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Carrying Little Sticks: Is there a ‘Deterrence Gap’ in Employment Standards Enforcement in Ontario, Canada?

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Abstract: This article assesses whether a deterrence gap exists in the enforcement of the Ontario Employment Standards Act (ESA), which sets minimum conditions of employment in areas such as minimum wage, overtime pay and leaves. Drawing on a unique administrative data set, the paper measures the use of deterrence in Ontario’s ESA enforcement regime against the role of deterrence within two influential models of enforcement: responsive regulation and strategic enforcement. The article finds that the use of deterrence is below its prescribed role in either model of enforcement. We conclude that there is a deterrence gap in Ontario.

I. Introduction: Employment Standards Enforcement

While the regulation of minimum terms and conditions of employment dates back to the master and servant regime created in the aftermath of the Black Death, its contemporary form began to take shape with the rise of industrial capitalism in the nineteenth century.¹ Over time, child labour, health and safety, hours of work, and wages, among others, all became the subject of legislation that stipulated minimum standards enforceable by the state. These statutes vested inspectors with the power to enter workplaces to determine whether employers were complying

¹ D. Hay, & P. Craven, *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004); R. Palmer, *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press 1993).

with minimum standards and to issue orders² requiring employers to bring their practices into line with legal standards if they were not. Employers who violated the law could also be prosecuted and fined or imprisoned.

Studies of the enforcement of these workplace laws have focused overwhelmingly on child labour and occupational health and safety (OHS), where researchers found that employers were rarely prosecuted for violating the law.³ Scholars have fiercely debated the significance of this light touch approach to enforcement. Speaking of the enforcement of early nineteenth-century factory act legislation, Carson characterized the non-prosecution of employers as part of a process that conventionalized factory crime driven by the tension between the political demand for protective workplace law and the structural and ideological obstacles to criminalizing elites.⁴ Bartrip and Fenn rejected any explanation that linked enforcement to class structure and conflict, but rather saw the development of legislation and enforcement as a pragmatic search for efficiency.⁵ This debate was followed a decade later by a bitter exchange between Pearce and Tombs and Hawkins, in which Pearce and Tombs criticized what they characterized as the compliance school of enforcement, with its emphasis on persuasion at the expense of punishment, while Hawkins defended the importance of securing cooperation from the regulated

²The MOL occasionally uses the term compliance “tool” interchangeably with the term compliance “order” to refer to this means of closing a file. In the ensuing analysis, however, we use the term “order” for the sake of consistency as these tools are akin to orders.

³ For example, see W. Carson, *The Conventionalization of Early Factory Crime*, 1979, 7 I.J. Soc. L. 37 (1979); R. Johnstone, *Occupational Health and Safety Prosecutions in Victoria: An Historical Study*, 12 Austr. J.L.L. 113 (2000); E. Tucker, *Administering Danger in the Workplace* (University of Toronto Press 1990); E. Tucker, *The Politics of Occupational Health and Safety in a Cold Climate: Diverging Trends in Worker Protection and Participation in Canada, 1985-2000*, 58 Rel. Ind./Ind. Rel. 395 (2003).

⁴ Carson, *supra* n. 3.

⁵ P. Bartrip & P. Fenn, *The Conventionalization of Factory Crime – A Re-assessment*, 8 I.J. Soc. L. 175 (1980). Also, see Carson’s response: W. Carson, *Early Factory Inspectors and the Viable Class Society – A Rejoinder*, 8 I. J. Soc. L. 187 (1980).

and questioned the efficacy of a punitive enforcement model.⁶ Since that time, new models of enforcement have been developed that seek to overcome the ‘punish or persuade’ divide, but the debate over the role of deterrence and its limited use continues.⁷

The Employment Standards Act (2000) (ESA) provides employees in Ontario with a range of minimum standards, including minimum wages, hours of work and overtime, vacation and holiday pay, and leave and termination entitlements, to name a few. While in principle ESA entitlements were intended to be universal, in fact numerous exemptions and special rules produce a tattered quilt of protection.⁸ Another way the ESA fails to protect employees is through gaps in its enforcement.⁹ In this article, we are particularly concerned with one potential source of under-enforcement, limited use of deterrence measures. Deterrence measures penalize employers for violating ES laws and are imposed *in addition* to restitution and compliance orders that require employers to pay employees what they are legally owed and generally to obey the law. In the absence of deterrence, employers bear no cost to violating the law, a situation that in theory is likely to lead to continuing and, perhaps, higher levels of violation. Thus, our central question is whether there is a deterrence gap in ES enforcement.

⁶ F. Pearce & S. Tombs, *Ideology, Hegemony, and Empiricism: Compliance Theories of Regulation*, 30 Brit. J. Crim. 423 (1990); F. Pearce & S. Tombs, *Policing Corporate ‘Skid Rows’: A Reply to Keith Hawkins*, 31 Brit. J. Crim. 415 (1991); K. Hawkins, *Compliance Policy, Prosecution Policy, and Aunt Sally: A Comment on Pearce and Tombs*, 30 Brit. J. Crim. 444 (1990); K. Hawkins, *Enforcing Regulation: More of the Same from Pearce and Tombs*, 31 Brit. J. Crim. 427 (1991).

⁷ For example, see, S. Tombs & D. Whyte, *The Myths and Realities of Deterrence in Workplace Regulation*, 53 Brit. J. Crim. 746 (2013).

⁸ L. F. Vosko, et al., *Tattered Quilt? An Analysis of Exemptions and Special Rules Directed at Homecare Workers, Liquor Servers and Agricultural Workers under Ontario’s Employment Standards Act, 2000*, Can. L. & Empl. L. J. (forthcoming).

⁹ L. F. Vosko, A. M. Noack & E. Tucker, *Employment Standards (‘ES’) Coverage and Enforcement: A scan of employment standards complaints and their resolution under the Employment Standards Act, 2000 (‘ESA’)*, Ontario Ministry of Labour Changing Workplaces Review (2016); Mitchell, C. M., & J. C. Murray, *Changing workplaces review: An agenda for workplace rights, final report* (2017) Retrieved from: https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf

The answer to that question cannot be separated from the role of deterrence theorized by a model of enforcement. In a pure compliance model, no deterrence is required and so the idea of a deterrence gap is meaningless. However, all enforcement theorists we know of insist that deterrence has some role to play, the crucial question being its frequency, severity and the circumstances of its use. Although it is not possible to avoid the debate over enforcement models, we seek to reduce its salience by selecting two models against which to measure the use of deterrence in Ontario's ESA enforcement regime. The first, responsive regulation, hypothesizes that deterrence will normally have a limited role to play, while the other, strategic enforcement, sees a much greater role for deterrence measures.¹⁰ These models will be described in more detail in the second section of the article, which sets out the conceptual foundations of deterrence and how we might think about whether a deterrence gap exists. One important advantage of our two-model approach is that if a deterrence gap is found to exist in both, then a claim that the current approach to ESA enforcement in Ontario is flawed would be particularly powerful. If, on the other hand, a deterrence gap only exists in one enforcement model but not in the other, then we would need to return to a discussion of the strengths of the strategic and responsive regulation models themselves in order to assess the efficacy of Ontario's practice of ESA enforcement.

Part III of the article begins by putting the deterrence gap in historical context, focusing on proactive inspections, financial penalties, and prosecutions from the 1970s to the 1990s. The article then investigates the current practice of enforcement by the Employment Standards

¹⁰ I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press 1992); D. Weil, *A Strategic Approach to Labour Inspection*, 147 *Int. Lab. Rev.* 349 (2008); D. Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* (Boston University Press 2010).

Branch (ESB) of the Ministry of Labour (MOL), which is responsible for enforcing the ESA. Part IV examines whether a deterrence gap exists in Ontario using publicly available documents and a unique and previously unavailable database, the Employment Standards Information System (ESIS). The ESIS contains, *inter alia*, information on all submitted ES complaints and their outcomes, violations detected, inspections conducted, and the use of enforcement mechanisms. A central feature of the ESIS is that it provides a nearly complete census of Ontario's ES enforcement activities and their outcomes that is not otherwise publically available.¹¹ Through the ESIS we are able to identify the total number of detected violations and calculate the frequency of the use of deterrence measures. We supplement the ESIS with data from the Legal Services Branch of the Ministry of Labour, which is responsible for more serious regulatory offence prosecutions and with reported cases that provide information on the role of deterrence in sentencing convicted offenders. We find that deterrence plays a minor role in ESA enforcement. Finally, by way of conclusion, we argue that whether a responsive regulation or a strategic enforcement approach is used, there is a deterrence gap in Ontario, and thus that both specific and general deterrence should have larger roles to play in ES enforcement.

II. Conceptualizing a Deterrence Gap

The strategies adopted by governments to enforce laws and policies entail various forms of compliance and deterrence. There is a longstanding debate in the literature over compliance

¹¹ The authors obtained access through a research sharing agreement between the Ontario Ministry of Labour and our respective universities. Nevertheless, the views set out in herein represent those of the authors and do not necessarily represent the views of the Ontario Ministry of Labour. For a discussion of several limitations of ESIS data, see L. F. Vosko, et al., *The Compliance Model of Employment Standards Enforcement: An Evidence-based Assessment of its Efficacy in Instances of Wage Theft*, 48 Ind. Rel. J. 256 (2017), at 258.

and deterrence approaches to regulatory enforcement whose foundations we discussed in a previous article.¹²

Since the early 1990s, regulatory theorists have sought ways to transcend the deterrence/compliance debate by finding effective means of combining these elements into a unified enforcement strategy. For many years, the most popular model of this kind was responsive regulation, developed by Ayres and Braithwaite.¹³ The key idea is that the best way to combine deterrence and compliance measures in a manner that is responsive to the regulatory context is to start with persuasion and other compliance measures and only escalate to more coercive and deterrent measures if persuasion fails. In such a model, the regulator should have available a range of compliance and coercive tools that permit a graduated escalation to more coercive measures as needed. This approach results in the famous enforcement pyramid, premised on the assumption that compliance measures will be effective most of the time and that deterrence measures will only be required in limited circumstances to deal with the minority of bad apples. Within that model, the hammer of deterrence should be hidden most of the time but must be brought down when needed. A deterrence gap exists if government officials fail to escalate up the pyramid when compliance or lower-level deterrence measures have failed to achieve obedience to the law.

The second model, strategic enforcement, builds from an analysis of the changing context of enforcement. In particular, Weil points to a number of factors that make enforcement a challenge in the twenty-first century.¹⁴ While limited enforcement resources are not a new

¹² *Ibid.*

¹³ Ayres and Braithwaite, *supra* n. 10

¹⁴ Weil, *supra* n. 10.

phenomenon, in many jurisdictions neo-liberal policies have resulted in their reduction or the failure to increase resources in proportion to the growth in employment and the number of workplaces. Equally important is that enforcement has become more challenging because of significant changes to the contemporary workplace environment. This environment is characterized by fissuring of responsibility for employer obligations due to the growth of employment agencies, franchising, sub-contracting and independent contracting.¹⁵

Strategic enforcement is designed to maximize enforcement efficacy in this context. The theory does not build on general assumptions about the character of employers, but rather is concerned with the context in which employers operate and the systemic pressures that tempt them to violate ES laws to make a profit. Weil identifies four principles that should guide strategic enforcement: prioritization; deterrence; sustainability; and systemic effects. Unlike Ayres and Braithwaite, Weil does not believe that deterrence will rarely be necessary and therefore can remain largely hidden and unused.¹⁶ Quite the opposite, he argues deterrence measures should be carefully crafted and highly publicized so that employers will know in advance that the cost of violating employment standards are likely to be higher than its benefits. This strategic crafting is crucial in precisely those contexts where employers may be under pressure to violate the laws. To that end, Weil makes a number of concrete suggestions. For example, civil monetary penalties should be routinely assessed, especially for repeat offenders.¹⁷ Weil also recommends increased use of liquidated damage awards¹⁸, which compensate workers

¹⁵ D. Weil, *The Fissured Workplace* (Harvard University Press 2014); see also L. F. Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford University Press 2010).

¹⁶ Weil, *supra* n.10, 2008, at 81-83.

¹⁷ U.S. law only permits civil monetary penalties for repeat offenders.

¹⁸ Liquidated damages are a damage award, whose amount is determined in advance, that becomes payable to the victim of a monetary violation without proof of damages.

for the additional losses they suffer when they don't get paid what they are owed, but which are likely to be experienced by employers as deterrence measures because they pay more than the amount saved by violating the law. Other deterrence measures recommended by Weil include hot cargo embargo orders that prevent the resale of goods produced in violation of ES, high profile prosecutions for ES violations and criminal prosecutions in the most egregious cases.¹⁹ The strategic enforcement model also counsels that enforcement, including deterrence measures, should target lead firms in supply chains that have the capacity to police the activities of the subordinate entities.²⁰ As with responsive regulation, strategic enforcement also theorizes the possibility of a deterrence gap, but a gap is much more likely to materialize given the greater role it is likely to play in the mix of compliance and deterrence measures needed to secure obedience to the law.

III. The Practice of ESA Enforcement in Ontario²¹

A. The Deterrence Gap in Historical Context, 1970s-2000s

From the inception of ESA implementation in 1969, the MOL adopted a complaints-driven enforcement regime that emphasized the importance of employer-employee 'self-reliance' as a means to ensure compliance.²² This approach was adopted notwithstanding that the employees most dependent on the ESA were largely non-union workers in feminized jobs located at the

¹⁹ Weil, *supra* n. 10, 2010, at 81-83.

²⁰ Weil, *supra* n. 10, 2008, at 356; T. Hardy, & J. Howe, *Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains*, 57 J. Ind. Rel. 563 (2015), at 567-68.

²¹ This description only applies to non-unionized employees. Unionized employees cannot use the public enforcement system but rather must seek a remedy for ES violations through the collective agreement grievance process (ESA, s. 99).

²² Archives of Ontario, Record Group 7-1, File 7-1-0-1532.2, box 54. *Letter, From Dalton Bales, Minister* (August 8, 1969).

bottom of the labour market and, therefore, the least likely to be able to assert their rights.²³ A limited proactive inspection program supplemented the complaint system, but it declined significantly through the 1980s and 1990s under Progressive Conservative (1980-85), Liberal (1985-1990) and New Democratic Party (1990-1995) governments, in part due to insufficient budgets.²⁴ Specifically, the number of proactive inspections went from 1304 in 1980-81 to a low of 10 in 1996-97. Ironically, the number of proactive inspections began to rebound beginning in 1997 under a right-leaning Progressive Conservative government.²⁵ Nevertheless, the risk of violation detection through proactive inspection remained small.

In addition, even in the unlikely event a violation was detected, the consequences for the employer were not serious. Even though the ESA provided that employers could be prosecuted and penalized for violations, and the size of the penalties increased over time from a maximum \$1,000 in 1968 to \$10,000 in the 1980s, \$50,000 in the early 1990s, and \$500,000 in 2000, the risk of being prosecuted was always quite low.²⁶ When Employment Standard Officers (ESO) detected violations by far their most common response was to secure ‘voluntary’ compliance or to issue a compliance order. The worst that most employers who violated the ESA could expect was that they would be required to pay what they owed without the imposition of any penalty. Moreover, even in the rare instance when employers were prosecuted, the levied fines almost

²³ J. Fudge, *Labour Law's Little Sister: The Employment Standards Act and the Feminization of Labour*, 7 J.L. & S.P. 73 (1991).

²⁴ R. J. Adams, *Employment Standards in Ontario: An Industrial Relations Systems Analysis*, 42 Rel. Ind./Ind. Rel. 46 (1987); M. P. Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (McGill-Queen's University Press 2009).

²⁵ We do not have detailed data about inspections conducted in the 1980s and 1990s.

²⁶ Adams, *supra* n. 24; Archives of Ontario, Record Group 7-186. Policy and Program Development, (News Releases). *Fines Increased for Workplace Violations* (April 30, 1990); *Employment Standards Act*, 2000 S.O. 2000, c 41.

never approached the higher end of the scale.²⁷ In summary, through the 1970s, 1980s, and 1990s, the MOL relied primarily on a complaints-driven system that was not only reactive, but that was deeply compliance based.²⁸

By the last decade of the twentieth century, the ESA was becoming the focus of heightened conflict. The growth of precarious employment - forms of employment characterized by high levels of uncertainty, low income, lack of union coverage and control over the labour process and limited access to regulatory protection - resulted in more workers being dependent on employment standards for protection. At the same time many employers sought greater labour market flexibility to maintain or enhance profitability in the face of increasing global competition or supply-chain pressures.²⁹ This produced a series of legislative and regulatory changes from 1995 to the present that have attempted to manage these contradictory pressures. On the one hand, Ontario governments embraced core ideas of Regulatory New Governance (RNG) that sought to manage these contradictory pressures through forms of internal responsibility premised on two assumptions. The first was that workers are empowered to secure their ES rights through self-help and settlements with employers facilitated by ESOs and the second was that employer violations stemmed from ill- or uninformed and ineffectual employers who would become compliant when employees brought problems to their attention. RNG's affinity with responsive regulation, discussed above, is obvious.

²⁷ The Task Force on Hours of Work and Overtime noted this concern in the 1980s. It found that the small probability of detection and assessment, and the low expected penalty, did not deter ESA violations. See, Ontario, *Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime* (Toronto: Ministry of Labour 1987).

²⁸ Archives of Ontario, Record Group 7-78. *Choosing a Tribunal to Adjudicate Unjust Dismissal Cases* (1976-77).

²⁹ Vosko, *supra* n. 15.

The weakness of RNG, however, is that it attempts to resolve the contradictory pressures bearing on ES by effectively denying their salience.³⁰ But governments inspired by RNG cannot impose their imagined reality in the face of effective opposition from advocacy groups, supported by research and amplified by a sympathetic press, that highlight the lived reality of disempowered precarious employees who face widespread ES violations that tend to be concentrated in fissured and hyper-competitive sectors of the economy. Strategic enforcement, discussed above, is more closely aligned with this material reality and, although governments in Ontario have not formally embraced a strategic enforcement approach, they have been pressured to enact legislation and adopt enforcement policies at least partially responsive to the demands of advocacy groups. Deterrence measures and their usage are often in the eye of this regulatory storm.

B. Compliance and Deterrence Tools in Contemporary ESA Enforcement

There is a range of enforcement tools currently available to ESOs, consisting of both compliance and deterrence measures. We could present these tools as a pyramid, with compliance measures on the bottom and deterrence measures toward the top, but to do so would be problematic in two important ways. First, it might imply an acceptance of the assumptions and desirability of the enforcement pyramid advocated by responsive regulation and second it prejudices precisely what is to be investigated, the relative frequency of the use of compliance

³⁰ L. F. Vosko et al., *Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions*, 37 *Econ. Ind. Dem.* 373 (2016); E. Tucker, *Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom* Ch. 4 (T. Nichols & D. Walters, eds, Baywood Press 2013).

and deterrence measures. Therefore, Figure 1 below lists the available tools according to their category.

[insert Figure 1 here]

Education and publicity play a key role in ESA enforcement. The MOL adopted the Education, Outreach & Partnership (EOP) program in 2009 to:

- Create an environment where employers and employees understand their rights and obligations under the Employment Standards Act, 2000 (ESA).
- Increase employer awareness of responsibilities under the ESA by providing them with resources and tools to help them comply.
- Encourage compliance with the ESA.³¹

Although the specific initiative is new, education has been a fundamental part of ESA enforcement since its inception.³² The MOL provides online guides and tools to assist employers and employees, produces a poster that employers must display in every workplace, and translates materials into twelve languages.

Of course, compliance assistance does not produce perfect conformity with the law and when employees experience violations they are encouraged to engage in self-help by bringing the matter to the attention of their employer and seeking to have it resolved voluntarily, a pure compliance measure. The *Open for Business Act* (2010) made self-help a requirement, subject to

³¹ Ontario Ministry of Labour, *Education, Outreach and Partnership* (2015), <http://www.labour.gov.on.ca/english/es/eop/index.php> (accessed 9 August 2018).

³² Thomas, *supra* n. 24.

a few exceptions.³³ However, reflective of the contradictory pressures operating within RNG, the requirement was repealed in 2017 as the result of a successful campaign to strengthen ES and its enforcement.³⁴

Where self-help fails to resolve the employee's concern, the employee may file a complaint with the ESB, which normally assigns the matter to an ESO who will conduct an investigation. During the course of that investigation, the complaint may be settled (with or without the direct involvement of the ESO) or withdrawn by the complainant. In the absence of a settlement or withdrawal, the ESO will assess the complaint to determine whether a violation has occurred. If the ESO determines that the employer has violated the Act, the employer may agree voluntarily to comply, failing which the ESO will issue a compliance order. A compliance order may require the employer to pay where there has been a monetary violation or it may involve an order to do something else, depending on the violation. For example, where an employer has terminated an employee for seeking to enforce her or his ES rights, the ESO may order reinstatement and/or monetary damages. Where there are record-keeping or posting violations, the ESO may order rectification. These are all compliance measures that do not involve deterrence.³⁵

As primarily a complaints-based system, the MOL is relatively passive about detecting violations, leaving it to workers to bring violations to their attention. However, researchers

³³ M. Gellatly, et al., 'Modernising' Employment Standards? *Administrative Efficiency and the Production of the Illegitimate Claimant in Ontario, Canada*. 22 *Econ. Lab. Rel. R.* 81 (2011).

³⁴ J. Grundy et al., *Enforcement of Ontario's Employment Standards Act: The Impact of Reforms*, 43 *C. P. Pol'y/Analyse de Politiques* 190 (2017); *Fair Workplaces, Better Jobs Act* (2017) S.O. 2017, c. 22.

³⁵ Where an order to pay is issued, the employer is subject to a small administrative fee, the greater of \$100 or 10% of amount ordered. Although conceptually and in the view of the MOL the fee is not a punishment aimed at deterrence, arguably employers experience it as a sanction that can be avoided by voluntarily paying and so it might be thought of as a routinely applied but low-level deterrence measure.

recognize there are numerous reasons why individuals do not complain and that proactive detection strategies (inspections) are necessary.³⁶ In Ontario, workplace inspections can be divided into three main types: expanded investigations arising out of an individual complaint; targeted or blitz inspections, and regular inspections.³⁷ When ESOs detect violations on inspections, they will always apply compliance measures, including a settlement or a request for voluntary compliance or, failing that, a compliance order.

Regardless of whether violations are detected by complaint or inspection, ESOs have the power to invoke deterrence measures in addition to compliance measures and the key question for our research is the frequency of their use. Until fairly recently, there was only one deterrence measure available to an ESO, but new measures have been introduced to provide for lower level penalties that are easier to impose. There are two low-level deterrence measures. The first is the Notice of Contravention (NOC), introduced in 2000 and found in s. 113 of the ESA:

113. (1) If an employment standards officer believes that a person has contravened a provision of this Act, the officer may issue a notice to the person setting out the officer's belief and the prescribed penalty for that contravention.³⁸

Ontario Regulation 289/01 sets out the prescribed penalties. Prior to 2018, the penalty for a first contravention was \$250, for a second \$500 and a third or subsequent contravention \$1,000. If the contravention affects more than one employee and is not for a violation of a posting or record-keeping requirement, the fine can be multiplied by the number of employees. As a result

³⁶ See D. Weil & A. Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 *Comp. Lab. L. & Pol'y J.* 59 (2006).

³⁷ For record-keeping purposes, the MOL divides inspections into eight main types and a category labelled 'other' category. For the record, the eight types are: expanded investigations, targeted inspections, previous violator inspections, regular inspections, re-inspections, Temporary Help Agency (THA) Blitz inspections, THA Blitz re-inspections, and compliance check investigations. However, the three categories we use are sufficient for the purposes of our analysis.

³⁸ *Employment Standards Act*, *supra* n. 26, at s. 113.

of the political pressure to strengthen enforcement, starting January 1, 2018 penalties were increased so that they now begin at \$350 and go up to \$1500. As well, a “name and shame” provision (s. 113(6.2)) was added in 2017 to allow publication of the names of persons who have been issued a NOC. An employer who is served with a NOC is deemed to be guilty and liable to pay the prescribed penalty unless the employer applies to the Ontario Labour Relations Board (OLRB) for a review within 30 days. If the employer files an application for review, the board holds an adjudicative hearing and the onus is on the Director of the OLRB to prove the contravention on a balance of probabilities. If the Director is successful, the OLRB may still reduce the penalty.³⁹

The second lower-level deterrence measure, introduced in 2004, is tickets issued pursuant to the *Provincial Offences Act*, (POA), Part I. Regulation 950 made pursuant to the POA determines which violations of provincial statutes are ticketable.⁴⁰ The government amended the regulation in 2004 to create ticketable violations under the ESA.⁴¹ There are currently 59 ticketable ESA violations and ESOs are empowered to issue tickets when they detect ticketable violations. The Chief Justice of the Ontario Court of Justice sets the fine. As of 2018, it is set at \$295 for every violation. There is also a victim fine surcharge added to each fine, which is set at \$60 for fines in the ESA range.⁴² Money collected from the fines goes to the municipality in

³⁹ *Ibid.*, at s. 122.

⁴⁰ *Provincial Offences Act*, R.S.O. 2000, c. P. 33.

⁴¹ *Proceedings Commenced by Certificate of Offence*, O. Reg. 162/04 filed June 10, 2004 (as amended) under *Provincial Offences Act*, R.S.O. 1990, c. P.33.

⁴² *Victim Fine Surcharges*, O.Reg. 161/00, filed April 1, 2000 under *Provincial Offences Act*, R.S.O. 1990, c. P.33.

which the offence occurred, while the victim fine surcharge goes into a Victims' Justice Fund used to compensate the victims of crime.⁴³

Prior to the creation of NOCs and ticketable violations, the only deterrence tool was a regulatory offence prosecution under Part III of the POA. The ESA makes it an offence to contravene the act or its regulations, or to fail to comply with an order or direction issued by an ESO.⁴⁴ Individuals are liable to be fined up to \$50,000 or imprisoned for up to 12 months. Corporations are liable to be fined up to \$100,000 for a first offence, \$250,000 for a second offence and \$500,000 for a third or subsequent offence. Directors of corporations can also be charged if the director fails to comply with an order to pay wages issued against the directors pursuant to ss. 106 and 107.⁴⁵ Finally, where the employer is a corporation, an officer, director or agent of the corporation may be prosecuted for authorizing or permitting or acquiescing in the contravention.⁴⁶

The ultimate deterrence measure would be prosecution under the *Criminal Code of Canada* (1985). It is a little-known fact that in 1935 the *Code* was amended to make it a crime to knowingly pay less than the minimum wage, although amendments made during the legislative process and narrow judicial interpretation thereafter resulted in the provision being inoperable.⁴⁷ Most of this section of the *Code* was repealed in 1955, but it is still a criminal offence intentionally to falsify an employment record by any means, including the punching of a time

⁴³ There is also a provision in the POA for commencing a Part I prosecution by issuing a summons, which may be used where the violation is not ticketable. In such a case, the maximum penalty on conviction is \$1,000. To our knowledge, summonses were not used in ESA enforcement during the period under examination, 2012/13 to 2014/15.

⁴⁴ *Employment Standards Act*, *supra* n. 26, at s.132.

⁴⁵ *Ibid.*, at s. 136.

⁴⁶ *Ibid.*, at s. 137.

⁴⁷ E. Tucker, *When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master*, 54 Osg. Hall L. J. 933 (2017).

clock.⁴⁸ In principle, an employer could commit criminal fraud in relation to a monetary violation, but there is no record of any employer being charged for this crime.⁴⁹

IV. Putting Deterrence Tools to Work: 2012/13 to 2014/15⁵⁰

A. Establishing Baselines: Detected Violations and Compliance Measures

To put the frequency of deterrence tool usage into perspective, it is necessary to establish some kind of baseline. We use detected and recorded violations from complaints and inspections, the two ways violations come to the attention of ESOs. However, we do so with several caveats. As we noted earlier, researchers have established that particularly under a complaints-based system the number of detected violations represent a small proportion of the total number of violations. In addition, the ESO may not record every violation he or she observes. ESOs exercise considerable discretion when conducting inspections and may choose simply to let some violation go unrecorded.⁵¹ The decision to use detected and recorded violations as opposed to violations is on the one hand a pragmatic response to the limitations of our data, but is also justified because the focus of this analysis is on the behaviour of enforcement officials when a violation comes to their attention and they decide to take some official action.

A second caveat about our use of ESO-detected and recorded violations as the baseline is that the ESO's determination that a violation has or has not occurred may be reversed at a later

⁴⁸ *Criminal Code of Canada*. 1985. R.S.C., 1985, c. C-46, s. 398.

⁴⁹ *Ibid.*, at s. 380.

⁵⁰ The MOL's fiscal year runs from April 1st to March 31st. The fiscal year of a complaint is established by the day the MOL receives the complaint. The fiscal year of an inspection is the day of the ESOs first visit to the workplace. We have restricted our analysis to these three years because they are the only years for which ESIS has complete data on the outcomes of both complaints and inspections.

⁵¹ See for example, K. Hawkins, *Law as a Last Resort* (Oxford University Press 2002); M. Lipsky, *Street-Level Bureaucracy* (Russell Sage Foundation 1980).

stage. First, ESO orders or failures to issue an order may be challenged, in which case the OLRB conducts a review and can substitute its judgment for that of the ESO. Second, as mentioned, the OLRB may also not uphold a NOC. Third, employers charged with Part I or Part III offences under the POA may successfully defend themselves in court. As a result, ESO-detected and recorded violations are not a completely accurate count of the number of substantiated violations. Nevertheless, we are confident that the overall impact of these events on the total number of actual violations is quite small. More importantly, any differences that do result are not terribly germane to our analysis, which is focused in the first instance on how often ESOs use deterrence tools when *they* detect and record violations.

In what follows we examine ESO detected and recorded violations, looking first at complaints and then at inspections. These ways of detecting violations require separate analyses for two reasons. First, as we shall see, the process of detecting and recording violations is different for complaints than it is for inspections. The second and more important reason for examining complaint and inspection violations separately is that it allows us to determine whether ESOs use deterrence measures differently depending on the context in which they detect the violation.

1. Complaints

When complaints enter the MOL's system and are recorded in the ESIS database, there are five possible outcomes:

- Withdrawal by the complainant
- Settlement if the complainant and the employer agree to certain terms
- Denial if no violation is found
- Validation (a violation is found) and resolution through voluntary compliance by the employer;

- Validation and issuance of a compliance order against the employer.

Of the total of 44,742 complaints recorded between 2012/13 and 2014/15, 24% were withdrawn, 13% resulted in settlements, 20% were denied, 22% were validated and the employer complied voluntarily, and 21% were validated and required that a compliance order be issued.

These outcomes, however, do not tell us the percentage of complaints in which there was an ES violation. Rather, ESIS provides us with information on detected violations only. For a violation to be detected the claim must be assessed by an ESO, but claims that are withdrawn or settled are not assessed. The fact that a claim is withdrawn or settled does not mean that there was not a violation, however, since there are many reasons why employees may settle or withdraw complaints before it is assessed even though they experienced a violation. These data do not show in what percentage of these cases violations occurred – only that 63% of complaints were assessed between 2012/13 and 2014/15.

Examining when violations occur in more detail, violations were detected in a total of 19,260 of the 44,742 complaints or 43% of the time, but if we consider only assessed complaints (28,139), then violations are found 68% of the time. At least one monetary violation was detected in 18,930 complaints (67% of assessed complaints), while at least one non-monetary violation was detected in 664 complaints (2% of assessed complaints). Monetary and non-monetary violations are occasionally found in the same complaint, which is why the sum of monetary and non-monetary violations is greater than the number of complaints with any violation.

When we turn to the number of violations, we see that in total 34,626 violations, both monetary and non-monetary, were detected by ESOs from complaints (Table 1), or on average

11,542 annually. There are more violations than there are complaints with violations because when a complaint has a violation, it is likely to have more than one violation. On average, each complaint with a violation had 1.8 violations. As expected, monetary violations constitute 98% of all detected violations.

[insert Table 1 here]

For every detected violation compliance is sought either through securing voluntary compliance by the employer without a compliance order, or by ordering compliance. Overall, employers voluntarily complied in rectifying 15,272 of the 34,626 detected violations from complaints, or 44% of the time. It was necessary to order employer compliance for the other 19,354 detected violations, or 56% of the time. If we disaggregate monetary and non-monetary violations, we find that ESOs achieved voluntary compliance in 43% of monetary claims and 78% of non-monetary claims. The flipside is that ESOs ordered compliance in 57% of monetary violations and 22% of non-monetary violations. The large difference between voluntary and ordered compliance for monetary and non-monetary violations presumably reflects the fact that correcting non-monetary violations costs employers little or nothing, while correcting monetary violations by definition require a monetary payment. The lower rate of voluntary compliance for detected monetary violations may suggest that, contrary to compliance theory, a large number of these violations are not innocent employer errors.⁵² If that is the case, we might expect to see deterrence measures used more frequently for monetary violations detected by complaint.

⁵² Vosko et al., *supra* n. 11.

2. Inspections

In Ontario, proactive inspections are a secondary means of detecting violations. However, the inspections data must be approached with some caution and cannot be taken as a complete record of all violations that are found during an ESO inspection. As discussed previously, ESOs exercise an enormous amount of discretion in how they respond to an observed violation. We can assume there is an under-reporting of violations detected by inspection, but we have no way to estimate its extent.

For the three years under examination (2012/13 to 2014/15) there were 5,998 inspections (Table 2). Over these three fiscal years, there was a steady decrease in the number of annual inspections completed. In 2012/13, ESOs completed 2,349 inspections compared to 1,747 inspections in 2014/15. Among all inspections, ESOs detected and recorded one or more violations on 3,968 occasions or 65% of the time. In 2012/13 the number of inspections with violations was 71% and then decreased to 56% in 2014/15. Because ESOs detect and record multiple violations, a total of 11,563 violations were found (Table 2), amounting to, on average, 2.9 violations per inspection with violations. Of these, 3,241, or 28% were for monetary violations, the remaining 8,322 (72%) being for non-monetary violations. The relatively low percentage of monetary violations recorded on inspections contrasts sharply with the results from complaints where monetary violations predominated (98%). The difference is explained by the fact that, while employees are significantly more likely to complain about monetary than non-monetary violations, in inspections ESOs are directed to evaluate employers' compliance with only eleven specific employment standards, many of which relate to non-monetary employment standards such as record-keeping and posting requirements. When ESOs detect monetary violations in workplace inspections, the amount of restitution to which employees are entitled is

less than entitlements that result from complaints. The median amount of employee entitlements for violations of employment standards detected via complaints between 2012/13 and 2014/15 was \$1,062, whereas the median amount of employee entitlements for violations of employment standards detected via workplace inspections during this same time period was \$745.

[insert Table 2 here]

As is the case for violations detected from complaints, ESOs take compliance measures for every violation recorded during an inspection. When a violation is detected, the ESO can close the file in three ways: voluntary compliance by the employer in the absence of a compliance order; voluntary compliance by the employer in the presence of a compliance order; and no voluntary compliance by the employer leading to the issuance of a compliance order, typically an Order to Pay.⁵³ Overall, for the 11,571 violations detected,⁵⁴ ESOs achieved voluntary compliance by the employer in the absence of a compliance order in 1,008 instances, or 9% of the time. ESOs achieved voluntary compliance by the employer in the presence of a compliance order in 8,903 instances, or 77% of the time. Finally, ESOs did not achieve voluntary compliance, leading to the issuance of a compliance order, in 1,660 instances, or 14% of the time. If we disaggregate monetary and non-monetary violations, we find that voluntary compliance was achieved in 85% of monetary claims and 86% of non-monetary claims. The

⁵³ See, Ontario Ministry of Labour, *Administrative Manual for Employment Standards (AMES)* (Ontario Government 2017a). In its current *Administrative Manual for Employment Standards (AMES)*, the MOL indicates that compliance orders may be issued in situations where an employer has agreed to voluntarily comply. According to the manual, “[i]ssuing a Compliance Order when there has been voluntary compliance ensures that there is a *record of enforcement activity* resulting from the contravention”, *Ibid.*, at Chapter 7.5.6, emphasis added.

⁵⁴ Note that this number is slightly different from the total number of violations detected in Table 2. The discrepancy represents 22 inspections with violations that are missing information about which compliance measure was used.

higher rate of voluntary compliance, including among employers issued compliance orders, on inspections compared to complaints, particularly in regard to monetary complaints, might suggest that violations detected on inspections are more likely to be the result of inadvertence and therefore these employers are more inclined to comply forthwith when the violation is brought to their attention.

3. Combined Data on Violations⁵⁵

If we combine the data on detected violations from complaints and inspections, we see there were 46,189 total detected and recorded violations, or on average 15,396 per year. There is a noticeable decline in the total number of violations in each year from both complaints and inspections, but because of the frailties we noted earlier in the processes that result in violations being detected and recorded, we do not believe this data supports the claim that ESA violations are decreasing in Ontario.

[insert Table 3 here]

B. Use of Deterrence Measures: An Empirical Investigation

The use of compliance measure does not preclude the use of deterrence measures for the same violation. Every violation detected could result in the imposition of a deterrence measure notwithstanding that the employer has voluntarily agreed to comply or been ordered to do so.

Recall that s. 113 of the ESA authorizes an ESO to issue a notice of contravention whenever the

⁵⁵ We note that combining the data in this way potentially conflates two units of analysis. In workplace inspections, violations are detected at the level of the employer. In complaints, violations are detected at the level of the employee. In some instances, multiple complaints are filed against a single employer and thus counted as multiple violations, whereas in an inspection this would be counted as a single violation.

ESO “believes that a person has contravened a provision of this Act” and s. 132 provides that “a person who contravenes this Act or the regulations...under this Act or the regulations is guilty of an offence.” Therefore, it is a matter of discretion and policy, not law, as to whether deterrence measures are used in addition to compliance measures when violations are detected. In fact, as we see below, deterrence measures are rarely used.

1. Low Level Deterrence Measures: Notices of Contravention and Part I Tickets

Notices of Contravention

Notwithstanding that NOCs can be issued for any violation of the ESA, over the three year period under discussion, ESOs issued a total of 207 NOCs for violations detected via complaints and 96 NOCs for violations detected via workplace inspections (Table 4).

[insert Table 4 here]⁵⁶

Put differently, ESOs issue NOCs for less than 1% of all detected violations in both complaints and inspections (Table 4). Focusing on complaints, 67% of NOCs are issued for monetary violations, but monetary violations are far more frequent than non-monetary violations, so that NOCs are issued for only 0.4% of all detected monetary violations, compared to 9% of non-monetary violations (Table 4). It is not obvious why this should be the case since most people view monetary violations as more serious than non-monetary ones, given their immediate impact on workers. NOCs are used to approximately the same degree for violations detected in inspections as they are in complaints (0.8% for inspections compared to 0.6% for complaints).

⁵⁶ Due to small cell counts, we are unable to disaggregate NOCs into monetary and non-monetary violations.

Part I Tickets

Between 2013/14 and 2014/15, during the complaints process, ESOs issued 307 Part I tickets, 203 for monetary violations and 104 for non-monetary violations (Table 5). For complaints data, the information about tickets issued in 2012/13 has been suppressed due to the very infrequent use of tickets. ESOs issued more tickets in inspections and therefore data are available for 2012/13 to 2014/15. During this period (2012/13 to 2014/15), ESOs issued 905 Part I tickets, 644 for monetary violations and 261 for non-monetary violations. Clearly, ESOs use tickets as a low-level deterrence measure more often than NOCs, which ESOs issued a total of 303 times over the same period. The *Administrative Manual for Employment Standards* used by Ministry staff during the period under study explains why. It directed ESOs to use tickets rather than NOCs whenever there is a choice so ESOs issued NOCs only if the contravention was not a ticketable offence.⁵⁷

ESOs issued tickets for 1.4% of all ticketable violations detected from complaints. Oddly, they issued tickets for less than 1% of monetary ticketable violations and nearly 30% of non-monetary ticketable violations. The more frequent use of tickets for non-monetary violations is somewhat counter-intuitive given that monetary violations would seem to be more serious in their immediate consequences. Of course, unlike NOCs, ESOs can only issue tickets for ticketable violations, not for every violation of the ESA. However, it is fair to say that almost all monetary violations are ticketable.

⁵⁷ Ontario Ministry of Labour, *Administrative Manual for Employment Standards* (Ontario Government, 2014), 7.5.7. The direction has been removed from the current AMES. See Ontario Ministry of Labour, *supra* n. 53 at 7.5.7.

ESOs issue tickets far more frequently for ticketable violations detected on inspections than through complaints. As Table 5 shows, ESOs issued tickets for 8% of all ticketable violations detected by inspection. However, when we disaggregate monetary and non-monetary ticketable violations detected on inspections, we find that ESOs issue tickets for 20% of the monetary violations they detect, compared to 3% of non-monetary violations they detect. This pattern is the reverse of what we saw for the use of tickets in the context of complaints and may be explained by the overrepresentation of non-monetary violations in workplace inspections and the underrepresentation of non-monetary violations in complaints.

[insert Table 5 here]

Among complaints in 2013/14 and 2014/15, ESOs most commonly issued tickets for monetary violations related to failure to pay wages (34%), vacation pay (24%), and overtime pay (15%). The most common ticket issued for non-monetary violations is for record-keeping (29%). Among inspections, the trend for most common tickets issued between 2012/13 to 2014/15 is slightly different. The most common tickets issued for monetary violations relate to holiday pay (42%) and overtime pay (27%). For non-monetary violations, the most common tickets are for record keeping (13%) and requiring employees to work excess hours (8%).⁵⁸

⁵⁸ Similar data are described in R. Casey et al., *Using tickets in employment standards inspections: Deterrence as effective enforcement in Ontario, Canada?*, 29 *Econ. & Lab. Rel. Rev.* 228 (2018), <https://doi.org/10.1177/1035304618769772> (accessed 19 June 2018).. However, in that paper the analysis included an additional year of data (2012/13 to 2015/16).

Low-Level Deterrence Measures Combined

Despite the differences in the procedures for issuing, enforcing and challenging NOCs and tickets, they are similar in terms of the small size of the penalty and so it is useful to consider them in combination in order to appreciate the use of low-level deterrence measures.

[insert Table 6 here]

Overall ESOs use low-level deterrence measures very infrequently. More than 96% of the violations they detect and record do not attract a low-level deterrence measure.

2. Higher Level Deterrence Measures

In principle, there are two higher-level deterrence measures available, Part III prosecutions under the *Provincial Offences Act* and prosecutions under the *Criminal Code* for intentionally falsifying employment records or fraud. To our knowledge, no employer has been charged under the *Criminal Code* for wage theft since it was revised in the 1950s (Tucker 2017). Therefore, we restrict our analysis to the use of Part III prosecutions.

Unlike the deterrence measures we have discussed to this point, the ESO does not determine whether a Part III prosecution is launched. Rather, the ESO makes a recommendation to prosecute. The Regional Program Coordinator (RPC) and Manager review that recommendation and if all agree the ESO prepares a Crown Brief that is submitted to the Legal Services Branch (LSB) for consideration. If the ESO, RPC and Manager are not in agreement about whether to recommend a prosecution to the LSB, the matter is referred to the Regional Program Director who decides. If the LSB determines a prosecution is appropriate, it lays

charges against the defendant or defendants. The case will either be resolved by a plea deal agreed to by the defendant(s) and the Crown, or by trial.⁵⁹

Ideally, we would like to have data on how often ESOs recommend prosecutions and on how often the ESB recommends prosecutions to the LSB. Unfortunately, we only have data for prosecutions launched and for convictions. The LSB provides data on prosecutions by calendar year (ESIS data uses the fiscal year) and the MOL posts data on convictions on its website.

Table 7 provides data on the number of prosecutions, defendants and charges launched by the LSB and the number of prosecutions, defendants and charges for which there are convictions.⁶⁰

[insert Table 7 here]

Table 7 shows that the LSB initiates prosecutions infrequently. In the three years for which we have data, the LSB launched 34 prosecutions, involving 57 defendants and 167 charges. Because our data is for calendar years and not fiscal years, we cannot accurately calculate the percentage of violations that resulted in Part III prosecutions, but as we will see this number is not meaningful in any event. The LSB is relatively successful in obtaining convictions when it prosecutes (around 60% of prosecutions and defendants), but around 75% of the charges are dropped or do not result in convictions.

While a detailed analysis of the role of prosecutions in the enforcement process is beyond the scope of this article, it is important to understand that the LSB never prosecutes employers and directors for violating employees' rights. Rather, the LSB only prosecutes in response to an employer's or director's failure to comply with an order to pay wages or to reinstate and/or

⁵⁹ Ontario Ministry of Labour, *supra* n. 54 at Ch. 7A,.6.

⁶⁰ Within a prosecution there may be multiple defendants and a defendant may be charged with multiple violations. Multiple defendant cases typically involve situations in which the employer and directors have been charged together.

compensate in the case of a reprisal or leave of absence violation, or for interference with an ESO. In other words, the LSB prosecutes employers for defying the authority of the ESO and, by extension, the state, not for the violation of the workers' substantive rights in the first instance. If we were to calculate the percentage of underlying violations that are prosecuted on the same basis as we calculated the frequency of NOCs and Part I tickets, the percentage would effectively be zero.⁶¹

One final issue is the question of penalty. When articulating sentencing principles, judges embrace the principle of deterrence. For example, in *R v. Blondin*, discussed in more detail below, Justice of the Peace Bubrin extensively cited a decision of the Ontario Court of Appeal in occupational health and safety case, *Regina v. Cotton Felts*, on the importance of deterrence in sentencing.⁶² In that case the court held, "Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence," and then discussed the role of specific and general deterrence. However, notwithstanding their principled embrace of deterrence in sentencing, it is not obvious that the courts translate principle into practice. Over the three calendar years covered in this study, the total amount of the fines imposed was \$1,085,651, or an average of \$26,479 for each of the 41 charges with a conviction. This figure, however, is distorted by a single fine in one prosecution (with 7 charges) of \$350,000. If we eliminate this anomalous instance, the average for the remaining 34 convictions is \$21,637. In either case, this represents a relatively small fraction of the maximum first offence fine for an individual (\$50,000) and especially for a corporation (\$100,000).

⁶¹ In July 2018 we received data on Part III prosecutions for 2015 and 2106, beyond the timeframe of this analysis. However, that data show a significant increase in the use of Part III prosecutions, although it does not allow us to determine whether there has been a change in the circumstances in which the LSB launches prosecutions.

⁶² *R. v. Blondin*, 2012, ONCJ 826; *R. v. Cotton Felts*, 1982, 2 CCC (3d) 287.

There are, however, some exceptions. In *Blondin* the court sentenced the defendant to three months imprisonment and a fine of \$50,000 and fined his corporations an additional \$300,000.⁶³ This punishment was in addition to an order to pay restitution to the employees who collectively were owed \$142,000. Courts sentenced ESA violators jail terms in two other cases. One involved Peter Check, as the director of a (presumably) small corporation, which was the employer of record. He was convicted of permitting or acquiescing in the failure to comply with an order to pay and was fined \$18,750 and sentenced to 90 days in jail.⁶⁴ The other case involved Peter Seseck who owed 43 employees around \$127,000 in wages dating back to 2014. The MOL issued an order to pay in March 2015 that Seseck ignored. In June of 2017, he was convicted for failing to comply with the order to pay and was sentenced to 30 days in jail, in addition to a \$20,000 fine.⁶⁵

C. Discussion of Results

The data establish clearly that ESOs use low-level deterrence measures very infrequently and that higher-level deterrence measures are extremely rare and only used when employers and other duty holders defy the authority of the ESO by disobeying compliance orders. Most employers who violate the ESA can expect that if the violation is detected the worst that will

⁶³ *Blondin*, *supra* n. 62.

⁶⁴ Check and his corporations failed to pay students he had hired to work as lifeguards. Three orders to pay were issued for nearly \$50,000. Check sought to have the orders reviewed but failed to pay the amount owing in trust to the Director of Employment Standards. As a result, the reviews were dismissed. When he did not pay the orders, a Part III prosecution was launched. Check unsuccessfully challenged the prosecution and was subsequently convicted. See *All Pool Solutions*, 2009a. [2009] O.E.S.A.D. No. 67; *All Pool Solutions*, 2009b. [2009] O.E.S.A.D. No. 106; *R. v. Check*, 2012, O.J. 6410 (OCJ). Check had pleaded bankruptcy and so perhaps in part the jail sentence was imposed because the small likelihood of collecting the fine.

⁶⁵ Sarah Mojtehedzadeh, '*Jail sentence for boss who owed workers \$125,000*' *Toronto Star* (6 June 2017) (accessed 9 Aug. 2018).

happen is that they will be ordered to comply with the law and to pay what they owed, without any penalty. But does this finding establish a deterrence gap? As indicated at the outset, the answer to that question depends on how one conceptualizes the role of deterrence in enforcing employment standards. While each of the two theoretical approaches we discussed identifies a role for deterrence, there are significant differences in their analysis of when and how to apply sanctions.

Responsive Regulation

Responsive regulation takes the view that compliance measures should be used first and that enforcement officials should only use deterrence when compliance measures have failed, beginning first with low-level sanctions and only escalating to higher-level sanctions if lower-level sanctions do not work. One could argue that Ontario adheres to this model. It is certainly true that ESOs resort to compliance measures whenever a violation is detected and recorded, although there are some instances in which low-level sanctions are also imposed.

The AMES advises ESOs that NOCs are appropriate “when the officer believes that the employer was aware of their responsibilities under the Act but was deliberately non-compliant”.⁶⁶ With regard to tickets, the AMES broadly advises that: “Part I prosecutions generally are used for first offenders of less serious offences”.⁶⁷ This advice is preceded by a lengthier discussion of the objectives of the prosecution policy (applying to Part I and Part III prosecutions), which states that general and specific deterrence are necessary to ensure compliance with the ESA. The AMES identifies a number of factors that the ESO should take

⁶⁶ Ontario Ministry of Labour, *supra* n. 53, at 7.5.7.

⁶⁷ *Ibid.*, at 7A.4.1.

into account in deciding whether a prosecution is warranted. These include the seriousness or gravity of the offence, history of compliance, mitigating or aggravating circumstances, availability of effective alternatives to prosecution, program identification of targeted contraventions for general deterrence and the necessity of maintaining public confidence in the legislation.⁶⁸

One could argue that based on the formal prosecution policy, Ontario embraces a pyramid model of enforcement. However, in practice, the enforcement pyramid looks something like Figure 2. That is, a flat pyramid with rarely used deterrence measures at the top. Of course, one could still argue that there is no deterrence gap, but that would require making large and implausible assumptions that employer violations of the ESA are almost always the result of ignorance or incompetence and that once violations are detected Ontario employers become fully ESA-compliant.⁶⁹

[insert Figure 2 here]

One indication that compliance is not achieved following the detection of a violation comes from a recent enforcement blitz conducted from September 1 to October 31, 2016 that targeted workplaces with past employment standards violations. During the blitz, which involved 104 inspections, the government found that 77 of employers with records of past violations were still not fully compliant with the ESA. The ESB does not provide a breakdown of the violations detected and recorded, but does report that it recovered \$125,267 for employees, so clearly monetary violations were involved. These results strongly indicate that employers

⁶⁸ *Ibid.*, at 7A.2-3.

⁶⁹ For arguments against making these assumptions, see Vosko et al., *supra* n.11.

who have been subject to compliance measures in the past show a significant propensity to re-offend.

Moreover, according to the theory of responsive regulation, employers who were caught re-offending should be subject to some kind of deterrence measure since they had not learned their lesson after being subject to compliance measures. Although the government announced before the blitz it was adopting a zero tolerance policy, suggesting it would apply deterrence measures to repeat offenders, in fact, nothing like that occurred. Of the 103 employers inspected, ESOs found that 75 had re-offended. ESOs issued 227 compliance orders, and employers voluntarily complied with all of them. But these were repeat offenders who had already been given a chance to comply without penalty for their first violations. Therefore, a zero tolerance policy in the context of responsive regulation should have resulted in penalties for all repeat offenders. Yet ESOs only issued 15 NOCs and 27 tickets. Assuming no employer was subject to more than one low-level deterrence measure, at most only 55% of repeat offenders were punished.⁷⁰ So even by the standards of responsive regulation, there is strong evidence of a deterrence gap.

Strategic Enforcement Model

It is arguable that the ESB has adopted some elements of strategic enforcement model. Targeted inspections have become more prominent and convictions are publicized on the Ministry's website. However, it is clearly the case that the Ministry does not use deterrence nearly as frequently as is called for by the strategic enforcement model. To recall, the model

⁷⁰ Ontario Ministry of Labour, *Blitz Results: Repeat Offenders/Zero Tolerance* (2017c), https://www.labour.gov.on.ca/english/es/inspections/blitzresults_rvzt2016.php (accessed 9 Aug. 2018).

called for the routine imposition of civil monetary penalties for violators and especially for repeat violators.⁷¹ Although strictly speaking Ontario does not have a system of civil monetary penalties, NOCs serve a very similar function: they involve the imposition of a small monetary penalty, which can only be contested at the OLRB, an administrative agency. But, as we saw, NOCs are rarely used and it is the policy that tickets are preferred if the violation is ticketable. Of course, if ESOs routinely issued tickets for violations, they would be a functional equivalent of a civil monetary penalty, but they are not. As we saw, close to 97% of violations result in no penalty whatsoever. By this measure, the deterrence gap is immense.

The same conclusion holds true if we consider the role of higher-level sanctions. Weil recommends high profile prosecutions, yet these are rarely undertaken.⁷² Indeed, criminal prosecutions are seemingly off the table. With regard to Part III prosecutions, we have seen that the fines are generally quite low relative to the maximum and there is little publicity beyond the posting of the conviction on the Ministry's website. There are, however, exceptions, as we saw in the Blondin, Check, and Sesek cases, which resulted in jail sentences and, at least in the Blondin case, the prosecution attracted a great amount of publicity in the media, which law firms amplified in client newsletters. But these cases truly are the exceptions that, so to speak, prove the rule that high profile prosecution activity is rare. Finally, there is no evidence that Ontario has adopted a strategy of using deterrence measures against lead firms in order to secure their commitment to enforcing ESA compliance by their sub-contractors, franchisees and other subordinate entities in their supply chains.

⁷¹ Weil, *supra* n. 10, 2008.

⁷² Weil, *supra* n. 15.

While our finding of a deterrence gap in Ontario is obviously a matter of local interest, it has broader relevance to scholars and officials concerned with minimum employment standards enforcement in other jurisdictions. First, it is a cautionary tale. Ontario is not a jurisdiction that has wholeheartedly embraced a RNG approach to ES enforcement, but rather has responded to political pressure for stronger enforcement, including the creation of additional deterrence measures and, some commitment in principle to their expanded use. However, notwithstanding this partial acceptance of the need for a more deterrence-oriented approach, ESOs do not even use low-level deterrence measures to the extent expected of a government fully committed to responsive regulation and the enforcement pyramid. Elsewhere we look more closely at some of the field level impediments to increasing the use of deterrence measures, but for present purposes our findings strongly suggest that increasing the use of deterrence measures in any jurisdiction is likely going to be difficult, even when there is political pressure for doing so.⁷³

A second and related lesson is that the proclaimed policy of government may mask what is occurring on the ground. This applies with particular force to those jurisdictions committed to RNG policies like responsive regulation that are legitimated in part because they declare that although the hammer of deterrence is usually hidden, it is available *and will be used* when compliance measures fail. The reality may be that deterrence is not only hidden, but stored in a closed toolbox that is difficult to pry open. The result is not third-way regulation but regulatory degradation and failure.⁷⁴

⁷³ L. F. Vosko & the Closing the Enforcement Gap Research Group, *Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs* (in review).

⁷⁴ S. Tombs & D. Whyte, *A Deadly Consensus? Worker Safety and Regulatory Degradation under New Labour*, 50 *Brit. J. Crim.* 46 (2010).

Finally, our case study adds to the evidence from many jurisdictions and from the beginning of labour inspections nearly two centuries ago which strongly suggest that deterrence gaps are the norm, not the exception, in the enforcement of protective labour and employment laws. As leaders of the Ontario labour movement observed more than 100 years ago in relation to the enforcement of the factory act:

“It has been the experience of every labour man that after... an Act... has become law the trouble has only commenced, for you have got to keep hammering away all the time to make the Government put the law in force...[W]hile there are government inspectors appointed to do the work, [they] will not do their duty ... to prosecute a manufacturer who is deliberately violating the Act...”⁷⁵

V. Conclusion

Nearly every serious enforcement model recognizes the need for deterrence, even while there is disagreement about its role.⁷⁶ Our study finds that regardless of whether we adopt a light-touch model, like responsive regulation, or a proactive model, like strategic enforcement, as our baseline, there is a deterrence gap in ESA enforcement in Ontario. This finding adds to the large body of international evidence that points to deterrence gaps as longstanding norms.

If that is the case, a key question is how to close the deterrence gap. Simply changing the model is not enough, since, as we have seen, there is a significant risk that a gap will open between the law and policy on the books and the law and policy on the ground. We do not have

⁷⁵ Trades and Labour Congress of Canada, *Proceedings* 10-11 (1899).

⁷⁶ It should also be noted there is evidence that deterrence works. For example, a recent study found that wage theft laws which dramatically increase punitive damages awards to victims reduce the incidence of minimum wage violations. See D. Galvin, *Deterring ‘Wage Theft’: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, Institute for Policy Research, Northwestern University, Working Paper Series WP-15-08 (2016).

an easy solution to this problem. Indeed, if there was a magic bullet no doubt it would have already been fired. But perhaps one positive step has been the campaign to characterize ES violations as “wage theft” thus challenging dominant normative, political, and cultural understandings of the law as one that merely regulates private and consensual relations between workers, rather than as a law that addresses a serious public wrong.⁷⁷ Effective enforcement, however, is like to remain an ongoing struggle.

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⁷⁷Tucker, *supra* n. 46; K. Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid and What We Can Do About It* (The New Press 2009).

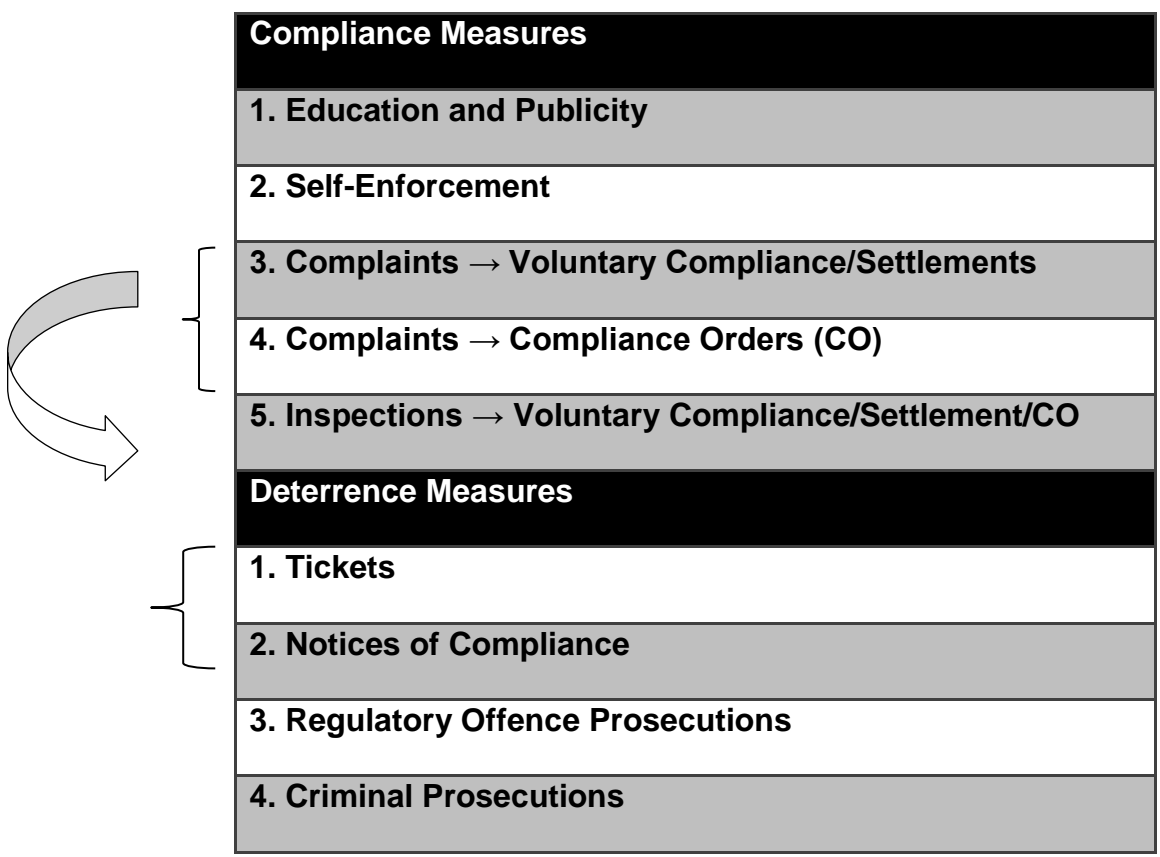


Figure 1. Compliance and Deterrence Measures



Figure 2. Ontario's Enforcement Pyramid

Table 1. Number of Violations Detected in Complaints and their Outcomes, by Fiscal Year

	2012/13	2013/14	2014/15	Total
Total Number of Violations	12,079	12,071	10,476	34,626
Monetary and Non-Monetary Violations				
Total Number of Monetary Violations	11,825	11,798	10,217	33,840
Total Number of Non-Monetary Violations	254	273	259	786
Outcomes of Complaints with Monetary Violations				
Voluntary Compliance	5,358	5,037	4,263	14,658
Compliance Ordered	6,467	6,761	5,954	19,182
Outcomes of Complaints with Non-Monetary Violations				
Voluntary Compliance	203	210	201	614
Compliance Ordered	51	63	58	172

Source: Employment Standards Information System (ESIS) data 2012/2013 to 2014/2015

Table 2. Number and Percentage of Violations Detected in Workplace Inspections and their Outcomes, by Fiscal Year

	2012/13	2013/14	2014/15	Total
Total Number of Inspections	2,349	1,902	1,747	5,998
Number of inspections without violations	672	602	756	2,030
% of Inspections without violations	28.6%	31.7%	43.3%	33.8%
Number of inspections with violations	1,677	1,300	991	3,968
% of Inspections with violations	71.4%	68.3%	56.7%	66.2%
Total Number of Violations	4,958	3,786	2,849	11,593
Number of monetary violations	1,355	1,127	793	3,275
% of Monetary violations	27.3%	29.8%	27.8%	28.2%
Number of non-monetary violations	3,603	2,659	2,056	8,318
% of Non-monetary violations	72.7%	70.2%	72.2%	71.8%
Outcomes of Inspections with Monetary Violations				
Voluntary Compliance, no compliance order	117	155	72	344
Voluntary Compliance, compliance order issued	993	786	657	2,436
Compliance Ordered	245	185	64	494
Outcomes of Inspections with Non-Monetary Violations				
Voluntary Compliance, no compliance order	245	289	130	664
Voluntary Compliance, compliance order issued	2,630	2,064	1,773	6,467
Compliance Ordered	723	293	150	1,166

Source: Employment Standards Information System (ESIS) data 2012/2013 to 2014/2015

Table 3. Violation Source and Types, by Fiscal Year

	2012/13	2013/14	2014/15	Total
How the violation was detected				
Complaint Violations	12,079	12,071	10,476	34,626
Inspection Violations	4,958	3,786	2,849	11,593
Type of violation				
Monetary Violations	13,180	12,925	11,010	37,115
Non-Monetary Violations	3,857	2,932	2,315	9,104
Total Violations	17,037	15,857	13,325	46,219

Source: Employment Standards Information System (ESIS) data 2012/2013 to 2014/2015

Table 4. The Use of Notices of Contravention, by Fiscal Year

		2012/13	2013/14	2014/15	Total
Complaints	Total Number of Violations	12,079	12,071	10,476	34,626
	Total Number of Notices of Contravention	60	79	68	207
	% of Violations with a NOC	0.5%	0.7%	0.6%	0.6%
	Monetary Violations	11,825	11,798	10,217	33,840
	Notices of Contravention for Monetary Violations	44	59	35	138
	% of Monetary Violations with a NOC	0.4%	0.5%	0.3%	0.4%
	Non-Monetary Violations	254	273	259	786
	Notices of Contravention for Non-Monetary Violations	16	20	33	69
% of Non-Monetary Violations with a NOC	6.3%	7.3%	12.7%	8.8%	
Inspections	Total Number of Violations	4,958	3,786	2,849	11,593
	Total Number of Notices of Contravention	42	20	34	96
	% of Violations with a NOC	0.8%	0.5%	1.2%	0.8%

Source: Employment Standards Information System (ESIS) data 2012/2013 to 2014/2015

Table 5. The Use of Part I Tickets, by Fiscal Year

Complaints	2012/13	2013/14	2014/15	Total
Ticketable Offenses	---	11,751	10,196	21,947
All Tickets	---	121	186	307
% of Complaints with Ticketable Offences	---	1.0%	1.8%	1.4%
Monetary Ticketable Offenses	---	11,573	10,021	21,594
Tickets Issued for Monetary Offences	---	78	125	203
% of Complaints with Monetary Ticketable Offences	---	0.7%	1.2%	0.9%
Non-Monetary Ticketable Offenses	---	178	175	353
Tickets Issued for Non-Monetary Offences	---	43	61	104
% of Complaints with Non-Monetary Ticketable Offences	---	24.2%	34.9%	29.5%
Inspections	2012/13	2013/14	2014/15	Total
Ticketable Offenses	4,870	3,723	2,781	11,374
All Tickets	298	348	259	905
% of Inspections with Ticketable Offences	6.1%	9.3%	9.3%	8.0%
Monetary Ticketable Offenses	1,352	1,124	790	3,266
Tickets Issued for Monetary Offences	203	255	186	644
% of Inspections with Monetary Ticketable Offences	15.0%	22.7%	23.5%	19.7%
Non-Monetary Ticketable Offenses	3,518	2,599	1,991	8,108
Tickets Issued for Non-Monetary Offences	95	93	73	261
% of Inspections with Non-Monetary Ticketable Offences	2.7%	3.6%	3.7%	3.2%

Source: Employment Standards Information System (ESIS) data 2012/2013 to 2014/2015

Note: We removed the complaint data from 2012/13 from this analysis due to small cell counts for tickets, reflecting their extremely low level use by ESOs.

Table 6. The Use of Deterrence Measures (NOCs and Part I Tickets Combined), 2012/13 to 2014/15

	NOCs Issued	Tickets Issued	Total	% of Violations with Deterrence Measure
Monetary Violations	181	847	1,028	2.8%
Non-Monetary Violations	122	365	487	5.3%
Total	303	1,212	1,515	3.3%

Source: Employment Standards Information System (ESIS) data 2012/2013 to 2014/2015

Table 7. The Use of Part III Prosecutions and Convictions, by Year

	2012	2013	2014	Total
Prosecutions				
Launched	9	13	12	34
With Convictions	6	9	5	20
Defendants				
Charged	14	27	16	57
Convicted	6	10	5	21
Charges				
Laid	44	65	58	167
With Convictions	15	18	8	41

Source: Employment Standards Information System (ESIS) data 2012/2013 to 2014/2015

Note: Data are from the LSB and are recorded by calendar year