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NEW "FLEXIBLE" EMPLOYMENT STANDARDS REGULATION
IN BRITISH COLUMBIA

DAVID B. FAIREY*

RéSUMÉ
La législation sur les normes d'emploi est un outil important de la politique publique pour la promotion de la sécurité économique des acteurs oeuvrant sur le marché du travail qui sont défavorisés et vulnérables en raison de l'inégalité inhérente à laquelle doit faire face le travailleur non représenté dans les rapports entre employé et employeur. En prenant comme guide la promesse du Parti progressiste-conservateur de l'Ontario, faite pendant leur campagne aux élections provinciales de 1999, de « moderniser » la Loi sur les normes d'emploi de l'Ontario pour la rendre plus « flexible » et adaptée au marché du travail contemporain, ainsi que les amendements législatifs à la Loi de l'Ontario introduits pendant la période allant de décembre 2000 à septembre 2001, le nouveau gouvernement libéral de la C.-B., élu en 2001, promulguera des changements radicaux de nature tout aussi « flexible » à la Loi sur les normes d'emploi de la C.-B. au cours des quatre années qui ont suivi. Ces changements furent partiellement justifiés par la nécessité de donner une plus grande protection aux travailleurs vulnérables. Cet article fournit une évaluation préliminaire des répercussions sur les travailleurs vulnérables de 42 changements à la Loi en C.-B., de 40 changements au Règlement, et de changements importants aux pratiques en matière d'application et des procédures administratives de la Direction des normes d'emploi de la C.-B. Après un examen de quelques uns des changements les plus importants, dont certains comportant des réductions sans précédent dans la protection des travailleurs, cet article conclut que les répercussions sur les travailleurs vulnérables seront extrêmement négatives.

INTRODUCTION
In May 2001, the newly elected provincial Liberal government in British Columbia embarked on a program of sweeping change in the regulation of labour in the workplace. Central to this "New Era" was a determination to increase "flexibility" in employment standards law and administration. The new Liberal government also justified its "New Era" labour policies on the basis of giving protection to vulnerable workers in certain sectors.1 Over the ensuing four years, through Bills 48, 37, and

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56, substantial changes were made to nearly every significant aspect of the law and its enforcement. In this period approximately forty-two changes were made to the Employment Standards Act, and a further forty changes made to the Regulation. At the same time, there were dramatic reductions to budgets and staff resources for the Employment Standards Branch.

The purpose of this paper is to describe the main changes to BC employment standards law and administration since election of the Liberal government, to discuss how these changes alter previously established employment regulations and practices, to explain in Canadian context how some of these changes are unprecedented or go beyond established standards and practices elsewhere, and to provide a preliminary assessment of the potential effects upon vulnerable workers.

Literature surveys by Canadian researchers of labour regulation have found that studies of state regulation of employment relationships have not generally explored the regulation of non-unionized labour, and while recent studies highlight the ways in which states are attempting to re-regulate unionized relationships, this research agenda has not been expanded to include the implications of labour re-regulation for non-unionized workers. In addition, researchers have found that comprehensive analysis of the effects of piecemeal Canadian policy responses to the increasing vulnerability of workers—often in reforms reflecting employers' demands for greater flexibility and lower labour costs—is scarce.

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1. The BC Liberal Party's 2001 election platform was headlined "A 'New Era' for British Columbia". Part of the platform included giving workers and employers greater flexibility in employment standards. See A New Era for British Columbia: A Vision for Hope & Prosperity for the Next Decade and Beyond (Vancouver: Liberal Party of B.C., 2001) at 11.

2. This examination of the potential implications for increased labour market segmentation and employment polarization and vulnerability in BC expands on the approach of Mark Thomas in which he examines recent "flexibility" and "modernization" reforms to the Ontario Employment Standards Act. Thomas focuses his analysis on changes to the legislation and does not look at changes to the system of administration and enforcement, which this paper attempts to do in relation to the BC employment standards. See Mark Thomas, "Regulating Flexibility: The Case of Employment Standards Legislation in Ontario", in Gregor Murray, Colette Bernier, Denis Harrison, & Terry H. Wagar, eds. Rethinking Institutions for Work and Employment: Selected Papers from the XXXVIIIth Annual CIRA Conference (Quebec City: Canadian Industrial Relations Association, 2002) 123.


4. See, for example, Thomas, supra note 2 at 123.

EMPLOYMENT STANDARDS LAW IN CANADA

Employment standards legislation is widely recognized as a significant instrument of public policy to provide minimum standards for the economic security of the most disadvantaged and vulnerable labour market participants.6

A 1997 report evaluating Canada's federal employment standards legislation (the Canada Labour Code, Part III) found a wide range of interrelated rationales for employment standards internationally that highlight the broad economic and social goals of employment standards legislation.7

In Canada, the origins of employment standards legislation can be found in early protective legislation such as Factory Acts that imposed maximum hours of work for women and children in the 1890s, and the statutes that imposed minimum wages for women at the end of World War I. According to Fudge, Tucker, & Vosko, Canadian employment standards legislation "recognizes the inequality in the employment relationship and that labour is more than a commodity".8

Paul Malles identified for the Economic Council of Canada's 1976 Labour Market Study9 four broad objectives for employment standards law in Canada:

1. to narrow the gap between the wages and working conditions obtained by organized labour through collective action, and by unorganized labour;

2. to protect the individual employee against undue exploitation;

3. to eliminate unfair competition between employers; and

4. to raise the living standards of the working poor.10

It is therefore well established in Canadian labour-regulation-policy literature that economic security and workplace protection for unrepresented workers, which enables them to keep pace with the economic status and employment conditions of represented workers and workers with labour market power, is central to employment standards law in Canada.

6. Vulnerable workers and their employment relations have recently begun to receive long-overdue attention in the Canadian labour regulation policy literature. Over the past two years the Canadian Policy Research Networks, the Law Commission of Canada, and the Canadian Centre for Policy Alternatives have been involved in policy research focused on vulnerable workers. In addition, employment standards legislation has been under review federally and in the provinces of Saskatchewan, Manitoba, and Alberta.


THE "NEW ERA" OF LABOUR POLICY IN BRITISH COLUMBIA

The rationale for recent changes to BC employment standards is motivated by the Liberal government's belief that “the labour relations climate in British Columbia is often perceived as hindering investment in the province". As such, changes to the Employment Standards Act were explicitly designed to simplify the rules and advance a model premised on greater flexibility. To this end the ministry has aggressively sought to introduce legislation that initiates “[c]hanges to employment standards that give employees and employers greater flexibility, reduce unnecessary regulation and bring mandatory penalties into force”.

The spring 2001 BC Liberal Party election campaign platform on employment standards borrowed heavily from the 1999 election campaign platform of the Progressive Conservative Party in Ontario, in which it promised to “modernize” the Ontario Employment Standards Act to make it “flexible” and adaptable to the contemporary labour market. The need for “modernization” in Ontario was articulated by the Progressive Conservative government through a discourse that tied Employment Standards Act reform to the government’s general commitment to “improve the province’s competitive status as a place to invest”. Following re-election, the Ontario government introduced a series of legislative amendments between December 2000 and September 2001, the most significant of which were an extension of the maximum hours of work from forty-eight to sixty per week and the averaging of overtime entitlements over a period of up to four weeks.

In November 2001, following its election in May, the new Liberal BC provincial government embarked upon a series of substantive changes to the Employment Standards Act, regulations under the Act, and the system of administration and enforcement of the Act.

In announcing changes to the Act in May 2002, following a quick twenty-eight-day consultation and senior staff review in November and December 2001, the minister explained, “These changes are designed to provide flexibility and encourage self-reliance so employees and employers can build mutually beneficial workplace relationships.” The stated goals of the new legislation were to:

- protect vulnerable employees, particularly those in certain sectors;

14. Thomas, supra note 2 at 128.
• encourage flexible workplace partnerships;
• help revitalize the economy, specifically small business, by recognizing the needs and the realities of the workplace; and
• simplify the rules.\(^{15}\)

With respect to “flexibility”, greater work-scheduling flexibility was being promoted, and the rules and procedures simplified “to help create new jobs and attract investment”. With respect to protection for vulnerable employees, in certain sectors a new approach to education and enforcement was to be applied, and penalties increased for employers who violate the law.

**Increased Workplace “Flexibility” Regulation in Conflict with Greater Protection for Vulnerable Workers**

A review of many BC provincial government statements and reports since May 2001, and the submissions of employer organizations in 2001 relating to needed changes to the employment standards regime, reveals that the adoption of elements of a “regulated flexibility” model of minimum workplace protections correspond to a broad range of ‘competitive labour market’ objectives. These objectives include:

• fewer laws and regulations (deregulation);
• total exclusion from the law of more occupations, industries, and sectors;
• increased partial exclusion of occupations, industries, and sectors from specific requirements of the law;
• greater flexibility in the application of specific minimum standards (e.g. hours of work and overtime);
• the option of employers and their employees to, by agreement, opt out of certain legislated requirements; and
• opportunities for non-complying employers to settle the violation complaints of employees under terms that are less than the law prescribes.

If these “flexibility” objectives are considered in the context of a growing body of research literature on the changing structure of employment and the disproportionate growth of non-union, non-standard, contingent, and precarious employment, and the consequent growth of economically vulnerable workers,\(^{16}\) it

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16. See, for example, Richard P. Chaykowski, *Non-standard Work and Economic Vulnerability* (Ottawa: Canadian Policy Research Networks, 2005); Fudge, Tucker, & Vosko, *supra* note 8; Rene Morisette & Garnet Picot, *Low-Paid Work and Economically Vulnerable Families over the Last Two Decades* (Ottawa:
becomes apparent that increased flexibility in employment standards is in conflict with enhancing the workplace protection of vulnerable workers and increasing their economic security. Indeed, the obvious potential is for increased employment standards "flexibility" to have the opposite effect, i.e. to increase employment vulnerability and precariousness, and increase the polarization of working conditions and incomes.17

Labour market vulnerability is broadly defined by Saunders and others in relation to workers whose participation in the labour market leaves their well-being at risk because they find it difficult to access work that provides "decent income and working conditions that meet 'societal norms'".18 Components of labour market vulnerability are identified as including:

- low-income own-account self-employed who fall outside the scope of employment standards legislation;
- employees who, though legally entitled to employment standards protections, have difficulty accessing these rights;
- employees who lack access to non-statutory benefits, or because of their part-time status lack access to statutory employment standards benefits;
- workers unable to qualify for or fully benefit from Employment Insurance or public pension plans; and
- adult workers whose earnings are very low over long periods of time, because of low wages and/or lack of stable employment.19

In a recent study of non-standard work and the economic well-being of vulnerable workers in Canada, Richard Chaykowski has found that the segment of the labour force that may be characterized as economically vulnerable is sizeable—about one-

17. See Rittich, supra note 5.
19. It is noted that Vosko, Zukewich, & Cranford, supra note 16, would have labour-market-policy impact research focus on the broader multi-dimensional notion of "precarious employment", which looks beyond the income-focused concerns of much of the recent employment "vulnerability" research and in addition considers continuing employment certainty, control over the labour process, and the degree of regulatory protection.
third of all individuals who do paid work over the course of a year, and about 11% of those who are employed full-time throughout the year.20

**BC’s “New Era” Changes to Employment Standards**

The BC Liberal government program for change in Employment Standards over the period July 2001 to June 2004 covered every significant aspect of the regulation and enforcement of minimum conditions of employment. It covered (a) legislative change (changes to the Act), (b) Regulation change by executive order, (c) program resource allocation change (budget and staff reductions), and (d) administrative change (policy and process).

**Legislative Change**

Three government bills over the period May 2002 to May 2004 made approximately forty-two changes to the Employment Standards Act. The majority of these changes were made as a result of Bill 48 (May 2002).21 Bill 37 (May 2003)22 made about eight significant changes to the Act, the most significant of which established radically new lower standards to permit the employment of children under fifteen. Bill 56 (May 2004)23 brought the powers, rules, and procedures of the Employment Standards Tribunal, previously prescribed by the Act, within the much more restrictive and “legalistic” requirements of all administrative tribunals under a new Administrative Tribunals Act.

Of the forty-two substantive changes made to the Act, only seven are assessed by the author to be of benefit to workers, while the other thirty-five are assessed by the author to either have negative impacts for workers (the majority) that far outweigh the few positive changes, or to be relatively neutral.

Changes to the Act and Regulation have been assessed by the author according to whether there has been an increase or decrease in the following elements:

- The scope of employment covered
- The types and levels of minimum payments provided for covered employees, and the eligibility requirements
- The types and levels of protections for covered employees relative to the constraints placed on employers in establishing non-wage conditions of employment

• The measures prescribed to ensure employer compliance
• The measures and resources utilized to enforce minimum standards
• The effectiveness of employee and employer information and education by government agents concerning the rights and obligations of each
• Employee access to, and the adequacy and effectiveness of, appeal rights and procedures

Each of the above criteria has implications for the labour market relative to the polarization of conditions of employment, facilitation of non-standard employment relationships, and the vulnerability of workers in non-union workplaces.

The assessed positive changes to the Act involved the following:

• Time worked is now counted to include work required to be done during a meal break (section 32(2)).
• Notices of termination have no effect if issued during a "temporary layoff" (section 67(1)(a)).
• The Employment Standards Branch director's remedies upon finding a violation (section 79) have been expanded to include the posting of workplace notices concerning a determination or information about the Act and Regulation, directing that a payroll service be utilized to pay an employee, and ordering payment of costs incurred by the Branch in relation to investigation of a contravention.
• Monetary penalties under section 98(1) have been made mandatory in the event of a violation (previously at the director's discretion).
• Under section 21, employers are prohibited from deducting or withholding from wages in one pay period amounts required to be paid in another pay period to comply with the minimum wage provisions. For example, if in the first pay period an employee has earned wages at the rate $9 per hour ($1 per hour above the minimum wage), the employer cannot withhold payment of $1 per hour at the end of that pay period, to be paid at the end of the second pay period during which the employee is paid only $7 per hour, so as to make it appear that she or he has been paid the $8 per hour minimum wage in the second pay period.
• The director's power to vary or cancel a determination of violation under section 86 has been restricted to a time period within thirty days of receipt of a copy of an appeal of such determination.24

24. Under section 86, the director of Employment Standards has the power to vary or cancel a staff determination of violation of any part of the Act or Regulation.
The section 96 enforcement provisions have been changed to clarify that the liability for unpaid wages extends to directors and officers of corporations, firms, syndicates, or associations considered to be the same employer. However, as discussed below, the Wage Recovery provisions of the Act were also negatively changed to relieve company directors and officers from liability if their companies are in bankruptcy or receivership.

The most significant negative changes to the Act as a result of Bills 48 and 37 are summarized in the following sections. A preliminary assessment of their potential effects on workers, especially vulnerable workers, is also provided.

**Exclusion of Employees Covered by Collective Agreements**

The scope-of-coverage section of the Act (section 3) was completely rewritten for the purpose of excluding from major provisions of the Act all employees covered by a collective agreement if the collective agreement contains "any language" respecting these provisions. This new collective agreement "contracting out" feature of employment standards law is unique in Canada, although it first appeared in the BC Act in the period 1983 to 1995 and was then repealed following recommendations of the Thompson Commission.²⁵ Similar collective agreement exclusion legislation was initially proposed in Ontario in 1996 following the election of the Conservative Harris government in 1995, but then withdrawn in 2001.²⁶

According to the 2005 Labour Force Survey estimates by Statistics Canada, only 32.6% of all employees in British Columbia worked under conditions specified in union collective agreements.²⁷ The new BC Act excludes from its minimum standards all such employees when the collective agreements they work under contain "any provision" dealing with the following matters:

- Hours of work and overtime (exclusion from all of Part 4 of the Act)
- Statutory holidays (exclusion from all of Part 5)
- Annual vacation or vacation pay (exclusion from all of Part 7)
- Seniority retention, recall, termination, or layoff (exclusion from section 63—employer's liability to pay compensation for length of service in the absence of notice of termination)
- Paydays (exclusion from section 17)
- Payment of wages upon termination (exclusion from section 18)

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²⁶ See Fudge, *supra* note 3.

• How wages are to be paid (exclusion from section 20)
• Assignment of wages—employer’s duty (exclusion from sections 22, 23 & 24)
• Supply of special clothing/uniforms (exclusion from section 25)
• Payments by employers to funds for employees, insurers or others (exclusion from section 26)
• Wage statements (exclusion from section 27)
• Payroll records—content and requirements (exclusion from section 28)

These new exclusions have serious negative potential because they invite, according to industrial relations experts interviewed,28 “corrupt arrangements between employers and pseudo/employer dominated unions which now exist in BC”.

In addition, the Act (section 3(6)) was changed so that where a collective agreement exists the employees covered by it no longer have access to the complaints, investigations, enforcement, and appeals provisions of the Act (Parts 10, 11, and 13) with respect to the employment of children (section 9), payment of fees to obtain a job or job information (section 10), requirements to pay minimum wage (section 16), deductions from pay (section 21), jury duty leave (Part 6), group terminations (section 64), rules on notice of termination (section 67), and rules on payments on termination (section 68). Any complaints or disputes in respect of these provisions of the Act for unionized employees must now be resolved through the collective agreement grievance procedure, or referred to the BC Labour Relations Board.

**Employment of Children**

Significant changes were made to the section 9 of the Act with respect to the employment of children under the age of fifteen.29 Prior to these changes, no employer could hire a child under the age of fifteen without first obtaining a permit from the director of the Employment Standards Branch. Such permits were issued only after the Branch had investigated the workplace, determined the need for restrictions on the type and hours of work, and obtained parental and school consent.

The child employment permit system has been replaced by provisions that allow employers to hire children between the ages of twelve and fourteen merely after the employer has obtained the consent of one parent or guardian, shifting all responsibility for the workplace safety and well-being of such children to the parent or guardian.

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28. Professor Mark Thompson, University of British Columbia; David Ages, former Employment Standards Branch regional manager and subsequently Labour Relations officer with the British Columbia Nurses Union; and Graeme Moore, former Industrial Relations officer and policy advisor with the Employment Standards Branch.

addition, there is a new provision (section 9(2)) allowing the employment of children under twelve years of age with the permission of the director of the Employment Standards Branch.

A recent study of BC's Employment Standards Act changes with respect to child labour included an online survey of the recent employment experiences of public school students in BC, aged twelve to eighteen years. That study found that, as a result of Bill 37 and subsequent changes to the Regulation, BC now provides significantly less protection to child workers than any other jurisdiction in Canada, the United States, and the European Union. The survey of students revealed that significant proportions of employed twelve- to fourteen-year-olds had not had the health and safety of their workplaces evaluated by their parents, and that significant proportions of twelve- to fourteen-year-olds had been employed without written approval of their parents, as required by the new Act. Other violations of the Act were also found, demonstrating that the new system of self-regulation and enforcement of child labour protections is failing.30

Employer Requirements to Inform Employees

Under section 6 of the Act, employers are no longer required to post in workplaces statements of their employees' rights under the Act. And under section 31 employers are no longer required to post in each workplace hours of work notices, or to give employees twenty-four hours' notice of shift changes. As a consequence, all workers—especially vulnerable workers—will be less informed of their rights (because employers have an incentive to not voluntarily inform them), and employees subject to frequent shift changes will have less ability to plan their lives.

Hours of Work and Overtime

Under section 34, the minimum daily pay to employees who start work on any given day has been reduced from four hours to two hours. This change constitutes a clear lowering of benefits, and significantly affects part-time employees in the retail, cultural, recreational, and food-service industries.

Under section 36, the premium to be paid when an employee is required to work during the thirty-two consecutive hours of rest otherwise required each week, was reduced from double time to time-and-a-half.

The flexible work schedules previously permitted by sections 37 and 38 of the Act, and sections 19, 20, and 21 of the Regulation (with the approval of 65% of employees affected), have been replaced by new provisions (section 37) permitting employers

to enter into agreements with individual employees to forgo their statutory rights to overtime pay when they are required to work longer than eight hours a day or forty hours in a week. Under new “hours averaging agreements” for up to twelve hours of work per day, and limited to an average of forty hours per week over one to four weeks, overtime rates of pay do not apply. In addition, the minimum daily overtime pay at double-time rates does not apply until after twelve hours of work; previously, double-time pay applied after eleven hours of work.

Also, for employees not working under an “hours averaging agreement”, the daily hours worked before double time is paid for overtime was extended from eleven hours to twelve hours, and double-time pay for all hours worked in excess of forty-eight hours per week was reduced to time-and-a-half.

There are several negative features in the new “hours averaging agreement” provisions:

- The individuality of such agreements subjects individual employees to employer coercion and duress to sign without representation.
- Democratic decisions made by a majority of employees in the work group to be affected are eliminated.
- The Employment Standards Branch cannot provide enforcement because employers are not required to register such written agreements for Branch approval.
- A greater range of work schedules is possible than under the previous rules.
- The provision is complex and confusing, and there is no direction to employees and employers as to what happens when employees do not work a shift as the result of sickness or other absence from work, how scheduled work on a statutory holiday is to be compensated, how vacations are affected, and how payments on termination are affected.

Statutory Holidays

Added to the thirty calendar days of employment to qualify for a statutory holiday with pay under section 44 is a new eligibility requirement that an employee must also have worked or earned wages for at least fifteen of the previous thirty calendar days preceding the holiday. This new provision alone eliminates statutory holiday pay completely for many part-time employees, and in fact takes eligibility back over ten years to the way it was prior to 1994, when the Thompson Commission recommended changes to benefit part-time employees. Commissioner Thompson reported in 1994 that he had received submissions that the fifteen worked days requirement then in place created confusion about the application for part time-workers, and that
part-time workers might work regularly without ever becoming eligible for a paid holiday.\textsuperscript{31}

In addition, statutory holiday pay (section 45) is now calculated on the basis of an average day’s pay for all days worked in the preceding thirty calendar days, instead of the same amount of pay as if the day had been worked. As well, the requirement to schedule another day off with pay for employees who work on a statutory holiday (section 46) has been removed. And the requirement to provide an employee with a day off in lieu of a statutory holiday when the statutory holiday falls on the employee’s day off (section 47) has been removed.

According to an authoritative source,\textsuperscript{32} all of the above changes to minimum standards in the Act are of benefit to employers at the expense of employees.

\textit{Complaints, Investigations, and Determinations}\textsuperscript{33}

Some of the most significant changes to the Act have been to a number of sections of Part 10 with respect to the rights of employees to file complaints of employer violations, and how complaints are to be handled by the director of the Employment Standards Branch and his or her staff.

Under section 76(1), the director is no longer required to investigate every complaint received, only to accept and review complaints. And under amended section 76(2), a complaint does not have to be accepted or reviewed if “the employee has not taken the requisite steps ‘specified by the Director’ in order to ‘facilitate resolution’ or investigation of the complaint”. These changes established the legal framework for the Employment Standards Branch to adopt new administrative policies and procedures (to be reviewed in more detail later), which include: (1) the requirement of complaining employees to first confront their employer with their complaint with the aid of a new “Self Help Kit”, before being permitted to file a written complaint with the Employment Standards Branch; (2) the replacement of active “investigation” of complaints by Employment Standards officers by a new “mediation” process to try to obtain new “settlement agreements”; and (3) a new “adjudication” role for officers in the event that a “settlement” cannot be reached, where officers convene formal hearings to receive the evidence of both parties to a complaint (and which must be attended by the complainants and their employers), and then issue written decisions.


\textsuperscript{33} A “determination” under the Act is a decision required by the director of Employment Standards in the administration and enforcement of specific sections of the Act.
Although not clearly defined, new "settlement agreements" are given special status in the Act. Once signed by complaining employees and their employers, "settlement agreements" take the place of a director's "determination" (see sections 87 through 91). In the event that an employer does not comply with the terms of such a settlement, the affected employee cannot then ask the Employment Standards Branch to issue a violation determination to force compliance with the Act in full. It is only the settlement agreement that is enforceable in the court. Therefore if an employee settled a complaint in return for compensation that was less than prescribed by the Act (which is typically the case), he or she will have waived right to receive what the Act prescribes if the employer reneges on the settlement agreement.

According to a former senior Branch officer, the new formal status for "settlement agreements" is a huge change, because the incentive for employers to settle quickly is removed, and more significantly, because full Branch investigations are no longer mandated, opens the door to intimidation of employees by employers and the Branch—since the choice of complainants is now to take a settlement or get nothing at all unless they can prove conclusively that their claims are valid.34

Because of imbalance in the power relationship between employees and their employers, the new formalized mediation and settlement agreement process effectively places employees in a more vulnerable position of receiving less protection than was previously the case.

**Wage Recovery**

There have been three significant changes to the Act with respect to limits on employer liability for wages required to be paid.

The limit on retroactive liability for wages required to be paid by an employer under a director's determination (section 80) has been reduced from two years from date of complaint or determination to six months. This change alone, because it significantly reduces the penalty an employer must pay for violating the Act, will further encourage unscrupulous employers to violate the Act.

Under the new section 96(2), directors or officers of companies no longer bear personal liability for wages owed to employees if the company is in bankruptcy or receivership. In 2001 alone the Employment Standards Branch collected $500,000 for employees by means of the director's liability provision, which was excluded by amendment in 2002.

In addition, under section 30, farm producers are no longer liable for the unpaid wages of farm workers if the farm workers are employed by licensed farm labour contractors who have been paid by the producer for the work performed.

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34. See Ages, *Creative Resistance*, supra note 32.
This lowering of wage protections for farm workers is one of several changes to the Act and Regulation (detailed below), which significantly lowered standards for an already highly vulnerable group of workers. According to former Employment Standards Branch policy advisor Graeme Moore, “In no other field of employment are workers so vulnerable.”

**Appeals**

Significant changes have been made to Part 13 of the Act regarding the right to appeal a decision of the director of Employment Standards to the Employment Standards Tribunal with respect to a complaint, a determination of violation, or a penalty, creating further barriers to unrepresented workers in pursuit of their employment rights. First, under section 112(2), the Act now permits the charging of a fee to persons wanting to appeal a decision of the director. Second, where previously there were no specific restrictions in making an appeal, the grounds for appeal have now been substantially restricted to errors in law, failure to observe principles of natural justice, and new evidence becoming available (section 112(1)). Third, under section 114(a), the Employment Standards Tribunal has new power to dismiss an appeal without a hearing where at least one of the new restrictive grounds for appeal has not been met.

**Regulation Change by Executive Order**

Over the period July 2001 to June 2004 there were twelve provincial government executive Orders in Council to make approximately forty changes to the Employment Standards Regulation. Of those forty changes, thirty-four have been assessed to have either a negative effect on workers (the majority), or to be administratively neutral. And only six have been assessed to be positive.

The assessed positive changes to the Regulation covered the following:

- Increased amounts of monetary penalties are levied under section 29: from $0 to $500 for the first offence; and for subsequent offences: $2,500 for a second offence of the same provision within three years (previously $150 multiplied by the number of employees affected), and $10,000 for a third offence of the same provision within one year (previously $250 multiplied by the number of employees affected).

- Technical and administrative support employees of high technology companies are no longer excluded under section 37.8 from the Act’s provisions

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regarding hours of work, overtime, and statutory holidays. In 1999 the previous government had, as part of a package of exclusions by regulation for the benefit of high-technology companies, to permit greater “flexibility” in the employment of “high technology professionals”, also brought within the scope of some of those exclusions employees who were not high-technology professionals, including technical and administrative support staff.

- Under section 37.9, the overtime rates for silviculture workers are brought into alignment with the Act’s general overtime provisions.

- The statutory holiday pay for silviculture workers (section 39.9(8)) can no longer be based on an average day’s pay for the previous four weeks and must be equal to 3.6% of gross earnings on each paycheque.

- Under section 37.9(7), silviculture workers must now agree in writing before an employer can charge for lodging provided.

- So-called high-end commission salespeople are no longer exempt from statutory holiday provisions (section 37.14(4)) and must now be paid at least the minimum wage for their first 160 hours of work each month (section 37.14(5)).

The most significant negative changes to the Regulation are summarized as follows:

**Exclusions and Variances**

There were over 100 exclusions from the Act under the Employment Standards Regulation prior to 2001. After June 2001, the Regulation was changed several times to both expand the definitions of work or occupations excluded from all or some of the minimum standards of the Act, and to increase the number of jobs or occupations excluded from all or parts of the Act.

The section 1 definition of “farm worker” was broadened significantly to include jobs that previously had not been so classified, such as selling product during the normal harvest season, and initial product washing, cleaning, grading, or packing. Then, under section 34.1, farm workers as a whole were excluded from the hours of work, overtime, and statutory holiday provisions of the Act.

The section 1 definitions of “long-haul truck driver”, “high-technology professional”, and “manager” have also been expanded for the purpose of exclusion from core provisions of the Act.

Under section 37, foster-care providers have been added to the list of totally excluded occupations; fish-farm workers and livestock brand inspectors have been newly excluded from the hours of work and overtime provisions; specified commission sales-perssons have been newly excluded from the hours of work, overtime, and statutory holiday provisions; oil and gas field workers, short-haul truck drivers, and surface
miners have been newly excluded from the core provisions of the Act; and police recruits have been newly excluded from the prohibition against deduction from wages of employers’ costs for training.

In addition, overtime rates of pay have been reduced for several categories of oil and gas field workers working 24-hour shifts, long-haul truck drivers working more than 60 hours per week, taxi drivers working more than 120 hours within a two-week period, and silviculture workers required to work on a statutory holiday.

Minimum Wages

There have been two significant changes to the Regulation to lower the statutory minimum wage for two particularly vulnerable groups of workers: new entrants to the labour market and farm workers.

The first really significant “New Era” change to employment standards was made on 20 November 2001, just as the Ministry of Skills Development and Labour was starting its internal review and public consultations for changes to the Act and Regulation. The First Job/Entry Level Wage Regulation amended section 15 of the Employment Standards Regulation to create a new special $6-per-hour minimum wage for employees who had “no paid employment experience before November 15, 2001” and have “500 or fewer hours of cumulative paid employment experience with one or more employers”.

This new provision essentially excludes a defined category of employees from the general minimum wage of $8 per hour (established as of 1 November 2001) based on their “paid employment experience”. The consequent $2 (25%) differential in minimum wage for inexperienced workers is unprecedented in Canadian law. Nova Scotia is the only province with a lower minimum wage for inexperienced workers. However, in Nova Scotia the minimum wage for inexperienced workers is $6.70 per hour, and for experienced $7.15—a differential of only 45 cents (7%).

Another significant difference in the Nova Scotia legislation is that, regardless of the hours worked by inexperienced workers, the lower minimum wage applies only for the first three months of employment. Under the new BC legislation, depending on the hours worked by inexperienced workers, the lower minimum wage could apply for a minimum of three and one-half months for full-time employment of two hours per week, and up to more than one year for part-time employment of two hours per week.

A significant feature of the new BC $6 minimum wage is its non-application to employment under federal labour standards. Under Part III of the Canada Labour Code, the provincial minimum wage regulation generally applies to federally regulated employment in each province; however, the Canada Labour Code expressly prohibits discrimination in the minimum wage based on work experience (as now contained in the BC Employment Standards Act). Therefore, the federal Code does not adopt the $6 First Job/Entry Level wage in British Columbia for the reason that section 178 of
the Code requires that all workers be paid the $8 general minimum wage, “regardless of occupation, status or work experience”.

There are several other unique, inconsistent, and complicating features of the new $6 minimum wage regulation:

- No rigorous regulatory impact assessment was done before it was ordered into law, as has usually been the case with previous significant change to the minimum wage regulation.
- There has been no Employment Standards Branch monitoring or tracking of complaints with respect to the $6 minimum wage to assess its affects on workers.
- There are problems with the ambiguity and inconsistency of language in the Regulation, such as what constitutes “paid employment experience” and what paid time is counted for summation to 500 hours.
- The regulation is inconsistent with the rest of the Act and Regulation in that the onus to prove previous paid employment experience is placed on employees and not on employers.

The second group of vulnerable workers targeted for a lower standard of minimum wage under the “New Era” program was farm workers—specifically hand-harvesters who work on a piecework basis and harvest fruit, vegetable, or berry crops, and tend to be concentrated in the Fraser Valley, the Okanogan Valley, and southern Vancouver Island. According to a former Employment Standards officer and program advisor with twenty years of enforcement experience, hand-harvesters of Fraser Valley berry crops are largely drawn (about 98%) from the Lower Mainland’s Indo-Canadian community. They tend to be middle-aged and older, to have resided in Canada under five years, and to have limited ability to read or speak English. While some reside on the farms where they work, most reside in suburban homes and are transported to their workplaces by their employers, the farm labour contractors.

37. Written confirmation of this interpretation obtained from Neil Oster, program analyst, Human Resources and Social Development Canada.
40. Former senior staff with the Branch attribute the poor language of the Regulation to the fact that it was not drafted by experienced Branch staff but by staff in the new premier’s office immediately following his May 2001 election.
41. In the rest of the Act the onus for proof of contingent conditions is on employers.
Hand-harvesters are not covered by the $8 hourly minimum wage but by section 18 of the Regulation, which contains a schedule of minimum piecework rates according to the kind of harvesting they are engaged in. In April 1996 hand-harvesting farm workers were excluded from the vacation pay and statutory holiday pay provisions of the Act (respectively 4% and 3.6%) on condition that they be paid an equivalent prorated amount in addition to the minimum piecework rates in section 18 of the Regulation. In April 1999 the 4% for vacation pay and 3.6% for statutory holiday pay was rolled into the minimum piecework rates in the schedule, resulting in a total increase in minimum piece rates of 7.6%. However, in May 2003 the Regulation was changed to eliminate statutory holiday pay for farm workers, and as a consequence the minimum piecework rate schedule for hand-harvesters was reduced by 3.6%.

**Regulations for Employment of Children**

A third element of the significant changes made to employment standards with respect to the employment of children was the introduction of regulations on permitted hours of work. The new Part 7.1 regulation (sections 45.1 to 45.4) permits a child (twelve years of age and older) to work up to four hours on a school day, up to seven hours on a non-school day (unless approved by the director), up to twenty hours in a week with five school days, and up to thirty-five hours in any other circumstance.\(^{43}\)

**PROGRAM, BUDGET, AND STAFFING REductions**

A significant negative impact on the ability of the Employment Standards Branch to effectively administer and enforce the minimum requirements of the Act, and to process complaints under the Act, has been the radical reduction in Branch budgets and staffing resources since 2001.

The new Liberal government's sweeping budget cuts and one-third across-the-board staffing reductions in all ministries did not start until the 2002/03 fiscal year. However, staffing reductions began in Employment Standards in the 2001/02 fiscal year due to termination of the Skills Development and Fair Wage Compliance (SD&FWC) Program. Eliminated at this time were fifteen Employment Standards Branch positions.

While the SD&FWC Program had been focused on enforcement of the Skills Development and Fair Wage Act in relation to provincial government purchased or funded construction, the Branch staff who were involved were able to extend the

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scope of their investigations to enforce the Employment Standards Act more generally and effectively in the construction industry—notorious for non-compliance.

Over the next three years, Employment Standards Branch staffing was reduced by a third—from 151 to 109. In addition, the number of Branch offices province-wide was reduced from seventeen to nine (a 47% reduction) in the first year of the service-reduction plan.\(^4^4\)

Of particular significance to the effective enforcement of employment standards in the agricultural sector has been a 73% reduction in enforcement staff assigned to the Agricultural Compliance Team (ACT)—from eleven to three. Moore describes how the ACT, established in 1997 to follow up on the 1994 Thompson Commission Report finding of high levels of non-compliance in farm labour contracting, was highly successful in reducing farm labour contractor non-compliance in the period 1997 to 2001. He also analyzes the negative effects of ACT’s staffing reductions for agricultural employment in the post-2001 period.\(^4^5\)

It is assessed that these office closures and staff reductions have had a significant negative impact on employee access to Employment Standards information and enforcement services, and to have significantly reduced (if not eliminated) pro-active compliance investigation by Branch staff in large areas of the province. As a consequence, the Branch is almost exclusively operating in a rigid office-based complaints-processing mode.\(^4^6\)

**Administrative Measures and Procedural Changes**

Research by the Trade Union Research Bureau has found that significant labour policy change under the Liberal government's “New Era” program went beyond the content of legislation and the allocation of administrative resources in the case of Employment Standards. Faced with a large backlog of complaints due to under-resourcing in the years prior to 2001, and in anticipation that dramatic reductions to staffing would be made after 2001, changes were made to the Act and Branch administrative policies to consciously reduce the number of complaints received, and to obtain greater Branch control over complaints required to be processed. Procedures were set in place that significantly reduced the field/workplace investigations and audits of officers and virtually confine them to office activities, and to expedite the resolution of complaints through a new virtually compulsory two-stage “mediation” and “adjudication” process designed to reduce to a minimum the requirement to issue “determinations” of violation. As a consequence, a new bureau-

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44. With just nine regional offices, the BC Employment Standards Branch now has fewer offices than the Employment Standards Branch in Alberta, which has ten offices to serve 15% fewer employed Alberta workers.


46. This has been confirmed through interviews with a number of Employment Standards officers.
cratic message was subtly conveyed to staff to focus on “getting the determinations numbers down”.

Reducing the number of complaints initially received was achieved through measures to “restrict access to the gate” that include:

- employees being less informed of their rights, because their rights are not being posted in workplaces;
- office closures;
- conditional acceptance of written complaints (i.e. the requirement to complete and present the self-help form to the employer before a formal complaint can be filed with the Branch);
- forced “self-reliance” for complainants;
- initial action instructions and lengthy complaint forms in English only;
- access to important information, instructions, and forms limited largely to the Branch website;
- placement of Employment Standards officers in the offices of employer associations to handle complaints in industries targeted for greater compliance; and
- introduction of “partnerships” with employer associations.

Most gate-keeping of the more restrictive complaints was achieved by first requiring that complaining employees be “self-reliant” and confront their employer with their claim of violation of the Act. Except in “very unusual circumstances” (e.g. maternity leave or where there are fewer than thirty days left in the six-month period allowed for filing a complaint) the Employment Standards Branch will not accept complaints unless employees have used a new Self-Help Kit to file a claim directly with their employer.

The Self-Help Kit is a sixteen-page document (printed in English only), available only at government offices or on the government’s website. Part of the kit also requires complaining employees to complete a complicated claim form to calculate what they think the employer owes them.

If complaining employees have been undaunted by having to use the Self-Help Kit or by the potential intimidation or fear of having to alone confront and accuse their employers of having violated the law and, in having done so, not received satisfaction, they can then file a written complaint with the Employment Standards Branch. Once a complaint has been accepted by the Branch, employees must participate in a

47. The source of this and other “inside” Employment Standards Branch information contained in this section was interviews with a number of Employment Standards and Industrial Relations officers who requested anonymity.
new two-stage “dispute resolution” involving first a “mediation session” in which an officer attempts to have the complaining employee and her employer reach a “settlement agreement” (which does not have to provide payments or benefits prescribed in the Act) and, failing a settlement, a formal “adjudication hearing” presided over by an Industrial Relations officer. If either the employee or the employer cannot attend a mediation session or an adjudication hearing at a Branch Office during a normal Branch working day, Monday to Friday, the mediation or hearing is conducted by conference phone or video conference.

As a result of reduced staffing and the closure of five out of eleven Branch offices outside of the Lower Mainland and southern Vancouver Island, there is increasing use of distance mediation and adjudication. Distance adjudication by telephone, according to officers interviewed,\(^\text{48}\) raises serious questions about fairness, especially for vulnerable workers.

**Compliance, Complaints, and Enforcement**

Informed knowledge of the degree of employer compliance or non-compliance with employment standards legislation anywhere in Canada is very thin, according to joint research recently concluded by Canadian Policy Research Networks and The Institute of Public Policy of Canada.\(^\text{49}\) However, a survey of employers under the *Canada Labour Code* conducted for Human Resources Development Canada in 1997 found widespread non-compliance with Part III of the *Code* in a number of areas, particularly with respect to hours of work and severance pay. In particular sectors, the level of non-compliance was found to be at 45% to 50% of workplaces.\(^\text{50}\) A 1987 Ontario Task Force on Hours of Work and Overtime found a non-compliance rate of 96% with respect to weekly hours of work.\(^\text{51}\) And according to Moore, in British Columbia, the Employment Standards Branch found from fifty-nine agricultural worksite visits in 2003 that 69% of farm labour contractors and 36% of farm producers were in contravention of core provisions of the *Employment Standards Act*.\(^\text{52}\)

While many tools have been devised to ensure or increase compliance, most jurisdictions in Canada do not have hard data on the impact of their initiatives on compliance.\(^\text{53}\) Investigations by the Trade Union Research Bureau reveal that this statement is certainly true of British Columbia where there has been no government data

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48. See note 38.
52. Moore, *supra* note 42 at 24-25.
collection and assessment of the impact of the “New Era” changes to Employment Standards. The only complaints data accumulated by the Employment Standards Branch is the number received, the number withdrawn or abandoned, the number adjudicated, and the number where no contravention was found.

It is of some analytical value, however, to examine the impact of the Liberal government’s “New Era” changes to BC Employment Standards on the number of complaints received and adjudicated by the Employment Standards Branch. Historically, on an annually consistent basis, well over 90% of employment standards complaints submitted for adjudication resulted in determinations of employer non-compliance with the Act. However, according the Branch’s “complaints” data for fiscal years 1998/99 to 2005/06, in the years following 2002 (the year of most of the above changes), the number of employment standards complaints filed with the Branch declined by between 64% and 60% annually, compared to 2000/01 when 12,485 complaints were received. In 2003 only 4,839 complaints were received, followed by 5,039 in 2004 and 5,384 in 2004. Clearly the new Act, Regulation, and administrative changes to employment standards enforcement have had a chilling effect on employees who would otherwise have filed violation complaints.

CONCLUSION

Employment standards legislation is widely recognized as a significant instrument of public policy to provide for the economic security of those labour market participants who are disadvantaged and vulnerable as a result of the inherent inequality unrepresented workers experience in the employment relationship, and the undue exploitation that tends to result.

This paper has reviewed the substance of some of the most significant changes to the BC Employment Standards Act, the BC Employment Standards Regulation, and the administrative policies, procedures, and resources applied to their enforcement from 2001 to 2004. In addition, preliminary assessments have been made of the obvious or potential implications for workers in general, and vulnerable workers in particular. Some extremely negative effects of change, and in some instances unprecedented reductions, have been identified.

Employment standards reforms in British Columbia reflect employers’ demands for greater flexibility and lower labour market costs, and not the employees’ needs for more protection and security. The reforms increase the disadvantage that workers experience due to phenomena such as the reorganization of production and global economic integration.