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Submission to the Employment and Social Development  
Canada Consultation

# Proposal for a Modern Fair Wage Policy for Canada

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## 1. Introduction

We welcome the opportunity to participate in the consultation on a Modern Fair Wages Policy. It is good that the federal government is committed to developing a fair wages policy<sup>1</sup> that will “leverage procurement contracts” to “prevent suppliers from competing for contracts on the basis of substandard wages”.<sup>2</sup>

The Workers’ Action Centre (WAC) and Parkdale Community Legal Services (PCLS) work with non-unionized, low-waged and precarious workers in Ontario. We work with people hired through sub-contractors and temporary agencies in banking, airports, communications and transport. These are the workers who will benefit most from a robust, expansive and enforced fair wages act and policy.

The federal government spends close to \$25 billion dollars each year in contracts for goods, services and construction. In recent decades publically-funded services that used to be done “in-house” have been privatized, contracted out, delegated to broader public services organizations, and other forms of public-private partnerships. The government has established comprehensive procurement and “supply chain management” to ensure that publically funded goods and services are at the highest quality, in compliance with government policy for the least cost.

As the Special Advisors to Ontario’s Changing Workplaces Review noted in their final report, contracting and outsourcing reduces costs and places employers in a position where they are not responsible for the indirect employment they create as they shift liability and cost to others. This creates competition among contractors, causing a downward pressure on workers’ compensation while shifting responsibility for working conditions onto third parties. This contributes to increasingly precarious jobs.<sup>3</sup>

Contractors that compete on the basis of low wages are less likely to invest in training and health and safety. They are more likely to cut corners on quality thereby increasing long-run costs. Such conditions are ripe for companies to misclassify workers as independent contractors to avoid liability as an employer under contract with the government.

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<sup>1</sup> Minister of Employment, Workforce Development and Labour Mandate Letter (February 1, 2017) Online: <https://pm.gc.ca/eng/minister-employment-workforce-development-and-labour-mandate-letter>

<sup>2</sup> Government of Canada, Consultation on a Modern Fair Wages Policy. Online: <https://srv212.services.gc.ca/ihst/Questionnaire.aspx?sid=e3eb61b1-60f7-4a47-814f-571ce0da931d&lc=eng&iffsappid=LPB-DPT&iffssid=f2922d50-678f-4d9d-9720-074174fd612c>

<sup>3</sup> Michael Mitchell and John Murray, The Changing Workplaces Review An Agenda for Workplace Rights. Ministry of Labour, May 2017. Online: [https://files.ontario.ca/changing\\_workplace\\_review\\_english\\_summary.pdf](https://files.ontario.ca/changing_workplace_review_english_summary.pdf)

Fair wage policies recognize the important role that government can play as a model employer. They prevent governments from using their significant market share and purchasing power to undercut local labour conditions. Fair wage policies enable governments to use their tendering policy to achieve broader policy objectives for economic fairness for workers, health and safety and to positively impact labour market conditions.<sup>4</sup>

Fair wage policies generally require minimum wage schedules and benefits that must be paid to workers on government contracts. Such policies require a floor for employee compensation in sectors of government contracting to ensure a fair and sustaining wage. By setting a level playing field for employers bidding for government work, especially when such contracts are awarded on a low-bid basis, fair wage policies can help prevent a downward spiral in wages, benefits and working conditions.

## 2. Scope of Fair Wage Policy

Fair wage policies have been with us for a long time. Ontario's first wage policy was enacted in 1936 with the adoption of the *Government Contracts Hours and Wages Act*. Since that time, regulations have set out the minimum wages that are to be paid to workers on government contracts for services in construction and building security and cleaning services.

The federal government also had a fair wages policy under the *Fair Wages and Hours of Labour Act* which covered contractors and subcontractors in the construction, remodeling, repair or demolition sectors. This legislation was repealed in 2014.

Prior to repeal, the *Fair Wages and Hours of Labour Act* required all federal contracts for construction, remodelling, repair or demolition be subject to fair wages (prevailing wage), fair hours of work (regular work hours and overtime) and non-discrimination (human rights protection). The *Act* bound the government of Canada, all of its departments, crown corporations, and projects funded by the government. The *Act* required compliance by the contractor, subcontractor or any other person doing or contracting to do the work; liability for compliance along the subcontracting chain was with the primary contractor. Regulations under the *Act* gave authority to the government to require reporting of compliance and withholding of payment if violations of the *Act* are found.

We must move beyond the narrow scope of the *Fair Wages and Hours of Labour Act*. The government is contracting out work in many more sectors than construction. The scope of a modern fair wage act must be expansive to address changing workplaces and ways in which government contracts work.

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<sup>4</sup> Josh Mandryk, The Case for a Stronger Fair Wage Policy in Ontario, Canadian Centre for Policy Alternatives, April 2014. Online: [https://www.policyalternatives.ca/sites/default/files/uploads/publications/2014/05/Fair\\_Wage\\_FINAL.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/2014/05/Fair_Wage_FINAL.pdf)

## Cover all government contracted goods and services

A modern fair wage act should include all contracts entered into by the government with a company for provision of any goods, services and funded projects.

Having an expansive scope for a fair wage act is not without precedence. The City of Toronto, the largest municipality in Canada, has long had a Fair Wage Policy that applies to all of the city's contracted-out goods and services. The City of Toronto Fair Wage Policy is applied to all city of Toronto departments, agencies, boards and commissions.

The federal government has a dedicated procurement process for the contracting for goods and services by the government and its agencies.<sup>5</sup> The government has developed mechanisms to ensure that contracted goods and services meet effective public spending for contracted out work.<sup>6</sup> What is missing is the requirement that all contractors meet and comply with a comprehensive fair wage act and policy.

We recommend that a new fair wage act apply to all government procurement including departments, crown agencies, and funded projects. The new fair wage act should apply to **all** goods and services (including for example, defence procurement, construction, transport, delivery, communications etc.).

## Cover contracts in the broader public service

The scope of the fair wage act should be expanded to include all broader public service contracts for goods and services. Public sector institutions in communities across the country have an important role to play in strengthening local economies by ensuring fair wages and raising the floor in competition for contracted goods and services.

The repealed federal wage policy included government departments, crown corporations and funded projects. This scope of coverage should be maintained and expanded to ensure that contracts negotiated through public private partnerships (P3s) and alternative financing and procurement are required to comply with the new fair wage act.

## Include all contractors and their subcontractors

The way in which labour markets function have changed significantly since the federal government's *Fair Wages and Hours of Labour Act* was brought in to place. The practice of subcontracting work has increased substantially over recent years. Staffing models using indirectly

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<sup>5</sup> For example it includes a code of conduct for procurement and green procurement among other things. See Public Services and Procurement Canada. Online: <https://www.tpsgc-pwgsc.gc.ca/comm/index-eng.html>

<sup>6</sup> Public Works and Government Services Canada, Buyandsell.gc.ca

hired temporary agency workers have become more dominant in communications, transport and delivery, banking and other federally regulated sectors.

The repealed fair wage act required compliance by the contractor, subcontractor or any other person doing or contracting to do the work (e.g., independent contractors). The new fair wage act and policy should also provide a legal requirement for compliance along the sub-contracting chain. Similar to the repealed *Act*, liability must ultimately lie with the contracting firm at the top of the chain. This is necessary to ensure enforcement and compliance mechanisms such as holdbacks on payment can be levied by the government in cases of violation of the new fair wage act.

The recommended scope for a fair wage act is not without precedence and practice. The City of Toronto Fair Wage Policy has long recognized the need to require compliance along the contracting chain and requires that the policy be complied with by all contractors and subcontractors.<sup>7</sup>

### What should be covered?

The federal government's previous fair wage policy only applied to wages, hours of work and non-discrimination. Such a narrow scope creates a disincentive to employers who are bidding on government contracts to provide benefits. It also penalizes those employers who do provide benefits. The federal policy must be modernized to ensure that fair wage schedules include total compensation (wages and benefits), working conditions (at least minimum labour standards), and non-discrimination.

Jurisdictions such as Toronto demonstrate that a broader scope of coverage is viable. Toronto's policy links fair wages to the entire compensation package, including benefits and statutory benefits, rather than simply to straight wages. Toronto's wage schedules include hourly rate, vacation and holiday pay. The City's Fair Wage Office requires contractors to provide information about benefits provided such as company pension plans, extended health care benefits, dental and prescription plans (does not include legislated payroll deductions such as CPP, WSIB or EI). For contractors that do not offer "fringe benefits" to their workers, Toronto's Fair Wage Policy requires that an hourly amount will be added to the hourly wage schedule in lieu of benefits.

We recommend that the Toronto Fair Wage Policy scope of compensation package be adopted at the federal level.

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<sup>7</sup> In the procurement process, the company bidding on a contract must submit the name of all subcontractors and information about the subcontractors' use further subcontractors, wage rates, benefits and hours of work. See City of Toronto, Fair Wage Policy, Schedule A, Municipal Code, Chapter 67. Online: <https://web.toronto.ca/business-economy/doing-business-with-the-city/understand-the-procurement-process/fair-wage-office-policy/fair-wage-policy/>

## Establishment of wage schedules

This consultation on a modern fair wages policy must clearly address the Canadian Charter of Rights and Freedoms guarantee to the freedom of association and collective bargaining.

One of the goals of a federal fair wage act should be to level the playing field for companies bidding for government contracts. Given that many government jurisdictions award bids on a low-bid basis, there is a built in disincentive for unionization in companies seeking government contracts.

Historically the City of Toronto Fair Wage Policy has linked fair wage schedules to the entire union wage package, including benefits rather than straight wages. It has done so to meet objectives of its Fair Wage Policy which is to establish “fair wage rates and schedules [that] are intended to minimize potential conflicts between organized and unorganized labour in the tendering and awarding of City contracts.”<sup>8</sup>

A federal fair wage act and policy should minimize potential conflicts or unfair advantage between contractors who are unionized and those who are not. To do this, wage schedules must account for unionized rates in establishing prevailing wages for wage schedules. Fair wage schedules for classifications should be determined by appropriate collective agreements for similar work or similar work for that occupation or sector. In occupations or sectors with lower union densities where comparable classifications cannot be identified, then prevailing wages may be set. Such wage schedules must be set above the living wage.

To ensure that wage schedules are regularly updated, the government should set out in legislation the authority for a Fair Wage Office (or other similar entity that shall be authorized under legislation) to establish wages schedules for common classifications. Wage schedules may be set for 3 years and shall set out annual increases by the rate of inflation in the 3 year period. Authority should be delegated to update wage schedules every 3 years. Where a fair wage schedule is not established to address new areas of contracting out, the Fair Wage Office should have the delegated authority to examine the collective agreements and prevailing wages rates in the occupation or sector and determine a wage schedule for the goods or services to be contracted.

Employer groups, unions and employee groups should be consulted in the establishment of wage schedules and their updates.

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<sup>8</sup> City of Toronto Fair Wage Policy, A6. Establishment of rates, Schedule A of the City of Toronto Municipal Code, Chapter 67.

There should be no geographical distinction in schedules. With an increasingly mobile workforce and rising house prices, people may live in one community or area and work in another. Wage schedules should apply across the across the country.<sup>9</sup>

All wage schedules should be posted on the government website and integrated into procurement practices.

### Job quality

While wage levels are central to job quality, other dimensions are critical in determining the quality of a job. The federal government should ensure that public policy reflects the goals of decent wages and working conditions.<sup>10</sup> That is, the fair wage act should protect those made vulnerable by changing workplaces under government contracts.

The fair wage act should be expanded to include business practices that create precariousness for workers. One of the key practices creating lower wages, job and income insecurity and increased risk of workplace injury is the use of temporary help agencies to staff workplaces in government contracts. The fair wage act should explicitly limit the use of temporary help agencies under government contracts for goods and services.

Temporary work, a large part of which occurs through temporary help agencies (THAs) has grown over the past 20 years. With the growth of temporary agency employment, the Canada Labour Code (CLC) has had difficulty addressing the triangular employment relationship. The Code is vague on whether the assignment worker is an employee of the client company and hence entitled to protections under the federal labour code or an employee of the temporary help agency and protected under provincial employment standards. This is made more confusing in Ontario where client companies and temporary help agencies are jointly liable for wages and reprisals. An assignment employee trying to recover unpaid wages from the client company under such joint liability runs into jurisdictional barriers when the company is federally regulated and not under joint liability. In the case of triangular (or multi-employer) relationships, the CLC takes the approach of assessing who the “true employer” is and assigning liability. This leaves workers seeking unpaid wages in an untenable position. Beyond determining who the “true employer” is, the CLC is silent on the precarious conditions of temporary agency work.

Temporary agency workers are more likely to receive lower pay, increased risk of injury on the job-site, job instability, unpredictability of hours and income security, barriers to permanent employment and deterioration of health. As the Changing Workplaces Review Advisors state in their final report, the “triangular nature of the relationship between the employee, the agency and the client, and the temporary nature of the employment, results in some temporary help agency employees being among the most vulnerable and precariously employed of all workers.

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<sup>9</sup> This raises the importance of setting a national standard for a fair minimum wage that is at least at or above the highest provincial minimum wage.

<sup>10</sup> See for example, Harry Arthurs, (2006) Fairness at Work: Federal Labour Standards for the 21st Century.

To address this particular vulnerable group of workers, the CLC must be updated to regulate temporary agency employment.

While the proposed equal pay for equal work provision in Bill C-86 will, if passed, reduce some of the cost incentive for perma-temps, there are other monetary and non-monetary drivers that have enabled “temporary assignments” to become long term that need to be addressed. Other monetary incentives for long-term assignments are client company savings in health, dental and retirement benefits paid to directly-hired employees but not to agency workers. In most jurisdictions, client companies are not required to pay the workers’ compensation costs for agency workers or other statutory employer contributions (e.g., EI, CPP). Non-monetary advantages include the opportunity to use assignment workers for night shifts or to do the worst jobs in the company. The use of temporary assignment workers can also serve to discipline permanent employees who fear replacement by temporary workers.

A modern fair wage act should work to limit the use of temporary agencies to exceptional circumstances rather than support the growth of this business practice that creates such precarious work and vulnerability of workers.

Without a clear prohibition on staffing models reliant on temporary help agencies, employers may use temporary staffing to evade fair wage policies and erode conditions of work contracted out by government. For example, Canada Fibers Ltd is under contract with the City of Toronto to provide all of the City’s curb-side bluebox recycling. This seven year, \$264 million dollar contract provides the company with substantial stability. Yet Canada Fibers provided its employees with substantial instability and minimum wages. Canada Fibers used five temporary help agencies to staff its recycling plant. One of these workers, Angel Reyes, was fired after speaking to media about conditions facing perma-temps at this company. He worked for five years at Canada Fibre through a temp agency, making minimum wage. Toronto’s Fair Wage Office investigated Canada Fibers and found that more than 1,600 workers employed through temp agencies had been paid less than the wage schedule required. The company was ordered to pay approximately \$1.33 million in restitution to the workers, including \$200,000 in fines paid to the Fair Wage office.<sup>11</sup>

The federal wage act and policy should be updated to require that contractors and their sub-contractors should not utilize temporary help agency employees for more than 20 percent of their staffing complement at any time. Further, workers supplied by temporary help agencies that work at a contractor or subcontractors establishment for more than 90 days shall become directly hired by the contractor/subcontractor.

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<sup>11</sup> Sara Mojtehdzadeh, Recycling plant ordered to pay \$1.33 million in fines, back wages. Toronto Star, Tuesday September 26, 2017. Online: <https://www.thestar.com/news/gta/2017/09/25/recycling-plant-ordered-to-pay-133m-in-fines-back-wages.html>



The fair wage act should explicitly apply to all workers on publically contracted work. That would include dependent and independent contractors, labour leasing and, payment for services rendered rather than hours worked.

We have witnessed a significant growth in the practice of employers' misclassifying employees as independent contractors. Businesses do this to avoid the direct financial costs of compliance with the employment standards and employer contributions to Employment Insurance, Canadian Pension Plan as well as workers compensation premiums. For example, the Toronto Fair Wage Office reports that from the period of 2004-16, investigations found that misclassification of employees by contractors and subcontractors contractors was common.<sup>12</sup>

Bill C-86, will, when brought into effect, prohibit employers from misclassifying workers as "not employees" under the Canada Labour Code. However, Bill C-86 did not amend the definition of employee and so it will still be difficult for workers to prove they are employees. Bill C-86 has not clarified that those workers who are in an economically dependent relationship and not independent contractors should be employees under the CLC. As such, workers who should be covered by the federal fair wage act may find themselves outside of the scope of this protection. To curb misclassification of employees and employer practices of shifting work to independent contractors and fee for service contracts, the fair wage act should explicitly cover all workers, including independent contractors.

### **3. Administration and Enforcement**

A fair wage policy will do little to level the playing field, stop the downward spiral in wages and working conditions in government contracted work, and ensure decent wages and working conditions, if it is not enforced.

There was little, if any, enforcement of the *Fair Wages and Hours of Labour Act*. Investigations may only have been conducted in response to a complaint. There was no clear process of how to file a complaint. There was no process for proactive audits to determine if contractors were complying with the wage policy. Nor was there any requirement to report to the parliament or publically post enforcement of the *Fair Wage and Hours of Labour Act* and firms in violation of the Act. A new fair wages act must address these gaps.

In the absence of any information about contractors' violations under the previous regime, reporting from the City of Toronto Fair Wage Office provides an indication of the types of violations taking place.

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<sup>12</sup> Fair Wage Office - 2016 Annual Report, City of Toronto, September 7, 2017. Online: <http://www.toronto.ca/legdocs/mmis/2017/gm/bgrd/backgroundfile-106800.pdf>

In addition to reviewing all contractors and subcontractors bids for city work to determine eligibility and compliance under the policy, the Fair Wage Office also conducts on-site investigations, interviews workers and company officials, reviews certified company payroll records, issues citations for violations, obtains restitution in back wages for workers, and issues administrative penalties to companies.

Between 2004 and 2016, the Office recovered approximately \$4 million in back wages to almost 4,000 workers. These workers encountered contractor or subcontractor practices such as: underpayment of wages and misclassification of workers, underreporting of hours and the number of workers, cash payments, non-payment of wages, unpaid overtime, banked overtime hours, non-payment of benefits, off-the-clock violations and late payments. The Office also found that contractors failed to submit true and accurate certified payroll records. Among those contractors in violation, some were found to have intentionally failed to pay workers the proper fair wage rate and misclassified workers as “shareholders contractor”.<sup>13</sup>

These violations are just the tip of the iceberg. The Toronto Fair Wage Office is completely understaffed and resourced. This 3-person office is responsible for all contracting in all city of Toronto departments, agencies, boards and commissions.

Most workers, particularly those in non-unionized companies, do not file complaints. Research in Canada and the US document the substantial barriers facing individual workers to filing complaints of employment violations.<sup>14</sup> As such, enforcement cannot rely on individual complaints.

The government rightly asks questions in this consultation about how to ensure compliance, enable workers to enforce their rights under a fair wage act and policy and consequences on contractors for violating the policy. We provide a brief summary of the components necessary for effective enforcement of the wage policy.

## Administration

There must be a dedicated “office” or program under the Ministry of Employment and Social Development Canada (ESDC) to administer the fair wage act. This office should have delegated authority, under legislation, to:

- Establish fair wage schedules;

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<sup>13</sup> Fair Wage Office - 2016 Annual Report, City of Toronto, September 7, 2017. Online: <http://www.toronto.ca/legdocs/mmis/2017/gm/bgrd/backgroundfile-106800.pdf>

<sup>14</sup> LF Vosko et al, New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada, Paper commissioned by the Law Commission of Ontario. November 2011.

- Review all procurement calls to determine applicable fair wage schedules which become a requirement for procurement;
- Verify contractor(s) or sub-contractor(s) eligibility (e.g., previous CLC and Fair Wage violations) and capacity for a fair wage act to be met under bid;
- contractors enter into contracts to comply with fair wage act and wage schedules; and,
- Resolve disputes on applicability of wage schedules.

## Enforcement

- The enforcement program should be staffed without reducing capacity for Canadian Labour Code enforcement.
- Contractors and their subcontractors should be required to:
  - Provide all employees with information about the fair wage act, applicable wage schedules and wage rates and benefits (or pay in lieu of benefits) provided to each employee;
  - Maintain a list of the names, classification, applicable wage schedule of all workers, the hourly wage rate, hours worked per day and amount paid;
  - Provide certified copy of all pay sheets, lists, records and books relating to the work when requested to do so by the fair wage office/program.
- The ESDC should administer an accessible individual claims process for restitution when employers do not comply with the fair wage act. Individuals making complaints under this process should be protected from unjust dismissal.
- Proactive inspections should be conducted to determine compliance.
- Proactive inspections in response to individual claims, anonymous and third party complaints of non-compliance.
- Targeted proactive inspections to those contractors/subcontractors operating in sectors at high risk for violation.
- Collections of wages owing under the fair wage act would be relatively easy to secure through hold-backs on the contract. However, where violations come to light after a subcontractor or contractor has completed the work on the project, it is much more difficult to recover wages. As such, public sector projects should require a bond or security,

particularly for those contractors/subcontractors that are under public contract for short periods of time.

- There must be clear and transparent consequences for violating the fair wage act that will deter contractors and their subcontractors from doing so. Typically violations of fair wage policies result in a company being disqualified from obtaining public contracts for a period of time. For effective deterrence, the following measures should be put in place:
  - Intentional or egregious non-compliance with the fair wage act should result in permanent disqualification from bidding on federal government contracts;
  - If a contractor or contractor has been found in violation of the fair wage act on two occasions within a five year period they should be disqualified from bidding on government contracts;
  - There must be full restitution of all workers owed wages under the fair wage act before a contractor/subcontractor can be part of a bid for contracts;
  - Penalties must be significant enough to deter non-compliance within the sector and in keeping with the scale of the project or contract; and,
  - The names of contractors and subcontractors found in violation of the fair wage act should be published on procurement websites and ESDC website.

#### **4. Conclusion**

If we are to move from a destructive system of competition for government contracts based on reducing labour costs by cutting workers' pay and benefits to a positive competition based on raising the skills and productivity of the workforce and ensuring fair wages, then the scope of the fair wage act must be broadened. The federal fair wage act must cover all government contracts and apply through sub-contacting chains.