capacity is under-valued, which leads not only to minimal compensation benefits, but also to an underestimation of the worker’s needs for

occupational rehabilitation, the only requirement being support to help the worker attain pre-injury earnings.⁵³³

While not specific to the situation of temporary agency workers discussed above, Arthurs' *Funding Fairness, A Report on Ontario's Workplace Safety and Insurance System* engaged in significant discussion and recommendations regarding WSIB's experience rating system.⁵³⁴ Arthurs pointed out that while there was not a great deal of empirical evidence, studies that did exist tended to support what was heard in the funding review hearings, that the experience rating system may work to reduce workplace injuries and accidents but also likely creates incentives for suppression of claims and other abuses. Arthurs recommended that the experience rating system should only be maintained if it is shored up with stronger policy and enforcement procedures. To this end, the funding review made a number of recommendations related to improving workers' knowledge of rights, participants' fairness and honesty in WSIB proceedings, more worker protections including deterrence and punishment for claims suppression and other abuses. Arthurs also made recommendations regarding the redesign of the experience rating system. Worker representatives in the funding review also raised the issue of increased risk of injury faced by temporary agency workers due to their unfamiliarity with the worksite. Arthurs concluded that this issue would benefit from validation through further research.⁵³⁵

The Law Commission of Ontario recommends that:

40. The Ontario government assess the impacts of WSIB/OHSA policies and practices on temporary agency workers that contribute to increasing the vulnerability of these workers, particularly the practice of not recording health and safety incidents on the client employer's records.

Supply chain regulation in the context of both occupational health and safety and the ESA was strongly advocated by labour-side members of the Project Advisory Group. Research in this area and existing models have primarily been in the context of health and safety. In their paper commissioned by the LCO, Vosko *et al* recommend the development of supply chain regulation of health and safety in Ontario.⁵³⁶

James *et al* have highlighted the nexus between the rise in less integrated work activities and a corresponding shift to increased use of contingent or peripheral forms of labour.⁵³⁷ This phenomenon has resulted in a move away from integrated or central control of production and service delivery. Control is now based on competition of external suppliers for the best price and

quality. The authors point out that contracting out dangerous work does not necessarily result in lower health and safety compliance as user-employers may seek to ensure that their employment does not result in higher risks. However, in general, they conclude that there are a number of bases upon which the externalisation of work to small and medium-sized businesses may have adverse health and safety impacts. Smaller businesses statistically have generally poorer health and safety records, due to limited resources, so that the outsourcing of work by larger businesses to smaller businesses causes a health and safety squeeze further down the supply chain. Decentralizing work activities through subcontracting limits investment in health and safety and disrupts coordination particularly where in-house and temporary agency workers are working together.⁵³⁸ The authors note other concerns including widespread lack of health and safety awareness among temporary work agencies and host-employers, and come to the general conclusion that outsourcing deteriorates health and safety standards.⁵³⁹ After reviewing several models for legislative regulation of supply chain, James *et al* remain optimistic about the usefulness of this type of model even though they admit that the limited use of such measures internationally provide “far from extensive” evidence of their effectiveness.⁵⁴⁰

The authors did not support broad-based supply chain regulation but argued instead for such regulation in sectors where externalization was creating specific problems and where such measures could produce the greatest benefits. They suggest these would be temporary agency workers engaged in particular types of hazardous work and perhaps where manufacturing work is being subcontracted to “smaller organizations possessing a workforce below a particular size threshold.”⁵⁴¹

That was in 2007. In 2010, two of the same authors released an evaluative study of an Australian model of supply chain regulation. Findings showed poor compliance with what the authors referred to as upstream duties, or duties imposed upon those higher up the supply chain on those further down. Implementation appeared to be difficult with very strong enforcement mechanisms required to ensure proper and ongoing implementation. Nevertheless, the authors continue to be supportive of these measures and hopeful that improvements will be made to strengthen their effectiveness.⁵⁴²

Rather than statutory change, another approach suggested by the Dean Report recommended the development of supply chain relationships in Ontario government procurement policies that would consider the occupational health and safety “performance of suppliers in order to motivate a high level of performance.” The Dean Report recognized the Ontario government’s ability to influence the health and safety performance of the companies with which it does business through its procurement policies. By requiring vendors’ work proposals to be evaluated based on established qualifications that demonstrate a high standard of health and safety

performance, the Ontario government would be able to substantially regulate health and safety compliance along its supply chains, particularly for locally supplied services. There was a recognition that for goods, which could be supplied from international sources, such a system may be less feasible.⁵⁴³ The Dean Report further recommended the development of WSIB financial incentives for employers that “qualify suppliers based on their health and performance.” In making this recommendation, the Dean Report noted the challenges that small businesses might face in evaluating the health and safety performance of suppliers. To that end, the Report suggests the development of standards and guidance material to encourage small businesses to include health and safety qualification into supply chain relationships. The new prevention council, in consultation with stakeholders, would develop standards for incorporating qualification into supply chain relationships.⁵⁴⁴

The Law Commission of Ontario recommends that:

41. The Ontario government:

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

Our consultations revealed WSIB concerns relating to temporary foreign workers.⁵⁴⁵ Studies suggest that such workers do not access WSIB benefits or encounter difficulties when they do. Researchers have reported that 93% of SAWP workers in Ontario said that they did not know how to make a worker’s compensation claim and that many sick or injured workers are repatriated before their injury can be fully investigated or treated.⁵⁴⁶ Although the literature focuses on SAWP, this is likely because the program is more visible and accessible. The Project Advisory Group members pointed out that as with most issues facing migrant workers, it is likely that NOC C and D workers are even in greater need of protection due to the lack of central oversight in the program. As already noted, workers fear making a complaint given the possibility (real or perceived) of repatriation or being barred from returning.⁵⁴⁷ Language barriers and inadequate support to communicate with physicians or the WSIB present further challenges and there are difficulties communicating with workers once they have returned home. The same research also suggests Canadian doctors are not aware that migrant workers are entitled to WSIB benefits and, therefore, do not submit a claim.⁵⁴⁸

More generally, accessing health care was also reported as a problem. In many of the rural communities where migrant workers are employed, there are limited health care options for workers. Some reported that migrant workers were unable to find doctors, translation was not always available and there was no available medical walk-in clinic; workers had to go to a hospital for all health-related issues.⁵⁴⁹ In one area, despite large numbers of Spanish speaking migrant workers, there were no Spanish-speaking doctors. There are challenges in receiving appropriate health care if workers cannot effectively communicate with their medical practitioner or vice versa. Often, workers do not know where to get appropriate medical care (e.g., chiropractic care).⁵⁵⁰

For migrant workers, admitting sickness may be coupled with fear of [re]patriation or not being invited back by the employer. In some cases, employers do not arrange for OHIP cards for migrant workers, as they are supposed to do, or migrant workers have difficulty reaching a medical clinic or doctor because of lack of transportation.⁵⁵¹

In response to these concerns, in one rural community a volunteer community group was working with municipal public health officials to establish a health clinic at a centre.⁵⁵² Workers work long hours and it is difficult to take time off to seek medical attention and the workplace location presents challenges when there is limited access to transportation. They are often dependent upon their employers to take them to the nearest town to access any medical care that may be available.⁵⁵³

Where workers have supplemental insurance plans provided by their home countries, some respondents in the LCO's consultations indicated that it is easier to make a claim under the private insurance plan and send the worker home rather than make a WSIB claim and keep the worker in Canada in housing provided by the employer.⁵⁵⁴ The claims resolution process for workers' compensation was described as lengthy and difficult to navigate. The LCO heard that WSIB locations add a time constraint on claimants from rural areas and smaller cities that make the process more difficult for them.⁵⁵⁵

In the LCO's view, access to the doctor and workplace safety insurance claims may be sufficiently linked that areas with high concentrations of migrant workers could benefit from a mobile medical clinic that traveled to rural areas populated by migrant workers offering medical services coupled with assistance in making a workplace safety insurance claim for appropriate cases. Translation services or medical staff with fluency in the worker's language would respond to language needs. The mobility of the clinic would overcome the barriers of accessing medical services presented by rural locations. The presence of staff knowledgeable in OHS/WSIB issues

would be responsive to the need for added support. In our discussions on the potential of this project, both workers' advocates and employers' representatives stressed the importance of the neutrality of medical staff independent of the WSIB, union and other interests.

The Law Commission of Ontario recommends that:

42. The Ontario government implement:

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

Some temporary foreign workers, particularly those in agricultural settings experience depression, anxiety and alcoholism due to stress, isolation and family separation.⁵⁵⁶ Living in rural settings, in housing with strangers, many of these workers have only limited access to medical, community, religious or other supports, as they are dependent upon their employer for transportation and access to these supports (although some farmers provide their workers with bicycles).⁵⁵⁷ If such supports are available, cultural or language barriers may prevent the worker from accessing those services.⁵⁵⁸ A promising model of a community response to migrant workers' support needs is the Niagara Migrant Workers Interest Group (NMWIG) that has organized

to coordinate the efforts of individuals and interested organizations in Niagara who provide services in the areas of justice, health, transportation, nutrition, finances, employment, worker's health and safety, language, education, etc. to seasonal migrant workers.⁵⁵⁹

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

Jenna Hennebry outlines some of the many initiatives by non-profit organizations and the faith communities that "serve to empower migrant farm workers or to encourage their active

participation within or communication with a community.” She describes these efforts as “immense strides toward integrating migrant farm workers into their communities”. However, as she points out, without a guaranteed source of funding or central commitment to the programs, they will remain a patchwork of local initiatives at risk of discontinuing at any time.⁵⁶⁰ In our view, employers, government at all levels, F.A.R.M.S. and communities have a role to play in supporting these integration efforts.⁵⁶¹

The Law Commission of Ontario recommends that:

43. Employers, F.A.R.M.S., local governments and community and worker advocacy organizations, work together to continue to find ways to fund and implement medical, legal, spiritual and social supports to migrant workers.

VI. TRAINING AND EDUCATION

A. Training While Employed

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

However, it is not enough to just invest in the supply of skills. Employers also need to address the organisation of their workplaces so as to better harness the skills of their workers, and create more sustainable employment opportunities in the future. The economic downturn has raised awareness of both the vulnerability of modern economies, and a rising inequality in our labour markets.⁵⁶²

“The demise of the traditional career ladder” caused by the disappearance of middle level jobs has been identified as one of the contributing factors to the current labour market situation in Canada and Ontario. The rising inequality referenced above has manifest itself in increasing polarization of work into one of two categories: entry level jobs with little opportunity for promotion or high skilled knowledge jobs. While entry level jobs have increased, these jobs are no longer, as they once were, a pathway to higher wage, more secure, middle level positions. Instead workers frequently become trapped in less secure, lower paying positions.⁵⁶³ There has also been an increase in knowledge level jobs; however, they are accessible only to those with specialized levels of skill, experience and/or education. Progression up the ladder from entry to middle to knowledge jobs is no longer the norm. In the face of the economic downturn and an increasingly global and competitive market, employers are less likely to invest in workers in lower skilled positions through training and promotion. Put another way, businesses have less attachment than in the past to lower-skilled employees, who increasingly find themselves without the requisite education, skills and work experience to access higher-level positions.

To boost “productivity potential and future earnings”, the OECD has emphasized the importance of better training and education for lower-skilled workers.⁵⁶⁴

Over the past two decades, the trend to increased education attainment has been one of the most important elements in counteracting the underlying increase in wage inequality in the longer run. Policies that promote the upskilling of the work-force are therefore key factors to reverse the trend to further growing inequality.⁵⁶⁵

Employers' and workers' organizations have recognized this phenomenon and prioritized it on their agendas. In *Business Results Through Workforce Capabilities*, Canadian Manufacturers and Exporters (CME) noted that "our workforce began some time ago to shift away from unskilled labour towards skilled and semi-skilled positions. This trend has continued to accelerate, and now even semi-skilled labour is rapidly becoming redundant."⁵⁶⁶ In our consultations, CME stressed the importance of training workers while they are employed, noting that improved productivity requires well-trained employees.⁵⁶⁷ In association with Human Resources and Skills Development Canada, CME provides training on literacy and essential skills in the health and safety context through a program known as Innovations Insights.⁵⁶⁸ In another initiative, at the Centre for Workplace Skills, the CME works in partnership with the Canadian Labour Council "to encourage better participation and investment in skills development in Canada's workplaces. The Centre promotes and facilitates the exchange of knowledge to address key workplace skills development issues."⁵⁶⁹ The Centre is engaged in:

- Identifying effective and innovative practices in work-related learning, and...[sharing] these with people who can use the information in their own work-related learning decisions
- Engaging employers, unions, workers and other workplace stakeholders in the search for new approaches and solutions to critical workforce skills issues
- Supporting the Roundtable on Workforce Skills, a body of labour, business and government leaders who will explore emerging workforce trends and identify actions to address labour market challenges.⁵⁷⁰

The Centre has developed a best practices database and has produced reports on workplace learning. As an example, the Centre's report for the Conference Board of Canada, *Investing in Skills: Effective Work-Related Learning in SMEs*, examines "effective work-related learning programs implemented at 45 Canadian and international small to medium-sized enterprises" setting out best practices to respond effectively to the needs of employee training.⁵⁷¹ Recognized best practices include assessing learning needs aligned with organizational goals, making learning flexible, forging partnerships, supporting informal learning, recognizing achievements and sharing with other organizations. Other reports produced by the Centre identify the need for learning that is worker accessible, voluntary, builds on workers existing knowledge, reflects diverse needs and learning styles, is sensitive to gender, race, ethnicity and culture and involves workers in planning and design.⁵⁷²

Supporting the notion of training workers while they are still employed, the Ontario Federation of Labour (OFL) noted that many laid-off workers believed that training during their employment

would have improved their chances of securing decent work after their layoffs.⁵⁷³ One of the challenges, however, for precarious workers is recent evidence suggesting “that less skilled workers, who tend to have poor quality employment, are also unlikely to participate in training.”⁵⁷⁴ In particular,

workers who are female, are immigrants to Canada, have low-tenure or non-standard employment status, have lower education, are not covered by a collective agreement and/or are not in a managerial/professional occupation sometimes appear to be less likely to access training from their employer.⁵⁷⁵

In our consultations, unions underlined a lack of training opportunities, including on-the-job training for workers in low-skilled employment.⁵⁷⁶ They reported that workers’ training opportunities outside the workplace were often difficult to access. Even where cost was not prohibitive, vulnerable workers often did not have time to dedicate to training opportunities due to irregular schedules and long work hours.⁵⁷⁷ Lewchuk *et al* stressed that it was important for governments to recognize and give priority to training as an essential economic policy.⁵⁷⁸ This sentiment is echoed in the Commission on the Reform of Ontario’s Public Services’ report, *Public Service for Ontarians: A Path to Sustainability and Excellence* (Drummond Report).

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

Employment and training programs are important tools to ensure that workers have skills that are relevant for available jobs and to facilitate job matching. Effective government training programs help reduce the skills gap for many of these displaced workers and can increase their re-employment earnings.⁵⁷⁹

Drummond identified youth, recent immigrants, Aboriginal persons, female single parents with young children, older workers and persons with disabilities as having particular labour market challenges: “[t]he persistent lack of employment opportunities for these groups, as well as media

reports of skill mismatches and unfilled vacancies, shows that the existing program delivery structure needs significant improvement.”⁵⁸⁰

Increased investment in workplace training was the subject of several Drummond Report recommendations suggesting that management of Ontario’s 25 Workforce Planning Boards be decentralized to the regional level and that the boards be directed to encourage “employers to increase investments in workplace-based training.”⁵⁸¹ Workforce Planning Boards are funded by the Ministry of Training, Colleges and Universities with a mandate to help improve labour market conditions at the community level through partnership development, research and planning.

Another model for encouraging workplace training is known as the “1% law” implemented by Quebec that requires employers to devote at least 1% of their payroll to training or invest 1% of the value of their payroll into a public fund supporting workplace training.⁵⁸² While the Quebec law was originally directed at a broader range of enterprises, as of 2004 it is applicable only to businesses with a payroll of \$1,000,000 or more.⁵⁸³ One study found that the initiative, as it was until 2003, improved workplace training participation with more companies actively planning and implementing training and promoting adult learning through the cooperative efforts of employers, governments, unions and community groups. However, Canadian Policy Research Networks suggests there is mixed evidence for the effectiveness of this type of scheme that raises questions about its future usefulness as a policy initiative.⁵⁸⁴

Working Without Commitments emphasized the importance of formally recognizing the skills of workers employed through a series of short-term contracts with different employers.⁵⁸⁵ Lewchuk *et al* favour more effective employment support networks possibly through sectoral councils reaching out to workers through electronic bulletin boards and regional job fairs. The authors suggest that sectoral councils could play a greater role in developing skills certification that would enable broader recognition of skills learned on the job.⁵⁸⁶

Human Resources and Skills Development Canada describe sector councils and the Sector Council Program as the following:

Sector councils are national partnership organizations that bring together business, labour and educational stakeholders. Operating at an arm’s length from the Government of Canada, sector councils are a platform for these stakeholders to share ideas, concerns and perspectives about human resources and skills issues, and find solutions that benefit their sector in a collective, collaborative and sustained manner.

Through the Sector Council Program, the Government of Canada is working with the private sector to enhance adult workers' skills through activities such as: increasing employer investments in skills development; and promoting workplace learning and training.⁵⁸⁷

In our view, another possibility for developing skills certification would be to maximize the expertise of the new College of Trades which is currently phasing in its operations. The College is being put into place as a regulatory body for the skilled trades to "encourage more people to work in the trades and give industry a greater role in governance, certification and training."⁵⁸⁸ The Drummond Report has recommended an expanded role for the College taking on the non-classroom administrative aspects of apprenticeship programs.⁵⁸⁹ From our point of view, it may be possible to build upon the College's mandate to develop skills recognition criteria for a broader range of workers including workers who have developed on the job skills through employment at serial short-term contracts with different employers. A form of certification could pave the way for industry-wide recognition of skills learned in more diverse working relationships.

The Law Commission of Ontario recommends that:

44. The Ontario government engage the College of Trades (perhaps in partnership with sectoral councils, colleges and unions) to develop skills recognition criteria for a broader range of workers, including workers employed through a series of short-term contracts with different employers.
45. Ontario work with the federal government to utilize the expertise of sectoral councils operating in Ontario to develop
 - a) a system of accreditation for industry skills learned on-the- job; and
 - b) greater capacity as employment agencies through electronic bulletin boards and job fairs.

B. Employment Ontario

Working Without Commitments identified

...a need for policies and programs to assist workers looking for work by retraining them for new positions and helping them to keep jobs once they find them. Such programs would include employment counseling to more effectively link individuals' abilities and aspirations with available or emerging jobs.⁵⁹⁰

The issue of more effectively linking individuals' abilities with available or emerging jobs was addressed by Drummond who recommended developing "stronger local linkages and broaden[ing] community and regional planning for economic development" by "transferring responsibility for Workforce Planning Boards to the Ministry of Training, Colleges and Universities' regional offices".⁵⁹¹

The Ministry of Training, Colleges and Universities operates Employment Ontario, which is responsible for employment and training policy direction and delivery of services, labour market research and planning, as well as programs that support workplace training including apprenticeship, career and employment preparation and literacy skills.⁵⁹² Through these programs the Ontario government seeks to address emerging challenges facing unemployed individuals in the labour market. With a budget of about \$1 billion annually and serving approximately one million clients annually, Employment Ontario is an integrated, provincial employment and training network of service providers that offer a range of employment related services to employers, laid-off workers, apprentices, older workers, newcomers and youth.⁵⁹³ Employment Ontario's Employment Service consists of five components: client service planning and coordination; resource and information; job search, job matching, placement and incentives; and job/training retention.⁵⁹⁴

Ontario Job Creation Partnerships (OJCP) support community generated projects focusing on work experience placements for EI eligible individuals providing opportunities to improve long-term employment prospects and benefit local communities or local economies. The Literacy and Basic Skills (LBS) program provides services at no cost to eligible individuals to improve their reading, writing, numeracy and essential skills.⁵⁹⁵

One of the most promising training programs offered by the Ministry is Second Career, a program to re-train out of work individuals for high demand occupations. Laid-off workers who have since taken temporary or contract jobs or become self-employed to make ends meet are also eligible. The Program provides up to \$28,000 in financial assistance for tuition, books, transportation, and a basic living allowance.⁵⁹⁶ Launched in 2008, the program exceeded its three-year goal of 20,000 participants within only 16 months.⁵⁹⁷ It is now a permanent program and, as of January 2012, Second Career has trained 53,366 individuals.⁵⁹⁸

The Ontario Federation of Labour (OFL) has recommended the Ministry review the Program's eligibility criteria and ensure adequate funding for Second Career. The OFL believes that the threshold of means testing for determination of eligibility for Second Career is too low for many participants as it is based on family rather than individual income.⁵⁹⁹ The OFL has voiced concerns

about the Ministry's decision to fold a previous program, the Skills Development Program, into Second Career. According to the OFL, the Skills Development Program provided upgrading, language and literacy refreshers to address the short-term needs of laid-off workers and this program should be reinstated as a complement to Second Career.⁶⁰⁰ While all the details of Second Career's 2010 evaluation are not publicly available, the Ministry advises that 95% of participants have completed their skills training program and 63% of surveyed participants found work after completing their skills training program.⁶⁰¹ What is not clear is the degree to which participants found work that was stable, high-quality and/or in a skilled field. In our view it is important to ensure that employment programs translate into secure, sustainable employment rather than any type of job. Consistent with this perspective, the Drummond Report called for improved program evaluation, better data collection and tying employment and training programs to measured outcomes.

Ontario must improve how it tracks outcomes. Most program measures focus on service indicators (e.g., clients served, satisfaction) as opposed to outcomes. While client satisfaction and throughput are important, they are no substitute for measures of success such as employment duration, wage level and growth, and so forth. Key success indicators should be chosen based on best practices in other jurisdictions and from current literature...Regular evaluation of program performance using the collected data should be undertaken to inform future changes that will continually improve effectiveness.⁶⁰²

The Law Commission of Ontario recommends that:

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

Our consultations revealed a need for better data collection to improve labour market projections linking individuals with existing and future labour needs. On a similar note, the Drummond report indicated the need for an improved understanding of employment gaps to make employment and training services more effective.⁶⁰³ Among other suggestions, Drummond recommended the development of a labour-market policy framework to strengthen the link between employment and training services with economic development initiatives.⁶⁰⁴

The Law Commission of Ontario recommends that:

47. The Ontario government develop ways to more closely track present and emerging labour market needs linking these with employment and training initiatives.

As noted earlier, a significant portion of Employment Ontario's funding is tied to federal funding arrangements and employment insurance eligibility. In this way, the federal government is able to direct the funding to specific targeted populations based on its own forecasting and priorities. Ontario, however, conducts labour market forecasts that identify the province's specific future employment needs. In our view, Ontario must have the flexibility to determine the direction of its particular employment needs such that program delivery is targeted at those who need the programs most rather tying programs to employment insurance eligibility. The Drummond Report made the point very clearly:

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

The differing program and client eligibility requirements contained in these agreements limit Ontario's ability to maximize the benefits from providing an integrated suite of labour-market programs and services.⁶⁰⁵

The Report recommended a harmonized system of labour market agreements with the federal government,

Recommendation 9-3: Advocate for a comprehensive training agreement to replace the patchwork of federal-provincial employment and training funding agreements currently in place, many of which are about to expire, with a single arrangement.

This new arrangement should:

- Include residual federal training responsibility for youth and persons with disabilities, in addition to areas already covered under current agreements;
- Provide Ontario with enough flexibility to fully integrate these services under the EO banner, identify and respond to its fluid labour-market needs, and innovate using small-scale pilot projects; and
- Not be tied in any way to EI eligibility.⁶⁰⁶

We support and adopt this recommendation.

The Law Commission of Ontario recommends that:

48. The Ontario government should implement Recommendation 9-3 of the Drummond Report by negotiating with the federal government for a comprehensive training agreement not tied to Employment Insurance.

Our consultations revealed that, for workers in lower skilled positions, it was most effective to provide training in basic literacy, workplace and digital skills. While the Ontario government funds a number of apprenticeship programs, there appears to be a gap in government programming in the area of other types of employer-government partnerships for on-the-job training for workers in lower skilled positions that facilitate placement into better, more secure jobs. This type of initiative would be highly consistent with the current government's stated focus on partnering with business to create jobs.⁶⁰⁷

The Law Commission of Ontario recommends that:

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

C. Programs for Women

The Ontario Women's Directorate funds provincial programs specifically tailored to women. Low-income, underemployed and unemployed women in Ontario are eligible for the Women in Skilled Trades and Information Technology Training Program. The Skilled Trades stream of the program offers "employability and workplace preparation to help women prepare for a predominately male work environment as well as to make them aware of employer expectations", while the Information Technology Stream focuses specifically on preparing women for entry into that field.⁶⁰⁸ Both programs also provide gender sensitivity training to employers and monitor work placements. Nine programs were funded by the Ontario Women's Directorate between 2009 and 2011, preparing women for positions as electricians, horticulture technicians and general carpentry, as well as occupations in information technology applications and technical support network administration, web design and development, and IT business analysis and applications

development.⁶⁰⁹ OWD is also currently funding ten training programs for victims of domestic violence.⁶¹⁰ The programs are offered through partnerships between “a women's organization that provides violence against women prevention and support services; a training organization (e.g., college or community agency); and a minimum of two employers” and range from multi-sector programs (i.e., the Multi-Sector Training Program) to those tailored to specific industries (e.g., the Women in Transportation Project).⁶¹¹

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

D. Recent Immigrants

Studying the effectiveness of strategies to reduce precariousness, Goldring and Landolt found that immigrants whose initial jobs in Canada were in precarious work tended to remain in such work.⁶¹² Therefore, to ensure better long term outcomes, newcomers must enter into less precarious work at the earliest opportunity, preferably within the first year. Based on these findings, government sponsored education and employment initiatives aimed at recent immigrants within the first months are crucial. Goldring and Landolt’s research also identified three strategies that were most effective in reducing precariousness for immigrants: individual investment in continuing education leading to certification; employer supported on-the-job training; and English-language competence.⁶¹³ Current government thinking is evidently in line with these findings as demonstrated by the menu of programs that are on offer emphasizing post-secondary education, literacy skills, retraining and apprenticeships. Consistent with the research on the importance of early employment success, many of these programs provide both employment and immigration support simultaneously.

Through our consultations, we learned of the availability of many social supports for immigrants. Ethno-racial-religious service providers are numerous.⁶¹⁴ These groups are specifically tailored to meet the needs of certain communities. The Toronto Region Immigrant Employment Council stated that English as a Second Language training was a crucial “key to reducing vulnerability” and unions reported that workers conditions improved after attending ESL courses.⁶¹⁵ Some groups noted the significance of the lack of specific supports. For instance, the only mentoring program raised in the consultation process was designed for high-skilled immigrant workers.⁶¹⁶

The Law Commission of Ontario recommends that:

50. The Ontario government:

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

At the government level, responsibility for integration and immigration are shared among the Ministry of Citizenship and Immigration, the Ministry of Economic Development and Trade, the Ministry of Training, Colleges and Universities, the Ministry of Education, the Ministry of Health and Long Term Care, the Ministry of Community and Social Services and the Ministry of Government Services.⁶¹⁷ Ontario's Ministry of Citizenship and Immigration offers six key initiatives for newcomers to the province: Ontario Bridge Programs, Global Experience Ontario, English and French as a Second Language Services, Opportunities Ontario: Provincial Nominee Program, Newcomer Settlement Program and Language Interpreter Services.⁶¹⁸ Access to employment is a strategic direction in Ontario's Immigration Policy Framework.⁶¹⁹

A recent TD Economics Report, *Knocking Down Barriers Faced by New Immigrants*, suggests that the vast offering of current immigrant integration programs must be better coordinated through the adoption of best practices and, for language services, a standardized curriculum. The success of Manitoba's Entry Program is highlighted for providing a single point of access for information for immigrants, such as language training and credential recognition. The TD Report promotes pre-arrival services offered by the Canadian Immigration Integration Program providing newcomers from certain countries with information about Canadian social values, the type of documentation required, where to access services and language assessment and training. TD Economics supports similar integration services for immigrants once they arrive.⁶²⁰

Observing the need for better coordination, Drummond suggested that integration and settlement programs for newcomers, among others, be streamlined and integrated with Employment Ontario's employment and training programs.⁶²¹ In his view, not only would this achieve efficiencies, it would also improve client access to services. We agree.

The Law Commission of Ontario recommends that:

51. The Ontario government improve coordination and integration of integration and settlement programs for newcomers with other Ontario programs including Employment Ontario's employment and training programs.

VII. A COMPREHENSIVE PROVINCIAL STRATEGY

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

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

...As the policy agenda of OECD countries moves from job preservation to new job creation, labour market policy makers will need to collaborate with a broad set of actors – not only employers, but also unions, economic development agencies, colleges and business support providers. Much of this collaboration will need to happen at the level of relatively homogenous local labour markets. Public resources need to be used wisely in the delivery of joined up local approaches that are innovative but effective, minimizing duplication and building up relationships based on trust and mutual accountability. Producing better policy alignment will be important for both achieving better job outcomes, and also maintaining or reducing current levels of public expenditure. It is important that communities do not get back to "business as usual" after the crisis, but use the current situation as an opportunity to build a better partnership with employers to better utilize skills and build meaningful career ladders that support progression for the lower-skilled. Communities also need to anticipate future skills demands, while ensuring that they build on their own comparative advantages and are adaptable to change.⁶²²

The Law Commission of Ontario recommends that:

52. The Ontario government:

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

VIII. HOW TO PARTICIPATE

This Interim Report has been posted on the LCO website and has been distributed widely. We encourage your feedback. The LCO will consider all comments we receive and we may alter or amend our recommendations based on the feedback we receive. Our final recommendations will appear in our Final Report which we anticipate releasing early in 2013. The Final Report with recommendations is subject to approval by the LCO's Board of Governors.

There are many ways to express your views or help us hear from those affected by this project:

- Send us your comments in writing, by fax, in an email or through our online comment box.
- Call us to arrange a time to talk about your experiences, ideas and comments in person or on the telephone.
- You may have other suggestions for how you can best express your views or help others tell us their experiences.

You can mail, fax or e-mail your comments by **October 1, 2012** to:

Law Commission of Ontario

Attention: Vulnerable Workers and Precarious Work Project

2032 Ignat Kaneff Building, Osgoode Hall Law School, York University

4700 Keele Street, Toronto ON M3J 1P3

Fax: (416)650-8418

E-mail: LawCommission@lco-cdo.org

IX. LIST OF DRAFT RECOMMENDATIONS

1. a) The Ontario government, in consultation with labour and owner/management stakeholders, update, review and streamline the exemptions within the ESA and related regulations including a review of existing occupational specific exemptions, with the objective of ensuring any exemptions are justified on current public policy and industry considerations; and
b) the review develop and use principles that aim to promote a broadly available minimum floor of basic workers' rights, including that justifications for exemptions be balanced against the need to reduce precarious work and provide basic minimum standards to a broader sector of the working population.
2. The Ontario government consider codifying within the ESA a broad policy statement highlighting its commitment to protecting basic minimum employment rights, supporting compliance and fostering public, employer and employee awareness and education.
3. The Ontario government convene the minimum wage Committee, or similar body, to review minimum wage issues and recommend a transparent and fair process for determining future adjustments to minimum wage that balances business, economic, labour and poverty issues.
4. The Ontario government consider amendments to the ESA to require all workers in equivalent positions to be paid at least at the same rate as their permanent full-time equivalents.
5. The Ontario government, in consultation with labour, management and insurance representatives, explore options for the provision of benefits for non-standard and other workers without benefits coverage, with consideration given to the concepts of a benefits bank and mandatory short-term contract premium for temporary workers, among other options.
6. The Ontario government review personal emergency leave provisions in the ESA to determine ways to extend the benefit to workers in workplaces with fewer than 50 employees (including part-time, casual and temporary employees).

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

14. The Ontario government:

- a) expand time limitations to two years for all ESA remedies; and
- b) raise the ESA monetary cap to \$25,000.

15. The Ministry of Labour:

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

16. The Ministry of Labour:

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

17. The Ontario government consider amending the ESA to allow for orders requiring employers found in violation of the ESA to cover the costs of investigations and inspections.

18. The Ministry of Labour strengthen ESO policy direction with supporting education to emphasize deterrence in terms of prosecution, penalties and sanctions for repeat violators and those who wilfully fail to comply with payment orders.

19. The Ontario government ensure adequate resources for ESA compliance and enforcement, with a particular emphasis on proactive enforcement.

20. The Ministry of Labour:

- a) implement a joint labour-management employment standards work council as a pilot in a number of select non-unionized workplaces with high concentrations of vulnerable workers;
 - b) evaluate the pilot; and
 - c) if successful, implement ESA work councils in non-unionized workplaces.
21. The Ministry of Labour:
- a) explore processes of reaching out to and focusing on the top echelon of industry to address ESA non-compliance among workers affiliated with the company particularly those subcontracted to small enterprises and temporary agency workers; and
 - b) identify and provide recognition and incentives for companies that are leaders in extending employment standards compliance to external workers particularly those subcontracted to small enterprises and temporary agency workers.
22. The Ontario government amend the ESA to include a process for expediting complaints of reprisals and, in the case of migrant workers, ensure that such complaints are heard before repatriation.
23. In coordination with the federal government, the Ontario government:
- a) institute a process for independent decision-making to review decisions to repatriate temporary foreign workers prior to the repatriation to ensure dismissal is not a reprisal for accessing workers' rights under federal or provincial legislation or contract;
 - b) for reprisals, the independent-decision making body have the authority to order interim reinstatement for appropriate circumstances pending decisions and appeals; and
 - c) where there is a finding of reprisal, provision be made for transfer to another employer or, where appropriate, reinstatement.
24. The Ontario government support the establishment of greater legal and other supports for temporary migrant workers asserting rights and making claims through expanded legal services or other such mechanisms.
25. Unions and community groups continue to develop and expand innovative services to support migrant workers to assert their legal rights and make claims.

26. The Ontario government amend the AEPA by explicitly including the elements of bargaining in good faith protected by s.2(d) of the *Charter* as identified by the Supreme Court of Canada in *Health Services* and affirmed in *Fraser*.
27. Academics and/or a policy think tank in consultation with relevant stakeholders undertake a review of possible alternative models to traditional unionization and the Wagner model of collective bargaining to support and assist vulnerable workers in the workplace, including consideration of emerging models for representing worker interests in various forms of precarious work in Ontario, including agricultural work, domestic work, temporary agency work and others.
28. The Ministry of Labour convene an Innovative Solutions for Precarious Work Advisory Council of representatives of relevant ministries, experts, and labour and employer organizations to obtain advice and to develop initiatives for improved and expedited ESA compliance and enforcement with a view to recommending best practices for responding to the existing and emerging needs of vulnerable employees/precarious work in the changing workplace.
29. The Ontario government extend the *Employment Protection for Foreign Nationals Act* to all temporary migrant workers in Ontario.
30. The Ontario government negotiate an information-sharing agreement with Human Resources and Skills Development Canada and Citizenship and Immigration Canada to permit information to flow between Ontario and the federal government for the purpose of increasing protections for temporary foreign workers by:
 - a) strengthening federal-provincial oversight over temporary foreign worker contracts;
 - b) increasing enforcement of temporary migrant workers' rights under provincial legislation; and
 - c) imposing consequences upon employers who violate provincial legislation or breach contractual agreements with temporary foreign workers.
31. The Ministry of Labour act to reduce misclassification of employees as self-employed by:
 - a) engaging in proactive compliance and enforcement processes directed at industries with known high incidences of misclassification;
 - b) increasing transparency in decision-making through policy guidance and training for employment standards officers on the definition of employee and the common law tests; and

- c) launching a public education campaign to raise awareness of the issue of misclassification of employees under the *Employment Standards Act*.
32. The Ontario government consider extending some ESA protections to highly vulnerable low wage self-employed persons in dependent working relationships with one client and/or identifying other options for responding to their need for employment standards protection.
33. a) The Ontario government amend the ESA to require employers and contractors to provide all workers, including independent contractors, with written notice of their work or employment status and terms of their employment or work contract; and
b) The Ministry of Labour develop standard forms to support employers and contractors in this task.
34. OHSA enforcement activity include proactive inspections to ensure joint health and safety committees and representatives are in place where required and are effectively operational.
35. The Ontario government ensure that stakeholder discussions between industry and government regarding health and safety include workers or their representatives.
36. a) The Ministry of Labour conduct more proactive inspections in industries employing vulnerable workers at high risk for workplace injuries including agriculture, hospitality and cleaning and workplaces with temporary staffing agency workers; and
b) temporary foreign workers in all sectors be a priority for Ministry of Labour's proactive OHSA enforcement activities.
37. The Ontario Labour Relations Board, the Ministry of Labour and the Office of the Worker Advisor ensure that systems are in place for temporary foreign workers to access the expedited OLRB processes when pursuing s.50 complaints.
38. a) The Ontario government implement the section 21 Vulnerable Workers Committee as recommended by the Dean Report;
b) Among other issues, the Committee address the following:
 - i. prioritizing health and safety training, both basic and hazard specific, for migrant workers and their supervisors;

- ii. determining ways to provide access to basic rights training and hazard specific training to migrant workers either prior to arrival in Canada through consulates or immediately upon arrival; and
 - iii. identifying sectors where there are concentrations of vulnerable workers so that proactive enforcement activities are directed at these sectors.
39. The Ontario government implement recommendations 10, 14, 15, 16, 17, 29, 30, 31 and 32 of the Dean Report.
40. The Ontario government assess the impacts of WSIB/OHSA policies and practices on temporary agency workers that contribute to increasing the vulnerability of these workers, particularly the practice of not recording health and safety incidents on the client employer's records.
41. The Ontario government:
- a) explore health and safety supply-chain mechanisms to address the issue of subcontracting to small enterprises and particularly to temporary agency work; and
 - b) implement the Dean Report recommendations relating to supply chain regulation through government procurement policies and WSIB financial incentives for employers that qualify suppliers based on health and safety performance.
42. The Ontario government implement:
- a) a pilot mobile medical clinic service for migrant workers in rural areas where they reside providing access to medical care and corresponding support to facilitate WSIB claims, where appropriate; and
 - b) direct service or translation in the language of migrant worker.
43. Employers, F.A.R.M.S., local governments and community and worker advocacy organizations, work together to continue to find ways to fund and implement medical, legal, spiritual and social supports to migrant workers.
44. The Ontario government engage the College of Trades (perhaps in partnership with sectoral councils, colleges and unions) to develop skills recognition criteria for a broader range of workers, including workers employed through a series of short-term contracts with different employers.

45. Ontario work with the federal government to utilize the expertise of sectoral councils operating in Ontario to develop:
- a) a system of accreditation for industry skills learned on-the- job; and
 - b) greater capacity as employment agencies through electronic bulletin boards and job fairs.
46. a) Second Career and other training programs be assessed for their ability to reduce precarity through increased credentials that translate into increased wages, benefits, hours, duration of employment and other key measures of employment security; and
- b) programs that demonstrate measures of success based on these criteria should be expanded.
47. The Ontario government develop ways to more closely track present and emerging labour market needs linking these with employment and training initiatives.
48. The Ontario government should implement Recommendation 9-3 of the Drummond Report by negotiating with the federal government for a comprehensive training agreement not tied to Employment Insurance.
49. The Ontario government:
- a) develop employer-government partnerships for on-the-job training in real jobs for individuals working in lower skilled positions that facilitate placement into better, more secure jobs;
 - b) continue to support self-funded education initiatives including those that provide upskilling for certification; and
 - c) increase bursary and loan programs for self-funded education, where possible.
50. The Ontario government:
- a) prioritize the provision of education and training programs for targeted communities of vulnerable workers including women, racialized persons and recent immigrants;
 - b) focus its training and education programs for immigrants on individual investment in continuing education leading to certification; employer supported on-the-job training; and English-language competence prioritizing entry into programs within the first months after arrival; and
 - c) focus literacy skills education on providing a high degree of literacy skills that are transferable to the Ontario labour market.

51. The Ontario government improve coordination and integration of integration and settlement programs for newcomers with other Ontario programs including Employment Ontario's employment and training programs.

52. The Ontario government:

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

APPENDIX A: CONTRIBUTORS TO THE PROJECT

Over the course of the Project, the LCO consulted with and/or received submissions from numerous individuals and organizations including more than 100 workers. The following list includes all organizations and experts who provided written submissions and/or participated in one or more consultations with LCO staff.

- Access Alliance
- Agricultural Workers Alliance
- Alliance for Equality of Blind Canadians
- Belleville Community Advocacy and Legal Centre
- Canadian Hearing Society
- Canadian Manufacturers and Exporters
- Canadian Mental Health Association
- Canadian Auto Workers
- Canadian Union of Public Employees (CUPE) Ontario.
- CanAg Travel Services
- Caregivers' Action Centre
- CAW Former Simmons Workers Action Centre
- CAW Local 1285 Chrysler Action Centre
- Central Toronto Community Health Centre (Yi Man Ng)
- Chinese Canadian National Council, Toronto Chapter
- Chinese Interagency Network's Labour Committee
- Colour of Poverty Campaign
- Community Advocacy & Legal Centre (CALC) – Workers' Action Centre
- *Dignidad Obrera Agricola Migrante (DOAM)*
- Dr. David J. Doorey, York University, School of Human Resource Management
- Dr. Luin Goldring, York University
- Equal Pay Coalition
- Foreign Agricultural Resource Management Services (F.A.R.M.S.)
- Hispanic Development Council
- Human Resources and Skills Development Canada
- International Association of Machinists
- Jamaican Liaison Service, Seasonal Agricultural Workers Program
- Dr. Patricia Landolt, University of Toronto Scarborough
- Labour Education Centre
- Dr. Wayne Lewchuk, McMaster University

- Labour Issues Coordinating Committee
- Labour Ready
- Legal Clinic Workers Compensation Network
- Loyalist College Community Services
- Dr. Ellen MacEachen, Institute for Work & Health
- Manitoba Ministry of Labour
- Metro Toronto Chinese and Southeast Asian Legal Centre
- Mexican Consulate
- Migrant Workers Alliance for Change
- Niagara Migrant Workers Interest Group
- Occupational Health Clinics for Ontario Workers Inc.
- Ontario Council of Agencies Serving Immigrants (OCASI)
- Ontario Federation of Labour, Labour Adjustment Committee
- Ontario Ministry of Agriculture, Food and Rural Affairs
- Ontario Ministry of Citizenship and Immigration
- Ontario Ministry of Labour – Employment Standards Branch
- Ontario Ministry of Labour – Occupational Health and Safety Branch
- Ontario Ministry of Training, Colleges and Universities
- Ontario Women’s Directorate
- Ontario Works
- OPSEU Local 101
- Progressive Moulded Products (PMP) Workers Action Center
- Poverty and Employment Precarity in Southern Ontario (*PEPSO*)
- Queen West Community Health Centre
- Quinte United Immigrant Services
- Dr. Richard Mitchell, Brock University
- Sam Vrankulj, McMaster University
- Service Canada
- South Asian Legal Clinic of Ontario (SALCO)
- St. Stephen’s Community House
- Toronto Catholic District School Board
- Toronto Region Immigrant Employment Council (TREIC)
- Unite Here
- United Food and Commercial Workers Union Canada
- United Steel Workers
- United Way of Quinte and Quinte Labour Council (Workers’ Help Centre)

- Windsor Legal Assistance
- WoodGreen Community Services
- Working Women Community Centre
- Workplace Safety and Insurance Board

ENDNOTES

¹ There have always been workers outside the “standard” employment relationship. Regardless, the nature of employment has changed. See Leah F. Vosko, “Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity” in Leah F. Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006) 4, 6; Judy Fudge, “The New Workplace: Surveying the Landscape” (2009) 33 *Man LJ* 131; Katherine Stone, “The New Psychological Contract: Implications of the Changing Workplace for Labour and Employment Law” (2001) 48 *UCLA L Rev* 519.

² A brief note on terminology and classification. Immigrants are people who have emigrated from other countries throughout the world and have settled in Ontario. They may be established in Canada or recently arrived. Racialization has been defined as “the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life”: Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination* (2005, revised 2009). Online: http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf. Many immigrants are racialized persons and vice versa. Between 2001 and 2006, “over three quarters of immigrants to Canada were from the global South or countries with racialized majority populations” [Sheila Block & Grace-Edward Galabuzi, *Canada’s Colour Coded Labour Market: The Gap for Racialized Workers* (Canadian Centre for Policy Alternatives and the Wellesley Institute, 2011), 6. Online: http://www.wellesleyinstitute.com/wp-content/uploads/2011/03/Colour_Coded_Labour_MarketFINAL.pdf]. However, there are important distinctions between the two categories. Many racialized persons have been Canadian for several generations and immigrants who are not visible minorities are less likely to be racialized. Then again, Caucasian immigrants may be racialized because of an accent or other cultural differences. The LCO discusses immigrants and racialized Ontarians separately while acknowledging the commonality in how they may experience precarious work.

³ A Creative Symposium was held on 30 November 2006 in order to discuss the creation of a new law reform commission for Ontario and identify potential law reform projects.

⁴ Andrea M. Noack & Leah F. Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers’ Social Location and Context* (Law Commission of Ontario, 2011). Online: <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-noack.pdf>; Leah F. Vosko, Eric Tucker, Mark P. Thomas & Mary Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada* (Law Commission of Ontario, November 2011). Online: <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf>; See also student paper: Jamie Baxter, *Precarious Pathways: Evaluating the Provincial Nominee Programs in Canada* (Law Commission of Ontario, July 2010). Online: <http://www.lco-cdo.org/baxter.pdf>.

⁵ See the Appendices for a list of consultations carried out in the Vulnerable Workers and Precarious Work Project.

⁶ Efforts to reduce the benefits of employees in secure jobs with excellent benefits (particularly pensions) has recently threatened the stability of several European countries such as Greece. See for example, Niki Kitsantonis, “Ahead of Summit, Greece Rushes to Approve New Cuts”, *New York Times* (29 February 2012). Online: <http://www.nytimes.com/2012/03/01/world/europe/ahead-of-summit-greece-rushes-to-approve-new-cuts.html>.

⁷ “50th OECD Anniversary: International Migration and the SOPEMI” in *International Migration Outlook 2011* (Organization for Economic Cooperation & Development, 2011). Online: <http://www.oecd.org/dataoecd/22/5/48342373.pdf>.

⁸ The Canadian Chamber of Commerce, *2012-2013 Economic Outlook, Economy Battles Strong Headwinds: Modest Growth Ahead*, Economic Policy Series (2011). Online: <http://www.chamber.ca/images/uploads/Reports/2011/EconomicOutlook111228.pdf>.

⁹ John Morrissy, “Canadian jobs market headed for serious downturn”, *Financial Post* (2 November 2011). Online: <http://business.financialpost.com/2011/11/02/canadian-jobs-market-headed-for-serious-downturn/>.

¹⁰ Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (December 2010), vi-vii (Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*). Online: <http://www.lco-cdo.org/VulnerableWorkersBackgroundPaper-December2010.pdf>. Citing Harry W Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau: Human Resources Skills Development Canada, 2006), 232. Online: http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/final_report.pdf.

¹¹ John Stapleton, Brian Murphy & Yue Xing, *The “Working Poor” in the Toronto Region: Who They Are, Where They Live, and How Trends are Changing* (Metcalf Foundation, February 2012), 24-25. Online: <http://metcalffoundation.com/wp-content/uploads/2012/02/Working-Poor-in-Toronto-Region.pdf>.

¹² Guy Standing, *Precariat: The New Dangerous Class* (Huntington: Bloomsbury, 2011), 24.

¹³ Vosko, *et al*, note 4.

¹⁴ Sheila Block, *Work and Health: Exploring the Impact of Employment on Health Disparities* (The Wellesley Institute, 9 December 2010), 4 (Block, *Work and Health*). Online: http://www.wellesleyinstitute.com/wp-content/uploads/2010/12/Work_and_Health.pdf; Wayne Lewchuk, Marlea Clarke & Alice de Wolff, *Working Without Commitments: The Health Effects of Precarious Employment* (Montreal & Kingston: McGill-Queen’s UP, 2011), 11-20.

¹⁵ LCO consultation meeting with F.A.R.M.S. (17 January 2012) Mississauga, Ontario.

¹⁶ In certain circumstances, a federal program may provide these employees with temporary employment insurance support: Service Canada, *Work-Sharing*. Online: http://www.servicecanada.gc.ca/eng/work_sharing/index.shtml.

¹⁷ Tom Zizys, *Working Better: Creating a High Performing Labour Market in Ontario* (Metcalf Foundation, 2011), 21. Online: <http://metcalffoundation.com/wp-content/uploads/2011/05/working-better.pdf>.

¹⁸ Leah F. Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000), 27.

¹⁹ Zizys, note 17.

²⁰ Arthurs, note 10, 19.

²¹ Citizenship and Immigration Canada, News Release, “More Federal Skilled Workers for Canada in 2012” (3 November 2011). Online: <http://www.cic.gc.ca/english/department/media/releases/2011/2011-11-03.asp>; Wallace Immen, “Ottawa to seek innovative business migrants”, *The Globe and Mail* (9 March 2012) A6.

²² Canada has three temporary foreign worker programs discussed below.

²³ Zizys, note 17, 9.

²⁴ René Morissette, Grant Schellenberg & Anick Johnson, “Diverging Trends in Unionization”, *Perspectives on Labour and Income*, Vol 6, No 4 (Statistics Canada, April 2005). Online: <http://www.statcan.gc.ca/pub/75-001-x/10405/7827-eng.pdf>.

²⁵ The Conference Board of Canada Hot Topics, *Canada Inequality: Is Canada Becoming More Unequal?* (July 2011). Online: www.conferenceboard.ca/hcp/hot-topics/canInequality.aspx; Block, *Work and Health*, note 14, 67. In 2011, the rate of income inequality in Canada was slightly higher than the OECD average: OECD, *Society at a Glance 2011: OECD Social Indicators* (2011). Online: http://dx.doi.org/10.1787/soc_glance-2011-en, 67.

²⁶ OECD, *Growing Income Inequality in OECD Countries: What Drives It and How Can Policy Tackle It?*, Forum, Paris, 2 May 2011 (2011), 7 (OECD, *Growing Income Inequality*). Online: <http://www.oecd.org/dataoecd/32/20/47723414.pdf>.

²⁷ OECD, *Growing Income Inequality*, note 26, 7.

²⁸ Richard Wilkinson & Kate Pickett, *The Spirit Level: Why Equality Is Better for Everyone* (London: Penguin Books, 2010).

²⁹ Richard G. Wilkinson, *The Impact of Inequality: How to Make Sick Societies Healthier* (New York: The New Press, 2005), 40-53 and 221.

³⁰ Wilkinson, note 29, 101.

³¹ James Gwartney, Robert Lawson & Joshua Hall, *Economic Freedom of the World, Annual Report 2011* (Fraser Institute, 2011). Online: www.freetheworld.com/2011/reports/world/EFW2011_complete.pdf. Women’s well-being is defined by the United Nations Development Project’s Gender Inequality Index in relation to five variables (maternal mortality, adolescent fertility, female parliamentary representation, educational attainment and female labour force participation rate). See: United Nations Development Project, *Gender Inequality Index (GII)*, 1. Online: <http://hdr.undp.org/en/statistics/gii/>.

³² Noack & Vosko, note 4.

³³ Noack & Vosko, note 4, 6.

³⁴ Noack & Vosko, note 4, 12.

³⁵ Noack & Vosko, note 4, 17.

³⁶ Standing, note 12, 15.

³⁷ Noack & Vosko, note 4, 16-18.

³⁸ Noack & Vosko, note 4, 38; also see the part on Employment Standards below. Vulnerable Workers and Precarious Work:

³⁹ Standing, note 12, 15.

⁴⁰ Noack & Vosko, note 4.

⁴¹ *Employment Standards Act, 2000*, SO 2000, c 41 ss 74.1, 74.3.

⁴² Ellen MacEachen, *et al*, "Workers' Compensation Experience Rating Rules and the Danger to Worker Safety in the Temporary Agency Sector", Policy and Practice in Health and Safety [forthcoming].

⁴³ MacEachen, *et al*, note 42.

⁴⁴ MacEachen, *et al*, note 42.

⁴⁵ MacEachen, *et al*, note 42.

⁴⁶ Ontario Workplace Safety and Insurance Board, *Responsibilities of the Workplace Parties in Work Reintegration*, No 19-02-02 (15 July 2012). Online: <http://www.wsib.on.ca/en/community/WSIB/OPMDetail?vgnextoid=5b0bc0d9ca3d7210VgnVCM100000449c710aRCRD>.

⁴⁷ Katherine Lippel, Ellen MacEachen, Ron Saunders, Natalia Werhun, Agnieszka Kosny, Liz Mansfield, Christine Carrasco & Diana Pugliese, "Legal Protections Governing the Occupational Safety and Health and Workers' Compensation of Temporary Employment Agency Workers in Canada: Reflections on Regulatory Effectiveness" (2011) 9:2 Policy and Practice in Health and Safety 69, 80.

⁴⁸ Institute for Work & Health, "INFOCUS: Investigating Temporary Employment in Canada", *At Work* 62 (Fall 2010) 6 (Institute for Work & Health, "INFOCUS"). Online: http://www.iwh.on.ca/system/files/at-work/at_work_62.pdf.

⁴⁹ Leah F. Vosko, "A New Approach to Regulating Temporary Agency Work in Ontario or Back to the Future?" (2010) 65:4 Relations Industrielles/Industrial Relations 632, 634, referring to Sylvia Fuller & Leah F Vosko, "Temporary Employment and Social Inequality in Canada: Exploring Intersections of Gender, Race and Migration" (2008) 88 Social Indicators Research 31, Table 2-3.

⁵⁰ Diane Galarneau, "Earnings of Temporary Versus Permanent Employees", *Perspectives on Labour and Income*, Vol 6, No 1 (Statistics Canada, January 2005), 7 and 9 (Galarneau, "Earnings of Temporary Versus Permanent Employees"). Online: <http://www.statcan.gc.ca/pub/75-001-x/10105/7761-eng.pdf>.

⁵¹ Institute for Work & Health, "INFOCUS", note 48.

⁵² Lewchuk, Clarke & de Wolff, note 14, 136.

⁵³ Lewchuk, Clarke & de Wolff, note 14, 137; MacEachen, *et al*, note 42.

⁵⁴ Elsa Underhill & Michael Quinlan, "How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers" (2011) 66 Industrial Relations 397, 398.

⁵⁵ Ontario Workplace Safety and Insurance Board, *New Experimental Experience Rating (NEER) Program*. Online: <http://www.wsib.on.ca/en/community/WSIB/ArticleDetail?vgnextoid=ef00e35c819d7210VgnVCM100000449c710aRCRD>.

⁵⁶ LCO consultation meeting with the Workers' Compensation Network (29 April 2011), Toronto, Ontario; LCO consultation meeting with the Institute for Work & Health (17 June 2011) Toronto, Ontario; Ontario, Expert Advisory Panel on Health and Safety, *Report and Recommendations to the Ministry of Labour* (2010), 58 (*Dean Report*). Online: http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf; MacEachen, *et al*, note 42.

⁵⁷ Isabel Nunes, "The Nexus Between OSH and Subcontracting" (2012) 41 Work 3062, 3063.

⁵⁸ Joan M. Eakin, Danièle Champoux & Ellen MacEachen, "Health and Safety in Small Workplaces: Refocusing Upstream" (2010) 101 Canadian Journal of Public Health S29, S30; David Walters & Philip James, *Understanding the Role of Supply Chains in Influencing Health and Safety at Work: Report Submitted by the IOSH Research Committee* (Leicestershire, UK: Institution of Occupational Safety and Health, 2009). Online: http://www.iosh.co.uk/information_and_resources/research_and_development/research_fund/grants_awarded/doc.ashx?docid=c1116aa4-5a15-4049-aeac-89ee47147634&version=-1.

⁵⁹ Although the long term consequences of privatization can be costly on many levels, particularly for government employers: Robert Dryden & Jim Stanford, *The Unintended Consequences of Outsourcing Cleaning Work* (March 2012, Canadian Centre for Policy Alternatives Ontario). Online: http://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2012/03/Unintended%20Consequences%20of%20Outsourcing_final.pdf.

⁶⁰ Cynthia J. Cranford, Judy Fudge, Eric Tucker, & Leah F. Vosko, *Self-Employed Workers Organize: Law, Policy, and Unions* (Montreal & Kingston: McGill – Queen's University Press, 2005), 13-14 (Cranford, *et al*, *Self-Employed Workers*). It is not made clear, but these appear to be Canadian statistics.

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- ⁶¹ Leah F. Vosko & Nancy Zukewich, "Precarious By Choice? Gender and Self-Employment" in Leah F. Vosko, ed, *Precarious Employment: Understanding Labour Market Security in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006), 76-77.
- ⁶² Vosko & Zukewich, note 61.
- ⁶³ Feng Hou & Shunji Wang, "Immigrants in Self-Employment", *Perspectives on Labour and Income*, Vol 23, No 3 (Statistics Canada, Autumn 2011). Online: www.statcan.gc.ca/pub/75-001-x/2011003/article/11500-eng.pdf.
- ⁶⁴ Cranford, *et al*, *Self-Employed Workers*, note 60, 11-12, referring to figures from 1999; Noack & Vosko, note 4, 9.
- ⁶⁵ Cranford, *et al*, *Self-Employed Workers*, note 60, 13.
- ⁶⁶ Judy Fudge, Eric Tucker & Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Law Commission of Canada, October 2002), 16-17 (Fudge, Tucker & Vosko, "The Legal Concept of Employment"). Online: http://publications.gc.ca/collections/collection_2007/lcc-cdc/JL2-35-2002E.pdf.
- ⁶⁷ Leah F. Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2009), 172.
- ⁶⁸ Noack & Vosko, note 4, 24.
- ⁶⁹ Noack & Vosko, note 4, 24.
- ⁷⁰ Noack & Vosko, note 4, 25.
- ⁷¹ Noack & Vosko, note 4, 22-23.
- ⁷² Noack & Vosko, note 4, 28.
- ⁷³ Noack & Vosko, note 4, 31-32.
- ⁷⁴ Noack & Vosko, note 4, 18-21 and 24-32.
- ⁷⁵ "The concept of 'social location' has been developed to specify the ways in which political and economic conditions interact with class, ethnicity, culture, and sexual orientation to shape the meanings and strategies of working men and women": Fudge, Tucker & Vosko, "The Legal Concept of Employment", note 66, 7. For the connection between precarity and marginalized social location, see Leah F. Vosko, "What Is to Be Done? Harnessing Knowledge to Mitigate Precarious Employment" in Leah F. Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006) 379, 379; Workers' Action Centre, *Working on the Edge* (2007) (Workers' Action Centre, *Working on the Edge*). Online: http://www.workersactioncentre.org/wp-content/uploads/2011/12/pb_WorkingOnTheEdge_eng.pdf. Alternatively, working in precarious employment may itself place workers into a marginalized social position.
- ⁷⁶ In respect of newcomers to Canada, see Li Xue, *Portrait of an Integration Process* (Citizen and Immigration Canada, June 2007), 13-16. Online: <http://www.cic.gc.ca/english/pdf/research-stats/portrait-integr-process-e.pdf>.
- ⁷⁷ Noack & Vosko, note 4, 32.
- ⁷⁸ These projects are described at the Law Commission of Ontario website: www.lco-cdo.org.
- ⁷⁹ Julie Cool, *Wage Gap Between Women and Men*, No 2010-30-E (Library of Parliament, 29 July 2010), 7-8. Online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-30-e.pdf>. Also see Leah F. Vosko & Lisa F. Clark, "Canada: Gendered Precariousness and Social Reproduction" in Leah F. Vosko, Martha MacDonald & Iain Campbell, eds, *Gender and the Contours of Precarious Employment* (London: Routledge, 2009) 26, 31-32 and Cynthia J Cranford & Leah Vosko, "Conceptualizing Precarious Employment: Mapping Wage Work Across Social Location and Occupational Context" in Leah Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's, 2006) 43, 58-59.
- ⁸⁰ Vosko & Clark, note 79, 31-32.
- ⁸¹ Noack & Vosko, note 4, 19.
- ⁸² Statistics Canada, "Minimum Wage", *Perspectives on Labour and Income*, Vol 10, no 1 (Statistics Canada, January 2009), 3. Online: <http://www.statcan.gc.ca/pub/75-001-x/75-001-x2009101-eng.pdf>.
- ⁸³ Cool, note 79, 2. See too Cara Williams, "Economic Well-Being" in Statistics Canada, *Women in Canada: A Gender-Based Statistical Report*, 6th ed (Statistics Canada, December 2010), 16. Online: <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11388-eng.pdf>.
- ⁸⁴ Noack & Vosko, note 4, 24.
- ⁸⁵ Cool, note 79, 7-8.
- ⁸⁶ Vosko & Zukewich, note 61, 67.
- ⁸⁷ Vosko & Clark, note 79, 27.

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- ⁸⁸ Colin Lindsay, “Are women spending more time on unpaid domestic work than men in Canada?”, *Matter of Fact* (Statistics Canada, 25 September 2008), 1. Online: <http://www.statcan.gc.ca/pub/89-630-x/2008001/article/10705-eng.htm>.
- ⁸⁹ Anne Milan, Leslie-Anne Keown & Covadonga Robles Urquijo, “Families Living Arrangements and Unpaid Work” in Statistics Canada, *Women in Canada: A Gender-Based Statistical Report*, 6th ed (December 2011), 20. Online: <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11546-eng.pdf>.
- ⁹⁰ Noack & Vosko, note 4, 10.
- ⁹¹ Vosko & Clark, note 79, 34.
- ⁹² See, for example, Income Security, Race and Health Research Group, *Working Rough, Living Poor: Employment and Income Insecurities Faced by Racialized Groups in the Black Creek Area and their Impacts on Health* (Access Alliance Multicultural Health and Community Services, 2011), 36-38. Online: http://accessalliance.ca/sites/accessalliance/files/documents/Access%20Alliance_Working%20Rough%20Living%20Poor%20Final%20Report%20June%202011.pdf.
- ⁹³ Block & Galabuzi, note 2, 3 and 7-12.
- ⁹⁴ Sheila Block, *Ontario’s Growing Gap: The Role of Race and Gender* (Canadian Centre for Policy Alternatives, 2010), 7, Table 3 (Block, *Growing Gap*). Online: <http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/The%20Role%20of%20Race%20Ontario%20Growing%20Gap.pdf>.
- ⁹⁵ Cranford & Vosko, note 79.
- ⁹⁶ Block, *Growing Gap*, note 94, 4.
- ⁹⁷ Sirena Liladrie, *Do Not Disturb/Please Clean Room: The Invisible Work and Real Pain of Hotel Housekeepers in the GTA* (MA Major Research Paper, Ryerson University, 2008). Online: <http://digitalcommons.ryerson.ca/dissertations/106>.
- ⁹⁸ Jenna Hennebry, “Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada” (February 2012) 26 IRPP Study 1, 15. Online: http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no26.pdf.
- ⁹⁹ Noack & Vosko, note 4, 21.
- ¹⁰⁰ Philip Kelly, Stella Park & Laura Lepper, *TIEDI Analytical Report 22: Economic Recession and Immigrant Labour Market Outcomes in Canada, 2006-2011* (Toronto Immigrant Employment Data Initiative, 2011), 14. Online: http://books2.scholarsportal.info/viewdoc.html?id=/ebooks/ebooks0/gibson_cppc/2011-11-18/1/10497711; Craig Alexander, Derek Burleton & Francis Fong, *Knocking Down Barriers Faced By New Immigrants to Canada: Fitting the Pieces Together*, Special Report TD Economics (7 February 2012). Online: http://www.td.com/document/PDF/economics/special/ff0212_immigration.pdf.
- ¹⁰¹ Diane Galarneau & René Morissette, “Immigrants’ Education and Required Job Skills” *Perspectives on Labour and Income*, Vol 9, No 12 (Statistics Canada, December 2008). Online: <http://www.statcan.gc.ca/pub/75-001-x/2008112/pdf/10766-eng.pdf>; also see Alexander, Burleton & Fong, note 100, 5-6.
- ¹⁰² Galarneau & Morissette, note 101, 15.
- ¹⁰³ Block & Galabuzi, note 2, 12.
- ¹⁰⁴ Gillian Creese & Brandy Wiebe, “‘Survival Employment’: Gender and Deskilling Among African Immigrants in Canada” (2009, published online) *International Migration*; Jennifer Jihye Chun & Amanda Cheong, *Immigrants and Low-Paid Work: Persistent Problems, Enduring Consequences*, Working Paper Series (Metropolis British Columbia, 2011). Online: <http://riim.metropolis.net/assets/uploads/files/wp/2011/WP11-20.pdf>.
- ¹⁰⁵ Creese & Wiebe, note 104, 15-16.
- ¹⁰⁶ Mei Lan Fang & Elliot M Goldner, “Transitioning into the Canadian Workplace: Challenges of Immigrants and its Effects on Mental Health” (2011) 2 *Canadian Journal of Humanities and Social Sciences* 93.
- ¹⁰⁷ Chun & Cheong, note 104, 35.
- ¹⁰⁸ Chun & Cheong, note 104, 31.
- ¹⁰⁹ Statistics Canada, *Labour force characteristics by immigrant status of population aged 25 to 54, and by educational attainment*. Online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/I01/cst01/labor90a-eng.htm>.
- ¹¹⁰ Noack & Vosko, note 4, 21.
- ¹¹¹ *Occupational Health and Safety Act*, RSO 1990, c O.1; *Dean Report*, note 56, 47-48; Agnieszka Kosny, Marni Lifshen, Ellen MacEachen, Peter Smith, Gul Joya Jafri, Cynthia Neilson, Diana Pugliese & John Shields, *Delicate Dances: Immigrant Workers’ Experiences of Injury Reporting and Claim Filing* (Institute for Work & Health, 2011).

Online:

http://www.iwh.on.ca/system/files/documents/immigrant_workers_experiences_of_injury_reporting_and_claim_filing_2011.pdf.

¹¹² Citizenship and Immigration Canada, *Preliminary tables – Permanent and temporary residents, 2011*. Online: <http://www.cic.gc.ca/english/resources/statistics/facts2011-preliminary/03.asp>.

¹¹³ Citizenship and Immigration Canada, *Research Datamart, Preliminary 2011 data* (on file with LCO).

¹¹⁴ For program details see, for example, Maria Deanna P. Santos, *Human Rights and Migrant Domestic Work* (Boston: Martinus Nijhoff, 2005); Daiva K. Stasiulis & Abigail B. Bakan, *Negotiating Citizenship: Migrant Women in Canada and the Global System* (Toronto: University of Toronto Press, 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 and Barriers*, 2nd rev ed (Toronto: Garamond Press, 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 International Labour Office in its report on a rights-based approach to labour migration: International Labour Office, *International Labour Migration: A Rights-Based Approach* (International Labour Office, 2010), 93. Online: http://www.ilo.org/public/libdoc/ilo/2010/110B09_59_engl.pdf. See also Sandra Elgersma, *Temporary Foreign Workers* (Library of Parliament, September 2007). Online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0711-e.pdf>.

¹¹⁵ Human Resources and Skills Development Canada, *Temporary Foreign Worker Program: Application Forms and Contracts*. Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/fwp_forms.shtml. Consultation meeting with the Foreign Agricultural Resource Management Services (F.A.R.M.S.), the Labour Issues Coordinating Committee and CanAg Travel (17 January 2012) Mississauga, Ontario.

¹¹⁶ Citizenship and Immigration Canada annual reports to Parliament on immigration, the Temporary Foreign Worker Program Integrated Results-Based Management and Accountability Framework, and the Risk-Based Audit Framework, cited in Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons, Chapter 2: Selecting Foreign Workers Under the Immigration Program* (Office of the Auditor General, Fall 2009), 9. Online: http://www.oag-bvg.gc.ca/internet/docs/parl_oag_200911_02_e.pdf.

¹¹⁷ Human Resources and Skills Development Canada, “Table 10 (Annual): Number of temporary foreign worker positions on labour market opinion confirmations under the Seasonal Agricultural Worker Program by location of employment” in *Temporary Foreign Worker Program: Labour Market Opinion (LMO Statistics) – Annual Statistics 2006-2009* (March 2010). Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table10a.shtml. In 2009, of the 27,654 LMO’s issued for SAWP workers, 17,989 were issued for Ontario.

¹¹⁸ Citizenship and Immigration Canada, News Release, “Economic Growth and Prosperity the Focus of Immigration Changes” (20 April 2012). Online: <http://www.cic.gc.ca/english/department/media/releases/2012/2012-04-20.asp>.

¹¹⁹ SAWP has its own contracts. NOC C and D and Live-in caregivers contracts now include standardized terms covering wages, accommodation, benefits, hours of work, duties, vacation and sick leave entitlements. They require that health care insurance be provided at the employer’s expense until the worker is eligible for provincial health care coverage and one week termination notice must be given to workers who have worked for longer than 3 months. Recruitment fees are prohibited and transportation costs must be covered by employers and, unlike SAWP, which allows some recovery, transportation costs may not be recovered from the worker. The contract makes clear that terms are subject to provincial employment and health and safety standards.

¹²⁰ Employers are required to provide appropriate housing (at a cost and in accordance with guidelines), a Record of Employment must be prepared and chemical and pesticide safety equipment must be provided at the employer’s expense.

¹²¹ Hennebry, note 98, 5; Consultation meeting with the Foreign Agricultural Resource Management Services (F.A.R.M.S.), the Labour Issues Coordinating Committee (17 January 2012).

¹²² Best practices include: active involvement of farm employers in program design and administration; government-to-government negotiation of operational requirements in Memoranda of Understanding (“MOU”) with the workers’ individual countries of origin; the home country’s involvement in recruitment and monitoring of workers in Canada; and health insurance coverage. Philip Martin, *Towards Effective Temporary Worker Programs: Issues and Challenges in Industrial Countries, International Migration Programme*, International Migration Papers 89 Vulnerable Workers and Precarious Work:

(International Labour Office, 2007), 47 (Martin, *Towards Effective*). Online: http://www.ilo.org/public/english/protection/migrant/download/tempworkers_martin_en.pdf; SAWP employers are required to purchase supplementary extended medical and dental plan for workers and provide free accommodation.

¹²³ Philip Martin, *Managing Labor Migration: Temporary Worker Programs for the 21st Century* (International Labour Organization – International Institute for Labour Studies, 2003), 31. Online: <http://www.ilo.org/public/english/bureau/inst/download/migration3.pdf>.

¹²⁴ Workers say that the major benefit of going to Canada is higher incomes for their families and better schooling for their children; some workers who had been in the program for over a decade had children who had become professionals. Workers earned an average C\$9,100 in 2002 and, after deductions of 20 percent, had net earnings of \$7,300. If they stayed in Mexico, the workers said they would have earned C\$900 for the same seasonal work. Martin, *Towards Effective*, note 122, 45.

¹²⁵ See for example: Human Resources and Skills Development Canada, *Agreement For The Employment In Canada Of Commonwealth Caribbean Seasonal Agricultural Workers – 2012*. Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/sawpcc2012.pdf.

¹²⁶ Consultation meeting with NMWIG (9 May 2011) Niagara-on-the-lake, Ontario; Consultation meeting with SAWP Workers.

¹²⁷ Consultation meeting with Dignidad Obrera Agricola Migrante (8 May 2011) St. Catharine's, Ontario; Consultation meeting with SAWP Workers and Agriculture Workers Alliance (AWA) Centre.

¹²⁸ See, for example, Derrick Thomas, "Foreign Nationals Working Temporarily in Canada," *Canadian Social Trends*, No 91 (Statistics Canada, Winter 2010), 41-42. Online: <http://www.statcan.gc.ca/pub/11-008-x/2010002/article/11166-eng.pdf>. It is important to note that this data is based on the 2006 Census, which necessarily excludes some migrant workers because of the timing of the Census (May 2006), language barriers, lack of knowledge that migrant workers should fill out the Census, and fear of filling out government forms.

¹²⁹ Block, *Work and Health*, note 14, 4.

¹³⁰ Thomas, note 128, 46-47.

¹³¹ Thomas, note 128, 42.

¹³² Zahra Dhanani & Mergitu Ebba, *Workplace Sexual Violence and Harassment*, METRAC's Workplace Justice Series (METRAC Centre for Research and Education on Violence against and Children, 2009). Online: <http://www.crvawc.ca/documents/Workplace%20conference/Preventing%20Violence%20Against%20Marginalized%20Workers/Preventing%20Violence%20Against%20Marginalized%20Workers%20-%20Dhanani,%20Ebba.pdf>.

¹³³ Also see the Law Commission of Ontario's Persons with Disabilities Project (online: <http://www.lco-cdo.org/en/content/persons-disabilities>). It is important to recognize that persons with disabilities are a diverse group with a wide range of abilities and needs. An individual's experience in the labour market will vary depending on the type and severity of their disability and other aspects of their social location which cause them to be vulnerable.

¹³⁴ Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: Labour Force Experience of People with Disabilities in Canada* (2008), 7. Online: <http://www.statcan.gc.ca/pub/89-628-x/89-628-x2008007-eng.pdf>.

¹³⁵ Emile Tompa, *et al*, "Precarious Employment and People with Disabilities" in Leah F. Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada*, 2006, 90 and 110.

¹³⁶ Tompa, *et al*, note 135, 112.

¹³⁷ Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey, 2006: Tables (Part V)* (2008). Online: <http://www.statcan.gc.ca/pub/89-628-x/89-628-x2008011-eng.pdf>.

¹³⁸ Tompa, *et al*, note 135, 100.

¹³⁹ Tompa, *et al*, note 135, 114.

¹⁴⁰ Francis Fong, *The Plight of Younger Workers*, Observation TD Economics (8 March 2012). Online: http://www.td.com/document/PDF/economics/special/ff0312_younger_workers.pdf.

¹⁴¹ Ontario Ministry of Training, Colleges and Universities, *Labour Market Information & Research* (January 2012) (Ontario Ministry of Training, Colleges and Universities, *Labour Market Information*). Online: <http://www.tcu.gov.on.ca/eng/labourmarket/currenttrends/docs/monthly/201112.pdf>.

¹⁴² Standing, note 12, 16.

- ¹⁴³ Ontario Ministry of Training, Colleges and University, *Labour Market Information*, note 141.
- ¹⁴⁴ Galarneau, note 50, 7 and 9.
- ¹⁴⁵ Katherine Marshall, "Employment Patterns of Post-Secondary Students" *Perspectives on Labour and Income*, Vol 11, No 9 (Statistics Canada, September 2010). Online: <http://www.statcan.gc.ca/pub/75-001-x/2010109/pdf/11341-eng.pdf>.
- ¹⁴⁶ Ontario Ministry of Labour, *Injuries at Work*. Online: <http://www.worksmartontario.gov.on.ca/scripts/default.asp?contentID=2-5-3&mcategory=health>.
- ¹⁴⁷ F. Curtis Breslin, Peter Smith, Mieke Koehoorn & Hyunmi Lee, "Is the Workplace Becoming Safer?" *Perspectives on Labour and Income*, Vol 7 No 7 (Statistics Canada, June 2006), 21. Online: <http://www.statcan.gc.ca/pub/75-001-x/10706/9271-eng.pdf>.
- ¹⁴⁸ John Sammut, "Young Workers: What Factors Put Young Workers at Risk?", *Construction Safety Magazine*, Special Issue 2. Online: http://www.csa.org/images/pfiles/280_YoungWorkers.pdf.
- ¹⁴⁹ See: Ontario Ministry of Labour, *Young Workers*. Online: <http://www.labour.gov.on.ca/english/atwork/youngworkers.php>.
- ¹⁵⁰ *Dean Report*, note 56, 46; Ontario Ministry of Labour, *Blitz Results: New and Young Workers* (December 2011). Online: http://www.labour.gov.on.ca/english/hs/sawo/blitzes/blitz_report29.php.
- ¹⁵¹ Vosko, *et al*, note 4, 33.
- ¹⁵² See Block, *Work and Health*, note 14, 4; Wayne Lewchuk, Alice De Wolff, Andy King & Michael Polanyi, "The Hidden Costs of Precarious Employment: Health and the Employment Relationship" in Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006) 141; 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, 4 February 2010), 14. Online: <http://ceris.metropolis.net/Virtual%20Library/other/PermanentlyTemporary.pdf>; Liladrie, note 97.
- ¹⁵³ Commission on Social Determinants of Health, *Closing the gap in a generation: health equity through action on the social determinants of health: Final Report of the Commission on Social Determinants of Health* (World Health Organization, 2008), 80. Online: http://whqlibdoc.who.int/publications/2008/9789241563703_eng.pdf.
- ¹⁵⁴ Heather Scott-Marshall & Emile Tompa, "The Health Consequences of Precarious Employment Experiences" (2011) 38 *Work* 369. ¹⁵⁴ Institute for Work & Health, *New Canadian immigrants face less than ideal working conditions* (July 2008) (Institute for Work & Health, "New Canadian Immigrants"). Online: www.iwh.on.ca/media/2008-jul-09.
- ¹⁵⁵ Institute for Work & Health, *New Canadian immigrants face less than ideal working conditions* (July 2008) (Institute for Work & Health, "New Canadian Immigrants"). Online: www.iwh.on.ca/media/2008-jul-09 a Brantford Ontario tobacco farm in August 2002; Waterloo Public Interest Research Group, *Migrant Workers in Ontario: Growing the Food We Eat* by Melanie Kramer (2004), 20. Online: http://www.wpirg.org/downloads/WPIRG_MigrantWorkersInOntario.pdf; Hennebry, note 98, 16-17.
- ¹⁵⁶ *Dean Report*, note 56, 46; also see Kerry Preibisch & Jenna Hennebry, "Temporary Migration, Chronic Effects: The Health of International Migrant Workers in Canada" (2011) 183(9) *CMAJ* 1033.
- ¹⁵⁷ *Dean Report*, note 56, 46.
- ¹⁵⁸ Janet McLaughlin, "Spotlight on Research: Determinants of Health of Migrant Farm Workers in Canada", *Health Policy Research Bulletin*, No 17 (Health Canada, December 2010), 30 at 32 (McLaughlin, "Spotlight on Research"). Online: http://www.hc-sc.gc.ca/sr-sr/alt_formats/pdf/pubs/hpr-rpms/bull/2010-health-sante-migr-eng.pdf.
- ¹⁵⁹ Janet McLaughlin, "Spotlight on Research", note 158.
- ¹⁶⁰ Law Commission of Canada, *Is Work Working?: Work Laws that Do a Better Job, Discussion Paper* (Law Commission of Canada, 2004), 37 (Law Commission of Canada, *Is Work Working?*).
- ¹⁶¹ Lewchuk, Clarke & de Wolff, note 14, 255 and 261.
- ¹⁶² Preibisch & Hennebry, note 156, 1035.
- ¹⁶³ Consultation meeting with workers; Consultation meeting with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011) Toronto, Ontario; Consultation meeting with Wayne Lewchuk and Sam Vrankulj (21 April 2011) Toronto, Ontario; Consultation meeting with the Poverty and Employment Precarity in Southern Ontario (PEPSO) Research Alliance (17 June 2011) Toronto, Ontario.
- ¹⁶⁴ Block, *Work and Health*, note 14.

-
- ¹⁶⁵ Ana Maria Seifert, *et al*, “Precarious Employment Conditions Affect Work Content in Education and Social Work: Results of Work Analyses” (2007) 30 *Int’l J L & Psychiatry* 299.
- ¹⁶⁶ Institute for Work & Health, “Over-Qualified Immigrants at Risk of Poorer Mental Health”, *At Work* 64 (Spring 2011) 5. Online: http://www.iwh.on.ca/system/files/at-work/at_work_64.pdf.
- ¹⁶⁷ Consultation meeting with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011) Toronto, Ontario.
- ¹⁶⁸ See David Little, *Vulnerable Workers: The Legal Challenges* (Community Legal and Advocacy Centre, October 2005); Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 33 citing Ontario Federation of Labour, *Temporary Work in Ontario* (2002); Laurie Monsebraaten, “Fighting for dignity on the job”, *The Toronto Star* (11 July 2009). Online: <http://www.thestar.com/article/664487>.
- ¹⁶⁹ Preibisch & Hennebry, note 156, 1036; Hennebry, note 98.
- ¹⁷⁰ Yi Man Ng Submission (on file with the LCO).
- ¹⁷¹ *Employment Standards Act, 2000*, note 41 s 50.
- ¹⁷² Commission for the Review of Social Assistance in Ontario, *A Discussion Paper: Issues and Ideas* (Toronto: Commission for the Review of Social Assistance in Ontario, June 2011), 25. Online: <http://www.socialassistancereview.ca/uploads/File/A-Discussion-Paper---Issues-and-Ideas---English.pdf>.
- ¹⁷³ Workers’ Action Centre, *Working on the Edge*, note 75, 38.
- ¹⁷⁴ Ron Saunders, “Making Work Pay: Findings and Recommendations” (May 2006) 6 *Research Highlights* 1 (CPNR’s Vulnerable Workers Series). Online: http://www.cprn.org/documents/43620_en.pdf.
- ¹⁷⁵ Leah F. Vosko, *The Challenge of Expanding EI Coverage: Charting Exclusions and Partial Exclusions on the Bases of Gender, Immigration Status, Age, and Place of Residence and Exploring Avenues for Inclusive Policy Redesign* (Toronto: Mowat Centre for Policy Innovation, 2011) (Vosko, *Expanding EI Coverage*). Online: http://www.mowateitaskforce.ca/sites/default/files/Vosko_1.pdf.
- ¹⁷⁶ Vosko, *Expanding EI Coverage*, note 175, 3.
- ¹⁷⁷ City of Toronto, *Working As One: A Workforce Development Strategy for Toronto* (2012), 9. Online: <http://www.toronto.ca/socialservices/pdf/reports/WorkingAsOne.pdf>.
- ¹⁷⁸ *Immigration and Refugee Protection Regulations*, SOR 2002-227 s 212.
- ¹⁷⁹ See Law Commission of Ontario, *The Law as it Effects Older Adult: Consultation Project: Shaping the Project* (2008), 2. Online: <http://www.lco-cdo.org/older-adults/Older-Adults-Pre-Consultation-Paper.pdf>.
- ¹⁸⁰ See: Law Commission of Ontario, *Older Adults* project. Online: <http://www.lco-cdo.org/en/content/older-adults>.
- ¹⁸¹ Nathan Laurie, *The Cost of Poverty* (Toronto: Ontario Association of Food Banks, 2008), 4 and 14-15. Online: <http://www.oafb.ca/assets/pdfs/CostofPoverty.pdf>.
- ¹⁸² Laurie, note 181, 14. See too: Wilkinson & Pickett, note 28, 103-117.
- ¹⁸³ Income Security, Race and Health Research Group, note 92, 61.
- ¹⁸⁴ Workers’ Action Centre, *Working on the Edge*, note 75, 38; Andrew Jackson & Katherine Scott, *Does Work Include Children? The Effects of the Labour market on Family Income, Time and Stress*, Laidlaw Working Paper Series on Social Inclusion (The Laidlaw Foundation, 2002), 16-18 and 19-21. Online: http://www.laidlawfdn.org/sites/default/files/laidlaw_publications/working_papers_social_inclusion/wpsosi_2002_may_does-work-include-children.pdf; Block, *Work and Health*, note 14; Wayne Lewchuk, Alice de Wolff, Andy King & Michael Polanyi, “From Job Strain to Employment Strain: Health Effects of Precarious Employment” (2003) 3 *Just Labour* 23. Online: <http://www.justlabour.yorku.ca/volume3/pdfs/lewchuketal.pdf>; Income Security, Race and Health Research Group, note 92, 61.
- ¹⁸⁵ Judith K Bernhard, Luin Goldring, Julie Young, Carolina Berinstein & Beth Wilson, “Living with Precarious Legal Status in Canada: Implications for the Well-Being of Children and Families (2007) 24:2 *Refuge* 101, 105-108. Online: <http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/21388/20058>.
- ¹⁸⁶ Laurie, note 181, 15.
- ¹⁸⁷ For a wider lens on the issues, Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10.
- ¹⁸⁸ See, for example, the papers in Leah Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006); Income Security, Race and Health Research Group, note 92; Vosko, *Managing the Margins*, note 67; Lewchuk, Clarke & de Wolff, note 14.
- ¹⁸⁹ Law Commission of Canada, *Is Work Working?*, note 160.

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- ¹⁹⁰ Law Commission of Canada, *Is Work Working?*, note 160, 33.
- ¹⁹¹ Law Commission of Canada, *Is Work Working?*, note 160, 51-52 and 54-57.
- ¹⁹² Arthurs, note 10.
- ¹⁹³ Arthurs, note 10, xv, 8 and 231.
- ¹⁹⁴ Arthurs, note 10, 18.
- ¹⁹⁵ Arthurs, note 10, 18-19.
- ¹⁹⁶ Arthurs, note 10, 250.
- ¹⁹⁷ *Employment Standards Act, 2000*, note 41; *Occupational Health and Safety Act*, note 111.
- ¹⁹⁸ A more detailed introduction to the legislative regime governing employment and labour relations in Ontario is included in in Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 19-32.
- ¹⁹⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.
- ²⁰⁰ See, for example, *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, paras 26-29 (*Dunmore*).
- ²⁰¹ *Labour Relations Act, 1995*, SO 1995, c 1, Sched A s 3.
- ²⁰² *Human Rights Code*, RSO 1990, c H.19 s 5(1): “Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.”
- ²⁰³ Ontario Human Rights Commission, *Human Rights at Work, 2008*, 3d ed (Toronto: Ontario Human Rights Commission, 2008) (Ontario Human Rights Commission, *Human Rights at Work*). Online: <http://www.ohrc.on.ca/en/human-rights-work-2008-third-edition>.
- ²⁰⁴ *Human Rights Code*, note 202 ss 11, 24.
- ²⁰⁵ *Human Rights Code*, note 202 s 8.
- ²⁰⁶ *Occupational Health and Safety Act*, note 111 s 50(1); *Employment Standards Act, 2000*, note 41 s 74(1).
- ²⁰⁷ Ontario Human Rights Commission, *Human Rights at Work*, note 207; *Health Services and Support - Facilities Subsector Bargaining Assn v. British Columbia*, 2007 SCC 27 (*Health Services*), para 69; *Dunmore*, note 200, 27.
- ²⁰⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976) (*ICESCR*). Online: <http://www2.ohchr.org/english/law/cescr.htm>; *International Covenant on Social and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976); International Labour Organization, “Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)” in International Labour Office, *The International Labour Organization’s Fundamental Conventions* (2003) (*Convention No 87*). Online: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf.
- ²⁰⁹ *Health Services*, note 207, para 78. Emphasis in original.
- ²¹⁰ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, paras 91-97 (*Fraser SCC*).
- ²¹¹ *ICESCR*, note 208 art 6.
- ²¹² *ICESCR*, note 208 art 7.
- ²¹³ *ICESCR*, note 208 art 8.
- ²¹⁴ *ICESCR*, note 208 art 28 (“The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”). The Ontario Human Rights Commission explains that “the *ICESCR* is binding on the federal government and each of the provinces and territories, and rights that are within provincial competence are the obligation of the provincial and territorial governments”; Ontario Human Rights Commission, *Social, Cultural and Economic Rights Under International Law: Research Paper, Policy and Education Branch*. Online: http://www.ohrc.on.ca/sites/default/files/attachments/Human_rights_commissions_and_economic_and_social_rights.pdf.
- ²¹⁵ See the also Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 46-47.
- ²¹⁶ *Convention No 87*, note 208 part I art 2.
- ²¹⁷ *Convention No 87*, note 208 part II art 11.
- ²¹⁸ *Health Services*, note 207, para 71.
- ²¹⁹ *Convention (No 98) Concerning the Application of the Principles of the Right to Organise and Bargain Collectively*, 1 July 1949, 96 UNTS 257 (entered into force: 18 July 1951).

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- ²²⁰ See Judy Fudge, *The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, Working Paper Series No 11-15 (Metropolis British Columbia, 2011). Online: <http://riim.metropolis.net/assets/uploads/files/wp/2011/WP11-15.pdf>.
- ²²¹ Dunmore, note 200, para 27.
- ²²² Government of Ontario, *Breaking the Cycle: Ontario's Poverty Reduction Strategy* (Toronto: Ministry of Children and Youth Services, December 2008). Online: www.growingstronger.ca/english/default.asp.
- ²²³ *Poverty Reduction Act, 2009*, SO 2009, c 10 preamble.
- ²²⁴ *Poverty Reduction Act, 2009*, note 223 preamble.
- ²²⁵ *Poverty Reduction Act, 2009*, note 223 s 2(2)1.
- ²²⁶ *Poverty Reduction Act, 2009*, note 223 s 2(2)3.
- ²²⁷ *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009*, SO 2009, c 32; *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, SO 2009, c 9.
- ²²⁸ Commission for the Review of Social Assistance in Ontario, note 172, 2 and 22.
- ²²⁹ Zizys, note 17, 9.
- ²³⁰ Ontario Ministry of Labour, *2011 Minimum Wage Rate Set: Highest of Canadian Provinces* (11 February 2011). Online: <http://news.ontario.ca/mol/en/2011/02/2011-minimum-wage-rate-set---highest-of-canadian-provinces.html>; Ontario, Legislative Assembly, *Statement to the Legislature Regarding the Introduction of: The Occupational Health and Safety Statute Law Amendment Act, 2011*, 39th Parl, 2nd Sess (3 March, 2011) (Hon Charles Sousa, Minister of Labour). Online: http://www.labour.gov.on.ca/english/news/pdf/2011/ms_ohsa.pdf.
- ²³¹ Ontario Ministry of Labour, *Dedicated Team to Enforce New Laws that Protect Ontario's Vulnerable Workers* (July 2010). Online: http://www.labour.gov.on.ca/english/es/pubs/es_det.php.
- ²³² Office of the Premier, *Attracting Investment and Creating Jobs in Southwestern Ontario* (28 November 2011). Online: <http://news.ontario.ca/opo/en/2011/11/attracting-investment-and-creating-jobs-in-southwestern-ontario.html>.
- ²³³ Service Canada, *Employment Insurance Special Benefits for Self-Employed People*. Online: <http://www.servicecanada.gc.ca/eng/sc/ei/sew/index.shtml>.
- ²³⁴ *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, SOR/2010-172. Online: <http://gazette.gc.ca/rp-pr/p2/2010/2010-08-18/html/sor-dors172-eng.html>.
- ²³⁵ *Employment Standards Act 2000*, note 41.
- ²³⁶ *Employment Standards Act*, SO 1968, c 35.
- ²³⁷ Vosko, *et al*, note 4, 8-9.
- ²³⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess (1 December 2003) (Hon Alvin Curling, Speaker). Online: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2003-12-01&Parl=38&Sess=1&locale=en#P175_26881; *Exemptions Special Rules and Establishment of Minimum Wage*, O Reg 285/01; Vosko, *et al*, note 4, 10.
- ²³⁹ *Employment Standards Act 2000*, note 41.
- ²⁴⁰ *Employment Standards Amendment Act (Temporary Help Agencies)*, note 227.
- ²⁴¹ *Open for Business Act*, 2010, SO 2010, c 16.
- ²⁴² Vosko, *et al*, note 4, 17-18 ; Workers' Action Centre, *Working on the Edge*, note 75, 56-57.
- ²⁴³ *Canada Labour Code*, RS, c L-1 s 1.
- ²⁴⁴ Arthurs, note 10, 80.
- ²⁴⁵ Notes for an Address by the Hon Dalton Bales, QC, Minister of Labour for Ontario, During 2nd Reading of *The Employment Standards Act, 1968* (31 May 1968), Toronto, Archives of Ontario (Ministry of Labour, Minister, Correspondence, File 7-1-0-1407.2, box 47).
- ²⁴⁶ Arthurs, note 10, 30.
- ²⁴⁷ Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 38-39.
- ²⁴⁸ Noack & Vosko, note 4, 4.
- ²⁴⁹ Workers' Action Centre, *Working on the Edge*, note 75, 49.
- ²⁵⁰ *Occupational Health and Safety Act*, note 111 s 4.1(2).
- ²⁵¹ Statistics Canada, *Table 2 Rate of employees working for minimum wage or less, by province*. Online: <http://www.statcan.gc.ca/pub/75-001-x/tables-tableaux/topics-sujets/minimumwage-salaireminimum/2009/tbl02-eng.htm>.

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- ²⁵² *Exemptions Special Rules and Establishment of Minimum Wage*, see note 238 s 5(1.3).
- ²⁵³ On January 1, 2004 Ontario's minimum wage was \$6.85, see Ontario Ministry of Labour, *Background: Ontario's Minimum Wage Increases 2007 To 2010*. Online: <http://www.labour.gov.on.ca/english/news/pdf/2007/07-85b.pdf>.
- ²⁵⁴ Ontario Ministry of Labour, *2011 Minimum Wage Rate Set - Highest of Canadian Provinces: McGuinty Government Striking the Right Balance* (11 February 2011). Online: <http://news.ontario.ca/mol/en/2011/02/2011-minimum-wage-rate-set---highest-of-canadian-provinces.html>.
- ²⁵⁵ Noack & Vosko, note 4, 35.
- ²⁵⁶ Workers' Action Centre, *Working on the Edge*, note 75, 68.
- ²⁵⁷ Marilyn Braun-Pollon, Amelia DeMarco & Queenie Wong, *Minimum Wage: Reframing the Debate* (Canadian Federation of Independent Business, 2011), 18. Online: <http://www.cfib-fcei.ca/cfib-documents/rr3216.pdf>.
- ²⁵⁸ Braun-Pollon, DeMarco & Wong, note 257, 5.
- ²⁵⁹ Arthurs, note 10, 238.
- ²⁶⁰ Arthurs, note 10, 238.
- ²⁶¹ Vosko & Clark, note 79, 32-33.
- ²⁶² Noack & Vosko, note 4, 19-20.
- ²⁶³ Arthurs, note 10, 241.
- ²⁶⁴ Ontario Ministry of Labour "Personal Emergency Leave" in *Your Guide to the Employment Standards Act, 2000* (Ministry of Labour, 2009), 70. Online: http://www.labour.gov.on.ca/english/es/pdf/es_guide.pdf.
- ²⁶⁵ *Employment Standards Act 2000: Policy and Interpretation Manual*, vol 1 (Scarborough: Carwell, 2001), 18-10 (*Employment Standards Manual Vol 1*).
- ²⁶⁶ Consultation with Chinese Interagency Network's Labour Committee (6 May 2011) Toronto, Ontario.
- ²⁶⁷ Consultation with Labour Issues Coordinating Committee (6 May 2011) Toronto, Ontario/Flowers Canada-Ontario (17 April 2012).
- ²⁶⁸ *Employment Standards Act*, RSPEI 1988, c E-6.2 s 23(1).
- ²⁶⁹ Arthurs, note 10, 240.
- ²⁷⁰ Arthurs, note 10, xiv.
- ²⁷¹ Consultation meeting with the Ministry of Labour (MOL) (20 July 2011) Toronto, Ontario; Consultation meeting with Canadian Manufacturing and Exporters (CME) (11 May 2011) Mississauga, Ontario; Consultation meeting with workers; Consultation meeting with service providers (13 April 2011) Belleville, Ontario; Consultation meeting with the Labour Committee of the Chinese Interagency Network (6 May 2011) Toronto Ontario; Consultation meeting with the Agriculture Workers Alliance (AWA); Consultation meeting with the Niagara Migrant Workers Interest Group (30 March 2011) St. Catharines, Ontario; Colour of Poverty Campaign, Metro Toronto Chinese and the Southeast Asian Legal Clinic Submission, 1 (on file with the LCO); David J Doorey, *Improving Employment Standards Compliance: Institutional Learning and the Dual Regulatory Stream* (21 March 2011), 3 and 5. Online: <http://ssrn.com/abstract=1791815>.
- ²⁷² Workers' Action Centre, *Working on the Edge*, note 75, 69.
- ²⁷³ For example, Vosko, *et al*, note 4, 105; Workers' Action Centre, *Taking Action Against Wage Theft: Recommendations for Change* (Workers Action Centre, May 2011) (Workers' Action Centre, *Taking Action*). Online: http://www.workersactioncentre.org/wp-content/uploads/2011/12/pb_wtrecsforchange_eng.pdf.
- ²⁷⁴ For example, Vosko, *et al*, note 4, 71; Workers' Action Centre, *Taking Action*, note 273; New York State Department of Labour, *Labor Department Initiative Empowers Ordinary People to Join the Fight Against Wage Theft* (26 January 2009). Online: http://www.labor.ny.gov/pressreleases/2009/Jan26_2009.htm.
- ²⁷⁵ US, Senate Committee on Health, Education, Labor and Pensions, 111th Congr, *Ranking Member Report: The Nomination of M. Patricia Smith of New York, Nominee to Serve as Solicitor of Labor, U.S. Department of Labor: Accuracy of Senate Testimony* (1 February 2010). Online: <http://www.help.senate.gov/newsroom/press/release/?id=36ce7cc0-a29b-4482-ac85-a17ac37fc062>.
- ²⁷⁶ Ontario, Commission on the Reform of Ontario's Public Services, *Public Services for Ontarians: A Path to Sustainability and Excellence* (2012), 128 (Recommendations 3-11) (*Drummond Report*). Online: <http://www.fin.gov.on.ca/en/reformcommission/chapters/report.pdf>.
- ²⁷⁷ Arthurs, note 10, 81.
- ²⁷⁸ *Employment Standards Act, 2000*, note 41 s 74.6 (1)
- ²⁷⁹ Vosko, *et al*, note 4, 31.
- ²⁸⁰ Arthurs, note 10, 80.

²⁸¹ Arthurs, see note 10, 53.

²⁸² Ontario Ministry of Labour, “Education, Outreach and Partnership” (October 2011). Online: <http://www.labour.gov.on.ca/english/es/eop>.

²⁸³ Vosko, *et al*, note 4, 15.

²⁸⁴ Doorey, note 271, 3 and 5.

²⁸⁵ Consultation meeting with the Caregivers’ Action Centre (28 February 2011) Toronto, Ontario; Consultation meeting with Niagara Migrant Workers Interest Group (9 May 2011) Niagara-on-the-Lake, Ontario; Consultation meeting with the Labour Committee of the Chinese Interagency Network (6 May 2011) Toronto, Ontario.

²⁸⁶ Consultation meeting with the Labour Committee of the Chinese Interagency Network, Toronto, Ontario.

²⁸⁷ Consultation meeting with workers; Consultation meeting with the Labour Committee of the Chinese Interagency Network (6 May 2011) Toronto, Ontario; Consultation meeting with the Ontario Federation of Labour and Canadian Auto Workers (5 April 2011) Toronto, Ontario; Submissions to LCO (on file with LCO); Consultation meeting with the Caregivers’ Action Centre (28 February 2011) Toronto, Ontario; Consultation meeting with the Agriculture Workers Alliance.

²⁸⁸ Consultation meeting with workers.

²⁸⁹ Ontario Ministry of Labour, *Investigations and Inspection Statistics* (June 2009). Online: <http://www.labour.gov.on.ca/english/es/pubs/enforcement/investigations.php>.

²⁹⁰ Vosko, *et al*, note 4, 30.

²⁹¹ Workers’ Action Centre, *Working on the Edge*, note 75, 46; Metro Toronto Chinese and the Southeast Asian Legal Clinic Submission, 1 (on file with the LCO).

²⁹² Vosko, *et al*, note 4, 30.

²⁹³ Vosko, *et al*, note 4, 31.

²⁹⁴ Vosko, *et al*, note 4, 31.

²⁹⁵ Workers’ Action Centre, *Working on the Edge*, note 75, 70, citing Office of the Auditor General of Ontario, *2004 Annual Report* (2004), 240 (Office of the Auditor General, *2004 Annual Report*). Online: http://www.auditor.on.ca/en/reports_en/en04/309en04.pdf.

²⁹⁶ Vosko, *et al*, note 4, 26.

²⁹⁷ Arthurs, note 10, 212-213.

²⁹⁸ Vosko, *et al*, note 4, 81.

²⁹⁹ Vosko, *et al*, note 4, 55-56.

³⁰⁰ Arthurs, note 10, 53-54.

³⁰¹ Arthurs, note 10, 213.

³⁰² Vosko, *et al*, note 4, 72 citing Eric Tucker, “Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom” (Paper delivered at the Theo Nichols Conference “Safety or Profit”, Cardiff University, 11 January 2011), 17; Consultation meeting with the Caregivers’ Action Centre (28 February 2011) Toronto, Ontario; Consultation meeting with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011) Toronto, Ontario; Consultation meeting with Wayne Lewchuk and Sam Vrankulj (21 April 2011) Toronto, Ontario; Colour of Poverty Campaign, Metro Toronto Chinese and the Southeast Asian Legal Clinic Submission, 4 (on file with the LCO).

³⁰³ Vosko, *et al*, note 4, 15.

³⁰⁴ *Open for Business Act*, note 241 Schedule 9 s 1(3).

³⁰⁵ *Employment Standards Act 2000: Policy and Interpretation Manual*, vol 2 (Scarborough: Carswell, 2001), 26-7; The Ministry of Labour’s website states: “If you have not already tried to contact your employer, you will generally need to do so before your claim will be investigated.” Ontario Ministry of Labour, *Steps to Filing a Claim* (January 2011). Online: <http://www.labour.gov.on.ca/english/es/pubs/start/index.php#steps>.

³⁰⁶ Ontario Ministry of Labour, *Filing an Employment Standards Claim* (January 2011). Online: <http://www.labour.gov.on.ca/english/es/pubs/guide/esclaim.php>.

³⁰⁷ Color of Poverty Campaign and Metro Chinese and Southeast Asian Legal Clinic, *Joint Submission to the Law Commission of Ontario Concerning Vulnerable Workers and Vicarious Work* (on file with the LCO).

³⁰⁸ Ontario Ministry of Economic Development and Innovation, *Proposed Open For Business Act* (17 May 2010). Online: <http://news.ontario.ca/medt/en/2010/05/proposed-open-for-business-act.html>; Meaghan Ross & Alex Diceanu, “Bill 68: Open for Business or an Open Call for Action?” *Mayday Magazine* 67 (3 December 2010). Online:

<http://www.maydaymagazine.ca/donate/item/114-bill-68-open-for-business-or-an-open-call-for-action>; Whitten & Lubin, *Open for Business Act, Open for Criticism* (20 January 2011). Online: <http://blog.toronto-employmentlawyer.com/open-for-business-act-open-for-criticism>; Candian HR Reporter, *Ontario bill creates barriers to ESA complaints: Workers' advocates* (5 August 2010). Online: www.hrreporter.com/articleprint.aspx?articleid=8114.

³⁰⁹ *Drummond Report*, note 276, 127 (Recommendations 3-9).

³¹⁰ Consultation meeting with service providers (13 April 2011) Belleville, Ontario; Colour of Poverty Campaign, Metro Toronto Chinese and the Southeast Asian Legal Clinic Submission, 6 (on file with the LCO).

³¹¹ Vosko, *et al*, note 4, 18, 62 and 104.

³¹² Workers' Action Centre, *Working on the Edge*, note 75, 74; Vosko, *et al*, note 4, 106.

³¹³ Doorey, note 271, 8.

³¹⁴ *Employment Standards Manual Vol 2*, note 305, c 26-110.

³¹⁵ Vosko, *et al*, note 4, 33.

³¹⁶ Vosko, *et al*, note 4, 36.

³¹⁷ Mark P. Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal & Kingston: McGill-Queen's University Press, 2009) 131-132.; Vosko, *et al*, note 4, 36.

³¹⁸ Doorey, note 271, 3. Emphasis in original.

³¹⁹ Office of the Auditor General of Ontario, "Employment Rights and Responsibilities Program" in Office of the Auditor General *2004 Annual Report*, note 295, 239.

³²⁰ Vosko, *et al*, note 4, 106.

³²¹ Workers' Action Centre, *Working on the Edge*, note 75, 70.

³²² Office of the Auditor General of Ontario, "Employment Rights and Responsibilities Program" in *2006 Annual Report* (2006), 309 (Office of the Auditor General, *2006 Annual Report*). Online: http://www.auditor.on.ca/en/reports_en/en06/409en06.pdf.

³²³ Ontario Ministry of Labour, *Enforcement Data* (on file with LCO).

³²⁴ Ontario Ministry of Labour, *Business Service Standards: Employment Standards* (April 2011). Online: http://www.labour.gov.on.ca/english/about/ss_business.php.

³²⁵ Vosko, *et al*, note 4, 63.

³²⁶ Vosko, *et al*, note 4, 64; This strategy was employed by the Ministry of Labour in its enforcement blitzes in the aftermath of the deaths of four migrant workers who fell from scaffolding on 24 December 2009.

³²⁷ Consultation meetings with TFW and other workers; Consultation meeting with Migrant Workers for Change and the Canadian Auto Workers (CAW) (1 March 2011) Toronto, Ontario; Consultation meetings with Niagara Migrant Workers Interest Group (30 March 2011) St. Catharines, Ontario, (9 May 2011) Niagara-on-the-Lake, Ontario; Consultation meeting with Agricultural Workers Alliance.

³²⁸ Office of the Auditor General, *2004 Annual Report*, note 295, 242.

³²⁹ Office of the Auditor General, *2006 Annual Report*, note 322, 309-310.

³³⁰ Vosko, *et al*, note 4, 19-20; *Employment Standards Act, 2000*, note 41 ss 103(1), 104(10, 73.16, 74.17, 108(1), 113(1) and 132.

³³¹ *Provincial Offences Act*, RSO 1990, c P 33 (POA).

³³² See Law Commission of Ontario, "Modernization of the *Provincial Offences Act*" (2011), 16-17. Online: <http://www.lco-cdo.org/POA-Final-Report.pdf>. Part I proceedings under the POA are commenced by way of a certificate of offence. For these offences, "the provincial offences officer has elected to proceed by way of a less formal ticketing process, rather than compel the person's attendance in court through the Part III mechanism... The maximum fine is \$1,000 and imprisonment is not a permitted penalty." Proceedings under Part III of the POA are commenced by swearing of an information before a justice and are used for more serious provincial offences. "The decision whether to prosecute under Part I or Part III often rests with the police officer or provincial offences officer. That decision will depend upon the nature of the offence and the public interest that may demand higher penalties... The decision to charge under Part III may also depend on the circumstances or consequences of the commission of the offence." (17).

³³³ Workers' Action Centre, *Working on the Edge*, note 75, 59.

³³⁴ Arthurs, note 10, 196; Office of the Auditor General, *2004 Annual Report*, note 295, 244-245.

³³⁵ Vosko, *et al*, note 4, 104-105.

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- ³³⁶ Consultation meeting with service providers (13 April 2011) Belleville, Ontario; Colour of Poverty Campaign, Metro Toronto Chinese and the Southeast Asian Legal Clinic Submission, 8 (on file with the LCO).
- ³³⁷ Data provided by Ontario Ministry of Labour, on file with LCO.
- ³³⁸ Thomas, note 317, 130; Vosko, *et al*, note 4, 31, citing data derived from the Ontario Ministry of Labour, “Historical Funding-Operations, 1997-98 to 2006-07” (April 16, 2007), on file with authors; Ontario Ministry of Labour, “Annual report of 2007-08” (8 July 2008), on file with authors.
- ³³⁹ Ontario Ministry of Finance, *2011 Ontario Budget* (2011), 114. Online: http://www.fin.gov.on.ca/en/budget/ontariobudgets/2011/papers_all.pdf.
- ³⁴⁰ Ontario Ministry of Labour, *Backgrounder: Employment Standards: Education and Enforcement* (29 July 2011). Online: http://www.labour.gov.on.ca/english/news/bg_esenforcement110729.php.
- ³⁴¹ Anil Verma, *The Role of Employee Voice in Obtaining Better Labour Standards* (Federal Labour Standards Review, 2006), 3. Online: http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/research19.pdf.
- ³⁴² *Occupational Health and Safety Act*, note 111.
- ³⁴³ Roy Adams, *Industrial Relations Under Liberal Democracy: North America in Comparative Perspective* (Columbia: University of South Carolina Press, 1995), excerpted in The Labour Law Casebook Group, *Labour & Employment Law: Cases, Materials and Commentary*, 7th ed (Toronto: Irwin Law, 2004), 388.
- ³⁴⁴ Adams, note 343, 390.
- ³⁴⁵ Verma, note 341, 26.
- ³⁴⁶ Adams, note 343, 390.
- ³⁴⁷ Verma, note 341, 26.
- ³⁴⁸ Verma, note 341, 27-29.
- ³⁴⁹ David Weil, *Improving Workplace Conditions Through Strategic Enforcement*, Boston University School of Management Research Paper No 2010-20 (2010), 2. Online: <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>.
- ³⁵⁰ Weil, note 349, 16-17.
- ³⁵¹ See Hennebry, note 98, 14 and 16; Kerry L. Preibisch, “Migrant Agricultural Workers and Processes of Social Inclusion in Rural Canada: Encuentros and Descuentros” (2004) 29 *Canadian Journal of Latin and American & Caribbean Studies* 203, 212 and 229; Human Rights, Equity and Diversity Department of the United Food and Commercial Workers Union, *Report on the Status of Migrant Workers in Canada 2011* (2011), 22-23. Online: <http://www.ufcw.ca/templates/ufcwcanada/images/Report-on-The-Status-of-Migrant-Workers-in-Canada-2011.pdf>; Janet McLaughlin, “Falling Through the Cracks: Seasonal Foreign Farm Workers’ Health and Compensation Across Borders” (October 2007) 21:1 *The IAVGO Reporting Service*, 5 (McLaughlin, “Falling Through the Cracks”). Online: <http://www.injuredworkersonline.org/Documents/ONIWGconfMcLaughlin.pdf>.
- ³⁵² Hennebry, note 98, 14.
- ³⁵³ *Employment Standards Act, 2000*, note 41 s 74.
- ³⁵⁴ *Dean Report*, note 56, 46. Issues related to health and safety and WSIB were also reported. These will be discussed in the Part on OHSA.
- ³⁵⁵ Consultation meeting with the Foreign Agricultural Resource Management Services (F.A.R.M.S.), the Labour Issues Coordinating Committee and CanAg Travel (17 January 2012) Mississauga, Ontario; F.A.R.M.S. information indicates workers return home for other reasons including medical, domestic, and incompatible match. In general, the numbers of returns are low. The highest number of returns are for domestic (worker’s personal) reasons. Information supplied by F.A.R.M.S.(on file with LCO)
- ³⁵⁶ Consultation meeting with the Foreign Agricultural Resource Management Services (F.A.R.M.S.), the Labour Issues Coordinating Committee and CanAg Travel (17 January 2012) Mississauga, Ontario.
- ³⁵⁷ Consultation meeting with Foreign Agricultural Resource Management Services (F.A.R.M.S.) (17 May 2011) Mississauga, Ontario.
- ³⁵⁸ Consultations with workers; Information provided by F.A.R.M.S. to LCO (April 2012).
- ³⁵⁹ Hennebry, note 98, 14 and 16.
- ³⁶⁰ *Dean Report*, note 56, 50
- ³⁶¹ MIGRANTE – Ontario, the Caregivers Action Centre, Justicia for Migrant Workers and the Niagara Migrant Workers Interest Group.

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- ³⁶² United Food and Commercial Workers Union, *Maps to Agriculture Workers Alliance Regional Offices* (2011). Online: http://www.ufcw.ca/index.php?option=com_content&view=article&id=2008&Itemid=246&lang=en; United Food and Commercial Workers Canada & Agriculture Workers Alliance, *The Status of Migrant Farm Workers in Canada 2010-2011* (2011), 12. Online: http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf.
- ³⁶³ Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012), 17-19; Human Resources and Skills Development Canada, *Work – Unionization Rates* (Human Resources and Skills Development Canada, *Work – Unionization Rates*). Online: <http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=17>.
- ³⁶⁴ *Dunmore*, note 200, para 46.
- ³⁶⁵ Dan Cameron, “Employee Voice In The Non-Union Setting” *Policy Options* 29:04 (April 2008) 67, 67. Online: <http://www.irpp.org/po/archive/apr08/cameron.pdf>.
- ³⁶⁶ John Allemang, “The sorry state of our unions”, *The Globe and Mail* (24 March 2012). Online: <http://www.theglobeandmail.com/news/national/the-sorry-state-of-our-unions/article2380055/page3/>.
- ³⁶⁷ The LCO’s Background Paper provides a brief summary of the rise of industrial unionism in Canada during the post-war period and its marked decline over the past few years: Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 21-24 and 31-32.
- ³⁶⁸ Lewchuk, Clarke & de Wolff, note 14, 288; Angelo DiCaro, Chad Johnston & Jim Stanford, “Canada’s Labour Movement in Challenging Times: Unions and their Role in a Changing Economy” in Norene Pupo, Dan Glenday & Ann Duffy, eds, *The Shifting Landscape of Work* (Toronto: Nelson Education, 2011), 49.
- ³⁶⁹ Human Resources and Skills Development Canada, *Work – Unionization Rates*, note 363.
- ³⁷⁰ Human Resources and Skills Development Canada, *Work – Unionization Rates*, note 363.
- ³⁷¹ Human Resources and Skills Development Canada, *Union Coverage in Canada: Unionization Rate Stable Over Past Four Years* (Human Resources and Skills Development Canada, *Union Coverage in Canada*). Online: http://www.hrsdc.gc.ca/eng/labour/labour_relations/info_analysis/overview/2010/section_6.shtml.
- ³⁷² Human Resources and Skills Development Canada, *Union Coverage in Canada*, note 371.
- ³⁷³ See Chapter 1.
- ³⁷⁴ Lewchuk, Clarke & de Wolff, note 14, 288.
- ³⁷⁵ *Labour Relations Act*, SO 1950, c 34.
- ³⁷⁶ Some union leaders have made the same point recently suggesting that unions must adapt to changing realities. Allemang, note 366.
- ³⁷⁷ John Anderson, James Beaton, & Kate Laxer, “The Union Dimension: Mitigating Precarious Employment?”, in Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006), 301.
- ³⁷⁸ *Fraser SCC*, note 210, 365; Ontario Ministry of Labour, *Task Force on Agricultural Labour Relations: Report to the Minister of Labour* (Task Force on Agricultural Labour Relations, 1992), 3.
- ³⁷⁹ *Agricultural Labour Relations Act, 1994*, SO 1994, c 6 s 4.
- ³⁸⁰ *Dunmore*, note 200; The s. 15 argument was not considered in *Dunmore* and it was unsuccessful in *Fraser*, the subsequent SCC case on the issue.
- ³⁸¹ *Dunmore*, note 200, para 41.
- ³⁸² *Dunmore*, note 200, para 54.
- ³⁸³ *Dunmore*, note 200, para 52.
- ³⁸⁴ *Dunmore*, note 200, para 54.
- ³⁸⁵ *Dunmore*, note 200, para 53.
- ³⁸⁶ *Dunmore*, note 200, para 53.
- ³⁸⁷ *Dunmore*, note 200, para 55.
- ³⁸⁸ *Dunmore*, note 200, para 2.
- ³⁸⁹ *Dunmore*, note 200, para 42.
- ³⁹⁰ *Dunmore*, note 200, paras 2 and para 67.
- ³⁹¹ *Agricultural Employees Protection Act, 2002*, SO 2002, c 16 ss 1(1) (AEPA).
- ³⁹² AEPA, note 391 ss 1(2).

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- ³⁹³ There is no express provision in the AEPA for employers to consider employee representations in good faith but the Supreme Court of Canada has held that this duty is implicit: *Fraser* SCC, note 210, paras 101-102.
- ³⁹⁴ *Fraser v. Ontario (Attorney General)* (2006), 79 OR (3d) 219 (SCJ) (*Fraser* SCJ).
- ³⁹⁵ *Health Services*, note 207.
- ³⁹⁶ *Fraser* SCC, note 210, para 40. The Ontario Court of Appeal has recently considered *Fraser* in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2012 ONCA 363.
- ³⁹⁷ *Fraser* SCC, note 210, para 41.
- ³⁹⁸ *Fraser* SCC, note 210, paras 101-102.
- ³⁹⁹ *Fraser* SCC, note 210, para 107.
- ⁴⁰⁰ *Fraser* SCC, note 210, para 117.
- ⁴⁰¹ *Fraser* SCC, note 210, para 99; Faraday, Fudge & Tucker, note 363, 49.
- ⁴⁰² *Fraser* SCC, note 210, para 40.
- ⁴⁰³ *Fraser* SCC, note 210, para 41.
- ⁴⁰⁴ *Fraser* SCJ, note 394, para 18.
- ⁴⁰⁵ *Fraser* SCC, note 210, paras 109 and 110.
- ⁴⁰⁶ *Fraser* SCC, note 210, para 112.
- ⁴⁰⁷ Tucker, note 302.
- ⁴⁰⁸ Steven Tufts, "Community Unionism in Canada and Labour's (Re)Organization of Space" (1998) 30:3 *Antipode* 227, 228.
- ⁴⁰⁹ Cynthia J. Cranford & Deena Ladd, "Community Unionism: Organising Fair Employment in Canada" (2003) 3 *Just Labour* 46, 55, n2. Online: <http://www.justlabour.yorku.ca/volume3/pdfs/cranford.pdf>.
- ⁴¹⁰ Cranford, *et al*, *Self-Employed Workers*, note 60, 187.
- ⁴¹¹ DiCaro, Johnston & Stanford, note 368, 52.
- ⁴¹² Cynthia J Cranford, *et al*, "Thinking Through Community Unionism" in Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's UP, 2006), 359.
- ⁴¹³ *International Trade Union Confederation Constitution* (2006, as amended by the 2nd World Congress (2010)) art II(b). Online: http://www.ituc-csi.org/IMG/pdf/Const-ENG_2WC.pdf.
- ⁴¹⁴ *International Trade Union Confederation Constitution*, note 413 art II(a).
- ⁴¹⁵ Alan M Minsky, "Some Labour Relations Issues in the Construction Industry" (2001) 9 *CLR* (3d) 115.
- ⁴¹⁶ Janet McLaughlin, *Migration and Health: Implications for Development: A Case Study of Mexican and Jamaican Migrants in Canada's Seasonal Agricultural Workers Program* (The Canadian Foundation for the Americas (FOCAL), 2009), 10. Online: <http://www.focal.ca/pdf/Migrant%20Health%20McLaughlin%202009.pdf>; Human Rights, Equity and Diversity Department of the United Food and Commercial Workers Union, note 351, 5 and 18-20.
- ⁴¹⁷ *Occupational Health and Safety Act*, note 111 s 21.
- ⁴¹⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 2nd Sess, No 91 (8 March 2011), 4550 (Hon Charles Sousa). Online: http://www.ontla.on.ca/house-proceedings/transcripts/files_pdf/08-MAR-2011_L091.pdf.
- ⁴¹⁹ *Dean Report*, note 56, 47.
- ⁴²⁰ "Regulatory Impact Analysis Statement" in *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, note 234.
- ⁴²¹ *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, note 234; *Immigration and Refugee Protection Regulations*, SOR/2002-227 s 200(5)(d); Citizenship and Immigration Canada, *Operational Bulletin 275-C - April 1, 2011, Temporary Foreign Worker Program: Operational Instructions for the Implementation of the Immigration and Refugee Protection Regulatory Amendments*, 2.2. Online: <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob275C.asp#list>.
- ⁴²² SAWP has its own contracts. NOC C and D and live-in caregivers contracts now include standardized terms covering wages, accommodation, benefits, hours of work, duties, vacation and sick leave entitlements. They require that health care insurance be provided at the employer's expense until the worker is eligible for provincial health care coverage and one week termination notice must be given to workers who have worked for longer than 3 months. Recruitment fees are prohibited and transportation costs must be covered by employers and, unlike SAWP, which allows some recovery, transportation costs may not be recovered from the worker. The contract makes clear that terms are subject to provincial employment and health and safety standards. Employers are required to provide

appropriate housing (at a cost and in accordance with guidelines), a Record of Employment must be prepared and chemical and pesticide safety equipment must be provided at employer's expense.

⁴²³ Citizenship and Immigration Canada, *Backgrounders – Improvements to the Temporary Foreign Worker Program* (August 2010) (Citizenship and Immigration Canada, *Backgrounders – Improvements*). Online: <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-08-18.asp>; Citizenship and Immigration Canada, *Backgrounder – Four-year Limit for Foreign Nationals Working in Canada* (March 2011). Online: <http://www.cic.gc.ca/english/department/media/backgrounders/2011/2011-03-24.asp>; *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, note 234; For the federal government's explanation, see *Regulatory Impact Analysis Statement* (2009) C Gaz, Vol 143, No 41. Online: <http://canadagazette.gc.ca/rp-pr/p1/2009/2009-10-10/html/reg1-eng.html>.

⁴²⁴ Salimah Valiani, *The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-in Caregiver Program* (February 2009), 7 and 8. Online: <http://www.csl.carleton.ca/~dana/TempPermLCPFINAL.pdf>.

⁴²⁵ Valiani, note 424, 14-18; Metropolitan Action Committee on Violence Against Women and Children, *Domestic Workers & Live-in Caregivers Experiencing Workplace Sexual Violence and Harassment*, METRAC's Workplace Justice Series (2009), 3. Online: <http://www.metrac.org/resources/downloads/domestic.workers.workplace.harassment.pdf>.

⁴²⁶ Valiani, note 424, 14.

⁴²⁷ Metropolitan Action Committee on Violence Against Women and Children, note 425, 4.

⁴²⁸ *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, note 227.

⁴²⁹ Ontario Ministry of Labour, *Employment Protection for Foreign Nationals Act (Live in Caregivers and Others)*, 2009: FAQs (March 2010). Online: <http://www.labour.gov.on.ca/english/es/faqs/epfna.php>.

⁴³⁰ Live-in caregivers employment contracts must now include standardized terms covering wages, accommodation, benefits, hours of work, duties, vacation and sick leave entitlements; *Immigration and Refugee Protection Regulations*, SOR/2002-227.

⁴³¹ "Regulatory Impact Analysis Statement" in *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, note 234.

⁴³² Citizenship and Immigration Canada, News Release, "Minister Kenny Announces Important Change for Live-in Caregivers" (15 December 2011). Online: <http://www.cic.gc.ca/english/department/media/releases/2011/2011-12-15.asp>.

⁴³³ Consultation meeting with Caregivers' Action Centre (28 February 2011) Toronto, Ontario; Consultation meeting with Chinese Interagency Network Labour Committee (6 May 2011) Toronto, Ontario.

⁴³⁴ Consultation meeting with NOC C & D Temporary Foreign Workers.

⁴³⁵ *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, note 227.

⁴³⁶ *The Worker Recruitment and Protection Act*, SM 2008, c 23.

⁴³⁷ Human Resources and Skills Development Canada, *Temporary Foreign Worker Program: Manitoba's "Worker Recruitment and Protection Act" and Changes to HRSDC/Service Canada's Labour Market Opinion Application Process* (July 2011), para 5 (HRSKDC, *Manitoba's "Worker Recruitment and Protection Act"*). Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/questions-answers/manitoba.shtml.

⁴³⁸ HRSKDC, *Manitoba's "Worker Recruitment and Protection Act"*, note 437, 7; Consultation with Manitoba Ministry of Labour (21 & 23 June 2011); Manitoba Family Services and Labour *The Worker Recruitment and Protection Act C.C.S.M. c.W197 Valid Licence Holders*. Online: http://www.gov.mb.ca/labour/standards/asset_library/pdf/wrapa_valid_licensees.pdf.

⁴³⁹ Human Resources and Skills Development Canada, *Temporary Foreign Worker Program: Employer Compliance: Requirements for the Temporary Foreign Worker Program* (2011), 7. Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/pamphlet/ECR.pdf.

⁴⁴⁰ Citizenship and Immigration Canada, *Backgrounders – Improvements*, note 423.

⁴⁴¹ Herbert Grubel & Patrick Grady, *Immigration and the Canadian Welfare State*, Studies in Immigration & Refugee Policy (Fraser Institute, 2011), 35. Online: <http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/immigration-and-the-canadian-welfare-state-2011.pdf>.

⁴⁴² *House of Commons Debates*, 41st Parl, 1st Sess, No 146 (15 May 2012), 1440 (Hon Diane Finley); "Unions argue new wage rules discriminatory; Critics say new changes will hurt all workers" *Toronto Star* (16 May 2012) A6.

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- ⁴⁴³ Human Resources Development Canada, *Lessons Learned: Own-Account Self-Employment in Canada – Final Report* (2000), 5. Online: http://www.qln.ca/Documents/Knowledge%20Base/Linguistic%20Duality/ownacc_self-employment_1997.pdf.
- ⁴⁴⁴ Nadja Kamhi & Danny Leung, *Recent Developments in Self-Employment in Canada*, Working Paper 2005-8 (Research Department Bank of Canada, 2005), 1. Online: <http://www.bankofcanada.ca/wp-content/uploads/2010/02/wp05-8.pdf>.
- ⁴⁴⁵ Sébastien LaRochelle-Côté, “Self-employment in the Downturn”, *Perspectives on Labour and Income*, Vol 11, No 3 (Statistics Canada, March 2010), 5. Online: <http://www.statcan.gc.ca/pub/75-001-x/2010103/pdf/11138-eng.pdf>.
- ⁴⁴⁶ LaRochelle- Côté, note 445, 6.
- ⁴⁴⁷ Noack & Vosko, note 4, 8.
- ⁴⁴⁸ Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 9.
- ⁴⁴⁹ Cranford, *et al*, *Self-Employed Workers*, note 60, 177.
- ⁴⁵⁰ Cranford, *et al*, *Self-Employed*, note 60, 9. Also see Vosko & Zukewich, note 61, 67.
- ⁴⁵¹ Karen D. Hughes, “Rethinking Policy for the ‘New Economy’: The Case of Self-Employed Women” (2004) 67 Sask L Rev 571, 573 (Hughes, “Rethinking Policy”).
- ⁴⁵² Kamhi & Leung, note 444, 4.
- ⁴⁵³ OECD, “The Partial Renaissance of Self-Employment” in *OECD Employment Outlook, 2000* (2000), 155. Online: <http://www.oecd.org/dataoecd/10/44/2079593.pdf>; Cranford, *et al*, *Self-Employed Workers*, note 60, 5.
- ⁴⁵⁴ LaRochelle- Côté, note 445, 7.
- ⁴⁵⁵ For employees, see: Judy Fudge, “Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation” (2006) 44 Osgoode Hall LJ 609, 621 (Fudge, “Fragmenting Work”). For employers, see: Hughes, “Rethinking Policy”, note 451, 582-583; LaRochelle-Côté, note 445, 5.
- ⁴⁵⁶ Ernest B. Akyeampong & Deborah Sussman, “Health-Related Insurance for the Self-Employed”, *Perspectives on Labour and Employment*, Vol 4, No 5 (Statistics Canada, May 2003), 17. Online: <http://www.statcan.gc.ca/pub/75-001-x/75-001-x2003005-eng.pdf>. See also: Fudge, “Fragmenting Work”, note 455, 621 (“Generally, the self-employed are less likely to have access to benefits than employees, although access to benefits depends upon the type of self-employment, with self-employed employers enjoying greater coverage than the own-account self-employed.”).
- ⁴⁵⁷ Fudge, “Fragmenting Work”, note 455, 621. See also: Rosemary A. Venne, “A Half Century of Work: Women in the Labour Force” (2004) 67 Sask L Rev 489.
- ⁴⁵⁸ Karen D. Hughes, *Gender and Self-employment in Canada: Assessing Trends and Policy Implications*, Canadian Policy Research Networks Study No. W|04 Changing Employment Relationships Series (Ottawa: Renouf, 1999), 16-18 (Hughes, *Gender and Self-Employment*). Online: http://www.cprn.org/documents/18381_en.pdf.
- ⁴⁵⁹ Vosko & Zukewich, note 61, 77; Leah F. Vosko, Nancy Zukewich & Cynthia Cranford, “Precarious Jobs: A New Typology of Employment”, *Perspectives on Labour and Income*, Vol 4, No 10 (Statistics Canada, October 2003), 3 and 20-22. Online: <http://www.statcan.gc.ca/pub/75-001-x/75-001-x2003010-eng.pdf>.
- ⁴⁶⁰ Hughes, *Gender and Self-Employment*, note 458, 22.
- ⁴⁶¹ Hou & Wang, note 63, 4.
- ⁴⁶² Noack & Vosko, note 4, 8-9.
- ⁴⁶³ Robert M Parry & David A Ryan, *Employment Standards Handbook*, 3rd ed, Release No 35 (Toronto: Thomson Reuters Canada, 2002), 1-1.
- ⁴⁶⁴ *Employment Standards Act, 2000*, note 41, s 1(1).
- ⁴⁶⁵ Parry & Ryan, note 465, 1-1.
- ⁴⁶⁶ Judy Fudge, Eric Tucker & Leah Vosko, “Employee or Independent Contractor?: Charting the Legal Significance of the Distinction in Canada” (2003) 10:2 CLEJ 193, 209 (Fudge, Tucker & Vosko, “Employee or Independent Contractor?”).
- ⁴⁶⁷ Fudge, Tucker & Vosko, “Employee or Independent Contractor?”, note 466, 194.
- ⁴⁶⁸ *Employment Standards Manual Vol 1*, note 265, 5-14.
- ⁴⁶⁹ Parry & Ryan, note 465, 1-8; *Employment Standards Manual Vol 1*, note 265, 5-15 - 5-14.
- ⁴⁷⁰ *671122 Ontario Ltd v. Sagaz Industries Canada Inc*, [2001] 2 SCR 983, [2001] SCJ No 61, para 46 (“there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor”) (*Sagaz*).

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- ⁴⁷¹ *Sagaz*, note 470, para 47.
- ⁴⁷² *Sagaz*, note 470, paras 47-48.
- ⁴⁷³ *Employment Standards Manual Vol 1*, note 265, 5-27.
- ⁴⁷⁴ *Employment Standards Manual Vol 1*, note 265, 5-27.
- ⁴⁷⁵ *Labour Relations Act 1995*, note 201 s 1(1).
- ⁴⁷⁶ Workers' Action Centre, *Working on the Edge*, note 75, 32.
- ⁴⁷⁷ Consultation meeting with the Labour Committee of the Chinese Interagency Network (6 May 2011) Toronto, Ontario.
- ⁴⁷⁸ Workers' Action Centre, *Working on the Edge*, note 75, 16. Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 51.
- ⁴⁷⁹ Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 51.
- ⁴⁸⁰ Fudge, Tucker & Vosko, "Employee or Independent Contractor?", note 466, 230. They also question whether the dependent employee-independent self-employed distinction should determine the scope of labour protection and make a similar policy recommendation in Fudge, Tucker & Vosko, "The Legal Concept of Employment", note 66, 94, 95, 105 and 119.
- ⁴⁸¹ The Wellesley Institute, Atkinson Foundation and Metcalf Foundation, *Talking About Jobs* (2011), 7. Online: <http://www.wellesleyinstitute.com/wp-content/uploads/2011/11/6-Good-Ideas-About-Jobs-in-Ontario1.pdf>.
- ⁴⁸² *Employment Standards Manual Vol 1*, note 265, 5-23-and 5-39.
- ⁴⁸³ Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁴⁸⁴ *Occupational Health and Safety Act*, note 111; *Workplace Safety and Insurance Act*, SO 1997, c 16.
- ⁴⁸⁵ *Dean Report*, note 56, 14; Vosko, *et al*, note 4, 45-47.
- ⁴⁸⁶ *Occupational Health and Safety Act*, note 111 s 4.1(2).
- ⁴⁸⁷ Ontario Ministry of Labour, *Information for Workers and Employers About Reprisals*, Fact Sheet 30 (2012), 2 (Ontario Ministry of Labour, *Information for Workers and Employers About Reprisals*). Online: http://www.labour.gov.on.ca/english/hs/pdf/fs_reprisals.pdf.
- ⁴⁸⁸ Bill 160, *Occupational Health and Safety Statute Law Amendment Act, 2011*, 2nd Sess, 39th Leg, Ontario, 2011 (Royal Assent received Chapter Number: SO 2011 C 11) s 13(1). Online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2463.
- ⁴⁸⁹ *Occupational Health and Safety Act*, note 111 s 9.
- ⁴⁹⁰ *Occupational Health and Safety Act*, note 111 s 9(18)(a).
- ⁴⁹¹ *Occupational Health and Safety Act*, note 111 s 9(20).
- ⁴⁹² Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁴⁹³ Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁴⁹⁴ POA, note 331.
- ⁴⁹⁵ Criminal charges were laid against the construction company and others related to the tragic deaths of four workers by falling from scaffolding on 24 December 2009 in Toronto, Ontario.
- ⁴⁹⁶ *Farming Operations*, O Reg 414/05.
- ⁴⁹⁷ "'Regularly employed' means anyone who is employed for a period that exceeds three months. This includes permanent full-time staff, permanent part-time staff, contract staff, and seasonal workers. It also includes managers and supervisors. There may be situations where there is a high turnover of staff, and a number of different workers fill a particular position, with each person working in it for less than three months. If a position exists for longer than three months, regardless of the number of workers who may fill that position over the three months, that position will be included in determining if a health and safety representative or joint health and safety committee is required." Ontario Ministry of Labour, *About Joint Health and Safety Committees and Representatives*. Online: http://www.labour.gov.on.ca/english/hs/pubs/jhsc/jhsc_1.php.
- ⁴⁹⁸ Ontario Ministry of Labour, *Health and Safety Act for Farming Operations* (2006) (Ontario Ministry of Labour, *Health and Safety Act for Farming*). Online: http://www.labour.gov.on.ca/english/hs/pdf/farming_ohsag.pdf.
- ⁴⁹⁹ Ontario Ministry of Labour, *Health and Safety Act for Farming*, note 498, 1.
- ⁵⁰⁰ Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁵⁰¹ *Dean Report*, note 56, 6.
- ⁵⁰² *Occupational Health and Safety Act*, note 111; *Workplace Safety and Insurance Act*, note 484.
- ⁵⁰³ *Dean Report*, note 56, 17; George Gritziotis, "Prevention Update" *Safe at Work Ontario*, No 10 (Ontario Ministry of Labour, March 2012), 2. Online: http://www.labour.gov.on.ca/english/hs/pdf/sawo_today10.pdf.

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- ⁵⁰⁴ *Dean Report*, note 56, 46.
- ⁵⁰⁵ *Dean Report*, note 56, 46.
- ⁵⁰⁶ *Dean Report*, note 56, 46.
- ⁵⁰⁷ *Dean Report*, note 56, 46-47.
- ⁵⁰⁸ *Dean Report*, note 56, 47.
- ⁵⁰⁹ Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁵¹⁰ Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁵¹¹ *Dean Report*, note 56, 46.
- ⁵¹² Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁵¹³ Ontario Ministry of Labour, "Appendix I: 2009-10 Annual Report" in *Published Results-Based Plan 2010-11* (Toronto: Ontario Ministry of Labour, 2010), 28. Online: http://www.labour.gov.on.ca/english/about/pubs/rbp/2010/appendix_1.php.
- ⁵¹⁴ Vosko, *et al*, note 4, 50.
- ⁵¹⁵ Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁵¹⁶ Ontario Ministry of Labour, *Industrial Sector Plan 2011-2012* (2011), 20 (Ontario Ministry of Labour, *Industrial Sector Plan 2011-2012*). Online: http://www.labour.gov.on.ca/english/hs/pdf/sp_11ind.pdf. (The subsectors are: police services, fire services, fisheries, film and television, live performance).
- ⁵¹⁷ Consultation meeting with the Niagara Migrant Workers Interest Group (30 March 2011) St. Catharines, Ontario; Consultation meeting with workers; Consultation meeting with the Workers' Compensation Network (29 April 2011) Toronto, Ontario; Consultation meeting with Windsor Legal Assistance (14 June 2011) Windsor, Ontario; Consultation meeting with the Agriculture Workers Alliance (AWA).
- ⁵¹⁸ *Dean Report*, note 56, 27-28.
- ⁵¹⁹ Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario.
- ⁵²⁰ *Dean Report*, note 56, 47-48.
- ⁵²¹ Consultation meeting with the Labour Committee of the Chinese Interagency Network (6 May 2011) Toronto, Ontario; Consultation meeting UFCW Canada (7 April 2011) Toronto, Ontario.
- ⁵²² Consultation meeting with the Labour Committee of the Chinese Interagency Network (6 May 2011) Toronto, Ontario.
- ⁵²³ Consultation meeting with workers; Consultation meeting with the Agriculture Workers Alliance (AWA); Consultation meeting UFCW Canada (7 April 2011) Toronto, Ontario.
- ⁵²⁴ *Dean Report*, note 56, 48; See also: Ontario Ministry of Labour, *Industrial Sector Plan 2011-2012*, note 516, 20 (where farming has been the industrial subsector with the second highest number of fatalities in Ontario between 2008-2010).
- ⁵²⁵ Consultation meeting with Dignidad Obrera Agricola Migrante (DOAM) (8 May 2011) St. Catharines, Ontario; Consultation meeting with SAWP Workers.
- ⁵²⁶ In the temporary foreign worker context see: Consultation meeting with workers and SAWP workers; Consultation meetings with Niagara Migrant Workers Interest Group (30 March 2011), St. Catharines, Ontario, (9 May 2011), Niagara-on-the-Lake, Ontario; Consultation meeting with Windsor Legal Assistance (13 June 2011) Windsor, Ontario; Consultation meeting with the Agriculture Workers Alliance (AWA); DOAM Submission, 2 (on file with the LCO) ("The threat of repatriation is the primary reason why most workers never document or come forward with health concerns regarding the workplace."). The issue was raised in a broader context twice: Consultation meeting with an OPSEU Representative (15 June 2011); Toronto Workers' Health and Safety Legal Clinic Submission.
- ⁵²⁷ *Ontario Labour Relations Board Rules of Procedure*, r 41; *Occupational Health and Safety Act*, note 111 s 50. See also: Ontario Ministry of Labour, *Information for Workers and Employers About Reprisals*, note 487.
- ⁵²⁸ *Occupational Health and Safety Act*, note 111 s 50.1; O Reg 33/12 s 1.
- ⁵²⁹ *Dean Report*, note 56, 47.
- ⁵³⁰ Consultation with Ontario Ministry of Labour (10 May 2012) Toronto, Ontario; *Safe at Work*, No 10 (Ontario Ministry of Labour, March 2012). Online: <http://www.labour.gov.on.ca/english/hs/sawo/pubs/issue10.php>.
- ⁵³¹ Lippel, *et al*, note 47, 81.
- ⁵³² It should be noted that client employers could, nevertheless, be subject to penalties under the *OHS Act*, in appropriate cases.
- ⁵³³ Lippel, *et al*, note 47, 81.

⁵³⁴ Ontario, WSIB Funding Review, *Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System* (2012), 77-90, Online: <http://www.wsibfundingreview.ca/finalreport.php>.

⁵³⁵ *Funding Fairness*, note 535, 114.

⁵³⁶ Vosko, *et al*, note 4, 88.

⁵³⁷ Phil James, *et al*, "Regulating Supply Chains to Improve Health and Safety" (2007) 36:2 *Indus LJ* 163, 166.

⁵³⁸ James, *et al*, note 536, 166-167.

⁵³⁹ James, *et al*, note 536, 166-170.

⁵⁴⁰ James, *et al*, note 536, 186.

⁵⁴¹ James, *et al*, note 536, 187.

⁵⁴² Richard Johnstone, Michael Quinlan & Maria McNamara, *Enforcing Upstream: Australian Health and Safety Inspectors and Upstream Duty Holders*, Working Paper 77 (Canberra: National Research Centre for Occupational Health and Safety Regulation (NRCOHSR), 2010). Online: http://regnet.anu.edu.au/sites/default/files/u86/WorkingPaper_77_0.pdf.

⁵⁴³ *Dean Report*, note 56, 55.

⁵⁴⁴ *Dean Report*, note 56, 41 and 51-52.

⁵⁴⁵ SAWP workers' coverage begins as soon as they reach the agreed upon point of departure in their home country and it remains in place until they return to their country. It also covers time while they are in transit to or from the airport to the employer's premises, when using transportation authorized by the employer or while staying in employer-provided accommodations. If injured, SAWP workers must file a claim for benefits before leaving Canada. If a claim is not filed before leaving Canada, the workers' liaison officer is responsible for reporting the injury. In our consultations, we heard that some SAWP liaison officers had been effective in coordinating with WSIB to arrange for workers' access to workplace safety insurance.

⁵⁴⁶ Janet McLaughlin & Jenna L. Hennebry, "Backgrounder on Health and Safety for Migrant Farmworkers", *IMRC Policy Points*, No 1 (Waterloo: International Migration Research Centre, 2010), 5. Online: http://www.wlu.ca/documents/44258/IMRC_Policy_Points_Issue_1_-_Migrant_Farmworker_Health.pdf.

⁵⁴⁷ McLaughlin, "Falling Through the Cracks", note 351, 5.

⁵⁴⁸ McLaughlin, "Falling Through the Cracks", note 351, 9.

⁵⁴⁹ Consultation meeting with SAWP Workers; Consultation meeting with Agriculture Workers Alliance (AWA).

⁵⁵⁰ Consultation meeting with SAWP Workers; Consultation meeting with Agriculture Workers Alliance (AWA).

⁵⁵¹ Law Commission of Ontario, *Vulnerable Workers and Precarious Work Background Paper*, note 10, 43; Janet McLaughlin, "Challenges and Considerations: Providing Accessible Health Care for TFW" (Presentation at Permanently Temporary: Temporary Foreign Workers and Canada's Changing Attitude to Citizenship and Immigration Community Research Symposium, 4 February 2010), 32-34. Online: <http://ceris.metropolis.net/Virtual%20Library/other/PermanentlyTemporary.pdf>.

⁵⁵² Consultation meeting with Niagara Migrant Workers Interest Group (30 March 2011) St. Catharines, Ontario.

⁵⁵³ Michael Pysklywec, *et al*, "Doctors Within Borders: Meeting the Health Care Needs of Migrant Farm Workers in Canada" (2011) 183:9 *Can Med Assoc J* 1039, 1041.

⁵⁵⁴ Consultation meeting with Agriculture Workers Alliance (AWA) staff, Toronto, Ontario.

⁵⁵⁵ Consultation meeting with the Workers' Compensation Network (29 April 2012), Toronto, Ontario.

⁵⁵⁶ Consultation meeting with the Agriculture Workers Alliance (AWA) and UFCW Canada, Toronto, Ontario; Consultation meeting with temporary foreign workers; Submission from the Employer of a Live-In Caregiver (on file with the LCO).

⁵⁵⁷ Consultation meeting with the Niagara Migrant Workers Interest Group (30 March 2011) St. Catharines, Ontario.

⁵⁵⁸ Consultation meeting with the Niagara Migrant Workers Interest Group (30 March 2011) St. Catharines, Ontario.

⁵⁵⁹ *Niagara Migrant Workers Interest Group Blog*. Online: <http://nmwig.blogspot.com>.

⁵⁶⁰ Hennebry, note 98, 23-25.

⁵⁶¹ An innovative model of providing support for migrant workers utilized by the UFCW is discussed in the section prior to Recommendation 27.

⁵⁶² Francesca Froy & Sylvain Giguère, *Putting in Place Jobs that Last: A Guide to Rebuilding Quality Employment at Local Level* (OECD, 2010), 3. Online: <http://www.oecd.org/dataoecd/12/6/44418145.pdf>.

⁵⁶³ Zizys, note 17, 7-9. Zizys does not attribute labour market polarization solely to the demise of career ladders. He also recognizes the impact of the loss of better paying blue-collar manufacturing jobs and the corresponding increase in entry level service sector positions paying considerably less. Decline in unionized jobs is another factor caused by Vulnerable Workers and Precarious Work:

a shift away from “union-heavy” manufacturing to “union-light” service sector, jobs but also political decisions. He further identifies declines in minimum wage in most North American jurisdictions, a trend that is being reversed.

⁵⁶⁴ OECD, *Growing Income Inequality*, note 26, 12.

⁵⁶⁵ OECD, *Growing Income Inequality*, note 26, 12.

⁵⁶⁶ Canadian Manufacturers and Exporters, *Business Results Through Workforce Capabilities: A Resource for Developing and Maintaining a Highly Skilled Workforce* (2007), 9.

⁵⁶⁷ LCO Consultation with Canadian Manufacturers and Exporters (11 May 2011) Mississauga, Ontario.

⁵⁶⁸ LCO Consultation with Canadian Manufacturers and Exporters (11 May 2011) Mississauga, Ontario.

⁵⁶⁹ Centre for Workplace Skills, *What We Do*. (Centre for Workplace Skills, *What We Do*). Online: <http://www.workplaceskills.ca/en/who-we-are/overview.html>.

⁵⁷⁰ Centre for Workplace Skills, *What We Do*, note 568.

⁵⁷¹ Centre for Workplace Skills, *Investing in Skills: Effective Work-Related Learning in SMEs* (2011), 4. Online: http://www.workplaceskills.ca/_uploads/media/4nvw3ps0.pdf.

⁵⁷² Centre for Workplace Skills, *Union-Led Work-Related Learning: Profiles of Effective Practices* (2011), 6. Online: <http://www.workplaceskills.ca/en/workers/union-led-work-related-learning-profiles-of-effective-practices.html>.

⁵⁷³ Ontario Federation of Labour (OFL) Submission, 5-6 (on file with the LCO).

⁵⁷⁴ Gordon B. Cooke, James Chowhan & Travor Brown, “Declining Versus Participating in Employer-Supported Training in Canada” (2011) 15:4 *International Journal of Training and Development* 271, 272.

⁵⁷⁵ Cooke, Chowhan & Brown, note 573, 275.

⁵⁷⁶ LCO Consultation with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011) Toronto, Ontario.

⁵⁷⁷ LCO Consultation with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011) Toronto, Ontario.

⁵⁷⁸ Lewchuk, Clarke & de Wolfe, note 14.

⁵⁷⁹ *Drummond Report*, note 276, 277.

⁵⁸⁰ *Drummond Report*, note 276, 278.

⁵⁸¹ *Drummond Report*, note 276, 285.

⁵⁸² Lewchuk, Clarke & de Wolfe, note 14, 285; *An Act to Promote Workforce Skills Development and Recognition*, RSQ, c D-8.3 s 3.

⁵⁸³ Paul Bélanger & Magali Robitaille, *Portrait of Work-Related Learning in Quebec* (Work and Learning Knowledge Centre, 2008), 20. Online: <http://www.ccl-cca.ca/pdfs/WLKC/WorkplaceTrainingQuebecEN.pdf>. This report found that the initiative had improved the delivery of workplace training participation with more companies actively planning and implementing training for their employees and that adult learning was being promoted through the combined, cooperative efforts of employers, governments, unions and community groups.

⁵⁸⁴ Richard Brisbois, Nicole Pollack & Ron Saunders, *Lessons from Other Countries Regarding Incentives for Employer-Sponsored Training* (Canadian Policy Research Networks, 2009), 26. Online: http://www.cprn.org/documents/51134_EN.pdf.

⁵⁸⁵ Lewchuk, Clarke & de Wolfe, note 14, 286.

⁵⁸⁶ Lewchuk, Clarke & de Wolfe, note 14, 286.

⁵⁸⁷ Human Resources and Skills Development Canada, *Sector Council Program Information*. Online: http://www.hrsdc.gc.ca/eng/workplaceskills/sector_councils/information.shtml.

⁵⁸⁸ Ontario Ministry of Training, Colleges and Universities, *Ontario Improves Skilled Trades System: McGuinty Government Establishes College Of Trades To Modernize Apprenticeship* (27 October 2009). Online: <http://news.ontario.ca/tcu/en/2009/10/ontario-improves-skilled-trades-system.html>. See: Ontario College of Trades. Online: <http://www.collegeoftrades.ca>.

⁵⁸⁹ *Drummond Report*, note 276, 286.

⁵⁹⁰ Lewchuk, Clarke & de Wolfe, note 14, 285.

⁵⁹¹ *Drummond Report*, note 276, 285.

⁵⁹² Ontario Ministry of Training, Colleges and Universities, *Role of the Ministry*. Online: <http://www.tcu.gov.on.ca/eng/about/role.html>.

⁵⁹³ *Drummond Report*, note 276, 279.

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- ⁵⁹⁴ Ontario Ministry of Training, Colleges and Universities, *Employment Service: Service Provider Guidelines* (2010), s 2.2-1. Online: http://www.tcu.gov.on.ca/eng/eopg/publications/eopg_sp_guidelines.pdf.
- ⁵⁹⁵ Information provided by Ontario Ministry of Colleges, Training and Universities to the LCO.
- ⁵⁹⁶ Ontario Ministry of Colleges, Training and Universities, *Second Career* (Ontario Ministry of Colleges, Training and Universities, *Second Career*). Online: <http://www.tcu.gov.on.ca/eng/secondcareer/qna.html#display>. Allowances beyond the maximum may be available for disability accommodation, dependent care, living away from home and costs related to literacy and basic skills training.
- ⁵⁹⁷ Ontario Ministry of Colleges, Training and Universities, *Second Career*, note 595.
- ⁵⁹⁸ Information provided to LCO by the Ontario Ministry of Training Colleges and Universities.
- ⁵⁹⁹ LCO Consultation with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011) Toronto, Ontario.
- ⁶⁰⁰ LCO Consultation with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011) Toronto, Ontario.
- ⁶⁰¹ Information provided to LCO by the Ontario Ministry of Training Colleges and Universities.
- ⁶⁰² *Drummond Report*, note 276, 283.
- ⁶⁰³ *Drummond Report*, note 276, 283.
- ⁶⁰⁴ *Drummond Report*, note 276, 285.
- ⁶⁰⁵ *Drummond Report*, note 276, 282.
- ⁶⁰⁶ *Drummond Report*, note 276, 283.
- ⁶⁰⁷ Ontario Ministry of Economic Development and Innovation, News Release, “Ontario Is Attracting Investment, Creating Jobs: McGuinty Government Supports Regional Economic Development” (29 November 2011). Online: http://www.ontariocanada.com/ontcan/1medt/en/news_2011_11_30_en.jsp.
- ⁶⁰⁸ Ontario Women’s Directorate, *Key Programs: Helping Women Achieve Economic Security Training Programs for Women* (Ontario Women’s Directorate, *Key Programs*). Online: <http://www.women.gov.on.ca/english/keyprograms/skilledtrades.shtml>; Consultation with Ontario Women’s Directorate (2 February 2012) Toronto, Ontario.
- ⁶⁰⁹ Ontario Women’s Directorate, *Key Programs*, note 607.
- ⁶¹⁰ Ontario Women’s Directorate, *Employment Training for Abused / At-Risk Women 2011-2013*. Online: <http://www.women.gov.on.ca/english/keyprograms/skilledtrades.shtml#abused>; Ontario Women’s Directorate, *Key Programs*, note 607.
- ⁶¹¹ Ontario Women’s Directorate, *Key Programs*, note 607; Information provided by Ontario Women’s Directorate.
- ⁶¹² Luin Goldring & Patricial Landolt, *Immigrants and Precarious Employment in the New Economy: Brief 2* (York University Immigrants and Precarious Employment Project, 2009), 4. Online: http://www.arts.yorku.ca/research/ine/public_outreach/materials.html.
- ⁶¹³ Luin Goldring & Patricial Landolt, *Immigrants and Precarious Employment in the New Economy: Brief 3* (York University Immigrants and Precarious Employment Project, 2009), 4. Online: http://www.arts.yorku.ca/research/ine/public_outreach/materials.html.
- ⁶¹⁴ LCO Consultation with Toronto Region Immigrant Employment Council (TRIEC) (18 May 2011).
- ⁶¹⁵ LCO Consultation with Toronto Region Immigrant Employment Council (TRIEC) (18 May 2011); LCO Consultation with the Ontario Federation of Labour (OFL) and Canadian Auto Workers (CAW) (5 April 2011).
- ⁶¹⁶ LCO Consultation with Toronto Region Immigrant Employment Council (TRIEC) (18 May 2011).
- ⁶¹⁷ Ontario Ministry of Citizenship and Immigration, “Immigration Overview: Ministry of Citizenship and Immigration” (PowerPoint presentation, March 2011) [unpublished], 5 (Ontario Ministry of Citizenship and Immigration, “Immigration Overview”).
- ⁶¹⁸ Ontario Ministry of Citizenship and Immigration, *Key Services*. Online: <http://www.citizenship.gov.on.ca/english/keyinitiatives/index.shtml>.
- ⁶¹⁹ Ontario Ministry of Citizenship and Immigration, “Immigration Overview”, note 616, 6.
- ⁶²⁰ Alexander, Burleton & Fong, note 100, 15-16.
- ⁶²¹ *Drummond Report*, note 276, 294.
- ⁶²² Froy & Giguère, note 561, 63.