

Open for Business, Closed for Workers: Employment Standards, the Enforcement Deficit, and Vulnerable Workers in Canada

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I. Why employment standards matter

Legislated employment standards¹ are a key component of a just and democratic society. Enacted by each province and the federal government within their respective jurisdictions, they ensure that everyone who works earns a minimum wage for their labour, and that nobody is subjected to inhumane working conditions or unduly harsh, arbitrary treatment at the hands of their employer. It is because of employment standards that all workers in Canada have the right to rest periods during and between shifts, to extra pay for working on public holidays, to maximum hours of work in the day and week, and to a couple of weeks of paid vacation every year. In most jurisdictions, employment standards act as a floor for collective bargaining, meaning that they permit unions to negotiate working conditions above and beyond those standards while limiting downward pressure on standards by non-unionized employers. In short, employment standards are there to shield workers – especially non-union workers – against the natural tendency of the labour market to gravitate

¹ In some jurisdictions, employment standards are called labour standards. For the sake of clarity, I will use employment standards throughout this paper. These types of standards are to be distinguished from labour *relations* norms, which deal with the rights of workers to organize into unions as well as the relations between a union, its members, and the employer.

towards more work for less pay.

These minimum standards are especially critical for communities of vulnerable workers, including women, members of First Nations, new immigrants, racialized people, youth, members of the LGBT community, and persons with disabilities. Disproportionately working in part-time, low-paid, temporary and other types of precarious employment (Fudge and Vosko 2003), members of these communities often rely on employment standards as their only means of protection against degrading and dehumanizing working conditions. Very few of these workers are unionized, and so they do not benefit from the stronger protection afforded by collective agreements.

In recent years, however, employment standards have been failing vulnerable workers. Across Canada, employment standards are being violated by a minority of unscrupulous employers who have been increasingly taking advantage of governments' *laissez-faire* approaches to labour market regulation. As a result, vulnerable workers are being denied overtime, statutory holiday pay, vacation pay, and other forms of compensation to the tune of hundreds of millions of dollars per year.

The consequences have been dire. In 2009-2010, for example, Ontario employers withheld over \$62 million from their employees, mostly vulnerable workers, who were subsequently only able to recover a mere \$14.8 million through Ontario's employment standards enforcement mechanisms (Vosko et al. 2011). And this is only the tip of the iceberg. These figures only represent violations actually discovered by employment standards officers (ESOs) in Ontario, and do not include the multitude of violations that go unreported every day. In Quebec, an estimated \$13 million was withheld from employees for overtime worked in October 2004 alone (Commission des Normes du Travail, 2005). This is

systemic wage theft. In the majority of cases, these employees are the least able to afford such dramatic reductions in their pay.

The lack of employment standards enforcement doesn't just affect individuals; it is equally harmful for Canadian society as a whole. Firstly, lack of enforcement means that the minority of employers who repeatedly violate employment standards gain an unfair competitive advantage over the majority of employers who comply, which ultimately pressures compliant employers to reduce compensation and cut hours to stay in business. Secondly, lack of enforcement means that vulnerable workers must increasingly rely on social programs to make up for their unpaid wages, placing an additional unnecessary burden on scarce government resources that would be better spent in ways other than subsidizing payrolls. Lastly, low levels of enforcement increase income inequality and poverty (Thomas 2009) as well as all of the social ills that go with it (Broadbent Institute 2012).

To address noncompliance, action is required not only from the government, but also from the business and labour communities. Governments should:

1. increase proactive enforcement mechanisms such as pre-emptive and randomized inspection of high-risk industries and employers;
2. remove barriers to unionization to promote genuine self-enforcement;
3. enrol civil society by engaging unions, workers and community organizations, and employers' associations;
4. remove discriminatory barriers from complaints mechanisms;
5. apply penalties consistently.

For their part, civil society stakeholders should partner with governments to establish permanent community enforcement mechanisms.

II. There is a pandemic of employment standards noncompliance across Canada

The workers most likely to be subjected to employment standards violations occupy non-standard, precarious positions, and these positions have constituted a growing proportion of the labour market for several decades. Since the 1970s, the standard employment relationship – characterized by security, continuity, and provision of benefits – has been increasingly displaced by precarious forms of employment such as low-wage, part-time, and temporary contract work (Thomas 2009). This displacement has resulted in a fundamental shift in the nature of the labour market. More and more, workers must take on multiple temporary jobs and seek employment within the burgeoning temporary employment agency sector to meet their subsistence needs. In Quebec, for example, the Ministry of Labour estimates that the percentage of precarious jobs as a proportion of the labour market grew from 16.7% in 1976 to 36.4% in 2001 (Bernier, Vallée, and Jobin 2003). The vast majority of these jobs are not unionized, and many of them pay poverty-level wages for long, irregular hours, provide few if any benefits, and do not come with pensions.

The recent growth of precarious employment has been fuelled by the emergence of neo-liberalism and its dominating influence on governments' labour market policies. Common examples of labour market deregulation include increases to the total maximum number of hours employees can work per week, reductions to the number of eligible overtime hours and the overtime pay multiplier (from twice to 1.5 times the normal hourly wage), additional barriers to union organizing, and reductions to rest periods between shifts. These changes to labour market regulation bolster employers' control over working conditions, which is why some labour scholars prefer the terms 're-regulation' or 'market regulation' to deregulation as reduced government regulation has translated into a form of 'employer' or 'business' controlled regulation of the labour market (Thomas 2009). Employers have used this control

to increase the number of precarious temporary and part-time positions through outsourcing, contracting out, and elimination of full-time positions. Examples of neo-liberal re-regulatory policies abound: in Ontario, the conservative government of the mid-to-late nineties increased the obstacles to forming a union by imposing a mandatory representation vote even in cases where a majority of bargaining unit members had signed union membership cards. In British Columbia, the Campbell government increased maximum working hours, reduced the overtime multiplier, and excluded numerous occupations from employment standards protections (Fairey 2005).

In effect, labour market re-regulation has also served to reduce union density across Canada in virtually all sectors (Fudge and Tucker 2000). Because unions safeguard against precarity, the decline in union density has directly contributed to the explosive growth of precarious employment, especially in the private service sector where union density has always been low. It is in this sector – predominantly restaurants and retail stores – where most precarious jobs are found. In addition, declining union density has prevented unions from playing a role as unofficial enforcers of employment standards in non-unionized work environments, a role they had actively assumed during the heyday of the labour movement in the early twentieth century as they sought to prevent non-unionized competitors from gaining a competitive advantage from substandard working conditions and pay (Quinlan and Sheldon 2011). It is for this reason that Tucker and Fudge argue that "... the contraction of unionization in the private sector has gone hand in hand with an erosion of standard employment – full-time, indeterminate employment with one employer" (Fudge and Tucker 2000).

Government policy has a significant impact on the number of precarious jobs. A recent

case study of the effect of the B.C. government's neo-liberal labour policy on the prevalence of precarious jobs concluded that the government's 2001 changes to employment standards significantly increased the proportion of precarious workers in the province (MacPhail and Bowles 2008). British Columbia was not the only province to effect such policy changes. For the last three and a half decades, Canadian governments have been aggressively reshaping labour markets according to neo-liberal economic theory (MacPhail and Bowles 2008), ostensibly to increase economic competitiveness by making the labour market more 'flexible'. These governments have accomplished this by 'deregulating' the labour market; that is, reducing and weakening employment standards and labour relations legislation.

At the same time that the dilution of employment and labour relations legislation increased the proportion of precarious work, so too have neo-liberal reductions to social programs. Many social programs affect the labour market (MacPhail and Bowles 2008). A strong social welfare system will tighten the labour supply for the lowest-paid segments of the labour market, thereby helping to elevate wages for the most poorly paid workers. Cuts to social programs such as welfare and employment insurance have the opposite effect; namely, they can make living on social assistance so unbearable they push workers back into the labour market, regardless of whether there are enough decent paying jobs to absorb them. This influx of labour depresses wages for the poorest workers as employers realize they can get away with paying less and less, and workers feel compelled to take what they can get. Indeed, pushing workers into low-wage, precarious jobs was precisely the intention of the major reductions to social programs throughout the 1990s and 2000s. These cuts are particularly onerous for women, as they reduced the social supports that used to relieve some of the burden of care labour – such as caring for children and adult parents – that falls

disproportionately onto women. In the absence of these supports, women who would otherwise like to work full time are compelled to take low-paying, part-time employment so they have time to perform this critically important care labour.

According to neo-liberal economic theory, reductions in social spending and re-regulation of the labour market promote economic growth by reducing businesses' costs and increasing their profitability. When businesses are more profitable, the theory goes, they possess more capital to invest and expand their operations, and that investment drives economic growth. In addition, low taxation and deregulated labour markets supposedly attract additional investment from abroad, further driving economic expansion. This is why government legislation aimed at reducing taxes and deregulating labour markets has often been euphemistically re-branded as legislation that makes the economy "open for business".² In turn, this investment-fuelled growth should theoretically translate into greater demand for labour, and thus into better jobs with greater job security and improved benefits.

In practice, however, the opposite has been true. Not only is there little evidence to suggest that neo-liberal labour market policies have stimulated economic growth, there is cogent evidence suggesting that they have failed to occasion the promised increased prosperity for workers. In fact, neo-liberal 'flexibility' has only resulted in reduced or stagnating wages, benefits, and job security for the middle- to low-income families (Thomas 2009). And as middle class wages have stagnated or declined, the highest incomes have

2 Shortly after taking office, former Prime Minister Brian Mulroney announced that Canada was 'open for business' in front of an audience of New York stock brokers and traders (*see Inwood 2005*). He made the announcement to signal an ideological shift towards less government regulation. In 1994, the provincial government of New Brunswick also tried to signal to its residents that it was 'open for business' by passing anti-union legislation (*see Mann 2009*). And in 2010, the Liberal government of Ontario passed the *Open For Business Act*, which has been criticized as operating to exclude women, new immigrants, and racialized persons from employment standards enforcement mechanisms by imposing additional administrative barriers onto claimants (*see Gellatly et al. 2011*).

grown rapidly, exacerbating an inequality of wealth that has been undermining our economic performance, our democratic engagement, and our social well-being (Broadbent Institute 2012).

The popular discourse on neo-liberalism has reduced workers' *expectations* of employment conditions (Thomas 2009). Supporters of neo-liberalism have often justified the erosion of employment standards by citing the spectre of globalized competition. Their argument is that due to the globalized nature of modern commerce, Canada must now compete with economies with much lower employment standards such as far longer hours and extremely low pay. In order to remain competitive, therefore, Canada must lower its own standards. A closer analysis of these arguments, however, reveals that they are flawed. Firstly, employment standards regimes that are far more robust than those in Canada may be found in numerous highly competitive economies around the world, so there is no reason to believe they will slow economic growth (Arthurs 2006). Secondly, the sectors that experience high rates of noncompliance – construction, gastronomy, courier, janitorial, and warehousing (Vosko et al. 2011) – do not actually face globalized competition. And lastly, the growth of precarious employment feeds economic inequality, which itself actually makes economies *more* unstable and crisis-prone (Stiglitz 2012). Rather than driving economic expansion, what the spectre of globalized competition actually accomplishes is the normalization of precarity and the acculturation of Canadian workers to inferior working conditions (Thomas 2009).

Many if not most precarious workers have no access at all to employment standards legislation, either because they are self-employed, because they are covered by other, even less protective statutes, or because they have been misclassified by their employer (Workers'

Action Centre 2011). Not considered here in detail, these loopholes are increasingly a problem as they prevent some of the most vulnerable of precarious workers from accessing even the weak protections afforded by employment standards legislation. Many agricultural workers, for example, are exempt from employment standards legislation. Because they are often new immigrants with uncertain legal status, however, they have an even greater need of protection than many workers who are actually covered.

The remaining precarious workers who are covered rely more on employment standards than their non-precarious counterparts. Since precarious employment is on the rise, an increasing number of workers overall are therefore reliant on employment standards for protection. At the same time, however, these workers' access to employment standards enforcement mechanisms has been reduced by government policy. This reduced access has exacerbated the pandemic of non-compliance. For example, after the Conservatives were elected to office in Ontario in the mid 1990s, they reduced workers' access to enforcement mechanisms by laying off a quarter of employment standards officers (ESOs), though the current Liberal government has restored many of them since then. In the interim, however, these layoffs contributed to the creation of a backlog of 14,000 complaints. In British Columbia in the early 2000s, the Liberal government reduced ESOs by a third, closed half of their offices, and gutted the agricultural sectors' special enforcement unit by laying off almost three quarters of its dedicated ESOs (Fairey 2005). In addition, governments have imposed additional administrative burdens on workers seeking to file complaints with ESOs. In Ontario, Alberta, and B.C., most workers are required to self-enforce their employment rights by first approaching their employer about alleged violations before they may lodge a complaint with the Ministry. And even after doing so, they have to gather evidence, apply legal principles,

and fill out complicated legal documents without the assistance of a lawyer or paralegal (Gellatly et al. 2011). Incomplete or improperly filled-out applications are dismissed without consideration.

Though the number of *bona fide* violations has likely remained constant or even increased, hurdles such as these have significantly reduced the number of *complaints*. In British Columbia, for example, the government's imposition of self-enforcement reduced the number of claims from 12,000 to between 3,400-6,500 per year (Quinlan and Sheldon 2011). The consequence of these additional hurdles has been a set of provincial and federal employment standards regimes that are 'open for business' but closed for workers.

Because Canadian employees face serious challenges enforcing their rights at work, employers who violate them face a low risk of getting caught. And even when they do get caught, the penalties are so minor that employers intent on offending have little incentive to comply. In fact, some jurisdictions' employment legislation does not even permit ESOs to fine or otherwise penalize offending employers, while other provinces simply don't apply the penalties available (Gallina 2005). New Brunswick, for example, currently does not empower ESOs to fine employers. And in Ontario in 2009-2010, though 20,762 complaints were filed and over \$64 million was found to be owed to workers, only 298 tickets and 86 fines were issued, and just 13 prosecutions were carried out (Vosko et al. 2011). At the federal level, virtually no prosecutions have been undertaken since 1986.

In fact, enforcement mechanisms currently provide employers with an incentive to violate. This is because most complaints are eventually settled informally or during mediation processes, and the worst consequence of an informal or mediated settlement for an employer is that it will have to pay all outstanding backpay; i.e. at most, the employer will have to pay

what it should have paid in the first place. In some cases, employers may even pay less. In a pilot test of a new mediated settlement program instituted by the Ontario government in 2009-2010, final settlement amounts were found to be 17% lower than the ESO's assessment (Vosko et al. 2011). In cases where the employee makes minimum wage, there is a danger that such settlements amount to a state mediated agreement to accept less than minimum wage. Due to the nature of the available statistics, it is not possible to assess how frequently settlements deviate from an ESO's assessment, though the ministry study from Ontario is cause for concern.

Most jurisdictions promote some form of mediation, though the precise method may vary across the country. In Saskatchewan, of 2,134 complaints in 2011-2012, only 204 formal wage assessments were carried out. The remaining complaints were resolved at the investigation stage, either because the employee dropped the complaint or agreed to a mediated settlement (Ministry of Labour Relations and Workplace Safety 2012). In Ontario, 80% of complaints are resolved during the investigation stage (Vosko et al. 2011). And of the 437 disputes in Newfoundland during fiscal 2011-2012, 365 were concluded with mediation at the early resolution stage (Labour Relations Agency 2012). Moreover, employers who settle cannot be fined. Should the employer choose to ignore the settlement, then the employee would have to bring an action in provincial or federal court to have the settlement enforced at great financial expense. For employers, the low risk of getting caught, combined with the minor chance of being penalized (and much greater chance of being rewarded), work together to provide strong material incentives to violate. For a small group of unscrupulous employers, these incentives are too profitable to ignore.

That there is a pandemic of non-compliance is borne out by the available statistics.

According to two surveys conducted by the Canadian government, the first in 1997 and the second in 2005, an estimated 75% of federally regulated employers were not compliant with at least one provision of Part III of Canada's *Labour Code*, the federal employment standards regime. Even more problematic was the finding of the 1997 survey that 25% of employers were failing to comply *with most obligations*. These may actually be conservative figures as the surveys were based upon self-reported data (Arthurs 2006).

Two similar surveys carried out by Quebec's Commission des Normes du Travail confirmed high instances of non-compliance with provincial employment standards. Based on a telephone survey of provincially-regulated employees, the report on the first survey, published in 2005, found that 61.8% of nonunionized workers were the subject of at least one employment standards violation by their employer (Commission des Normes du Travail 2005). This high instance of noncompliance was confirmed by the 2010 follow-up report that determined a rate of 58% (Belzile and Perreault 2012). Further, a significant proportion of employees were subject to three violations (9.9%) or four and above violations (6.4%). For the most part, these employment standards violations concern wage-related issues such as unpaid or underpaid overtime, lack of vacation or holiday pay, or wages below the statutory minimum. The 2005 survey found, for example, that 26.9% of workers were not paid at the higher rate for overtime, and 4.7% received no pay at all for overtime. According to a different, nonrandomized survey of 520 precarious workers in Toronto, 39% of respondents did not receive the overtime they were owed (Vosko et al. 2011). The failure to pay overtime is particularly striking given that overtime rules favour the employer. In Ontario, overtime doesn't begin until an employee has worked over 44 hours in a single week, and even then the employee may still not be entitled to overtime if the employee has agreed, and the

Ministry of Labour has approved, to average hours over a given number weeks. If, for example, the agreement stipulates a three week averaging period, the employee could work as many as 91 hours in a single week without receiving overtime as long as the sum total of hours over the three week period did not exceed 132.

The statistics both from the federal and Quebec governments suggest a wide gulf between the number of actual offences and the number of reported offences. On the federal level, the Arthurs report calculated a rate of 0.215 reported violations per 1000 workers. The Saskatchewan Ministry of Labour reported a similarly low violation rate for the 2011-12 fiscal year, and suggested that the low number of complaints relative to Saskatchewan's entire labour force indicates a high level of compliance. For fiscal 2011-2012, Saskatchewan's labour standards branch received 2,134 complaints for a total workforce of 553,900, or 3.85 complaints per 1000 workers, both unionized and not.

Assuming similar rates of complaints to violations across jurisdictions, there is a large disparity between the low rates of complaints revealed by these government statistics (less than 1%) and the high rates of non-compliance found by the federal and Quebec governments' surveys (60% of workers, 75% of employers). The existence of this disparity suggests that the low level of complaints is not due to a high level of compliance, but rather it is due to a fear of reprisal. This conclusion is also supported by the violations statistics derived from proactive inspections. The Auditor General of Ontario reported that proactive inspections turn up a violation rate for employees of 40% to 90% (Law Commission of Ontario 2012). In fiscal 2008-2009, 2,135 proactive inspections in Ontario generated 2,883 compliance orders amounting to \$1.9 million dollars in unpaid wages from a pool of 60,000 employees affected by the inspections. Given that so few employees complain while still

employed, it is likely that the preponderance of these violations would never have been discovered but for the proactive inspections.

The vast majority of complaints come from employees "after the employment relationship has ended," (Thomas 2009, 132) and so employment standards enforcement mechanisms are failing to protect people while they are working. At the federal level, the Arthurs report calculated that 92% of all complaints come from former employees (Arthurs 2006) and the Law Commission of Ontario heard testimony from experts confirming that most complaints in Ontario come from employees after they have left their jobs (Law Commission of Ontario 2012).

Taken together, these statistics demonstrate that there is a major enforcement deficit across Canada. Governments are failing to protect workers against exploitation, and this failure has translated into hundreds of millions of dollars in lost income.

III. The enforcement deficit disproportionately affects socially vulnerable communities

Because precarious workers are particularly reliant on employment standards, and precarious jobs are disproportionately occupied by persons from socially marginalized communities – including women, racialized persons, persons with disabilities, Aboriginal people, members of the LGBT community, and new immigrants – the employment standards enforcement deficit has a disproportionately negative impact on those communities (Thomas 2009). The current enforcement mechanisms across Canada are failing these communities because they are premised on a self-enforcement model, and self-enforcement is often not an option for people from marginalized social positions. The imbalance of power is too great. As one scholar notes, vulnerable workers are often victimized by veiled forms of discriminatory

conduct on the part of their employers such as the allocation of desirable schedules or easier tasks on the basis of racist and gendered decision-making processes (Gellatly et al. 2011). Approaching such employers about unpaid wages is a risk for vulnerable employees as they could be reprimanded in covert, difficult to document ways such as losing hours or being assigned difficult tasks. Or they could be laid off altogether. These are risks that vulnerable employees are least likely to be in a position to take.

Although the self-enforcement requirement may be waived where workers fear reprisal, the enforcement processes themselves can operate on the basis of racist and gendered modes of exclusion that prevent vulnerable workers from accessing them (Gellatly et al. 2011). In the first place, these workers are the least likely to be aware of their employment rights. Linguistic minorities and young workers are particularly likely to be unaware of their rights. And even when they are, vulnerable workers are likely to face increased difficulties at every stage of the complaints process. At the initial stage, vulnerable workers have greater difficulty filing the formal complaint, including while gathering evidence, interpreting legal rules, and filling out documentation, especially when their native language is neither English nor French. Assuming the complaint is not rejected for incompleteness, the following stage involving informal settlement talks mediated by the ESO also discriminates against vulnerable employees because of the limited socio-economic power they can marshal to resist an employer's settlement offer. This worker-employer power asymmetry may be especially problematic for workers with intersectional identities – for example, lesbian racialized women – that face interlocking and mutually reinforcing forms of systemic discrimination such as gendered racism.

Asymmetries of social power can seriously complicate even a professional mediator's

work, and the methods they use may even rob socially marginalized communities of the tools society has provided them to assert their rights (Grillo 1991). In instances such as these, mediation is an inappropriate means of conflict resolution. Other than cases where the number of hours worked is in dispute, there is little to mediate; the employment contract stipulates the rate, legislation determines overtime multiplier, and the employers' records should keep track of hours worked. Finally, after a settlement has been reached or an order has been made, the complaining employee may again be subject to retaliation for complaining and suffer reductions in hours, reassignment to the least desirable work, or ultimately laid off on another pretext.

IV. Unpaid wages affect us all

Because precarious workers are more likely to require support from social programs, unpaid wages are an unnecessary burden on government finances. Many provincial and federal social programs, such as the Working Income Tax Benefit, are provided to low-income earners on an income-tested basis. Precarious workers whose income is supplemented by such programs see their benefits increase as their income decreases. When these workers earn more money, for example because they receive the overtime pay they are owed, it results in a decrease in their benefit and more money the government can direct elsewhere. Unpaid wages are therefore equivalent to an indirect government subsidy for employers' payrolls. Not only is this problematic because those funds are badly needed elsewhere, but these subsidies afford offending employers a competitive advantage against their compliant competitors.

A recent example from the U.S. demonstrates the extent to which unpaid wages can strain government finances. Just this year, a U.S. Congressional committee released a study

based on data from Wisconsin demonstrating that a single Wal-Mart store costs U.S. governments between \$900,000 and \$1.75 million dollars in social assistance and other subsidies for its underpaid employees and their families (Democratic Staff of the US House Committee on Education and the Workforce 2013). There are 4,663 Wal-Mart stores across the U.S. Assuming an average of a \$1 million subsidy per store, Wal-Mart's payroll is subsidized to the tune of \$4.6 billion USD per year by American governments. However, this payroll subsidy would be reduced significantly if Wal-Mart consistently paid overtime. It does not. In 2008, Wal-Mart's refusal to pay overtime resulted in lawsuits for unpaid overtime that it ultimately settled for \$640 million USD (Skidmore 2013). And in 2012, Wal-Mart had to pay \$4.8 million in employee settlements in another class action suit for unpaid overtime.

V. Problems with current approaches to employment standards enforcement

The enforcement deficit is the result of ineffective regulatory strategies based on reactive enforcement, a model which in recent times has dominated employment standards regulation around the world (Quinlan and Sheldon 2011). This reactive model of enforcement is an outgrowth of neo-liberalism in the field of regulatory management theory called New Public Management (NPM). Ontario's OBA is an example of this kind of regulatory approach (Gellatly et al. 2011). NPM emphasizes voluntary compliance and seeks to minimize traditional, more coercive and intrusive enforcement tools. In effect, NPM seeks to replace state enforcement with limited, government-facilitated *self-regulation*, and purports to maximize efficiency by limiting government involvement and promoting mediated settlement.

As a consequence, most employment standards regulators in Canada rely heavily, and in some cases exclusively, on a two-pronged approach of complaint response and public education. Newfoundland, P.E.I., New Brunswick, and Nova Scotia currently rely exclusively

on these two prongs. In addition, Quebec, Ontario, Alberta, BC, Manitoba, and Saskatchewan all carry out a limited number of proactive inspections.

Heavily reactive regulatory enforcement approaches have been highly criticized in the regulatory literature (Sparrow 2000). In fact, reaction-only enforcement, which prevails in several provinces as well as at the federal level, has been rejected by the regulatory literature as an ineffective enforcement model in any regulatory context, and employment standards enforcement is no exception. Reaction-based complaints processes such as those that dominate the employment standards enforcement regimes across Canada provide remedies for individual complaints, but they cannot resolve systemic non-compliance (Gallina 2005). The reaction model is especially ineffective in the contemporary Canadian context where the risk of getting caught is negligible and the penalties, in the jurisdictions where they even exist, are rarely applied.

VI. Possibilities for remedying the enforcement deficit and improving compliance

1. Increasing proactive inspections

Increasing the number of proactive inspections in high risk industries has been widely recommended by numerous scholars and public reports in Canada, the U.S., and Australia as a key part of improving compliance. Indeed, several provinces already conduct proactive inspections to varying degrees, including Manitoba, Alberta, Ontario, Saskatchewan, and Quebec. There are a number of reasons why proactive inspections are desirable from an enforcement perspective. Firstly, proactive inspections are far more likely to unearth instances of exploitation of vulnerable workers, especially while they are still employed. This is because proactive inspections sidestep the problem of the employer-vulnerable worker power imbalance that prevents vulnerable workers from coming forward or negotiating a fair

settlement. Secondly, proactive inspections take advantage of economies of scale. In Quebec, for example, an employee complaint relating to pay may trigger an audit of the employer's entire payroll, which not only increases the likelihood of identifying more violations, but also saves ESOs time as they may investigate and deal with multiple violations in the course of a single inspection. Taking advantage of economies of scale is key to the efficient use of limited agency resources in any regulatory context (Sparrow 2000). Lastly, proactive inspections result in workers recovering a much greater percentage of wages than is typically the case through the complaints mechanisms. In Ontario, proactive inspections have permitted workers to recover between 90 and 99% of wages owing, whereas the complaints process has resulted in recovery of roughly half that percentage (Vosko et al. 2011).

When implementing a proactive inspection program, employment standards agencies should be sure to conduct a certain percentage of randomized inspections. Rather than only targeting employers that are likely to offend or have been caught offending already, enforcement agencies should dedicate a small number of yearly inspections entirely to random employers in sectors considered unlikely to offend. These randomized inspections are important to test the validity of the agencies' risk assessments against a comparator. Otherwise, the agencies will tend to target sectors they already considered to be a problem without recognizing the possibility that the risks may change or sectors thought mostly compliant may not be (Sparrow 2000).

Increasing proactive inspections will require additional resources at a time when government budgets are under pressure. However, these additional costs may be partly offset by reductions in social spending as lower-income workers become less reliant on social programs. Even where increases to employment standards budgets are not forthcoming, it

may still be worth it to allocate a greater share of resources from complaint response to proactive inspection, even if it means increases to processing times. Though complaining employees will to wait longer, proactive inspections are likely to discover more violations, resulting in better overall compliance.

2. *Remove barriers to unionization to promote genuine self-enforcement*

High rates of unionization tend to increase employer compliance with employment standards as employees are then more empowered to settle disputes with the employer through the grievance process rather than having recourse to government enforcement mechanisms. This is a model of genuine self-enforcement that corrects for the inevitable employer-employee power differential by pooling the collective power of the bargaining unit. Removing obstacles to unionization such as the representation vote is therefore a simple, efficient, and cost-effective way to promote genuine self-enforcement of employment standards.

That unions promote employer compliance with employment standards was demonstrated by a quantitative study of New Zealand employers on age discrimination practices (Harcourt, Wood, and Harcourt 2004). The researchers found a strong correlation between union density and odds of employer compliance. As union density increased from 1% to 100% within a given employer, for example, the odds of that employer placing an unlawful question about age on a job application dropped by 45%.

Further evidence that unions promote employment standards compliance is demonstrated by the complaint statistics. According to the Law Commission of Ontario report on vulnerable workers, the Auditor General of Ontario has asserted that most complaints lodged during the employment relationship come from unionized employees. This suggests

that membership in a union increases the likelihood of violations getting reported (Law Commission of Ontario 2012).

3. *Enrolling the community*

Employment standards enforcement agencies can utilize their resources more effectively by leveraging the self-interest of stakeholders such as unionized and other high-paying employers, labour and community unions, and workers' and immigrants' advocacy organizations and empowering them to play an active role in enforcement (Fine and Gordon 2010). High-paying and unionized employers have an interest in enforcement in order to ensure their competitors don't undercut them by paying substandard wages or refusing overtime pay. Unions similarly have an interest in enforcement because substandard wages at other workplaces both threaten their members' jobs and undermine their bargaining position. Community unions have been organizing around employment and other regulatory standards regimes for years. Many immigrants' organizations have also been actively involved in enforcing regulatory regimes, including employment standards (Fine 2005).

Further, informal workers' unions such as the Workers Action Centre of Toronto (WAC) already provide employment-related services to thousands of youth and immigrant workers. Organizations such as these therefore make logical community partners for employment standards enforcement agencies. The Centre's established and extensive networks of workers make it a likely go-to point for employment problems, and its valuable expertise could be leveraged by enforcement agencies. The WAC has been a valuable source of knowledge for public reports and government policy change, having compiled submissions for the Arthurs report (Workers' Action Centre 2005), the recent Law Commission of Ontario report (Workers' Action Centre 2012) as well as for the Ontario government's consultations on its legislation

governing temporary help agencies (Workers' Action Centre 2008).

What makes these stakeholders ideal partners for enforcement agencies is that they all have an interest in employment standards compliance, and they possess the 'insider' information about the labour market that is crucial to improving it. Through both formal and informal networks of communication, these stakeholders can often identify high-risk sectors and employers to increase the precision of targeted inspections. In addition, civil society actors such as unions have a broader array of tools with which to coerce employers into complying such as rallying community support, picketing, and public shaming (Hardy 2011). The WAC has been highly successful at mobilizing vulnerable workers and the community supporters using these and other forms of direct action to pressure both the government and employers (Lori Theresa Waller 2013).

There are numerous possibilities for enrolling community stakeholders in a way that leverages their interests. In Australia, labour unions have been actively involved in employment standards enforcement by acting as a hub for complaints (Quinlan and Sheldon 2011). In addition to labour unions, immigrant organizations are also a likely candidate to act as hubs for employment standards complaints. Because these groups often enjoy a high degree of credibility within new immigrant circles, they are more likely than other community and government organizations to be the first to hear of employment standards violations from exploited workers seeking assistance (Fine and Gordon 2010). They could also play a role assisting workers in actually filing complaints, especially in cases where cultural and linguistic translation is needed.

In addition to receiving complaints, community groups and unions could be deputized to conduct workplace inspections. Deputization has been demonstrated by several case

studies to increase the enforcement capability of employment standards agencies exponentially (Fine and Gordon 2010). A deputization model has been successfully used in Los Angeles, where local construction trade unions, the L.A. Unified School District, and city inspectors have partnered to permit union delegates to receive training and conduct proactive inspections of publicly-funded school construction sites. The partnership was the product of a direct agreement between the District and the unions that established an in-house employment standards enforcement department staffed by union volunteers. The resultant compliance program has been a major success. Not only have the union volunteers increased the inspection capacity of the city authority significantly, they also bring valuable insider knowledge as well as the language and cultural diversity that enables them to reach a wider ambit of workers (Fine and Gordon 2010). Furthermore, city officials have warmed to the program, overcoming initial apprehensions and now praising the union volunteers for their consistently responsible use of authority.

Labour unions can play a part in facilitating community enforcement by opening up membership to non-bargaining unit workers and pooling their dues to offer basic services. Though modern examples of 'Open Source Unionism' (Fine and Gordon 2010) are relatively rare, the recent merger of the Canadian Auto Workers and the Canadian Energy and Paperworkers Union into Unifor represents a potentially fruitful model to follow as it develops.

The major challenge to enrolling civil society is the danger that governments use these groups to offload responsibility for enforcement, a responsibility they neither can nor should have to bear. They simply do not have the resources. Many labour unions already face serious budget shortfalls due to declining membership, and community and informal workers' unions were never well-resourced to begin with due to the nature of their membership and

mission. The Workers Action Centre of Toronto, for example, receives most of its funding from private foundations. Private funds should not be required to enforce public policy. The key to avoiding this scenario will be to strike the right balance between community involvement and public enforcement without exploiting the organizations by making them responsible for filling the gaps in enforcement left by decades of neo-liberal labour market policy. This may involve making public resources available to community partners. Used to working on shoestring budgets, these organizations are likely to put additional resources to efficient use.

4. Making the complaints process accessible

Institutionalized forms of racist, gendered, and ableist discrimination should be actively removed from the complaints process. Employees should not be made to approach their employers before lodging a complaint; employees with sufficient social power to do so are likely to be able to enforce their rights on their own, be in a position to quit, or not require government support in the first place. These employees are not the ones suffering from the enforcement deficit.

Removing discrimination will involve several measures. In jurisdictions that have placed the onus of proof onto workers, that onus should be reversed. Employers should be responsible for disproving claims because they are statutorily required to document working hours, and they often do not provide this documentation to employees (Commission des Normes du Travail 2005).

In addition, mediation should play a more minor role in the resolution of claims. While informal settlement talks may accelerate claims processes, this benefit should not outweigh the importance of the employee receiving fair compensation for hours worked. When

mediating disputes, ESOs should strive to be aware of social power differentials caused by institutionalized discrimination and should work to correct them by disallowing settlements below statutory minimums. In other words, ESOs should limit the range of settlement to factual issues such as hours worked rather than global settlement amounts so that vulnerable employees are not coerced into accepting substandard wages. This could be achieved by requiring employers to file written settlement agreements for review by ESOs to ensure they comply with the law.

Finally, third party and anonymous complaints should be permitted in all jurisdictions. Doing so will also mitigate institutional discrimination as offending employers will not be able to single out individual complaining employees for reprisal.

5. *Applying fines consistently to violators, aiders, and abettors*

For many offending employers, violating employment standards is arguably a "calculated business decision" (Quinlan and Sheldon 2011) because the likelihood of getting caught is low and the penalties are rarely applied. To make it unprofitable for employers to violate, ESOs should be required to apply penalties consistently, either by providing them with more detailed policy direction on the application of penalties (Law Commission of Ontario 2012), or by requiring ESOs to apply them through legislative change. In jurisdictions with low penalties such as the federal jurisdiction, fines should be increased significantly (Arthurs 2006).

In addition, professionals and managers who typically have access to or oversee the payroll should be incentivized to report infractions. Incentivization could be achieved by mandating penalties for individuals within an organization with knowledge of a violation (Hardy 2011). Several jurisdictions already do this, though fines are rarely issued. Targeted

individuals could include lawyers, accountants, managers, and auditors.

VII. Conclusion

High standards of employment are a cornerstone of a strong, healthy society, as well as a robust, thriving economy. They protect us against degrading working conditions, and they promote fairness at the workplace. In addition, they help counteract the natural tendency of the labour market to exacerbate income inequality, which is not only unjust, but also undermines our economic prosperity.

But these positive outcomes have been threatened in recent years by the erosion of employment standards and the pandemic of non-compliance. At the same time that governments have been weakening employment standards, they have been scaling back enforcement mechanisms and facilitating widespread and systemic violations. These violations have had severe consequences for all workers, especially women, members of First Nations, racialized persons, youth, members of the LGBT community, and persons with disabilities. Already underpaid and overworked, these vulnerable workers have been denied hundreds of millions of dollars per year in overtime, vacation and holiday pay, and other forms of compensation contractually owed to them.

While progress has been made in some jurisdictions over the last few years, government need to do more to ensure employment standards are respected. Employment standards enforcement agencies need to ratchet up the number of proactive inspections they perform, remove discriminatory barriers from complaints processes, and explore ways of enrolling civil society partners to expand their investigatory capacity such as deputizing volunteers who possess an interest in ensuring compliance. In addition, they should seek to make violation unprofitable by applying penalties consistently.

Governments' recent emphasis on self-enforcement is not entirely a bad idea. But self-enforcement must be genuine; it must be underpinned by a relationship of employee-employer equality that is only achievable in a unionized context. To promote genuine self-enforcement, therefore, governments should remove legislative obstacles to union organizing, and unions should open their doors to non-bargaining unit workers.

Employment standards are so crucial for workers. Let's strive for employment standards that work.

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