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*Volume 50, Issue 4 (Summer 2013)*  
*The Voices at Work North American Workshop*  
*Guest Editors: Sara Slinn & Eric Tucker*

Article 4

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# “Rights without Remedies”: Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs

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## Citation Information

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<http://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss4/4>

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# “Rights without Remedies”: Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs

## **Abstract**

Workers in Ontario, Canada are on the edge of a crisis in the enforcement of their minimum employment standards (ES). This crisis is shaped not only by well-documented deficiencies in the scope of labour protection but by the fact that the administration of the ES system has not kept pace with the increasing number of workers and workplaces requiring protection under the province’s employment standards act. Coupled with an outmoded complaint-based system, the dearth of support for ES enforcement is cultivating a situation in which an unprecedented number of workers are bearers of rights without genuine opportunities for redress. Responding to this situation, this article explores how measures augmenting the voices of workers and their advocates could contribute to improving ES enforcement in Ontario. It does so through a review of innovative practices in other common law contexts characterized by similar enforcement regimes where labour market conditions have likewise deteriorated.

## **Keywords**

Labor laws and legislation; Ontario

## “Rights without Remedies”: Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs

LEAH F. VOSKO \*

Workers in Ontario, Canada are on the edge of a crisis in the enforcement of their minimum employment standards (ES). This crisis is shaped not only by well-documented deficiencies in the scope of labour protection but by the fact that the administration of the ES system has not kept pace with the increasing number of workers and workplaces requiring protection under the province's Employment Standards Act. Coupled with an outmoded complaint-based system, the dearth of support for ES enforcement is cultivating a situation in which an unprecedented number of workers are bearers of rights without genuine opportunities for redress. Responding to this situation, this article explores how measures augmenting the voices of workers and their advocates could contribute to improving ES enforcement in Ontario. It does so through a review of innovative practices in other common law contexts characterized by similar enforcement regimes where labour market conditions have likewise deteriorated.

Les travailleurs de l'Ontario, au Canada, sont au bord de la crise en ce qui a trait au respect de leurs normes minimales d'emploi. Cette crise se dessine non seulement en raison de lacunes bien documentées dans le cadre de la protection des travailleurs, mais encore parce que l'administration du système des normes d'emploi n'a pas suivi le rythme de l'augmentation du nombre des travailleurs et des lieux de travail nécessitant une protection en vertu de la

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\* York University. I am grateful to colleagues from the Cornell ILR School's Women's Writing Group, four anonymous reviewers, and Eric Tucker for their comments on an earlier version of this article as well as to John Grundy and Kim McIntyre for their research assistance. I also thank the Social Sciences and Humanities Research Council of Canada's standard research grants program and the Canada Research Chairs program for their financial support. An earlier version of this article was originally presented at the Voices At Work North American Workshop (16-17 March 2012), hosted at Osgoode Hall Law School, York University, Toronto and funded by the Leverhulme Trust, the Centre for Labour Management Relations at Ryerson University, and Osgoode Hall Law School.

Loi sur les normes d'emploi de la province. Associé à un système désuet axé sur les plaintes, le peu de soutien au respect des normes d'emploi fait perdurer une situation où, même si un nombre sans précédent de travailleurs bénéficient de ces droits, ils n'ont pas véritablement l'occasion de les faire valoir. Réagissant à cette situation, le présent article passe en revue les pratiques novatrices mises de l'avant dans d'autres secteurs de la common law caractérisés par un régime semblable de contrôle d'application et où les conditions du marché du travail s'étaient également détériorées afin de déterminer si des mesures faisant mieux entendre la voix des travailleurs et de leurs défenseurs peuvent contribuer à améliorer le respect des normes d'emploi en Ontario.

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**WORKERS IN ONTARIO ARE ON THE EDGE OF A CRISIS** in the enforcement of their minimum employment standards (ES). This crisis is shaped not only by well-documented deficiencies in the scope of labour protection but by the fact that the administration of the ES system has not kept pace with the increasing number of workers and workplaces requiring protection under the *Employment Standards Act (ESA)*.<sup>1</sup> The dearth of support for ES enforcement, coupled with an outmoded complaint-based system, is cultivating a situation in which an unprecedented number of workers are bearers of rights without genuine opportunities for redress.<sup>2</sup> Indicative of the principally reactive approach to

1. *Employment Standards Act, 2000*, SO 2000, c 41 [ESA].

2. Hence the allusion in the title of this article to "rights without remedies," which refers to a comment made by former Ontario Minister of Labour, Chris Bentley. In 2004, shortly before departing from his post, Bentley noted that "[r]ights without remedies will not be rights for long ... a new, more effective approach to enforcement of employment standards is long overdue." See Ontario, Legislative Assembly, *Hansard* 38th Parl, 1st Sess (26 April 2004) at 1400 (Chris Bentley), online: <<http://hansardindex.ontla.on.ca/hansardeissue/38-1/1037.htm>>.

enforcement, Ontario's ES system is characterized by a backlog of unresolved claims, a complaint process resting on individual workers coming forward in an increasingly hostile environment, and an inspectorate unable to keep pace with regulatory provisions for proactive inspection. Giving workers and their advocates a stronger voice in ES enforcement is critical to ameliorating this mounting crisis.

In response to this challenge, this article explores how measures that augment the voices of workers and their advocates could contribute to improving ES enforcement in Ontario. It does so through a review of innovative practices in other common law contexts characterized by similar enforcement regimes where labour market conditions have likewise deteriorated. Proceeding in four parts, the analysis begins in Part I with a description of how the concept of voice is employed herein, and its importance for workers in precarious jobs characterized by a lack of union representation. In studies of labour market regulation, voice is identified typically with union representation. An increasing number of workers for whom ES are the principal source of labour protection, however, do not have redress through unions and face other labour market insecurities. Many of these workers are also members of social groups confronting other challenges to realizing labour rights and protections (*e.g.*, women, recent immigrants, temporary migrant workers, young people, et cetera). For such workers, a lack of union representation, together with other structural disadvantages, creates a climate in which violations, as well as practices evading and eroding workplace laws, are commonplace.

Part II describes the crisis in ES enforcement in Ontario, focussing on the enforcement system's primarily reactive or complaint-based orientation, and how this approach, which places the onus of enforcement in individual workers' hands, mutes the voices of workers in precarious jobs. Part III canvasses practices in other jurisdictions that offer potential models for countering the degree of individualization faced by workers in Ontario in seeking to realize their ES rights and entitlements. In identifying innovations that give workers and their advocates a greater voice in enforcement, Part III provides examples of how state agencies, workers' advocates (unions and community organizations), and partnerships between state agencies and workers' advocates can support both individual workers and workers' collective voice. Finally, bridging the critique of Ontario's ES enforcement regime and the review of practices adopted elsewhere, Part IV identifies voice mechanisms that offer promise in remedying the enforcement crisis in Ontario.

## I. VOICE IN THE REGULATION OF EMPLOYMENT STANDARDS

As it is used here, in relation to the topic of workplace regulation, voice entails the ability to pre-empt grievances in the workplace or to make such grievances effective (*i.e.*, realize their effective remedy or resolution).<sup>3</sup> In a broad sense, voice amounts to the capacity to speak and be heard as a member of the community of workers served by formal legal protections and the associated enforcement policies.

Although there is a range of approaches to the study of voice, scholars in the traditions of political science and law typically see voice in the light of rights, linking it to humanism and industrial citizenship.<sup>4</sup> As Adrian Wilkinson and Charles Fay note, “the concept of industrial democracy (which draws from notions of industrial citizenship) sees participation as a fundamental democratic right for workers to extend a degree of control over managerial decision making.”<sup>5</sup> Others add that free speech and human dignity have a place in the voice/participation matrix.<sup>6</sup>

Complementing this approach, scholars in industrial relations conceive of voice in terms of representation. Here, analysts focus typically on power relations and control over the labour process in central institutions of labour market regulation (especially collective bargaining structures) and view representation as key to countervailing power. They identify voice with democratic trade unions, which are seen as the primary agents for supporting workers in exercising their rights since they are independent and membership-based. Although there is growing acknowledgment of the need for representation among non-unionized workers

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3. Richard B Freeman & James L Medoff, *What Do Unions Do?* (New York: Basic Books, 1984) at 7-11; John W Budd, Paul J Gollan & Adrian Wilkinson, “New approaches to employee voice and participation in organizations” (2010) 63:3 Hum Rel 303; Tony Dundon et al, “The meanings and purpose of employee voice” (2004) 15:6 Int’l J Hum Res Mgmt 1149; Cynthia Estlund, “Rebuilding the Law of the Workplace in an Era of Self-Regulation” (2005) 105:2 Colum L Rev 319.
  4. HW Arthurs, “Developing Industrial Citizenship: A Challenge for Canada’s Second Century” (1967) 45:4 Can Bar Rev 786.
  5. “New Times for Employee Voice?” (2011) 50:1 Hum Res Mgmt 65 at 67.
  6. See *e.g.* International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, 86th session, Geneva (18 June 1998), online: <<http://www.ilo.org/public/english/standards/decl/declaration/index.htm>>; John W Budd, Rafael Gomez & Noah M Meltz, “Why a Balance is Best: The Pluralist Industrial Relations Paradigm of Balancing Competing Interests” in Bruce E Kaufman, ed, *Theoretical Perspectives on Work and the Employment Relationship* (Champaign, Ill: Industrial Relations Research Association, 2004) 195 at 197-98; Janice R Foley and Michael Polanyi, “Workplace Democracy: Why Bother?” (2006) 27:1 Econ & Indus Democ 173.

in the face of declining rates of unionization, most scholarship in this tradition centres on those best able to express their workplace concerns.<sup>7</sup> To this end, it also largely takes a particular employment model as given: the standard employment relationship,<sup>8</sup> in which the worker works full-time and continuously for one employer on his or her premises under direct supervision, normally in a unionized situation, and has access to a social wage.<sup>9</sup> Concomitantly, it assumes the native-born male industrial worker as its central subject.

The focus of my inquiry, by contrast, is workers beyond those who are in a position to complain or to play the role of the protagonist<sup>10</sup> in ES enforcement. It includes both workers who lack formal representation altogether and those who face other structural disadvantages inhibiting their access to representation.<sup>11</sup> Its presumed subjects normally do not have access to union representation, which makes them dependent principally on ES rather than the often more favourable terms of collective agreements. They may also be disadvantaged with respect to the scope of labour protections provided via ES because of, in the case of gender relations, divisions of paid and unpaid labour shaping men's and women's labour force status as well scheduling and work arrangements; in the case of immigration status, differential

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7. But see Vanessa Tait, *Poor Workers' Unions: rebuilding labor from below* (Cambridge, Mass: South End Press, 2005); Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, Mass: Belknap Press, 2005); Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Ithaca, NY: Cornell University Press, 2006).
  8. Ulrich Mückenberger, "Non-standard forms of employment in the Federal Republic of Germany: The role and effectiveness of the State" in Gerry Rodgers & Janine Rodgers, eds, *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Geneva: International Labour Organization, International Institute for Labour Studies, 1989) 267 at 267-68.
  9. Freeman and Medoff cast unions alternatively as conduits, particularly for the expression of voice amongst "inframarginal" employees, since their compensation packages and job security are tied to length of service and, hence, the countervailing exit option is not desirable. See Freeman & Medoff, *supra* note 3. See also Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970).
  10. Eric Tucker, "Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom" in Theo Nichols & David Walters, eds, *Governance, Change, and the Work Environment: Safety, Profit and the Conventional Wisdom* (Amityville, NY: Baywood) at 27 [forthcoming in 2013] [Tucker, "Old Lessons for New Governance"].
  11. Although it is beyond the scope of this investigation to engage extensively with scholarly literature on the impacts of neo-liberalism, it is worth emphasizing that the ranks of these two groups have swelled in recent decades with the transition from Keynesianism to neo-liberalism. See e.g. Jamie Peck, *Workfare States* (New York: Guilford Press, 2001); Mark P Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal: McGill-Queen's University Press, 2009).

provision of rights and access to supports for citizens and permanent residents, temporary work permit holders, and non-status workers based on form of immigration and duration of stay in the country; and, in the case of age, graduated social minima. Structural disadvantage may also relate to the overlapping issue of workers' employment status and form of employment, since ES coverage pivots on the standard employment relationship. Distinctions between different employment statuses (self-employment or paid employment) and among forms of paid employment (part-time or full-time, temporary or permanent) operate to exclude certain categories of workers fully or partially from access to ES entitlements. Such exclusion can be by design, as is the case for the self-employed, or by implementation, as is the case with part-time and temporary employees unable to qualify for ES protections due to their hours of work or tenure in a single job.<sup>12</sup>

In defining ES-dependent workers, I therefore aim to encompass workers whose employment situations do not match the standard employment relationship, a group that includes many women, immigrants, and young people. I also seek to include those whose connections to paid employment are, at times, tenuous due to circumstances linked to structural disadvantage as well as those who do not currently have a job since, in a complaint-based enforcement system of the sort operating in Ontario, workers are often in a position to complain only after they have left their jobs. In identifying actors and institutions with potential roles to play in representing ES-dependent workers, I correspondingly include workers' advocates (*e.g.*, legal case workers) and workers' centres, which often identify more with community than with workplace concerns and typically take a holistic

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12. See generally Leah F Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000); Judy Fudge, Eric Tucker & Leah Vosko, "The Legal Concept of Employment: Marginalizing Workers" (Originally prepared for the Law Commission of Canada, 25 October 2002), online: Government of Canada Publications <[http://publications.gc.ca/collections/collection\\_2007/lcc-cdc/JL2-35-2002E.pdf](http://publications.gc.ca/collections/collection_2007/lcc-cdc/JL2-35-2002E.pdf)> [Fudge, Tucker & Vosko, "The Legal Concept of Employment"]; Stephanie Bernstein, "Mitigating Precarious Employment in Quebec: The Role of Minimum Employment Standards Legislation" in Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen's University Press, 2006) 221 [Vosko, *Precarious Employment*]; Katherine Lippel, "Precarious Employment and Occupational Health and Safety Regulation in Quebec" in Vosko, *Precarious Employment* (*ibid*) 241; Eric Tucker, "Will the Vicious Circle of Precariousness be Unbroken? The Exclusion of Ontario Farm Workers from the *Occupational Health and Safety Act*" [Tucker, "Vicious Circle of Precariousness"] in Vosko, *Precarious Employment* (*ibid*) 256; Leah F Vosko, "Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity" [Vosko, "Labour Market Insecurity"] in Vosko, *Precarious Employment* (*ibid*) 3; Leah F Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2010) [Vosko, *Managing the Margins*].



approach to the experiences of working people due to the constituencies they support.<sup>13</sup> Workers' centres and workers' advocates may be focused not only on narrow workplace issues but on broader social and economic concerns linked to processes of social reproduction. For this reason, they may be uniquely positioned to observe systematic tendencies, including the fact that "the current [individualized rights-based model for enforcing ES in Ontario] ... sets different de facto standards of legal compliance for employers of low-wage earners versus high-wage earners"<sup>14</sup> because the low waged do not earn enough to receive adequate legal support. Workers' centres and workers' advocates may also be well-situated to assist ES-dependent workers in actualizing their rights through broad-based strategies that extend beyond particular workplaces.

Enabling more workers to exercise voice in ES enforcement requires a greater plurality of mechanisms for redress for those facing violations and other forms of evasive behaviour, as well as an expanded group of actors and institutions upon whom they can rely for support.

## II. EMPLOYMENT STANDARDS ENFORCEMENT IN ONTARIO

ES are legislated standards setting minimum terms and conditions of employment in areas such as wages, working time, vacations, public holidays, equal pay for equal work, leaves of absence, and termination and severance of employment. They are meant to serve as the floor of workplace protection for most workers in a labour market, but they are the main source of protection for workers in non-unionized jobs. Despite their significance for the over six million workers in the over 370,000 workplaces in Ontario, a large body of literature reveals gaps in the scope of coverage under the *ESA*. These shortcomings are acute for workers in precarious jobs, which typically involve forms of employment differing from the standard employment relationship. Existing studies reveal a misfit between coverage under the *ESA* and solo self-employment, part-time employment, and temporary paid employment—forms of employment in which workers often experience high levels of uncertainty, low income, a lack of access to regulatory

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13. See Cynthia J Cranford et al, "Thinking through Community Unionism" in Vosko, *Precarious Employment* (*supra* note 12) 353; Janice Fine, "A Marriage Made in Heaven?: Mismatches and Misunderstandings between Worker Centres and Unions" (2007) 45:2 *Brit J Indus Rel* 335. See also Simon J Black, "Community Unionism: A Strategy for Organizing in the New Economy" (2005) 14: 3 *New Lab Forum* 24.
14. Samuel Estreicher & Zev J Eigen, "The forum for adjudication of employment disputes" in Cynthia L Estlund & Michael L Wachter, eds, *Research Handbook on the Economics of Labor and Employment Law* (Cheltenham, UK: Edward Elgar, 2010) 409 at 414.

protection, and limited control over the labour process.<sup>15</sup> Another significant area of weakness under the *ESA* relates to enforcement. Although the limited resources devoted to enforcement affect all workers covered by the *ESA*,<sup>16</sup> the enforcement gap is particularly significant for workers in precarious jobs, including those who may technically be covered by its provisions but are not in a position to access their rights. This less well-studied contemporary gap is the focus of this Part.<sup>17</sup>

#### A. THE EXISTING MACHINERY<sup>18</sup>

In Ontario, workers' access to ES depends on the Ministry of Labour's (MOL) ability to oversee their implementation, since this branch of government is mandated to administer, enforce, and promote compliance with the *ESA* and

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15. See Vosko, "Labour Market Insecurity," *supra* note 12; Fudge, Tucker & Vosko, "The Legal Concept of Employment," *supra* note 12; Judy Fudge & Leah F Vosko, "Gender, Segmentation, and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy" (2001) 22:2 *Econ & Indus Democ* 271; Bernstein, *supra* note 12; Tucker, "Vicious Circle of Precariousness," *supra* note 12; 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, Vulnerable Workers and Precarious Work Project* (2011), online: <<http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-noack.pdf>>.
  16. Attesting to the magnitude of this gap, the number of workers covered by the *ESA* increased between 1997 and 2007 by 24 per cent. Over the same period, funding for the ES Program decreased by 33 per cent. Indeed, even significant increases in 2009–2010, flowing from the provincial government's recognition of the problem, leave funding levels over ten per cent below 1997 levels without adjusting for inflation. See Leah F Vosko et al, "New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada" *Law Commission of Ontario, Vulnerable Workers and Precarious Work Project* (2011) at 30, online: <<http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf>> [Vosko et al, "New Approaches to Enforcement"].
  17. For a detailed history of Ontario's ES regime, documenting the contemporary shift from a Keynesian emphasis on welfarism, under which ES were understood as minimum floor and enforced largely through proactive measures, to a neoliberal emphasis on "regulated flexibility" characterized by a move to a reactive model, see Thomas, *supra* note 11. On the administration of the *ESA* at its inception, see Marion E Lane, *Administration in Action: An Institutional Analysis of the Ontario Employment Standards Branch* (LLM Thesis, University of California at Berkeley, 1977) [unpublished].
  18. The following discussion of the enforcement machinery in Ontario draws partly on data collected for a report prepared for the Law Commission of Ontario of which I am a co-author. See Vosko et al, "New Approaches to Enforcement," *supra* note 16. I thank Mary Gellatly, Mark Thomas, and Eric Tucker for permitting me to use this material in preparing this section of this article as well as for encouraging me to prepare this stand-alone piece, expanding one of my own contributions to that Report—namely, its survey of enforcement practices in other jurisdictions.

its regulations. Under the *ESA*, Employment Standards Officers (ESOs) and the Director of Employment Standards have considerable powers of investigation (*e.g.*, to enter business premises and requisition records for inspection). ESOs also have a great deal of leeway in resolving complaints of violations. Enforcement tools include the precipitation of settlements, orders to pay, fines, compliance orders, and prosecutions. The level of discretion accorded to ESOs and other officials responsible for enforcement makes this arena of workplace regulation fertile ground for the investigation of mechanisms for augmenting workers' voice.

In the face of limited legislative direction, Ontario's ES enforcement regime amounts to a reactive system supplemented by voluntary compliance and proactive measures.<sup>19</sup> The bulk of the MOL's enforcement efforts depend on worker complaints to trigger regulatory intervention, and they emphasize negotiated settlements, principally using coercive measures such as orders to pay and, in egregious cases, prosecution.<sup>20</sup> When measures promoting voluntary compliance

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19. Although reactive approaches are most prevalent in ES enforcement, and hence the focus of this section, the MOL uses voluntary and proactive approaches selectively. Among its strategies of voluntary compliance, it operates a call centre, the Employment Standards Information Centre, assisting callers with questions about the *ESA*, and it provides multi-lingual interpreters. The call centre does not provide legal advice. It received almost 350,000 calls in 2009–2010. Staff members also answer emails from workers and employers; indeed, they prepared nine thousand responses in 2009–2010. See Vosko et al, "New Approaches to Enforcement," *supra* note 16 at 15. Additionally, the MOL website includes tutorials explaining provisions of the *ESA*, how they apply to workers and employers, how to file a claim, and videos demonstrating to employers what they are to expect in cases of inspection and describing to workers what they are to expect upon filing a claim. Among its proactive strategies, the MOL uses targeted inspections and enlarged investigations in select instances of when violations are detected. See Ontario Ministry of Labour, *Administration Manual for Employment Standards* (Toronto: Ontario Ministry of Labour, 2010) at ch 4 [copy on file with the author] [MOL, *Administration Manual*]. Expanded investigations are most common; in such instances a workplace is identified for investigation based on the results found during an individual claim investigation. Notably, resources devoted to such inspections pale in comparison to those devoted to the reactive system. In 2009–2010, for example, the MOL conducted ninety-nine expanded investigations in contrast to 20,762 individual claims investigations. See Ontario Ministry of Labour, *Employment Standards Program Annual Report, 2009-2010* (Toronto: Ontario Ministry of Labour, 2010) [copy on file with the author].
20. On the notion of reactive enforcement, as well as how it operates in other jurisdictions, see Glenda Maconachie & Miles Goodwin, "Recouping wage underpayment: increasingly less likely?" (2006) 41:3 Aust J Soc Issues 327; Federal Labour Standards Review, "New compliance strategies: 'Hard law' approach" by Paul Leonard Gallina (Human Resources Development Canada, 2005), online: <[http://www.hrsdc.gc.ca/eng/labour/employment\\_standards/fls/pdf/research20.pdf](http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/research20.pdf)>; National Employment Law Project, *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft* (January 2011) at 57-58,

are unsuccessful, individual workers must first seek a remedy from their employer and, when such efforts fail to produce results, they may file a claim with the MOL for unpaid wages and other ES entitlements. Typically, complaints initiate an investigation, which may lead to prosecution and penalties for employers and settlements for workers. Upon the introduction of an online claims process in 2006–2007, the MOL posted a self-help kit designed to assist workers in learning about their *ESA* entitlements, determining which ES had been violated, and calculating the amount of unpaid wages owed to them in cases of violations. This kit then instructed workers first to contact their employer to obtain wages and entitlements owing.

Through such investigative processes, typically 80 per cent of claims are ‘resolved,’ a percentage encompassing claims withdrawn by the claimant, settled by workers and their employers directly, complied with by employers (*i.e.*, where an ESO determination finds the employer in violation), or denied.<sup>21</sup> In fewer than 20 per cent of cases, the ESO issues an order to pay, which claimants and employers have a right to appeal to the Ontario Labour Relations Board (although few take this route). In the majority of cases that are settled, any orders respecting employers’ contraventions are void<sup>22</sup>; many employer contraventions of the *ESA* are thereby erased from public view through processes of negotiating, promoting, or brokering of settlement agreements formerly prohibited.<sup>23</sup> Furthermore, in cases where settlements are not reached and the ESO resumes the investigation and decision-making, if an employer voluntarily complies with the ESO’s decision that an ES entitlement must be provided to a claimant, the employer is required to pay either what he or she technically owes the worker or less<sup>24</sup> when a lower settlement is accepted.<sup>25</sup>

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online: <<http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1>>.

21. Workers Action Centre & Employment Standards Work Group, *Modernizing Part III of the Canada Labour Code*, (submitted to the Federal Labour Standards Review Commission, October 2005), online: <[http://www.workersactioncentre.org/wp-content/uploads/2011/12/pb\\_Modernizing\\_eng.pdf](http://www.workersactioncentre.org/wp-content/uploads/2011/12/pb_Modernizing_eng.pdf)>.
22. Mary Gellatly et al, “Modernizing’ Employment Standards?: Administrative Efficiency and the Production of the Illegitimate Claimant in Ontario, Canada” (2011) 22:2 *Econ & Lab Rel Rev* 81.
23. MOL, *Administration Manual*, *supra* note 19, s 5.6.14.
24. A pilot project of facilitated settlements conducted after the introduction of the *Open for Business Act, 2010* found that 21 per cent of cases that went to a decision-making meeting were resolved through settlements and that these cases resulted in settlements of, on average, 17 per cent lower than what was assessed to be owed by the ESO. See Ontario Ministry of Labour, Meeting with Workers’ Action Centre & Parkdale Community Legal Services, Employment Practices Branch “ES Modernization Progress Update” [copy on file with the author], cited in Vosko et al, “New Approaches to Enforcement,” *supra* note 16 at 18, n 50.
25. Furthermore, when an ES complaint is settled without the issuance of an order to pay, there can be no fines levied through contravention notices.

When sanctions are deemed appropriate, the *ESA* sets out a variety of options, including orders to pay wages and to reinstate workers as well as prosecution, but there are no criteria for the use of such sanctions and penalties. A key component of ES enforcement is the recovery of wages and other monies owed to workers. Collections, however, represent a challenging facet of enforcement since a substantial amount of the monies owed to workers are from employers who are insolvent or bankrupt, a category that grew dramatically in the 2008–2009 recession,<sup>26</sup> and since the MOL has privatized some of its collection activities.<sup>27</sup>

## B. WORKER VOICE IN A NARROWLY REACTIVE REGIME: THE PERILS OF INDIVIDUALIZATION

Despite the focus on worker claims of ES violations, the reactive system impeded worker voice in many ways. The majority of resources for enforcing ES in Ontario are devoted to investigating individual complaints of employer violations even though, as Ron Saunders and Patrice Dutil note, “dealing with compliance one case at a time is expensive and risks overloading the available capacity.”<sup>28</sup> Indicative of the problem of overloaded capacity, there was a backlog of fourteen thousand complaints as of 2010. In response, the MOL pledged to eliminate this backlog by March 2012. However, due to the extra resources required to fulfill this objective, following its elimination, the MOL promised to pre-empt future backlogs through an “enhanced compliance strategy ... reaching out to employers through a mix of education, outreach and enforcement to ... stem any problems before they arise.”<sup>29</sup>

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26. Vosko et al, “New Approaches to Enforcement,” *supra* note 16 at 22. In such instances, recovery of, for example, unpaid wages is difficult because workers are typically one of several creditors’ owed money and are paid subject to priority ranking as determined by federal bankruptcy and insolvency legislation. Here, the MOL assists employees by filing Proofs of Claim with the Trustee in Bankruptcy or the Monitor.
  27. This situation has led the Office of the Auditor General of Ontario to characterize weaknesses in the collections of amounts in default owed to workers by employers as a major problem with the ES regime. Office of the Auditor General of Ontario, *2004 Annual Report* (30 November 2004) at 240, online: <[http://www.auditor.on.ca/en/reports\\_en/en04/309en04.pdf](http://www.auditor.on.ca/en/reports_en/en04/309en04.pdf) <[http://www.auditor.on.ca/en/reports\\_2004\\_en.htm](http://www.auditor.on.ca/en/reports_2004_en.htm)> [Auditor General of Ontario, *2004 Annual Report*]; Office of the Auditor General of Ontario, *2006 Annual Report* (5 December 2006), at 311, online: <[http://www.auditor.on.ca/en/reports\\_en/en06/409en06.pdf](http://www.auditor.on.ca/en/reports_en/en06/409en06.pdf)>.
  28. “New Approaches in Achieving Compliance with Statutory Employment Standards” Canadian Policy Research Network & The Institute of Public Administration of Canada (July 2005) at 2, online: <[http://www.cprn.org/documents/37835\\_en.pdf](http://www.cprn.org/documents/37835_en.pdf)>.
  29. Ontario Ministry of Labour, *Employment Standards: Ministry Successes* (29 July 2011), online: <[http://www.labour.gov.on.ca/english/news/nr\\_esenforcement110729.php](http://www.labour.gov.on.ca/english/news/nr_esenforcement110729.php)>.

As for the process of complaints resolution, enforcement also falls largely in the hands of individual workers who face numerous barriers in pursuing claims. The individual claims-making process inhibits workers who remain on the job (and aim to maintain their present job) from making claims because there is no provision for anonymous or confidential complaints, or for complaints filed by third parties. Nor is interim reinstatement pending investigation available to fired workers, even though it is available to unionized workers under the Ontario *Labour Relations Act*<sup>30</sup> in certain circumstances. For workers who opt to complain while they are still on the job, anti-reprisal provisions apply. Yet even though such provisions place the burden of proof on the employer, this burden only applies to a finite set of circumstances despite the wide-ranging forms retaliation may take.<sup>31</sup> Given such barriers, nine out of ten workers file ES claims after they have left the job.<sup>32</sup>

In addition to obstacles acute among workers in precarious jobs, such as the inability to survive on unemployment insurance benefits of 55 per cent (the current replacement rate) of already meagre earnings if they lose their jobs due to retaliation (and if they qualify), workers reliant on ES protections also face barriers related to their social location. Workers' immigration status is a case in point. Under federal immigration policy, many workers migrating under Canada's temporary and temporary-to-permanent immigration programs<sup>33</sup> are required to hold employment

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30. *Labour Relations Act, 1995*, SO 1995, ch 1, Schedule A.

31. According to the *Employment Standards Act*, the burden of proof applies if the employee:

- (i) asks the employer to comply with this Act and the regulations,
- (ii) makes inquiries about his or her rights under this Act,
- (iii) files a complaint with the Ministry under this Act,
- (iv) exercises or attempts to exercise a right under this Act,
- (v) gives information to an employment standards officer,
- (vi) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,
- (vii) participates in proceedings respecting a by-law or proposed by-law under section 4 of the *Retail Business Holidays Act*,
- (viii) is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV.

See *ESA*, *supra* note 1, s 74(1)(a).

32. Auditor General of Ontario, *2004 Annual Report*, *supra* note 27 at 242.

33. Attesting to the growing significance of temporary and temporary-to-permanent immigration programs in Canada, between 1987 and 2011, the number of temporary migrant workers grew from 131,752 to 446,847, over 67,000 of which resided in Ontario. See Citizenship and Immigration Canada, Research and Evaluation Branch, "Facts and Figures 2011—Immigration Overview: Permanent and Temporary Residents," online: <<http://www.cic.gc.ca>>

for a specified period, often with a specific employer. For example, temporary migrant workers who work, often year after year, under the Seasonal Agricultural Workers Program and the Low-Skill Temporary Foreign Worker Program are tied normally to one employer for a specific term. These workers have the same rights to ES as other workers. However, workers with insecure immigration status who face substandard conditions of employment are rarely in a position to complain due to implicit or explicit threats that they will be penalized by the immigration system (*e.g.*, with deportation).

For those workers willing to take the risk to raise their voice, the complaint process is riddled with obstacles, especially for those in precarious jobs who confront other structural disadvantages. In practice, both the step initially recommended in the self-help kit, and made mandatory for most workers under the *Open for Business Act, 2010*,<sup>34</sup> that workers first seek compliance from employers before being permitted to file an ES claim, and the requirement, also introduced by this legislation, that workers provide information in writing sufficient for the case to proceed, make many uninformed assumptions about the situation of workers reliant on ES. They presume that ES-dependent workers have access to the internet (given that the MOL's website is the primary source of knowledge about *ESA* rights),<sup>35</sup> strong English language skills,<sup>36</sup> high levels of literacy (at a minimum, a level sufficient to submit a lengthy claim form, requiring extensive narrative

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gc.ca/english/pdf/research-stats/facts2011.pdf>.

34. *Open for Business Act, 2010*, SO 2010, c 16, amending *Employment Standards Act, 2000*, SO 2000, c 41 [*Open for Business Act*]. The exceptions are young workers, live-in caregivers, people with language barriers or a disability, workers who are afraid to contact the employer, workers with non-monetary complaints, workers approaching the six month time limit, or workers whose employer has closed or gone bankrupt.
35. Reliance on internet access creates significant barriers for many people that are structurally disadvantaged. Statistics Canada reports that if someone is poor, older, lives in a rural community, was born outside of Canada, and/or has relatively low levels of education, he or she is less likely to use or have use of the internet. See Statistics Canada, *Canadian Internet Use Survey* (12 June 2008), online: <<http://www.statcan.gc.ca/daily-quotidien/080612/dq080612b-eng.htm>>.
36. According to one study, as many as half a million people in Ontario may need an interpreter in pursuing legal matters. Yet no language interpretation services are provided to workers who require them in the ES claims process. See Karen Cohl & George Thomson, "Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services" *The Law Foundation of Ontario*, Linguistic and Rural Access to Justice Project (December 2008) at 13, online: <<http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf>>.



accounts in writing, to initiate investigation),<sup>37</sup> and knowledge of how highly complex legal rights apply to their own conditions of work.<sup>38</sup> The newly introduced information requirement also stands in stark contrast to the previous process of claims investigation. Prior to the introduction of the *Open for Business Act*, when a worker filed a claim, an ESO investigated whether or not, and if so, which, ES violations had taken place by seeking information from both the claimant and the employer through telephone calls, letters, and fact-finding meetings in which both parties were given the opportunity to present their cases. The ESO then evaluated evidence provided by the employer and the employee and made a determination. ESOs could thus gather evidence in ways attentive to barriers faced by workers in precarious jobs. Furthermore, the introduction of an information requirement is paradoxical as it was accompanied by a legislative change granting ESOs greater leeway in dealing with undue delays by allowing them to make determinations based upon the best information available.<sup>39</sup>

Heightening these voice problems, ES are alone among workplace regulations conferring employment rights in that they provide for no government or quasi-government funded assistance for workers who perceive their rights to have been violated. The MOL and other government agencies provide funding for information, education, and legal support in areas of health and safety, workplace safety and insurance, and human rights (*e.g.*, Occupational Health Clinics for Ontario Workers, Office of the Worker Advisor, Human Rights Legal Support Centre). Yet few legal supports exist for workers pursuing claims under the *ESA*, who also have limited representational routes for voicing their experiences. Ontario's Community Legal Clinic system provided *ESA* representation in eighty-six cases, ninety brief services, and advice for just over 850 workers in 2008.<sup>40</sup> There are

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37. To access the ES claim form online, see Ontario Ministry of Labour, *Form: Employment Standards Claim* (January 2011), online: <<http://www.labour.gov.on.ca/english/es/forms/claim.php>>. There is a link between literacy and social location. For example, "individuals with low literacy skills" tend to be "older, less educated, immigrants or ha[ve] a mother tongue other than English or French." See Statistics Canada, *International Adult Literacy Survey: Learning Literacy in Canada: Evidence from the International Survey of Reading Skills* by S Grenier et al, Catalogue no 89-552-MIE—No 19 (January 2008) at 37, online: <<http://www.nald.ca/library/research/stats/llc/llc.pdf>>.

38. Gellatly et al, *supra* note 22 at 93.

39. See *ESA*, *supra* note 1, ss 102.1(1)-(3).

40. See Soyini Barrington, Policy and Research, Legal Aid Ontario (9 July 2009) [copy on file with the author], cited in Vosko et al, "New Approaches to Enforcement," *supra* note 16 at 35, n 82. For an informative parallel study addressing the issue of wage recovery in Australia and demonstrating the importance of legal support services in fostering access to justice among workers, see Chris Arup & Carolyn Sutherland, "The Recovery of Wages: Legal



no legal aid certificates for *ESA* matters. The \$10,000 cap on *ESA* claims also means that few lawyers in the private bar can afford to represent workers. And the time limit of six months to file a claim makes the meagre compensation available to aggrieved workers highly time sensitive. In each of these ways, the ES enforcement system thwarts worker voice in the claims-making process, a profound limitation for those who rely on the *ESA* as their principal source of labour protection.

### III. AMPLIFYING WORKERS' VOICE: SURVEYING INNOVATIVE ENFORCEMENT EFFORTS

The growing crisis of ES enforcement in Ontario stems from its narrow reactive regime, which places the onus of enforcement principally on individual workers without giving them meaningful voice by making available appropriate supports in the complaints process and making possible greater involvement of key actors across the enforcement regime (*e.g.*, in pursuing investigations and inspections and in determining penalties and settlements). Although there are promises and pitfalls in transplanting approaches from one jurisdiction to another,<sup>41</sup> as an extensive body of literature in comparative law and comparative labour law illustrates, innovative initiatives operating in other common law contexts characterized by broadly similar political cultures and legal traditions offer insight into countering the deficiencies that characterize Ontario's ES enforcement regime.<sup>42</sup>

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Services and Access to Justice" (2009) 35 Monash UL Rev 96.

41. A range of commentators have contributed to the transplantability debate in comparative law and comparative labour law, including Bob Hepple, Otto Kahn-Freund, Pierre Legrand, and Alan Watson. Some such authors suggest, quite contentiously, that legal transplants are common and easy to implement socially (Watson), whereas others contend, more moderately, that transferability is best approached as a continuum (Kahn-Freund). Still others argue that genuine transplantation is difficult to achieve due to cultural and historical factors (Legrand). In an extensive review of the central debates on legal transplantability in comparative law and comparative labour law outlining these distinct positions, Anthony Forsyth demonstrates, building on Gunther Teubner's interventions, that transplantation is possible with thoughtful consideration of the interaction between law and various social systems. See Anthony Forsyth, "The 'Transplantability' Debate in Comparative Law and Comparative Labour Law: Implications for Australian Borrowing from European Labour Law" (Working Paper No 38, Centre for Employment and Labour Relations Law, The University of Melbourne, June 2006) at 2-22, online: <<http://www.law.unimelb.edu.au/files/dmfile/wp381.pdf>>. Although I do not delve deeply into such debates in this article, informed by their contours, I take a similar position. I thereby pursue a survey of innovative enforcement initiatives drawn from other common law contexts-sharing important features with Ontario, focusing principally on their tenor.

42. It is nevertheless important to preface the survey I undertake below by emphasizing that

Such initiatives fall into two (often mutually-reinforcing) categories: those supporting individual voice and those supporting collective voice. The first category includes initiatives directed principally at improving workers' access to complaints processes, including those where institutions or groups support individuals in making complaints. The second includes initiatives boosting the involvement of groups of workers and workers' advocates in the overall enforcement process.<sup>43</sup> In the collective voice category, the diversity of actors and institutions involved justifies the examples chosen for review given the goal of highlighting examples where enforcement is not left exclusively to individual workers but, rather, shared amongst multiple government agencies and external institutions.

#### A. INNOVATIONS SUPPORTING INDIVIDUAL WORKERS' VOICE

In the context of a largely reactive regime, one avenue for improving the situation of workers is to maximize routes to the documentation of complaints. Specifically, permitting anonymous, confidential, and third-party complaints, in relevant provisions of legislation or through administrative protocols, offers possibilities for decreasing the burden on individual workers while giving voice to their experiences.

Anonymous complaints are desirable since they provide the most protection for workers still on the job. Through administrative means, the province of Saskatchewan allows "the employee or a third party such as a parent, friend or a member of the community" to submit a written claim against an employer, which the Compliance and Review Unit then investigates.<sup>44</sup> The anonymous complaint option is available if the worker is still employed at the workplace, believes that provisions of the province's *Labour Standards Act*<sup>45</sup> are not being followed, and wants to seek redress but is not in a position to file a formal complaint.<sup>46</sup> Only written complaints with supporting evidence are reviewed. The Compliance and

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political and social systems, as well as contexts, matter: In the common law jurisdictions under study, different circumstances motivated the initiatives that I canvass. For example, in the United States, historically low rates of unionization are at the root of some leading federal enforcement strategies. Distinctly, in Australia, several of the enforcement measures I explore reflect the attempt by a new Labor government to in some way compensate for the decollectivization and decentralization of labour relations occurring prior to its rise to power.

43. In the ensuing discussion, as well as in Part IV, below, the distinction between supporting individual and collective voice is therefore used principally for heuristic purposes.

44. Saskatchewan Ministry of Labour Relations and Workplace Safety, Labour Standards Division, *Anonymous Complaint Form* at 1, online: <<http://www.lrws.gov.sk.ca/anonymous-third-party-complaint-form>>.

45. *Labour Standards Act*, RSS 1978, c L-1.

46. However, employees seeking wage recovery must file a formal complaint personally.

Review Unit also pursues expanded investigations in such cases.<sup>47</sup> This approach is indicative of how, in practice, some initiatives oriented to individuals can contribute to benefits for groups of workers and prepare the ground for improvements to collective voice. For example, where a claim submitted by a worker is found to apply to more than one worker at the worksite, the Ministry will expand their inspection to protect all workers present.<sup>48</sup>

There are also provisions for anonymous complaints in six American states: Colorado, New Jersey, California, Connecticut, Illinois, and New York.<sup>49</sup> As in Saskatchewan, provisions of these state laws or administrative measures could be strengthened by allowing the claimant to write "anonymous" on written forms rather than requiring that the name of the claimant be listed with the promise that the claim will be treated anonymously.

More modestly, the province of British Columbia<sup>50</sup> and nine American states<sup>51</sup> permit confidential complaints, which keep the identity of the worker unknown to the best of investigators' ability during the investigation process.

The Fair Work Ombudsman, an agency responsible for enforcing Australia's *Fair Work Act*,<sup>52</sup> is also willing to receive calls from any party who wishes to complain about an alleged breach of Commonwealth workplaces laws,<sup>53</sup> but it does not guarantee complainants that it will be able to maintain their confidentiality during the course of an investigation.<sup>54</sup> In the United States, sixteen states permit workers to designate another person to bring an unpaid wages lawsuit on their own behalf or on behalf of other workers who have similar claims, and seven states allow organizations and individuals, including fellow work-

47. Saskatchewan Ministry of Labour Relations and Workplace Safety, *supra* note 44.

48. The *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, which extends select labour protections outside the *ESA* to a group of temporary migrant workers in jobs known to be highly precarious, also includes provisions for an ESO to meet with any person who may have contravened the *Act*, if he or she "acquires information" that suggests this possibility (*i.e.*, if the ESO receives anonymous tips). See *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, SO 2009, c 32, ss 22(1)-(3).

49. National Employment Law Project, *supra* note 20 at 58.

50. *Employment Standards Act*, RSBC 1996, c 113, s 75(1).

51. These states are Arizona, Arkansas, Kentucky, Ohio, Illinois, Nebraska, New Jersey, North Carolina, and New York. See National Employment Law Project, *supra* note 20 at 58. Among these states, NY Lab § 196-A extends the strongest protections to workers.

52. *Fair Work Act 2009* (Cth) [*Fair Work Act*].

53. Commonwealth of Australia, Fair Work Ombudsman, *Workplace Complaint Form User Guide*, online: <[www.fairwork.gov.au/Complaints1/Workplace-Complaint-Form-User-Guide.pdf](http://www.fairwork.gov.au/Complaints1/Workplace-Complaint-Form-User-Guide.pdf)> [Accessed 2 March 2012].

54. Commonwealth of Australia, Fair Work Ombudsman, *Workplace Complaint Form*, online: <<http://www.fairwork.gov.au/Complaints1/Workplace-Complaint-Form.pdf>>.

ers in the same workplace, to file complaints on behalf of affected workers.<sup>55</sup> Even under Australia's new centralized system of industrial relations in which unions have diminished power, the *Fair Work Act* also gives unions the right to bring court proceedings in relation to ES violations experienced by individual workers if they are entitled to represent the employee in question.<sup>56</sup> If the violation relates to a workplace agreement or workplace determination that binds the union, the union can also make an application in its own right, on behalf of an employee, or both.<sup>57</sup>

Anonymous, confidential, and third-party complaints thereby contribute to alleviating risks for workers and create conditions conducive to the exercise of voice. They also convey to employers and government officials the message that coworkers and worker representatives form a larger community in which workers (especially those in relatively secure employment) act as other workers' (especially the precariously employed) keepers, highlighting, once again, important linkages between improving individual and collective voice.

A presumption of employer retaliation is another tool for lessening potential harm to workers opting to complain or permitting claims to go forward on their behalf. This protective device involves creating "a legal protection that *any* adverse or discriminatory action taken by an employer against the worker within a certain period of time after the worker [or another permitted party] complains will be presumed to be retaliatory."<sup>58</sup> Such provisions simultaneously make it easier for

55. National Employment Law Project, *supra* note 20 at 58.

56. On the content of these standards and the shift to the *Fair Work Act*, see Vosko, *Managing the Margins*, *supra* note 12 at 115-17.

57. John Howe, Nicole Yazbek & Sean Cooney, "Study on Labour Inspection Sanctions and Remedies: The case of Australia," Working Document No 14 (Geneva: International Labour Organization, Labour Administration and Inspection Programme, March 2011) at 32, online: <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---lab\\_admin/documents/publication/wcms\\_154066.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_154066.pdf)> [Howe, Yazbek & Cooney, "Labour Inspection Sanctions and Remedies"]. There nevertheless remain significant barriers to union participation in enforcement in Australia, including constraints on unions' rights of entry to investigate suspected violations and/or hold meetings with employees, for which they now require a permit, which was not the case under a previous regime. See Vosko, *Managing the Margins*, *supra* note 12 at ch 4, 6. On the enforcement rights of unions in the Australian system more generally, see Tess Hardy & John Howe, "Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia" (2009) 22 Aust J Lab L 306. Furthermore, under the *Fair Work Act*, the fact that the Fair Work Ombudsman now has the responsibility for enforcing its terms, including its intention to control unlawful union activity, such as strikes, could compromise the working relationship between the Fair Work Ombudsman and unions and thereby undermine collaborative efforts to address compliance. See Howe, Yazbek & Cooney, "Labour Inspection Sanctions and Remedies" (*ibid*) at 32-33.

58. National Employment Law Project, *supra* note 20 at 60 [emphasis in original].

workers to bring forward cases of retaliation and simultaneously empower labour inspectors to investigate such claims. They also place the burden of proof on employers. Although few pure examples exist, a provision in New York's *Wage Theft Prevention Act*<sup>59</sup> provides enhanced rules against retaliation, by including threats as a form of retaliation and especially by making it illegal for any person to retaliate and by providing for greater damages.<sup>60</sup>

Further strategies for empowering individual workers in enforcement processes include outreach activities on the part of labour inspectorates, which assist workers in finding and using their voices by bringing state personnel into workplaces in non-confrontational situations to introduce workers and employers to minimum labour standards and to explain the inspectorate's role in enforcement. These outreach activities make state services and supports more accessible to those unfamiliar with their workplace rights or with available complaints mechanisms, or to those fearful of approaching enforcement officers. In the United States, such strategies have grown measurably at the federal level in the last decade. They include efforts tailored to ethnic communities, such as the Compliance Outreach to the Asian Community and Hispanics (COACH), through which the Northern New Jersey Office of the federal Wage and Hour Division visits and works directly with groups of workers and employers historically reluctant to use its services and introduces them to wage and hours laws through publications and other educational services. They also encompass the Rapid Employee Assistance in Chinese Hotline, a telephone hotline geared to answer questions about employment laws from Chinese-speaking workers in New York. These two examples predate the public awareness campaign known as "We Can Help," launched by the Wages and Hours Division in April 2010. Through this program, the agency is attempting to connect the precariously employed with its services via collaboration with local worker advocacy and interfaith organizations, to enhance its presence and improve in-person assistance in complaints processes.<sup>61</sup>

59. *Wage Theft Prevention Act*, c 564, § 8380 (McKinney 2010) (available on WL).

60. In publicizing this provision of the Act, the New York State Department of Labor notes that this protection:

[A]pplies to any worker who alleges that the employer has done something that *the employee thinks breaks a Labor Law or an Order issued by the Commissioner*. This applies even if the employee is mistaken about the law, if they acted in good faith and even if the employee does not cite a specific part of the Labor Law. This law protects employees even if the employer *incorrectly* believes they made a complaint.

See New York State Department of Labor, *Wage Theft Prevention Act Fact Sheet* (2011) at 1 [emphasis in original], online: <<http://www.labor.ny.gov/formsdocs/wp/P715.pdf>>.

61. United States Department of Labor, *Wage and Hour Division - We Can Help*, online: <<http://www.dol.gov/wecanhelp/>>. Although this example involves collaborations between

Outreach campaigns by government agencies are also undertaken by Australia's Fair Work Ombudsman. Such campaigns typically involve audits of sectors or industries in which worker complaints are high or rising. After conducting a review revealing that 4,006 complaints pertaining to Australia's new National Employment Standards had been lodged by administration support officers between 2008 and 2010 and that clerical workers made 11,459 enquiries with the Fair Work Ombudsman between January 2010 and May 2011, the Ombudsman undertook a national audit of a segment of clerical workers. In addition to an education and compliance phase, this audit involved first seeking records of administration employees' time and wages for assessment against the *Fair Work Act*, its regulation, and the relevant industrial instrument (*i.e.*, *Clerks - Private Sector Award 2010*<sup>62</sup>). A total of 1,621 businesses were then inspected, resulting in the recovery of \$171,024 in wages and entitlements for 280 employees.<sup>63</sup>

Enforcement activities responsive to workers' complaints can also extend beyond the purview of government labour agencies to include joint initiatives with other agencies. This tactic is already operational in the United Kingdom, where the creation of the Pay and Work Rights Helpline aims to streamline access to the five enforcement bodies charged with employment rights and related legislation—Her Majesty's Revenue & Customs; the Employment Agencies Standards inspectorate; the Department for the Environment; Food and Rural Affairs, the Health and Safety Executive; and the Gangmasters Licensing Authority. Under this model, operators answering calls are trained about these enforcement bodies' responsibilities and are able to refer cases to the relevant body or bodies. Indeed, as the report of the Low Pay Commission notes:

[O]ften, cases have to be referred to more than one enforcement body – for example, HMRC [Her Majesty's Revenue & Customs] and EAS [Employment Agencies Standards inspectorate]. This has had a beneficial knock-on effect as the various

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collectively-oriented community organizations (from which it also accepts independent referrals) and state agencies, I place "We Can Help" in the category of initiatives supporting individuals because it focuses on improving access to the complaints process for individual workers belonging to marginalized communities.

62. Commonwealth of Australia, Fair Work Commission, *MA000002 - Clerks-Private Sector Award 2010* (19 December 2008), online: <[http://www.fwc.gov.au/documents/modern\\_awards/award/ma000002/default.htm](http://www.fwc.gov.au/documents/modern_awards/award/ma000002/default.htm)>.
63. Commonwealth of Australia, Fair Work Ombudsman, *National Clerical Workers Campaign 2011: Final Report – June 2012*, online: <<http://www.fairwork.gov.au/campaignresults/National/National-Clerical-Workers-Campaign-Report.pdf>>. For a review of other efforts by the Fair Work Ombudsman to engage with unions and workers, see Tess Hardy, "Enrolling non-state actors to improve compliance with minimum employment standards" (2011) 22:3 *Econ & Lab Rel Rev* 117.

enforcement bodies have had to collaborate on multi-issue complaints and have, as a result, considered joint investigations where possible.<sup>64</sup>

Such coordinative initiatives facilitate voice, as they recognize that workers attempting to access complaint mechanisms in one area often need other kinds of support. They are also attuned to the relationship between employment status and form of employment, on the one hand, and various types of structural disadvantage impeding labour market membership, on the other hand.

## B. INNOVATIONS SUPPORTING WORKERS' COLLECTIVE VOICE

In addition to the range of possible means to support individual workers in situations calling for the use of complaints machinery, there are also a growing number of initiatives that give groups of workers voice in the enforcement process.

### 1. MULTIAGENCY PROACTIVE ENFORCEMENT

In the United States in particular, the use of proactive investigations is becoming increasingly prominent as a first order strategy in high-risk sectors to draw out workers' collective experiences where they are otherwise unlikely to bring forward individual complaints. For example, in 2011, the US Department of Labor, as part of its new plan/prevent/protect agenda, initiated an enforcement sweep focusing on the bottom of the "fissured"<sup>65</sup> pyramid of production in the agricultural industry. Beginning in south Florida and continuing up the east coast, the sweep was intended to increase compliance and inform workers of their rights under several core pieces of legislation (*e.g.*, the *Migrant and Seasonal Agricultural Worker Protection Act*, the *Fair Labor Standards Act*, and the *Occupational Safety and Health Act's Field Sanitation Standard*).<sup>66</sup> By June of that year, inspectors

64. United Kingdom, *National Minimum Wage: Low Pay Commission Report 2011* (Presented to Parliament by the Secretary of State for Business, Innovation & Skills, April 2011) at 108, online: <[http://www.lowpay.gov.uk/lowpay/report/pdf/Revised\\_Report\\_PDF\\_with\\_April\\_date.pdf](http://www.lowpay.gov.uk/lowpay/report/pdf/Revised_Report_PDF_with_April_date.pdf)>.

65. In his work on enforcing labour standards in the United States, David Weil uses the term "fissured" to describe the expanding number of industries characterized by large low-wage segments whereby lead companies, which together shape product market conditions affecting workers' wages and conditions of employment, are effectively separated from the actual employment of workers. See David Weil, "Enforcing Labour Standards in Fissured Workplaces: The US Experience" (2011) 22:2 *Econ & Lab Rel Rev* 33 at 34-36. In analyzing the organization of agricultural production, this term is a suitable descriptor given the complex contracting arrangements characterizing this sector.

66. The weakness of this strategy is that it fails to reach up to firms at the top of the chain, which set terms that condition the employment relationships and standards in the most highly competitive parts of this labour market (*i.e.*, at the bottom). This limitation calls for



had conducted over twenty investigations, recovered \$670,770 in back wages for approximately six hundred agricultural workers, and assessed over \$128,850 in penalties, finding violations such as “paying workers less than the federal minimum wage, and paying workers at packing sheds who did not qualify for the *Fair Labor Standards Act*’s agricultural exemption “straight time” for all hours worked, rather than time and one-half their regular rates of pay for overtime work hours as required.”<sup>67</sup> This sweep involved sending teams of investigators to fields and packing houses to assess compliance by “facility owners, growers, farm labor contractors and all other business entities associated with these agricultural operations. Thorough inspections of transportation, field sanitation facilities, employment practices and pay records [were] conducted to ensure compliance.”<sup>68</sup> A central component of the department’s surveillance activities involved interviewing workers at multiple sites simultaneously, presumably to avoid situations in which fear of reprisal could mount, with numerous investigators covering large areas on the same day and involving departmental lawyers early in preparing cases for future litigation.<sup>69</sup>

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embedding the US Department of Labor’s tactic of using sweeps in a strategy of liability between top and bottom.

67. United States Department of Labor, News Release, “US Labor Department’s Initiative in South Florida Results in Nearly \$800,000 in Back Wage and Fines for Violations Affecting about 590 Farmworkers” (27 June 2011), online: <<http://www.dol.gov/opa/media/press/whd/whd20110845.htm>>.

68. *Ibid.*

69. Other more direct examples of measures targeted to industries in the United States include focussed inspections, undertaken by the DOL’s Wage and Hour Division, in industries beyond those mentioned in the plan/prevent/protect agenda, such as gas stations and restaurants. For example, in 2011, after recovering \$1.2 million in back wages for almost four hundred employees at one hundred New Jersey gas stations and finding them “rife with violative pay practices such as paying workers a flat salary or ‘straight time’ wages for all hours,” the Wage and Hour Division launched a state-wide initiative involving investigations at randomly chosen gas stations to educate operators about their obligation to pay the minimum wage and overtime requirements under the *Fair Labor Standards Act*. See Harold Brubaker, “Feds Target Wages at N.J. Gas Stations,” *Philly.com* (23 April 2011), online: <[http://articles.philly.com/2011-04-23/business/29466702\\_1\\_minimum-wage-gas-stations-fair-labor-standards-act](http://articles.philly.com/2011-04-23/business/29466702_1_minimum-wage-gas-stations-fair-labor-standards-act)>. A similar measure, known as a “neighborhood sweep,” involving labour officials at the state level, and focussing geographically on restaurants in Ithaca, New York, found 77 per cent of those visited to be violating New York State labour laws in 2009. See New York State Department of Labor, News Release, “Targeted Labor Department Investigation Finds Ithaca Restaurant Workers Victimized by Wage Theft” (10 December 2009), online: <[http://www.labor.ny.gov/pressreleases/2009/December10\\_2009.htm](http://www.labor.ny.gov/pressreleases/2009/December10_2009.htm)>.



## 2. COMMUNITY-BASED ENFORCEMENT

Innovative community-based practices are also emerging in which workers' advocates and unions are involved in documenting and redressing violations, and thereby in discerning common patterns of noncompliance. Empowering workers by enabling their chosen representatives to work systematically towards improved compliance, the most institutionalized of those practices are also based in the United States. Examples include the well-documented and ongoing deputization programs created by the Los Angeles Unified School District and the Los Angeles Board of Public Workers.<sup>70</sup> Under the first program, the Los Angeles Unified School District deputizes and trains representatives of building trades unions to enforce the prevailing wage on district projects funded by monies from construction bonds. These representatives are known as "work preservation volunteers"<sup>71</sup> and are provided with badges and business cards and authorized to enter school sites to conduct compliance visits. This program arose from a controversial agreement in which construction unions conceded their right to strike over job issues in exchange for the creation of an internal compliance department by the School District enabling union representatives to conduct compliance visits. The Los Angeles Board of Public Workers followed suit, training what it calls compliance group representatives. Both programs are designed to make these on-the-ground inspectors the representatives of labour inspectors from the City and thereby expand the City's enforcement capacity while simultaneously providing workers and their advocates with greater voice. Compliance representatives' duties include interviewing employees about hours, wages, job classification, and official duties, as well as problems at work more generally. They also assist workers in filling out forms in the complaint process when they perceive through their investigatory efforts that violations have taken place. They do not, however, determine violations or assess penalties. Under both programs, representatives are retrained every year. They are not permitted to use their activities to gather information for their unions, disparage non-union contractors, or review project data outside a pending complaint. Rather, their role is to mimic the neutral labour inspector.

These examples represent the strongest version of what Janice Fine and Jennifer Gordon call community-based enforcement in operation (*i.e.*, enabling civil society groups to deliver information and education, patrol communities,

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70. Janice Fine & Jennifer Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations" (2010) 38:4 Pol & Soc'y 552.

71. *Ibid* at 563.

file and investigate complaints, and provide ongoing deterrents).<sup>72</sup> Program strengths include their relative permanence and their enshrinement in public law. Weaknesses include deputies' inability to advocate for workers facing violation and/or evasive behaviour. Both programs also follow David Weil's prescription for regulatory jujitsu:<sup>73</sup> their substantive success flows from the business representatives' intimate understanding of sector-based issues, their aligning the contours of their activities to specific rules applicable to public construction, and their access to detailed data.<sup>74</sup>

### 3. PARTNERSHIPS BETWEEN STATE AGENCIES AND COMMUNITY ORGANIZATIONS

Still another example of community-based enforcement that holds promise as a model is New York's former Wage and Hour Watch, which entailed a formal partnership between New York's labour department and six agencies including workers' centres and unions. This arrangement involved a time-limited memorandum of agreement (signed in 2009) in which the participating organizations

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72. *Ibid* at 558-60.

73. David Weil, "A Strategic Approach to Labour Inspection" (2008) 147:4 *Int'l Lab Rev* 349 at 372.

74. Although it is less institutionalized, another example of community-based enforcement drawn from the United States where workers gain voice is the Maintenance Cooperation Trust Fund, a janitorial watchdog involving a California local of the Service Employees International Union (Local 1877) and lead contractors engaged in collective agreements with that local. Together, these institutions established a trust fund whose mission is to abolish unfair business practices in this industry through education as well as investigating cleaning contractors' conditions in order to enhance enforcement by public agencies and private attorneys. Signatory contractors pay between one and five cents per hour worked by workers to fund such programs, which require a staff of seven to cover the California area. This staff exposes, persuades, and will ultimately sue violators if they refuse to change. It also helps state agencies with fact-finding, brings workers to agencies to follow up, and supports workers engaged in private litigation. As part of its activities, the Maintenance Cooperation Trust Fund enters monitoring agreements with troublesome contractors and helps cultivate interagency monitoring. The main limitations of its activities, compared to the preceding examples, are twofold. First, firms can always choose alternative contractors whereas more traditional justice for janitors campaigns target worksites, and thus building tenants must comply with monitoring agreements rather than firms. Second, the Maintenance Cooperation Trust Fund is not capable of making lasting change inside state agencies because such agencies are not involved directly as partners. See Catherine K Ruckelshaus, "Labor's Wage War" (2008) 35 *Fordham Urb LJ* 373 at 391-94; Karina Muñiz, "The Janitorial Industry and the Maintenance Cooperation Trust Fund" in Ruth Milkman, Joshua Bloom & Victor Narro, eds, *Working For Justice: The L.A. Model of Organizing and Advocacy* (Ithaca, NY: Cornell University Press, 2010) 211.

agreed to identify and train at least six people to serve as Wage and Hour Watch members for two years. These individuals, who were not deputized, were to provide at least two hundred businesses per year with labour law compliance information, hold sessions for the public, and refer potential labour law violations to the labour department. They were not authorized to carry out inspections. They thereby functioned like "neighbourhood watch" applied to the labour standards domain. Consequently, the chief strengths of the model are that it fosters ongoing partnerships between the state enforcement bureaucracy and community groups and preserves the ability of the latter to advocate for workers.<sup>75</sup>

One successful example of New York Wage and Hour Watch in action, predating its codification, was the 2007 investigation of a commercial strip in Bushwick, Brooklyn. This investigation involved a particularly dynamic approach as it brought the Labor Department's Division of Labor Standards together with its Bureau of Immigrant Workers' Rights in partnering with the Retail, Wholesale and Department Store Union and Make the Road New York, which, in working collaboratively, found \$350,000 of underpayments owed to sixty workers. After this determination, the two community agencies remained active in the area, informing businesses and workers about labour law, resulting in increased compliance, and contributing to a greater sense of community membership amongst workers highly dependent upon minimum labour standards.<sup>76</sup>

#### IV. REMEDYING THE ENFORCEMENT CRISIS IN ONTARIO: LESSONS FROM ELSEWHERE

Considering the existing array of initiatives emergent in other common law jurisdictions, what options are available for altering Ontario's ES regime to begin to counter the tendency to place enforcement in individual workers' hands? How might workers reliant on the *ESA* and their advocates have a stronger voice in its enforcement? Since almost all regulatory regimes rely on a mix of approaches and methods, Ontario's system could be improved by drawing insights from both the individual and collective voice mechanisms canvassed here.

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75. For a detailed assessment of New York's Wage and Hour Watch Program and the roots of the demise of this partnership, see Janice Fine, "Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labor Standards Non-Compliance in the United States" (2013) 50:4 *Osgoode Hall LJ* 813.

76. New York State Department of Labor, News Release, "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](http://www.labor.ny.gov/pressreleases/2009/Jan26_2009.htm)>.

#### A. AUGMENTING WORKERS' INDIVIDUAL VOICES UNDER THE COMPLAINT-BASED SYSTEM

At a policy level, it is critical to recognize that an onerous and risky complaints process requiring the precariously employed to play the protagonist<sup>77</sup> works against the exercise of voice. Maximizing the accessibility of the complaints process, and supports once it is accessed, is therefore necessary.

The foremost failings of Ontario's ES enforcement system relate to the onus placed on individual workers to initiate and proceed through arduous claims processes, made more complex by the additional requirements (since 2010) that the claimant confront his or her employer about perceived violations and provide certain information in writing before he or she is permitted to make a formal claim. To maximize effective routes to individual claims-making and reduce its associated risks to workers, the involvement of outside parties and external supports is critical in this context. Rather than making the complaints process more onerous, the ES enforcement regime could provide for anonymous and third-party complaints to initiate investigations and limit the potential for reprisals against workers whose rights are in question, changes which could be achieved largely through the straightforward adaptation of administrative measures. Here, the anonymous complaints process operating in Saskatchewan and the third-party complaints permissible in Australia offer preferable models. On the assumption that complaints may be shared among workers, in such situations Ontario could also follow Saskatchewan's lead and pursue expanded investigations.

Permitting anonymous and third-party complaints does not, however, resolve deficiencies in the support available to workers in the complaints process. Workers making claims under the Health and Safety, Workplace Safety and Insurance, and Human Rights regimes are eligible for significant supports from Occupational Health and Safety Clinics for Ontario Workers, the Office of the Workers' Advisor, and the Human Rights Legal Support Centre, respectively. Enhanced supports, ideally through devoting greater financial resources to legal aid, are necessary for the ES enforcement regime to function effectively, and for ES-dependent workers not only to be deemed to be full members of the labour market in laws on the books but to be able to exercise their voice and participate in practice. Timely person-to-person support in the claims process is especially key given the six month time limit on claims-making and since studies of other jurisdictions (*e.g.*, British Columbia) show that the self-help model undercuts worker claims-making altogether. To buoy such measures, reelecting New York state's wage-theft

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77. Tucker, "Old Lessons for New Governance," *supra* note 10 at 27.

legislation, the creation of an effective presumption of employer retaliation is also important. This would involve boosting the current onus of proof under Ontario's *ESA*<sup>78</sup> through measures of interim reinstatement during claims investigation for workers fired for seeking their ES entitlements, establishing meaningful fines in cases of documented reprisal, and expanding the circumstances under which worker protections against retaliation apply as well as the actors that may be deemed to be engaging in retaliatory behavior.<sup>79</sup>

In the complaints process, third-party representation of the sort possible in Australia offers another direction that Ontario could take. This sort of representation is crucial to the expression of individual voice and could contribute to augmenting workers' collective voice by, among other things, spawning new or supporting existing institutions (*e.g.*, unions) devoted to workers' realization of their rights. Furthermore, there is no principled reason that third-party representation should be a feature of some pieces of labour legislation and not others. Assistance through the complaints process, as well as outreach of the sort that labour inspectorates in other jurisdictions pursue in partnership with community organizations, would also make such representation more meaningful. So, too, would greater interagency coordination, that is, the facilitation of links between different government agencies, in a range of related areas where a worker may be in a position to complain (*e.g.*, Occupational Health and Safety, Human Rights, Employment Standards, *et cetera*). Such coordination has the potential to deliver fair compensation to workers if collections are simultaneously altered such that costs of enforcement shift to those that violate the law. Limited fines for employers and the financial burden of mounting a claim mute workers' voices in the complaint process, particularly the precariously employed, especially those facing other structural disadvantages such as migrant workers, for whom claims-making is also constrained by obligations to households and communities abroad. One potential remedy here is to require employers found in violation to cover administrative costs (*e.g.*, costs of investigation). This could act as a deterrent against avoiding compensating workers for what they are genuinely owed.

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78. *ESA*, *supra* note 1, s 74(2).

79. For example, the New York state *Wage Theft Prevention Act's* anti-retaliatory provisions are extended under the *New York Labor Law*. See *New York Labor Law*, c 31, art 7, § 215 (McKinney 2010) (available on WL).

## B. BEYOND THE INDIVIDUALIZED MODEL: PROSPECTS FOR COLLECTIVE VOICE

Repairing the complaint-driven system alone is insufficient in increasing voice amongst ES-dependent workers. Greater avenues for collective action are required, involving a diversity of actors and institutions in enforcement. From this perspective, practices emergent in other common law jurisdictions confronting similar problems highlight two channels to pursue in particular.

The first channel involves inventing new collaborations where workers' designates (*e.g.*, business agents from unions or representatives from entities supporting non-unionized workers such as workers' centres) are either deputized to assist in enforcement or involved in other formal arrangements directed towards similar ends. Such initiatives offer particular promise in segments of the labour market characterized by high levels of violation or evasive behaviour on account of the presence of immigrants and young or women workers, whose social location may impede their ability to voice complaints as individuals. Although deputization is ideal under many circumstances, given the limits that it can place on the actions of workers' advocates, collaboration between state inspectors and workers' advocates to enforce ES rights may be desirable. Initiatives organized by geography, of the sort evolving under the former New York Wage and Hour Watch, offer strong examples. They go a considerable distance in bringing the culture of enforcement to the streets, in giving voice to collectives of workers in a given region or neighbourhood.

Although little known, the MOL's *Administration Manual for Employment Standards (2010)* provides a vehicle through which Ontario could pursue community-based enforcement initiatives of these sorts. It mandates the existence of an Employment Standards Program Advisory Committee, whose roles include monitoring "changing circumstances and emerging issues" and assisting "in the development of strategies and best practices to implement special projects."<sup>80</sup> To fulfill its mandate, the Employment Standards Program Advisory Committee is also to review "stakeholder concerns;"<sup>81</sup> this committee thereby offers a potential mechanism for communicating with workers' organizations and advocates in improving enforcement.<sup>82</sup> Collectively, such provisions permit the committee to develop and advance initiatives augmenting the collective voice of workers in conjunction with diverse actors and institutions.

80. MOL, *Administration Manual*, *supra* note 19, ss 1.5.3-1.5.4 [emphasis added].

81. *Ibid*, s 1.5.2.

82. Indeed, in its deliberations, the Employment Standards Program Advisory Committee is explicitly permitted to invite additional persons to attend meetings to provide information and participate in discussions. See *ibid*, s 1.5.7.

Another channel for increasing collective voice entails conducting regular enforcement sweeps of high-risk sectors of the sort undertaken by the US Department of Labor and expanded investigations carried out routinely in Saskatchewan. Both types of undertakings offer attractive models since they cover greater ground than the investigation of individual complaints and give workers voice by providing low risk opportunities for the expression of grievances.

## V. CONCLUSION

The lack of effective individual and collective voice mechanisms amongst workers dependent on ES as their primary source of labour protection hinders their access to formal rights and entitlements. By requiring workers, a sizeable subset of whom are precariously employed, not only to come forward with their own grievances but to prepare and present their own cases, often with limited foreseeable pecuniary benefits beyond obtaining entitlements that they are already owed, Ontario's predominantly complaint-based system has a chilling effect. There are, however, other paths to follow. In other common law contexts, where conditions of work and employment have similarly deteriorated, there are a growing number of initiatives where the burden of enforcement does not rest predominantly on individual workers but is rather shared between different government agencies and external institutions. In such contexts, unions and community groups are increasingly playing supportive roles in knowledge-sharing about workers' rights and taking on substantive responsibilities linked to representation, investigations, and settlements. In making necessary adaptations to Ontario's ES enforcement regime, drawing from these examples of incremental change and especially their underlying principles could contribute to creating a context in which rights bearers have better access to meaningful remedies where collective improvements are also within closer reach.

