2001

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FLEXIBILITY AND FEMINIZATION: THE NEW ONTARIO EMPLOYMENT STANDARDS ACT

JUDY FUDGE

RÉSUMÉ
On parle souvent de féminisation et de souplesse pour décrire ce qui se produit sur les marchés du travail des pays industrialisés depuis les années 1980, bien qu’on ne s’entende pas sur leur signification. En examinant la toute nouvelle Loi sur les normes d’emploi de l’Ontario, l’auteur tente de démontrer que la souplesse et la féminisation sont deux phénomènes liés ensemble à une diminution de la qualité des relations de travail types. Les changements ainsi apportés aux normes minimales de la province en matière de travail témoignent d’une philosophie néolibérale sur le plan de la réglementation du marché de l’emploi, notamment par rapport à la question des heures de travail. Ces modifications reflètent toutefois une certaine considération des difficultés que pose aux travailleuses la responsabilité de s’occuper de leurs enfants et d’autres membres de la famille. En plus d’expliquer les contradictions qui en résulent, cet article illustre comment la politique du gouvernement ontarien en ce qui concerne les normes d’emploi aura vraisemblablement pour effet d’accroître l’ensemble des inégalités qui existent sur le marché du travail et d’aggraver la répartition actuelle du travail selon le sexe, en plus d’être inefficace. En refusant de remettre en question ses postulats de départ, le gouvernement de l’Ontario agit sur l’économie comme une machine favorable à l’entreprise mais nuisant à l’intérêt public.

Ten years ago, I argued in this Journal that it was time to redesign employment standards legislation in order both to bring it better into line with changing forms of employment and to elevate its status as a mechanism for regulating the labour market.¹ I identified trends in the Canadian labour market, especially the increase in nonstandard jobs historically associated with women workers and increasing inequality in the labour market, that were, and continue to be, associated with labour market polices

designed to promote flexibility. I advocated that a revised employment standards policy be used to re-regulate the labour market.

The fledgling New Democratic government of Ontario did not embark on an ambitious project to reform the Employment Standards Act. Instead, it followed a more modest path, injecting a bit more equity into the legislation. The increase in the minimum wage and the introduction of a wage protection program, which provided some compensation for employees who were owed statutory entitlements by impecunious or absconding employers, were the most-far reaching changes to employment standards brought in by the Rae government. Specific provisions for homeworkers and building service workers, such as cleaners, alleviated the plight of some of the workers who were most vulnerable to exploitation. In general, however, the government maintained the legislative status quo and reductions to the Ministry of Labour staff meant that there were even fewer resources for enforcement.

Now, ten years later, the Conservative government of Ontario, has just re-written the Employment Standards Act. During its first mandate, the Harris government froze the minimum wage, abolished the employee wage protection fund, overhauled the legal rules relating to enforcement and made further cuts to the number of staff devoted to enforcing the legislation. However, it held back from changing workers’ basic entitlements under the legislation, even though the Red Tape Commission, which the government appointed to ferret out and rid the economy of wasteful bureaucratic regulation, recommended significant changes to employment standards.

In its 1999 campaign for a second mandate, the Conservative government targeted employment standards for two types of changes. It promised to increase flexibility in hours of work, although it was never precise about how this was going to be done, and to introduce a new unpaid family leave, most of the details of which were in place. On December 20, 2000, after limited public consultation and less legislative review, Bill 147, a completely re-written Employment Standards Act, was shepherded through third reading by Minister of Labour Chris Stockwell.

In this article I want to focus on the two most prominent new features of the revised Employment Standards Act: the changes to the hours of work and leave provisions. Bill 147 represents the Ontario government’s dual, and I will argue, ultimately contradictory, labour policy of increasing flexibility in hours of work through deregulation and accommodating the competing demands of family and employment through unpaid leave. These policies both exemplify and respond to trends in the

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2. See, S.O. 1991 c. 16, s. 5; S.O. 1995, c. 1; O. Reg. 770/94, s. 1(1).
3. The Employment Standards Improvement Act, 1996 (Bill 49), S.O. 1996, c. 23. The Employee Wage Protection Fund was discontinued on the day the Public Sector Transition Stability Act, 1997, came into effect.
5. Bill 147, S.O. 2000, c. 41. The Bill was introduced November 23 and received Royal Assent on December 21, 2000.
labour market, which in my 1991 article I identified as flexibility and feminization. In this article, I argue that the provincial government’s preoccupation with promoting a certain kind of labour market flexibility exacerbates the deterioration in, which I call the feminization of, terms and conditions of employment. I will also argue that the type of labour policy exemplified in Bill 147 is inequitable and inefficient.

To make this argument, the article is divided into three sections. The first section places labour policy in the context of economic restructuring, explains the key concepts—flexibility and feminization—used to describe changes in labour policy and the labour market, identifies the key labour market trends of the 1990s, and examines how the labour market policy debate has been framed. The object of this section is to provide a framework for analyzing and evaluating the Ontario Conservative government’s employment standards policy. The second section sketches the legislative and policy context for Bill 147, describing how the Harris government went about reforming the Employment Standards Act. The heart of the case study is presented in section three, which provides a detailed analysis and evaluation of the changes to the hours of work and leave provisions contained in Bill 147. Here, I illustrate how the government’s employment standards policy is likely to increase overall inequality in the labour market, be inefficient and exacerbate the current unequal sexual division of labour. I conclude by suggesting directions for reforming employment standards.

I. FLEXIBILITY IN THE CANADIAN LABOUR MARKET: FLEXIBILITY FOR WHOM?

Since the mid-1970s, the economies of Western industrialized countries, Canada included, have restructured. The restructuring has been driven by a series of growing and historical crises in the international division of labour, the shift in economic and political power further in favour of transnational corporations, in global finance, and the capacity of the governments to regulate business. To varying degrees, elected governments have adopted a range of macro-economic policies which are designed to attract private capital to invest in their economies. These include

- an emphasis on freer trade across national boundaries,
- deficit containment,
- dampening inflation,
- reducing government spending in the social welfare field,
- privatization, and
- deregulation (both implicit and explicit).

These policies are typically identified as neo-liberal and they are based on the neo-classical economic model that displaced Keynesianism in the late 1970s to become conventional economic wisdom. The neo-classical advice is to balance aggregate supply and demand via flexible prices, interest rates and wages. Since the mid-1980s, Canadian fiscal and monetary policy has been an exemplar of neo-liberalism. During the 1990s, inflation was wrestled to the ground and the federal and most provincial deficits were almost eliminated. However, the problem remains the enduring high levels of unemployment in Canada.

The solution to this problem is identified as increasing the flexibility of the labour market. However, "flexibility is a very unclear word if it is not put in perspective and interests are not specified." If flexibility is defined as the ability to change, then a flexible labour market would allocate and reallocate labour to different uses at different times according to the economy’s changing demands. According to this measure, Canada’s labour market is flexible when compared with other industrialized countries; job turnover is high and nonstandard employment has grown. But, flexibility can also mean deregulation. The neo-classical economic model assumes that “left to its own devices, a competitive labour market will indeed ensure that all willing workers are employed, and that the resulting market-clearing wage will in some essential sense be a ‘fair’ one (in that it automatically reflects labour productivity.)" By this yardstick, Canada is, one again, at the flexible pole of the international spectrum. Despite this, the neo-classical advice is to increase flexibility by further reducing the influence of trade unions and the constraints of employment protection laws.

Under the neo-classical model, the terms of flexibility are determined by the needs of employers not employees. From the demand side, firms increasingly want to rely on a range of nonstandard forms of employment to respond quickly to prevailing market conditions or to changes in the production process. They also want to be able to compete with jurisdictions where the costs of labour are lower and there are fewer restrictions on how labour is deployed. One effect of neo-classical policies to increase

11. According to the OECD, only the United Kingdom and the United States, where labour market regulation is virtually non-existent, ranked as more flexible (Organization for Economic Co-operation and Development, OECD Employment Outlook 1994 (Paris: OECD, 1994). See also Jim Stanford, “Canadian Labour Market Developments in International Context: Flexibility, Regulation and Demand,” CSLS Conference on Structural Aspects of Unemployment in Canada, Ottawa, April 1999 (on file with the author.)
labour market flexibility is that they tend to remove protection primarily from the weakest groups in an economy rather than exposing all groups to competition. More generally, the risks of productive activity are shifted from employers, and often the state, to employees.\textsuperscript{12}

If flexibility is defined as adaptability to change it does not have to be synonymous with economic insecurity.\textsuperscript{13} Employees also want flexibility, but they want to avoid the insecurity that is associated with flexibility solely on the employer's terms. From the supply side, workers need flexibility in order to combine paid employment with their lifestyle decisions, the most important of which, from a social perspective, is the decision to care for others, especially children. From this perspective, the policy challenge is twofold. First, to develop policies that would permit employers to continue to benefit from flexibility in employment relations, such as hours of work and contingent and nonstandard forms of employment, for example, but that would not shift all of the risks of flexibility to workers. The second challenge is to design policies that accommodate better the dual demands of the labour market and households without reinforcing a sexual division of labour that results in women performing a disproportionate share of unpaid domestic labour to their economic disadvantage.\textsuperscript{14}

**Labour Market Trends: Feminization and Inequality**

The labour market of the 1980s was characterized by two trends: feminization and polarization. In the earlier article, I defined feminization as a twofold process: the increased labour market participation of women and the increase in nonstandard jobs—jobs that are part-time, temporary, poorly paid and insecure—typically associated with women.\textsuperscript{15} Polarization refers to the increasing inequality in the labour market which is exacerbating household inequality. These trends continued throughout the 1990s, fuelled in part by labour market policies designed to promote flexibility through deregulation.\textsuperscript{16}

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Throughout the 1990s, the type of jobs created continued to shift away from full-time, full-year employment with a single employer on an indefinite basis to nonstandard or contingent forms of employment. The decline in real earnings of recent labour market entrants, particularly young men and male immigrants, continued despite the increase in the human capital (skills and experience) of these workers. The significant improvements in labour market outcomes (earnings and employment) for women were offset by the general deterioration for men. And although inequality in individual earnings only increased marginally during the 1990s, among families inequality in market earnings rose substantially, which from a welfare perspective is likely the more important measure. Moreover, the unexpected rise in the low-income rate during the mid-1990s recovery suggests that this is a structural, rather than cyclical, change in the labour market.

There is also a relationship between the growing polarization in wages and recent trends in overtime; full-time and professional workers are working more overtime, though largely unpaid, with one employer rather than their low-wage counterparts in part-time employment or other forms of nonstandard employment, who are more prone to moonlight than attain overtime in their main job. Overall, the proportion of men and women putting in long hours have been rising since the early 1980s. Moreover, to ensure that family living standards do not drop in the face of declining and stagnant real wage rates, more members of households are in the labour market.

The increase in hours of work for a growing proportion of individual employees and the increasing amount of time spent in the labour market by family members has had some measurable negative individual and social consequences. Although relatively little research has been devoted to the health implications of working long hours, preliminary research has revealed that an increase in working hours is associated with increased cigarette and alcohol consumption, weight gain and depression. Other studies have shown that time stress is on the increase for every age group of Canadians, especially those who have the most responsibilities. The “struggle to juggle” in 1998 was most difficult for those aged 25 to 44 who were married parents and employed full time. Men in this group averaged 48.6 hours and women averaged 38.8 hours per week of paid work and work-related activities, an increase of 2.0 hours per week since 1992 for both men and women. But, despite the huge increase in women’s labour


19. Vanier Institute of the Family, supra note 17 at 8.


21. That was the finding of a Statistics Canada General Social Survey: Time Use (November 1999). Among the findings was that one-third of Canadians aged 25 to 44, representing just over 3 million people, identified themselves as workaholics in 1998, and more than half worry that they do not have
market participation since the 1960s, their total share of unpaid work has remained the same, at about two-thirds of the total. Even when employed full-time, women are still largely responsible for looking after their homes and families. Levels of severe time stress are the highest for employed married mothers.\textsuperscript{22}

\textbf{The Policy Debate: Efficiency or Fairness}

Since the early 1980s, the policy debate over employment and labour law reform in North America has been posed in stark “either/or” terms contrasting equity with efficiency or opposing regulation and rigidity to deregulation and flexibility.\textsuperscript{23} In conventional economic theory, a wide dispersion of labour market rewards, some of which may be insufficient to sustain a reasonable standard of life, is assumed to be a demonstration of how widely dispersed are individual resource endowments and capabilities. From this perspective, “any idea of social justice designed to reduce income inequalities risks damaging incentives and lowering overall economic well-being.”\textsuperscript{24} This is the basis of the thesis that there exists an inverse trade off between equity and efficiency.

However, there are alternative perspectives, especially those of institutional and feminist economists, that focus attention on the external and internal forces structuring markets and how these shape the incomes and opportunities of individuals. From these perspectives, equity and efficiency may not be as far apart as the current debate suggests; in fact, some economists argue that increasing social equality improves economic efficiency and leads to higher economic growth and well-being.\textsuperscript{25}

Improving and extending labour standards may, for example, decrease employee turnover, increase morale and productivity, and reduce occupational injuries. Moreover, the proliferation of low-compensation contingent work also raises the spectre of slower productivity growth and dynamic inefficiency—the failure of firms to adapt and innovate.\textsuperscript{26} Although conventional neo-classical economic theory posits that low productivity leads to low compensation, there is a strong argument that the causality

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\item enough time to spend with their family and friends. The Statistics Canada report is available online at <http://www.statcan.ca:80/Daily/English/991116/d991116a.htm> (date accessed: 1 March 2001).
\item Statistics Canada, \textit{supra} note 15 at 111. \textit{The Globe and Mail} reported that, according to the findings of a recent Statistics Canada study, women work an average of two weeks a year more than men do, when paid and unpaid work are combined. Colin Freeze, “Women Outwork Men by Two Weeks Every Year, \textit{The Globe and Mail} (13 March 2001) A1 at 9.
\item Kitson, Martin, and Wilkinson, \textit{supra} note 23 at 631.
\end{itemize}
can run in the opposite direction. Paying employees poorly can trigger and perpetuate a vicious circle for firms in the service sector whereby they attract low skilled and low commitment workers, driving up turnover, which, in turn, erodes a firm's level of service. When consumers reduce their demand for the low quality service, the firm responds by keeping compensation low. As well, access to low cost labour may make productivity increases unnecessary for employers.\textsuperscript{27} Moreover, the neo-classical assumption that there is a transparent trade-off between the quantity and quality of jobs has not been borne out by the most recent studies of increases in minimum wages in the United States. Card and Krueger found that the employment effects of increasing the minimum wage was zero to positive. This may be due to its effect on aggregate demand (raising the compensation of the lowest paid workers does destroy their jobs but the greater purchasing power created by a higher wage floor generates roughly the same number of better paid jobs) or it may be that low-wage employers mistakenly set wages too low and enforced increases bring benefits in reduced turnover and heightened productivity that off-set higher wage costs.\textsuperscript{28}

Furthermore, whether a particular initiative is efficient or not depends upon the level at which the outcomes are being measured: "'efficiency' at the level of the firm (micro-efficiency) is not necessarily synonymous with efficiency of the overall outcome."\textsuperscript{29} Policies that promote equity in the labour market, in particular, may have an important impact at the macro level in promoting productivity. Shits of risks and social costs cannot be confused with a reduction of the social capital, the public infrastructure, and private labour needed to reproduce a stable working population.\textsuperscript{30}

As Irene Breugel and Diane Perrons point out, "[T]here is a disjuncture between what is rational for some individual enterprises within the pre-existing gender order and what would collectively benefit employers in their need for a highly productive workforce."\textsuperscript{31} The examples they cite are mandatory (and generous) parental leaves and mid-career breaks, which would allow the retention of skilled employees by all firms without increasing the marginal costs of a "good" firm relative to a "bad" one. Not only is there the possibility that, in the absence of mandatory standards, the "prisoner's dilemma" effect will prevent "good" employers from agreeing to improved employment benefits, there is also the possibility that there may be numerous divergent outcomes of a policy initiative, leading to equilibriums at different levels.

Contrary to the canons of neo-classical economics, deregulated labour markets tend to be associated not with a convergence upon equilibrium but with a disturbing trend


\textsuperscript{30} Picchio, supra note 8.

\textsuperscript{31} Irene Breugel and Diane Perrons, "Where Do the Costs of Unequal Treatment for Women Fall?" in Jane Humphries and Jill Rubery, eds., \textit{The Economics of Equal Opportunities} (Paris: EOC, 1995) 160.
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toward job and wage polarization. 32 Diane Elson and other economists increasingly emphasize that “when people have to live from hand to mouth, human energies and morale are weakened; ‘contingent labour’ is conducive to ‘contingent households’ which fragment and disintegrate, with costs for the people from those households and for the wider society.” 33 If social cohesion and a productive and well-adjusted population are important policy goals, then it is efficient to have labour market policies that promote greater equity. 34

II. THE CONSERVATIVE GOVERNMENT’S LABOUR MARKET POLICY PERSPECTIVE

Bill 147, the new Employment Standards Act, is the culmination of the Conservative government’s labour standards policy, which the Conservatives characterize as a blend of flexibility and fairness. Operating from a neo-classical perspective, the government has defined the terms of flexibility to align primarily with employers’ interests. However, it has made great efforts to emphasize the fairness of the legislation and has introduced several key measures designed to help employees accommodate the competing pulls of family and paid employment. Fairness is read through a gendered lens, since women are recognized as bearing the greatest burden of accommodating family and employment and have been the most vocal group demanding change. The problem is that the government’s broader emphasis on deregulating working time and freezing the minimum wage undermines the pro-family policies by increasing time pressures on household members, especially women. Moreover, in combination with rising hours of work, the leave provisions will likely reinforce the current sexual division of labour, for it is predominantly women who bear the economic costs of caring for children.

Despite its commitment to deregulation and the urging of its supporters in business, the Conservative government did not launch a major onslaught on the Employment Standards Act, nor dramatically change the core standards. Instead, it injected a bit more flexibility, first by changing the mechanism of enforcement and, second, by eroding some select standards. On May 13, 1996, Elizabeth Witmer, then minister of Labour, introduced the first instalment in the Harris government’s policy of labour market flexibility. The Red Tape Commission, which had been appointed by the government to locate and eradicate wasteful bureaucracy, claimed that 500 businesses and institutions it surveyed identified reform of the Employment Standards Act as a top priority to improve the province’s competitive status as a place to invest. Bill 49, the Act to Improve the Employment Standards Act, according to the press release accompanying it, represented “the first of a two-phase reform of the Act that will cut through years of accumulated red tape, encourage the parties to be more self-reliant

33. Elson, supra note 25 at 205.
34. Fortin, Sharpe, and St. Hilaire, supra note 25.
in resolving disputes and make the Act more relevant to the needs of today's workplace." Although the Minister characterized the bill as making housekeeping amendments, the changes would have restricted access to the enforcement proceedings under the legislation and introduced flexible standards for unionized workplaces.35

The Employment Standards Work Group—a coalition of legal clinics, unions, and advocates for workers' rights—managed to attract some province-wide attention to the government's proposed amendments. While it was unable to persuade the government to withdraw those elements of Bill 49 that restricted employees' access to the statutory enforcement proceedings,36 the government withdrew the amendments that would have permitted unions and employers to negotiate their own employment standards. Moreover, the campaign against the government's proposals raised the profile of the legislation and demonstrated that a direct attack on basic employment standards, even if restricted to the unionized sector, was not popular.

This did not mean that changing employment standards was permanently off the government's labour policy agenda; it simply meant that the government would proceed with greater caution. In fact, it held off doing anything about employment standards until the end of its first mandate, when a consultation document was disseminated. In the Future of Work discussion paper released in early 1999, the Ministry of Labour identified some key labour market trends and asked a series of general questions about employment labour standards and specific questions about hours of work and balancing family responsibilities.37 The Employment Standards Act next featured in the government's re-election document, Blueprint for Change, in which the government promised to give employers and employees greater flexibility in designing work arrangements and to provide family-crisis leave.

In late July 2000, the Ministry of Labour released a consultation paper that was the penultimate stage in the employment standards reform process.38 "Time for Change" proclaimed the need to update the Employment Standards Act to meet the challenges of the twenty-first century:

> Ontario needs innovative workplaces that can respond effectively to emerging opportunities to be competitive and to contribute to a high quality of life. This in turn will increase productivity, job creation, growth, and investment in Ontario. To

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36. In addition to reducing the limitation period for bringing a complaint from two years to six months, Bill 49 restricted the statutory enforcement proceedings to employees who were not covered by collective agreements and had not brought a civil action on the same subject matter as the employment standards complaint. These changes, among others, were implemented. The Employment Standards Improvement Act, 1996, S.O. 1996, c. 23.


support these objectives, employment standards legislation needs to be flexible, modern, efficient, and fair.

The document did two basic things: detail the flexible work arrangements and family crisis leave, and suggest general directions for modernizing the Employment Standards Act. The flexible hours of work arrangements were the most controversial aspect. Among the other, less profound, changes to the hours of work provisions, the government proposed to abolish the permit system for extending hours of work beyond the 48-hour standard work week, increase the maximum hours of work in a week to 60 hours, and permit the averaging of maximum hours of work limits over four weeks and entitlement to overtime pay over three weeks. Under the proposed changes, instead of being required to pay the overtime premium of time-and-a-half for each hour that the employee worked over 44 in a week, an employer would not be required to pay any overtime premium until a total of 132 hours in three weeks was worked by an employee. Thus, an employee who worked 30 hours one week, 60 hours the next, and 42 the third week would not be entitled to overtime pay at time-and-a-half for 16 hours in the second week. In addition, by allowing the overtime limit to be averaged over four weeks, employers would gain a huge amount of control over work scheduling. Workers' schedules could swing wildly between "too little" and "too much," as employers sought "flexibility" to do just-in-time scheduling. These changes would create an incentive for employers to pressure workers to work longer, more erratic hours for less money, by abolishing the role of the government overseer.

The family leave provision was the only aspect of "Time for Change" that offered any unqualified benefit to employees. Citing the increase in the number of women working outside of the home, especially those with young children, the increased demands for care of the elderly or disabled, and the changes in the way that health care is delivered, the government introduced a 10-day unpaid family leave. According to "Time for Change," "the goal of the leave provision would be to recognize the various demands Ontario employees face today and to promote a better work-family balance." The government interpreted employees' need for flexibility in a highly gendered fashion; women's responsibilities to provide care for others was clearly the target of the policy. The government's strategy was to place some mild obligations on employers to accommodate employees' domestic duties, rather than to challenge employment norms that exacerbate the conflict between unpaid and paid work. The government's implicit assumption was that women's unpaid labour would continue to mediate the tension.

39. While the government could point to provisions in the existing legislation that provided for some flexibility on overtime and hours of work, its proposal to repeal the permit system meant that there would no longer be any scrutiny of the flexible arrangements by an independent third party. Instead of dealing with the criticisms of the permit system by reforming it along the lines suggested by the Ontario Task Force on Hours of Work and Overtime, Working Times: The Report of the Ontario Task Force on Hours of Work (Toronto, 1987), the government went in the opposite direction: it proposed to abolish the permit system and extend the limit on hours of work from 48 to 60 a week.
In workplaces of 50 employees or more, the government proposed to give all employees 10 days a year of unpaid, job-protected leave to deal with family crisis, personal or family illness, and bereavement. However, it refused to make a commitment to extend job-protected parental leave from 18 to 35 weeks for women and men who wanted to take advantage of the extended period of employment insurance parental benefits that was to begin December 31, 2000.40

In addition to these specific proposals, “Time for Change” emphasized the general need to simplify the language and update the provisions of the Employment Standards Act. However, the government made it clear that it was not proposing any major changes to the core standards. Instead, “Time for Change” identified the coverage of, exemptions from, and the structural, administrative and enforcement features of the Employment Standards as matters for discussion and possible revision. But with the exception of the specific recommendations to repeal workplace standards such as the Employment Agencies Act and the Industrial Standards Act, to increase the monetary penalties, and to introduce an anti-reprisal provision, the Ministry was not very specific about the other types of changes it was contemplating.

In late August 2000, the Minister of Labour presided over public consultations, which were conducted in five cities. Among the 240 groups and individuals appearing before the Minister, the usual suspects, holding predictable positions, turned out; workers advocates, legal clinics, and unions opposed the new flexible hours of work arrangements and called upon the government to extend parental leave, while employers and their organizations supported the increased flexibility and called for further deregulation. Not surprisingly, given that the consultation hearings were held in the dog days of summer, they attracted little media or public attention. The public process came to an end in late September 2000 with the deadline on submitting responses to “Time for Change.”

All was quiet on the employment standards front until the beginning of November 2000, when Premier Harris told reporters that the government had no plans to extend parental leave, since it had not received any significant pressure from women to change the legislation.41 The next day, an N.D.P. member of the provincial legislature, Shelley Martel, introduced a private member’s bill to extend parental leave to 35 weeks.42 That day, Chris Stockwell softened the government’s position; although he emphasized that it would be an added burden on small business, he said his government would, before the end of the year, decide whether to give Ontario parents the full-year job-protected parental leave.43

40. The federal government had earlier announced that it would be amending the Employment Insurance Act to allow employees up to one year of benefits in order to care for infants, and several provinces (Quebec, Nova Scotia, and British Columbia) announced that they would extend the length of job-protected parental leave accordingly.

41. Richard Brennan and Caroline Mallan, “Ontario Won’t Extend Parental to Full Year” Toronto Star (1 November 2000).

42. House of Commons Debates (2 November 2000) (Shelley Martel).

On November 23, during the National Week of the Child, the Minister of Labour introduced a completely rewritten *Employment Standards Act*, a mammoth 105 pages of new statutory language. With only three weeks remaining in the legislative sitting, Stockwell claimed it was crucial to pass the bill immediately so that new parents could have up to 52 weeks of job-protected leave in order to enjoy the extended employment-insurance benefits that would become available at year end. Not only was there no time for public hearings on the new bill, according to the Minister, additional consultation was not necessary.

While the extension of the job-protected leave to coincide with the longer period of parental benefits was the reason the government gave for moving quickly, it would have been possible for the government simply to enact the leave provision and to convene legislative hearings on the more controversial changes to the legislation. The timing of Bill 147 suggests that the parental and family-leave provisions were used to sugar coat what was otherwise a bitter pill for most Ontario workers—the changes relating to working hours. Although the Employment Standards Work Group managed to attract some public and media attention to that aspect of Bill 147, the government used its majority to limit legislative review.44 On December 20, a slightly amended Bill 147 received third reading.45 While the changes to the length of parental leave came into effect on January 1, 2001, the rest of Bill 147 was held in abeyance more than six months before proclamation, belying the Minister’s rationale for the need to move quickly and limit debate on the bill.

III. BILL 147: FLEXIBILITY VERSUS FAIRNESS

Bill 147 is a mixed bag of changes: the *Employment Standards Act* has been completely rewritten; there are some new provisions, including a requirement that employers post a notice of basic employment standards in the workplace and a robust anti-reprisal provision that benefit employees; and a bit more flexibility for employers has been injected throughout. The extent of the divergence from the old *Employment Standards Act* is not yet clear, since the Ministry had not made available any guides to or descriptions of the new statute. In fact, as late as July 2001 the new regulations were not available. This is remarkable, since much of the most controversial aspects of employment standards, especially exclusions, is contained in the regulations. The lack of key of information makes it difficult to evaluate every feature of the new legislation. However, there is sufficient detail on limits to maximum weekly hours of work and entitlement to overtime pay, on the one hand, and the leave provisions, on the other, to demonstrate that the Conservative government has an understanding of flexibility that promotes employers’ interests, undermines its avowed commitment to fairness, and reinforces an unequal sexual division of labour.

Maximum Hours of Work and Overtime Pay

From 1944 through 2000, the law in Ontario provided that an employee could not be required to work more than 8 hours in a day or 48 hours in a week, unless the employee agreed to work extra hours and a special permit was issued by the government. Bill 147 now repeals the 8-hour workday, allows employees to “agree” to work up to 60 hours in a week, and has (virtually) eliminated the permit system.

Section 17 of the old Employment Standards Act established the general rule of a maximum daily hours of work as 8 and a weekly maximum as 48. However, there were a number of exceptions to these standards. Section 18 provided for an extended workday, between 8 and 12 hours, if the following conditions were established: there was Director approval, employee or an employee’s agent’s agreement, and adherence to daily (12 hours) and weekly (48 hours) limits. Section 20 entitled the Director to issue permits authorizing work in excess of the daily or weekly hours of work limits established in sections 17 and 18. In the case of Director approval (section 18) and permits (section 20) for extended hours of work, the employee’s consent was required. Regulation 325, clause 2(2) allowed an employee and employer to agree to averaging two or more weeks when determining whether the weekly hours of work limit had been met. However, the agreement was subject to the Director’s approval. The only time an employer was permitted to exceed the statutory limits on hours of work without the employee’s consent and the Director’s approval was that of an accident or urgent need for work (section 19).

Bill 147 maintains the previous limit of 48 hours in a work week, in section 17(1). However, section 17(2) now allows an employer and an employee to simply “agree” that the employee will work up to 60 hours in a week, and the employer is no longer required to obtain a government permit to have employees exceed the 48-hour limit. In short, under the new Act, the role of the government overseer has been eliminated—at least when it comes to allowing employees to “agree” to work up to 60 hours a week.


47. Section 17 of Bill 147 states that no employer shall require an employee to work more than 8 hours in a day, “or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day.” No limit is then set on the number of hours that an employer can set for an employee’s regular work day. Bill 147 does make 13 hours the maximum number of hours in day that an employee can be required to work, subject to emergencies as defined in section 19. Section 18 of Bill 147 establishes this new 13-hour limit indirectly by providing that an employee is entitled to 11 hours free from work each day (s. 18(1)), but this entitlement does not apply to an employee who is on call and who is called in to work during a period when the employee would not otherwise be expected to work (s. 18(2)). Bill 147 (s. 18(3)) also requires that an employee be given at least 8 hours off between shifts unless the total time worked in successive shifts, does not exceed 13 hours or unless the employee “agrees” to forego the 8 hours off.


49. No specific provisions for withdrawing the agreement were provided.
Under section 1(3) of Bill 147, "agreements," such as those between an employer and a employee to have the employee work more than 48 hours in a week, must be in writing. Section 17(3) provides that once an employee agrees to work hours in excess of 48, the employee has to give two weeks' notice in writing to revoke that agreement. By virtue of section 17(4) employers may revoke an agreement made under subsection (2) after giving reasonable notice to the employee. There is no obligation that the notice be in writing nor any discussion or definition of what constitutes reasonable notice. Section 141, paragraph 9, specifically authorizes the Cabinet to make a regulation, despite section 17(3), that would make agreements to exceed 8 hours in a day irrevocable where the agreements are made at the time of an employee’s hiring and have been approved by the Director of Employment Standards.

Bill 147 has also widened the "exceptional circumstances" in which the mandatory limits on hours of work in a day or week can be legally ignored by an employer. The law previously (under the old Employment Standards Act, section 19) allowed employers to require employees to work longer hours than the legal maximum when, in two specific circumstances, it was necessary to avoid serious interference with the ordinary working of the establishment. Those two specific circumstances were: "[i]n case of an accident or in case of work urgently required to be done to machinery or plant.” Section 19 of Bill 147 replaces those two specific exceptional circumstances with four more vaguely described circumstances: (1) if there is an emergency; (2) if something unforeseen occurs, to ensure the continued delivery of essential public services, regardless of who delivers those services; (3) if something unforeseen occurs, to ensure that continuous processes or seasonal operations are not interrupted; and (4) if urgent repair work to the employer’s plant or equipment is required.

The new Employment Standards Act also changes the law on entitlement to overtime pay. From 1975 to 2000, the law in Ontario provided that most employees were entitled to be paid time-and-a-half of their regular rate for all hours worked in excess of 44 hours in a week. Bill 147 permits an employer and an employee to “agree” that this entitlement to the time-and-a-half overtime rate will be averaged over a period of up to four weeks.

By virtue of section 22(1), Bill 147 sets out the general standard for the calculation of overtime pay—44 hours per week. However, it allows the employee (or the employee’s agent) and employer to agree to average overtime entitlements over a four-week period (section 22(2)).

50. It is also important to note that the 60-hour-per-week limit provided in section 17(2) may be changed by Cabinet to “such other number of hours as are prescribed” through a regulation. Section 141, paragraph 8, authorizes the Cabinet to make a regulation that would allow employees to agree to work more than 60 hours in a week, provided that conditions in such a regulation are met and “those conditions could include having the approval of the Director [of Employment Standards].” This suggests that a regulation may be passed to require permits for work weeks that exceed 60 hours.

51. Bill 147, section 141, paragraph 7, specifically authorizes Cabinet to make a regulation that would permit an employer and an employee to “agree” to average the employee’s hours of work over a period of more than four weeks for the purposes of determining the employee’s entitlement to overtime. However, it also provides that the conditions set out in the regulations, including the
also allowed employees and employers to agree to average overtime pay entitlements over several weeks. However, the Director’s approval was required. In contrast, under Bill 147 averaging agreements, while they must be in writing (section 1(3)), do not need to be approved by the Director. Section 22(3) stipulates that an averaging agreement must be for a specified period and, if the employee is not represented by a union, the period cannot be for longer than two years from the date of the agreement, although the agreement can be renewed (section 23(4)). Section 22(6) states that an averaging agreement may not be revoked before it expires, unless both the employee and the employer agree.

Under Bill 147, if an employee agrees to have overtime entitlement averaged over four weeks and to work up to 60 hours in a week, it is possible that the employee could work 60 hours in a week and not be entitled to any overtime pay. Indeed, in the worst case scenario, this employee could work 60 hours in week one, 60 hours in week two, 56 hours in week three and 0 hours in week four and not be entitled to any overtime pay because the employee did not work more than 176 hours over the four-week period. Under the law as it existed from 1975 to 2000, this same employee would have received time-and-a-half for 16 hours in week one, 16 hours in week two, and 12 hours in week three.

Under the old law, unless an employer obtained a permit, employees could only be asked to work 48 hours in a week. While there were many well-documented problems with the permit system for extended hours of work, the government’s solution simply to abolish it shifts onto the employee the burden of objecting to long hours of work. Bill 147 lets employers ask workers to work up to 60 hours a week. Employees can refuse to work more than 48, but that presumes a balance of power between employer and employee that simply does not exist in most workplaces. While only the most precarious are likely to be dismissed if they refuse to work long hours, promotions and favourable treatment often depend upon an employee’s willingness to do what the employer asks.

There will be a real incentive with “averaging” for employers to schedule short weeks, say 20 hours, during slower periods, followed by really long weeks when business is busier. While the government says there is a caveat—the employee would have to agree to this arrangement—one has to ask, “Why would any workers ever agree to average overtime, since they will be paid less for working the same number of hours?” One answer is that there are many vulnerable workers who will not be able to say no without fear of repercussions. In fact, this is one of the reasons the government gave for adding an anti-reprisal provision and hiring 20 new employment standards officers.

Director’s approval, be met.

52. For a detailed discussion of the conditions for approving averaging hours under the old Employment Standards Act, see R.M. Parry, supra note 48 at 51.

53. Bill 147 now provides a general anti-reprisal section, which the Employment Standards Working Group has long been asking for. Section 74(1) prohibits employers from intimidating, dismissing, or otherwise penalizing an employee (or threatening to do so) because the employee asks the employer...
The Ontario government’s policy on working hours flexibility runs contrary to the direction taken in other provinces in Canada and in some countries in Europe. Quebec, for example, moved to a 40-hour work week in 2000. Almost half the workers in Canada have a 40-hour week. In contrast, overtime pay in Ontario is available after 44 hours, and the maximum weekly hours of work is 48. The increased flexibility that Bill 147 injects into the standards means that long hours are likely to increase. In Europe, many countries are heading toward a 35-hour work week. The most innovative experiment is that adopted by France in 1998, which passed two laws on 35 hours of work per week. As of January 1, 2000, the 35-hour work week became the legal standard in France; companies reducing hours and hiring more workers are given financial incentives in the form of lower payroll taxes.54

Moreover, two important bipartisan studies of hours of work, the first appointed by the Ontario government in the mid-1980s and the second appointed by the federal government in the early 1990s, recommended that the standard work week be reduced to 40 hours and that overtime be limited. In 1987, the Ontario Task Force on Hours of Work and Overtime recommended that an employer could ask each employee to work a total of 250 hours a year over the 40 hours per week and that for hours of work in excess of that amount a revised permit system be retained.55 In its 1994 report, the federally appointed Advisory Group on Working Time and the Distribution of Work suggested that overtime be reduced to 100 hours per year.56 It emphasized the importance of the government’s role in ensuring the balance between the contradictory pulls of employers’ and employees’ interests in flexibility. Increasing stress that results from the struggle to balance work and family time, together with the unequal distribution of work and work time, were major reasons for the recommendation to reduce hours of work.

The Conservative government in Ontario has moved in the opposite direction. Instead of decreasing the standard work week, Bill 147 introduces flexibility in a form that

54. In Germany and the Netherlands, where they have been significant reductions in weekly hours of work, negotiation, rather than legislation, has been the preferred mechanism for reducing the work week. Anders Hayden, Sharing the Work, Sparing the Planet: Work Time, Consumption, and Ecology (Toronto: Between the Lines, 1999).

55. Ontario Task Force on Hours of Work and Overtime, supra note 46.

will likely make the work week longer and more erratic. Stagnant and declining real wages increase the pressure on individuals to work longer hours and for more members of a household to work in order to maintain living standards. Bill 147 will likely exacerbate the growing polarization around hours of work and time stress. Increased inequality in work time and income, combined with less time for individual fulfilment and caring for family members, will likely have negative consequences for individuals, households, and society in general. These costs need to be accounted for when tallying the benefits that the government predicts will result from increasing flexibility for employers.

**Parental and Family Emergency Leaves**

Bill 147 provides job-protected leaves in three circumstances: absences due to pregnancy, the care of children new to a household, and emergencies, which include family emergencies and personal illness. The pregnancy and parental leave provisions have been revised to dovetail with the maternity and parental benefits provided under the *Employment Insurance Act,* and the emergency leave is new. The leave provisions in Bill 147 are the clearest example of the government's avowed intention to increase flexibility for employees and promote greater fairness.

Bill 147 makes two major changes to the old maternity and parental leave provisions. The first benefits employees by extending the length of parental leave from 18 to 35 weeks, and the second benefits employers by giving them greater flexibility to terminate employees returning from maternity and parental leave. Under the old *Employment Standards Act,* employers were required to reinstate an employee at the conclusion of the employee’s leave to the position that the employee most recently held with the employer, if it still existed, or to a comparable position if it did not. Bill 147 qualifies the employee’s right to reinstatement: section 53(2) states that the right to reinstatement in section 53(1) does not apply if the employment is ended solely for reasons unrelated to the leave. Moreover, Bill 147 does not contain the protection in the former *Employment Standards Act,* section 43(2), which provided that an employee whose employer had suspended or discontinued operations during the employee’s leave had rights to reinstatement (in accordance with the seniority system or practice) when the operations resumed. While the jurisprudence on an employee’s right to reinstatement after the conclusion of a statutory leave was inconsistent (ranging from an absolute right to reinstatement, to a rebuttable presumption, to *bona fide* termination exemption), the plain language of the old *Employment Standards Act* section 43(2) supported an interpretation that the right to reinstatement was absolute. The protection in Bill 147 has been watered down. This means that an employer could argue that an employee on leave has been terminated for economic reasons or cause. While the new anti-reprisal provision section 74(2) places the onus of proof on the employer,

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57. See, for example, the following inconsistent cases: *Re American Can Canada,* August 18, 1993 (Picher), Employment Standards Cases 1464; *Re Innes Dental Health Group,* July 26, 1993 (Muir) ES 93-145; *Re Nygard International,* October 12, 1994 (Muir) E.S.C. 3432; *Re Ontario Blue Cross,* August 18, 1995 (Muir) E.S.C. 3413 A.
who must establish that it did not contravene the Act, the absolute right to reinstatement is a more robust protection for employees.

Bill 147 also provides an entirely new "emergency leave" entitlement. Under section 50(1) an employee whose employer regularly employs 50 or more employees is now entitled to 10 days' leave without pay due to a personal illness, injury or medical injury, the death or illness, injury, or medical emergency of an individual described in section 50(2) (a broadly defined family member), and an urgent matter that concerns an individual described in section 50(2). Emergency leave is an extremely important provision, because it recognizes that employees should not be penalized for missing employment on account of unavoidable circumstances, such as personal illness or caring for a family member. What the leave provision does is provide employees with some recourse if an employer dismisses them or takes any form of reprisal against them for missing work for these reasons.

But this entitlement is very limited; only employees who work in workplaces with 50 employees or more are entitled to take emergency leave. This means that a growing portion of the workforce will be excluded. While large workplaces continue to be the largest source of employment in Canada, since the late 1970s small businesses have been the key contributors to net job creation. Moreover, in the early 1990s, Julie White found that there is a significant difference in the proportion of men and women in the smallest firms—those with fewer than 20 employees. Almost 31 per cent of all female workers are employed in these firms, in contrast to 25 per cent of male workers. Thus, the emergency-leave provision is least likely to be available to those workers who need it most: female workers in small firms who do not have the benefit of a collective agreement. While the government has justified the 50-employee requirement as necessary to protect small business, it is unlikely that many small businesses would be made uncompetitive simply because they were not allowed to fire employees who took off a few days for personal illness or a family emergency. Even when explicitly promoting employees' interest in flexibility and fostering a family agenda, the Conservative government places the interest of small business first.

The extension of job-protected parental leave and the introduction of emergency leave are good for employees. They increase employees' ability balance the demands of work and family. However, they do not go far enough. While extended parental leave,

58. Note that, unlike pregnancy and parental leaves, which require 13 weeks of service as a condition of entitlement, there is no minimum service requirement. The only requirement is that the employee's employer "regularly employs 50 or more employees" (section 50(1)).

59. According to one measure, between 1978 and 1992, companies with fewer than 20 employees had what amounted to an 8 per cent gain in employment, while companies with more than 500 employees shed jobs for a net loss of 1.2 per cent per year. John Manley (Minister of Industry) and Paul Martin (Minister of Finance), Growing Small Business (Ottawa: Industry, 1994) 3; G. Picot, J. Baldwin, and R. Dupuy, Have Small Firms Created a Disproportionate Share of New Jobs in Canada? A Reassessment of the Facts, Analytic Studies Branch, Research Paper Series, #71 (Statistics Canada: Ottawa, November 1994).

especially when combined with parental benefits, helps to ease the competing demands of work and family when the contradiction is most profound—when there is an infant to care for—it does little to challenge the unequal sexual division of labour. In fact, because of the way maternity and parental unemployment insurance benefits are structured (with a cap on the maximum amount of insurable earnings and benefits pegged at only 55 per cent of average weekly earnings), there is an incentive for the lower-income earner in a dual-earner household, typically the woman, to take parental leave.\textsuperscript{61} And while women are more likely to benefit from the emergency-leave provision than are men, the fact that the leave does not extend to small workplaces means that women are disproportionately excluded.\textsuperscript{62}

Moreover, it is obvious that increasing the flexibility that employers have when asking employees to work longer hours will increase the stress that women already experience in finding the time to balance the demands of work and family. In order to compensate for declining wages, it is likely that men and women will continue to work longer hours. This, in turn, will likely stretch household coping capacities even further and exacerbate the already unequal division of paid and unpaid labour between men and women.

**CONCLUSION**

Bill 147, the new *Employment Standards Act*, is a clear illustration of the Ontario Conservative government’s neo-classical labour market policy agenda. The government justified its changes to the *Employment Standards Act* by asserting Ontario’s need to be more competitive in order to improve the quality of life for people in Ontario. For the most part, flexibility is equated with deregulation, and employers benefit from it. The recent changes to hours of work standards give employers the flexibility to ask employees to work longer hours for less money. Some employees will be willing to work longer hours, in part to compensate for stagnant and declining real wages. A few employees may want to compress their work week in order to accommodate other commitments. And others will feel pressured to accommodate employer requests. The likely impact of this change to employment standards is to reinforce deleterious trends in the labour market. More people will work long hours that are injuring their health. The struggle to juggle family responsibilities will get harder, and combined with a growth in part-time jobs, longer hours for some will contribute to deepening polarization in the labour market.

The United States has the longest experience with neo-liberal labour market policies. Deregulation there has been touted as very efficient, since it has been seen as


\textsuperscript{62}. Overall, in 1999 paid female employees missed an average of seven days due to personal illness or family commitments, while employed men missed only one day. Statistics Canada, *Women in Canada, supra* note 15 at 103.
contributing to their low levels of unemployment relative to Western Europe. However, recently, greater attention is being paid to the quality of the jobs that the deregulated labour market has generated and to the deepening levels of poverty in the U.S. Much of the employment generated in that country since the 1980s has been in the low-wage service sector—McJobs are the classic illustration of this type of employment. The problem is that these jobs do not generate enough income or security for employees to have enough flexibility either to improve their skills or adapt to their family needs. There is also increasing evidence that labour-market policies that promote low-paying firms and sectors do not improve competitiveness in the longer term. Since low-paying firms and sectors are typically employers of the last resort, they have high levels of labour turnover, particularly when unemployment is low. According to Kitson, Martin, and Wilkinson, "[T]his excessive churning means that it is not possible to build up the long-term relations to develop co-operative work organization and a highly trained, multi-skilled, functionally flexible workforce necessary for the good design, high quality, and product and process innovation upon which competitive performance increasingly depends." Moreover, in as unlikely a place as one would expect, a headline in the business pages of the Globe and Mail recently proclaimed, "U.S. in the 1990s: Land of the Unequal, Home of the Poor." The levels of pay inequality in the U.S. are the highest of the rich nations; so, too, are its rates of poverty. This suggests that while neo-classical labour-market deregulation policies may create more low-wage and insecure jobs, this may not be efficient in the mid or longer term. Such deregulation has not led to greater productivity gains in the U.S. relative to its major competitors. Moreover, large degrees of inequality undermine social cohesion, stretch social norms, and erode the capacities of families to socialize children. Evidence suggests that neo-classical labour market policies are inequitable and inefficient.

The policy of increasing hours of work is not popular in most households in Canada. A recent issue of Maclean's that featured "redesigning work" on the cover, emphasized growing unhappiness with employment stress and an increased recognition of the social costs of working long hours as reasons for developing new employment policies. The story also identified employed mothers of young children as the key instigators of the challenge to the structure and culture of employment. Stress at work and, especially for women, in balancing family and work, is recognized as a growing social problem.

64. Kitson, Martin, and Wilkinson, supra note 23, 633, reference omitted.
66. In 1999, multi-factor productivity rose an average of 1.4 per cent in Germany, 1.6 in Japan, and just 1 per cent in the U.S. Moreover, both Germany and France did better than the U.S. in the 1990s in terms of gross domestic product. Ibid.
67. Patricia Chishom, "Redesigning Work" Maclean's (5 March 2001) 34.
When Bill 147 was introduced, the government emphasized the family-friendly changes it was making and downplayed the extent of the changes it was making to the hours-of-work provisions. The public policy debate was very narrow. That debate needs to be reopened, and its terms need to be expanded. Adaptability to economic change by employers and employees does not have to translate into reducing per-unit labour costs. It is possible to devise employment standards that enable the parties to negotiate a range of employment relations but that prevent the employer from shifting the risks of flexibility onto employees in particular, and society in general. Employment standards could also promote greater equality for men and women if they began from the assumption that every working person needs both to be self-sufficient and to care for others. It is a fallacy to assume that promoting fairness in the labour market reduces efficiency. By refusing to question its assumptions, neo-classical economic common sense operates as a pro-business ideology. Sadly, it also results in bad public policy.

68. For a discussion of these sorts of policies see Fudge and Vosko, supra note 14; and Spalter-Roth and Hartmann, supra note 14.