

# **“Effective and Enforced Employment Standards for Improved Income Security”**

**Brief to the Task Force on Modernizing Income Security for Working-Age Adults  
(MISWAA)**

**Written by:**

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2005

*Akram and Parvin worked at Beautiful South, a Toronto garment factory. Scott MacDonald, the owner, has a history of bounced checks. Many workers were forced to quit after being owed months in unpaid wages. One of the women workers filed a claim at the Ministry of Labour against Beautiful South in 2002. But the Ministry did not investigate the company's violations of other workers and so MacDonald continues to break the law. To this day, the Ministry has ordered the company to pay 6 workers over \$35,000 in unpaid wages, but has not enforced the orders. While the women wait and struggle without income MacDonald continues to run his factory. Since 2003, \$19 million in unpaid wages have gone uncollected by the Ministry of Labour<sup>1</sup>. And even this alarming figure only represents the cases actually reported and investigated by the Ministry.*

*For nine months Sadiq sold credit cards for Clegg Campus Marketing. His company told him that he was an independent contractor and not an employee. But Sadiq wasn't an independent contractor. Clegg gave him direction on how to do his job, supervised him and determined his hourly schedule. Still, Clegg only paid him a commission on what he sold. According to Sadiq, his 'commission' averaged out to \$4.41 an hour. One month, it dropped to \$0.63 an hour! Misclassifying employees as independent contractors – it is one way employers try to avoid the law and deny workers basic entitlements like the legal minimum wage.*

*Under the Employment Standards Act (ESA) there are eight public holidays per year. But that's not the case not for Douglas and most temp agency workers. In 2003 Douglas worked through the temp agency Action Force. They never paid for public holidays. Douglas filed a claim at the Ministry of Labour and won. He was owed \$300.00, which at the time was equivalent to a week's paycheck. Now, two years later Douglas works at the same workplace but through another temp agency called Apple One Employment Services. They have also refused to pay public holidays. For many temp workers public holidays are not a time to rest but a stressful loss of income.*

*Romielyn was regularly told by her employer Mincorp Exchange to work overtime. She felt she couldn't say no. She was never paid for her overtime hours. Her co-workers were also put in the same position. They were reluctant to file claims with the Ministry of Labour out of fear that they would be fired. Eventually, Romielyn felt she had no choice but to quit and report Mincorp to the Ministry of Labour. The Ministry ordered Mincorp to pay Romielyn her overtime but they did not extend the order to cover Romielyn's co-workers. As a result, co-workers have told Romielyn that they are still not receiving overtime pay.*

Unpaid wages, wages below the legal minimum, no public holiday pay and no overtime pay - the stories of Akram, Parvin, Sadiq, Douglas and Romielyn, reflect a growing reality in Toronto. Jobs are increasingly insecure. Employment standards and wages are deteriorating. Women, immigrants and people of colour are disproportionately found in the worst jobs. Their stories show that low-wage workers cannot rely on the current employment standards regime<sup>2</sup>. In fact, more often than not, reporting an employer simply means that a worker is out of a job. Many low-wage workers at the Workers' Action Centre report going from one lousy low-wage job to another or of spiraling into debt with credit cards or pay-day loans in order to make ends meet when employers don't pay.

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<sup>1</sup> Nick Cornacchia, Ontario Ministry of Labour, "Central Region - Insolvency & Collection Unit", January 2005.

<sup>2</sup> By this we mean the Employment Standards statute and Employment Practices Branch policies and practices.

A floor of adequate rights at work is something that both workers and employers benefit from. For workers, adequate standards signal fairness. For employers, standards establish a level playing field between competitors. The Ontario Ministry of Labour is responsible for setting the minimum wage and for ensuring that workplaces that are not unionized comply with the *Employment Standards Act (ESA)*.

Social policy considerations of income security must address the role that an effective and enforced employment standards regime can play in setting a strong floor of wages and working conditions. Employment standards should establish adequate standards for wages and working conditions that ensure income security and protect people in vulnerable work. Further, workers must have protection in order to claim their rights without fear of reprisal or job loss.

Without an effective and enforced employment standards regime workers have neither the income nor the security required to support themselves and their families. Moreover, while recalcitrant employers may benefit from breaking the law, the costs associated with sub-standard employment and precarious work is born by workers, families and government.

In December 2004 the Provincial Auditor of Ontario released an examination of the Ministry of Labour's employment standards regime and found significant problems in the enforcement of minimum standards. The Auditor's report concludes that the Ministry of Labour does few surprise inspections, rarely initiates prosecutions against companies found guilty of violating the *ESA* and fails to protect the rights of employees still in the workplace.<sup>3</sup> The Workers' Action Centre's work with low wage earners confirms these findings.

Inadequate employment standards are contributing to an unequal distribution of the costs and rewards in our economy. Low paid work is an increasingly large part of our economy -- 25% of jobs are low pay<sup>4</sup>. While access to employment benefits and protections is still largely based on the standard employment relationship (full time, full year and single employer), employers are now organizing 37% of work outside of the standard employment relationship<sup>5</sup>.

This paper is divided into four sections. Section one looks at the rise of precarity and emphasizes that women, immigrants and people of colour are disproportionately represented in the lowest paying and in the most insecure forms of work. Section two examines the failure of the current employment standards regime. Section three discusses the consequences of a failing employment standards regime. Finally, short-term and long-term recommendations are proposed for strengthening employment rights in Ontario and consequently for ensuring an adequate level of income security for workers in low-wage and insecure jobs.

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<sup>3</sup> Office of the Provincial Auditor of Ontario, 2004 Annual Report, November 30, 2004.

<sup>4</sup> 24.5% of Ontario workers earned \$10 or less in 1999. Statistics Canada, Income Statistics Division, survey of Labour and Income Dynamics, Custom Table R16253YC-1, 1999. This includes all forms of employment for workers over 17 and not in full time studies, not just hourly wages for full time or near full time employment used in recent research on hourly wages (for example, Ron Sanders, "Does a Rising Tide Lift all Boats? Low-Paid Workers in Canada, CPRN, May 2005). By using hourly wages for all work we capture the reality of workers wages for multiple job holders, part time, temporary and contract workers -- now comprising 37% of the labour market.

<sup>5</sup> Vosko, Leah. "Precarious Jobs: A New Typology of Employment" in *Perspectives*. Statistics Canada, 2003.

## **1. The rise of precarious work**

The studies reviewed by the Working Group have demonstrated that a significant portion of standard full-time work has been replaced by precarious work and that much of this work is also associated with low rates of pay<sup>6</sup>. Low paid work is an increasingly large part of the Canadian economy. Twenty-five percent of the jobs held in 2004 were low pay<sup>7</sup>. Indeed Canada's economy can be characterized as a low-wage economy, especially when viewed in comparison with some European countries<sup>8</sup>. Despite some suggestions that economic growth will eventually trickle down, the economic growth of the past two decades has not resulted in any meaningful benefits for low-wage workers.

Given the prevalence of precarious work and an economy characterized by low-wage work, it is no surprise that people leaving social assistance and Employment Insurance are likely to be trapped in insecure, poorly-paid work.

Not only have the studies reviewed by the Working Group demonstrated the prevalence of precarious and low-wage work, they have also revealed the ways in which women are disproportionately affected<sup>9</sup>. For example, 38% of women of colour and 31% of all women in Ontario were low paid in 1999, compared to only 23% of all men.<sup>10</sup>

In addition there has been discussion at the Working Group about the ways in which racialized people are disproportionately affected. Indeed, it is documented both in research and in workers' first-hand experiences, that discrimination in the workplace is pervasive and a significant determinant of poverty. For example, 32% of workers of colour were low paid in 1999, compared to 18% non non-visible minority men.<sup>11</sup> Given the extent of discrimination and its negative impact on income security, employment standards are an important tool to diminish discrimination and improve workers' income security.

## **2. The failure of the current employment standards regime**

Ontario has undergone active and passive deregulation of our labour standards. Active deregulation has taken place through changes to employment standards legislation introduced in 2000 that allowed employer-employee agreements to lower the floor of minimum entitlements (for example, enabling overtime averaging to reduce overtime compensation and enabling excessive overtime through longer work days and work weeks). More passive labour market deregulation has taken place through the failure to raise the floor of standards on the one hand and failure to update the laws to reflect changes in the economy and organization of work on the other.<sup>12</sup>

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<sup>6</sup> See Lee 2002, Morrissette & Picot 2005, Saunders 2003 & 2005, and Vosko et al 2003.

<sup>7</sup> See Saunders 2005:1.

<sup>8</sup> Ibid p.3

<sup>9</sup> See Saunders 2005; Vosko 2003.

<sup>10</sup> Statistics Canada, Income Statistics Division, survey of Labour and Income Dynamics, Custom Table R16253YC-1, 1999.

<sup>11</sup> Ibid.

<sup>12</sup> Law Commission of Canada, "Is Work Working? Work Laws that Do a Better Job, Discussion Paper, 2004, p34.

The majority of Ontario's 6.2 million workers rely on the *Employment Standards Act*. Yet violations of the *ESA* are widespread. Conservative estimates place one in three of Ontario's 350,000 employers in violation of the *ESA*.<sup>13</sup> In the experience of the Workers' Action Centre, the highest areas of non-compliance are failure to pay all hours worked, unpaid overtime premium pay, no real right to refuse excessive hours of work, reprisals for attempting to exercise employment standards rights, unpaid termination pay, unpaid vacation and public holiday pay.<sup>14</sup>

The Employment Standards Branch of the Ministry of Labour, responsible for enforcing the *ESA*, essentially relies on Ontario employers to voluntarily comply with the *Act*. This reliance on employer self-regulation has proven to be inadequate. As the Task Force on Hours of Work and Overtime determined in the late 1980s, the probability of detection and probability of assessment, and the expected penalty, all combine to create a low monetary cost for *ESA* violations.<sup>15</sup> This is still the case today. The Provincial Auditor concludes that there has been no significant improvement in the virtual abandonment of enforcement measures.

There are eight specific areas where the current employment standards regime is failing. These include: little risk of detection; the lawless workplace; little or no cost to employers who break the law; a dismal record of collecting unpaid wages; the rise of predatory employers; Ontario's sinking floor of rights; no protection against wrongful dismissal; and the limited reach of employment standards (temp work and subcontracting).

### **Little risk of detection**

There is almost no risk that the Ministry of Labour will inspect a workplace to detect *ESA* violations. The government's new commitment to 2,000 surprise inspections means that the chance of being inspected in Ontario's 350,000 workplaces has merely increased from 0.1% to 0.6%. Such low inspection rates do little to encourage employers to comply with the *Act*.

Employers risk detection only if an employee files an employment standards claim. But few workers do. With 1 in 3 or over 100,000 employers likely in violation, the 15,000 employment standards claims filed each year (on average) represent a small fraction of the total number of workers whose rights are being violated.

The small fraction of workers that do file claims for their minimum entitlements generally do so after leaving the job<sup>16</sup>. The Ministry of Labour investigates only the claim of the individual former employee, not the ongoing employment practices that are also likely in violation of the

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<sup>13</sup> The Ministry of Labour estimated that 35% of Ontario employers violated the provisions of the *ESA*, cited in Mark Thomas, "Regulating Flexibility: the Ontario Employment Standards Act and the Politics of Flexible Production, PHD Thesis, York University, December 2002, p. 310. Non-compliance with minimum wage laws in Ontario has been estimated as ranging from 20 to 45% and non-compliance with excessive hours of work permits has been estimated as 96%. "Evaluation of Federal Labour Standards," Human Resources Development Canada, August, 1997.

<sup>14</sup> For example, money owing for unpaid wages, termination pay, vacation pay, overtime and public holidays made up 91% of claims in 2002-03. See the Employment Standards Branch, 2002-03 Fiscal Year Report.

<sup>15</sup> Ontario Task Force on Hours of Work and Overtime, Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime, May 1987.

<sup>16</sup> Office of the Provincial Auditor, p. 242

*Act*. The claims process has become a process of negotiating the terms of severance of employment to ensure minimum standards are met rather than enforcement of employment standards for workers in the workplace.

### **The lawless workplace**

Because of the unequal power between employers and employees and the lack of *ESA* enforcement in the workplace, workers can do little to ensure their rights are enforced while on the job. There is a statutory provision barring reprisals against workers for trying to exercise any rights under the *ESA*, but this provision is not enforced. Most workers put up with employer violations and lose wages or move on to another job, hoping for better conditions. Meanwhile, workers continue to be hired into workplaces that operate below minimum standards.

### **Little or no cost to employers who break the law**

In the few cases where a claim proceeds against employers, most are settled for the wages that should have been paid or less. In 2002-03, employers were found guilty of owing \$28.7 million in wages to over 15,000 workers, yet only one employer faced prosecution. Last year, only 2% of guilty employers faced small fines (\$250 to \$1000) and only 2% faced prosecutions for breaking the law. As the Provincial Auditor points out, "lack of punitive action such as a fine or prosecution could encourage some employers to ignore their legal obligations."<sup>17</sup>

### **A dismal record of collecting unpaid wages**

Unless the employer voluntarily agrees to pay the worker what the Ministry of Labour has ordered, workers wages largely go unpaid. Half a billion dollars in workers' wages went unpaid in the 14 years between 1989-90 and 2002-03 -- that is, 71% of wages that employers were ordered to pay went unpaid.<sup>18</sup> The Ministry set up a special collections unit in the Central Region two years ago to improve collections. Yet only \$3.9 million was collected through this process while \$19.14 million in wages went uncollected.<sup>19</sup>

### **The rise of predatory employers**

Years of ineffective enforcement in highly competitive sectors have given rise to predatory employers who base operations on not heeding minimum standards, many do not even pay the minimum wage. These companies have few assets so they can quickly close down and reopen somewhere else. The Ministry of Labour needs a strategy to specifically deal with predatory employers.

### **Ontario's floor of rights is sinking**

The *ESA* provides a minimum floor of rights for standards such as hours of work, overtime pay, minimum wage, public holidays, vacations and leaves. With the exception of leaves, these standards have not been improved since the mid-1970s<sup>20</sup> and in some cases have been lowered.

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<sup>17</sup> Ibid, p. 240

<sup>18</sup> Compiled from Employment Standards Branch, Fiscal Year Reports, 1989-90 to 2002-03, Ontario Ministry of Labour

<sup>19</sup> Nick Cornacchia, Ontario Ministry of Labour, "Central Region - Insolvency & Collection Unit", January 2005.

<sup>20</sup> see "Legislative History" Employment Standards Act, 2000: Policy and Interpretation Manual. Carswell

Clearly we need to update these basic minimum standards to ensure adequacy and fairness in wages and working conditions.<sup>21</sup>

One minimum standard under consideration by the Task Force is the minimum wage. The *ESA* sets legal minimum wage requirements. Ontario's minimum wage floor has generally declined since the mid-1970s after reaching a high of \$8.58 in 1976 (expressed in inflation-adjusted 2001 dollars).<sup>22</sup> The current general minimum wage of \$7.45 is still \$2.55 below the poverty line.<sup>23</sup> By institutionalizing poverty rate wages, employers do not have to pay the full costs of labour. Rather, individual employees and government services such as health care and social services top up employers' wages. This is not the intended purpose of employment standards. Rather, modernizing our minimum wage standards must have the intended effect of ensuring workers can meet their basic needs.

### **No protection against wrongful dismissal**

Workers are forced to pay the costs of sub-standard employment or quit the job. Because of the power imbalance between employers and employees, workers are routinely fired for seeking their rights while on the job. A gaping hole in the current floor of rights is the absence of protection against wrongful dismissal. Companies can fire workers for any reason as long as notice is given. The only exceptions are those protected by human rights legislation. Higher paid, longer-term skilled and professional employees can pursue their cases in civil court. However, this is not an option for low-wage workers. Effective protection against unjust dismissal is essential to give low-wage workers some ability to seek redress when rights are violated while still on the job.

### **The limited reach of employment standards (temp work and subcontracting)**

Many workers are deprived of employment rights, benefits and protection because their work arrangements do not conform to the standard employment model. The employment standards regime was developed when the standard work form was full-time permanent work with the employment relationship clearly being between an employee and his or her employer. But with 37% of work being organized along more precarious forms of part time, temporary, own-account self-employment and multiple job holding, the existing employment standards regime is insufficient. In addition, employers have increasingly sought ways to shift the costs and liability of the employment relationship to third parties (e.g., temporary employment agencies) or down the production chain to ever-smaller sub-contractors. Yet through this process, employers using temp agencies and contractors maintain substantial control over the work process (e.g., control over scheduling of hours and overtime, how employees are paid). The employer costs have not been reduced, just shifted, usually on to the worker<sup>24</sup>.

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<sup>21</sup> Brought in over 30 years ago, Ontario still only has a two-week paid vacation while continental Europe commonly has a legislated five-week vacation period and Britain has moved up to four weeks. Nine other Canadian jurisdictions have 3 or 4-week vacations after five years.

<sup>22</sup> Ken Battle, "Ontario's Shrinking Minimum Wage", Caledon Institute of Social Policy, February 2003

<sup>23</sup> Ensuring an Adequate Standard of Living for the Working Poor. Draft for Discussion, February 18, 2005.

<sup>24</sup> For example, misclassification of employees as independent contractors means workers absorb the costs of not getting public holiday pay, vacation pay, termination and severance pay as statutory benefits. Other workers experience working for less than minimum wages.

New triangular relationships like those experienced by temp workers result in the client company (where a worker is assigned) being in control of much of the work process. For example, the client company supervises work, terminates assignments and schedules work and overtime. Yet the temp agency is the employer according to the *ESA*

Examples of rights violations experienced by temp workers include:

- A person on assignment with a client company for just over a year called the client company to say he was sick and couldn't come in. The client company told the temp agency to cancel his assignment and send another worker, which the temp agency did. The worker did not get any more work from that temp agency. Under the *ESA*, he has the right to 10 unpaid emergency leave days. Also, notice of termination should have been given. But because the agency says the worker could (theoretically) get another assignment, it is hard for this worker to obtain his rights.
- Temp agencies misclassify all temp workers as elect-to-work employees to avoid paying public holiday pay.
- A woman temp worker on assignment was told to work overtime. But she has children to care for and could not work overtime. The client company cancels her assignment (violating her right to refuse overtime). Her temp agency says she is not fired, but new assignments are sparse, effectively constructive dismissal.

Sub-contracting is another form of non-standard work that is growing. Subcontracting refers to the delegation of a portion of production or service provision, under contract, to an individual or smaller company. In many sectors of the economy, we are seeing sub-contracting where the contracting company still maintains much control over the work process. In highly competitive sectors, the contracts are structured so that there is little way that sub-contractors can deliver the product/service and comply with minimum employment standards such as paying overtime premium, vacation pay and, sometimes, minimum wage. But the contracting company bears no legal liability for employees covered by this contract even though it financially benefits from the arrangement. The only recourse under the *ESA* for workers who are not being paid is to make claims against the sub-contractor. But even when the worker is successful at the Ministry of Labour, there is no way to enforce the order because the sub-contractor has not obtained sufficient money from the contractor to comply with legal obligations.

### ***Subcontracting cleaning services***

*Maria and Jorge have been in Canada for less than one year. Their SIN number begins with a number nine, letting employers know that they are refugee claimants. They had a hard time finding work. Eventually, Maria, Jorge and their teenage daughter were hired to clean Zellers stores. They were hired by a small independent contractor, who had been hired by a large cleaning firm, who had, in turn, been hired by Zellers. They were told that they would be independent contractors and that they would be paid a flat fee. After four weeks of working 8-hour night shifts seven days per week, Maria and Jorge asked for their pay (which averaged out to about \$5.00/hour). The small independent contractor told them he didn't have the money. They waited two more weeks but still the contractor who had employed them refused to pay. On*

*one occasion when Jorge contacted the contractor to ask for his pay, the contractor 'fired' Maria and Jorge. During this period, they weren't able to make rent and had to ask their landlord for leniency. They lived two cold winter days without heat. They suffered the indignity of not having food for their children. When they were told they were 'fired' they set out looking for another cleaning job afraid that relying on income security programs would have a negative impact on their refugee claim.*

### ***Subcontracting sales***

*A group of workers were hired by a subcontractor to sell high-speed internet door-to-door for Rogers Communications. The workers were trained by Rogers, given company identification, strict instructions on protocol and routes they were to follow for sales. Rogers set out the terms of payment for each worker. When workers didn't get their wages, the only legal recourse was to go after the subcontractor who had no money because the contract with the client company left no room to pay wages.*

### **3 The consequences of a failing employment standards regime**

The lack of effective enforcement of the *ESA* in Ontario workplaces means that workers are picking up the costs of employer violations. Workers who don't get paid for all hours worked or don't get paid overtime premium-pay are working for no wages or reduced wages. Unpaid vacation pay and public holiday pay means less income for low-wage workers. Some workers go year after year not getting paid basic minimum standards, subsidizing their employers.

Because of the lack of protection on the job, workers are often forced to quit or are fired when they try to claim their rights. Job loss costs the worker and his or her family. After a job loss, many workers report experiences of not having access to Employment Insurance or of incurring debt to survive. Consequently, workers are forced to take any job they can get which often is another job under substandard conditions.

Income instability of substandard jobs and job loss create financial stress for workers already struggling close to or below the poverty line. In addition, the whole family, not just the worker, experiences the emotional stress of job loss and economic crisis.

The government also absorbs costs when employers fail to meet employment standards. Governments lose tax revenue on unpaid wages and have to pay out employment insurance and welfare benefits to those workers who are eligible. Further, there are health care costs associated with poor employment standards because overworked and underpaid employees are more likely to develop health problems. When assessing the costs of funding an adequate employment standards regime, the social and medical costs of deteriorating and inadequate employment standards must also be taken into account.

### **4. Recommendations:**

Short-term recommendations are focused on moving towards effective enforcement of existing employment standards. Long-term recommendations focus on addressing the gaps in employment standards legislation.

By 2007 undertake the following measures towards effective enforcement and improved compliance:

1) Increase detection of *ESA* violations

- *ESA* violations can be detected by ensuring that when a worker reports an employer that the Ministry extends a full investigation of that workplace<sup>25</sup>.
- Increase surprise inspections to 10% of Ontario workplaces.<sup>26</sup>

2) Increase the penalties associated with violations

- Enforce penalties to *ESA* violations - fine (contravention notice) **all** employers found in violation of the Act.<sup>27</sup>
- Prosecute **all** repeat offenders.

3) Ensure workers can claim their rights while still in the workplace

- Protect employees from wrongful dismissal. Workers should not be fired without cause.

4) Shift costs of enforcement to employers in violation

- Use money from fines and prosecutions to fund enforcement measures.

5) Make effective employment standards enforcement a priority by increasing budget and staffing at the Ministry of Labour to achieve the above goals.

6) Raise the minimum wage to \$10.00 and index to inflation.

By 2010, update and expand the floor of employment rights to extend the reach of standards to those currently excluded such as temp workers and independent contractors.

## **Conclusion**

In this paper we have argued that fair wages and working conditions, which are made possible through a system of employment standards and enforcement of those standards, are critical to the income security of working people, especially those in low-wage and precarious work. Further, we have discussed the gendered and racialized dynamics of low-wage and precarious work and

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<sup>25</sup> This practice adopts the investigation framework of the Ministry's Health and Safety Branch, which responds to individual claims with full investigations of employers' practices. It also supports the Provincial Auditors recommendation to the Ministry to extend investigations of claims to cover other employees of the same employer to improve effectiveness and efficiency. See Provincial Auditor Report, p. 242.

<sup>26</sup> This would bring the Employment Standards Branch in line with the Health and Safety Branch, which in 2002/03 conducted proactive inspections in over 35,000 workplaces or 10% of Ontario employers. The Health and Safety Branch has roughly twice the budget and staff as Employment Standards does. However, a combination of increased budgeting and enforcement cost recovery from employers in violation will lessen the budgetary requirements for proposed recommendations.

<sup>27</sup> Penalties must also be assigned in settlements arising during the claims process. 88% of claims are settled for the legal entitlement or less. Penalties are needed to act as deterrence for further violations. Without penalties, employers are confident that the worse that could happen when a former employee files a claim is being forced to pay what it should have paid in the first place.

insisted that employment standards are needed to protect workers against systemic forms of gender and race based discrimination. We have also outlined the ways in which the regime responsible for ensuring employment standards in Ontario – and by extension Toronto – are failing workers. We have made specific recommendations to rebuild employment standards.

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