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## **Protecting Workers from the Underground Economy in the Construction Industry Consultation**

### **Workers Action Centre (WAC) and Parkdale Community Legal Services (PCLS) Submissions**



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## Introduction

These submissions are made on behalf of the Workers' Action Centre (WAC) and Parkdale Community Legal Services (PCLS). Each year, our organizations support thousands of workers in low wage and precarious employment. Through case work, public legal education and law reform initiatives, it is our mission to support workers in their struggle for dignity and decent work in Ontario.

We appreciate the opportunity to express our support for the Ministry of Labour's proposed extended liability requirements for contractors in the construction industry. It is our submission that in order to be successful, the proposed liability framework needs to be expansive and adequately resourced:

- Liability should extend to general contractors and any intermediary contractor(s), not just the contractor who directly engaged the services of the directly liable employer;
- To combat misclassification, expanded liability should apply to all monetary *Employment Standards Act* (ESA) entitlements;
- The proposed liability framework should apply across the entire construction sector, including construction projects of all types and sizes, as well as unionized worksites;
- Record keeping requirements for subcontractors and contractors must be incorporated into the framework to ensure that the Ministry of Labour can effectively conduct investigations and hold liable parties accountable. Employees should also be entitled to information about their employers, similar to temporary help agency employees;
- Any legislative reform needs to be accompanied by adequate funding and resources for additional enforcement measures in the sector.

Misclassification and other forms of wage theft hurt workers, their families and our economy. Multilayered subcontracting arrangements are one of the major systemic barriers to minimum standards enforcement in the construction industry. The province has long recognized that general contractors need to be held liable for health and safety standards on their jobsites. That same principle should be applied to all minimum employment standards, including the *Employment Standards Act, 2000* (herein ESA). It is our submission that holding contractors and intermediary subcontractors jointly and severally liable for the unpaid wages owed by their subcontractors is crucial to creating a culture of ESA compliance in the construction sector and will specifically address the crisis of employee misclassification in the industry.

If implemented, we hope the Ministry of Labour will consider the proposed framework as a pilot project that can be expanded to other sectors - such as building services and food services - where subcontracting and franchise arrangements also undermine minimum standards enforcement.

## Scope of Issue

### 1. To what extent are employees experiencing non-payment of wages in the construction industry?

Non-payment of wages is a pervasive and intractable problem in the construction industry. A 2016 review of Employment Standards Complaints prepared for the Ministry of Labour found the broader industry category which includes construction to be one of the industries with the most ESA complaints.<sup>1</sup> That same study notes that workplace investigations in the industry found monetary violations in over 31 percent of the investigations conducted between 2011 and 2015.<sup>2</sup>

As outlined in our [recent report](#), wage theft is rampant in Ontario: 60 percent of the 513 workers surveyed reported that they had experienced at least one pay-related violation, with over 20 percent of workers experiencing wage theft of over \$5,000.<sup>3</sup> Ontario's Construction Secretariat recognizes that the purposeful misclassification of workers as independent contractors is a driving force of the underground economy in construction.<sup>4</sup> Of workers surveyed for our report, who reported being treated as an independent contractor, 76 percent were misclassified.<sup>5</sup>

As one of the few organizations in Ontario that supports non-unionized low-wage workers, the Workers Action Centre (WAC) is in the unique position of being able to speak to the experiences of non-unionized construction workers. The Centre provides direct support to approximately 2,000 workers each year. In addition, the Centre provides public legal education sessions across the Greater Toronto Area to an additional 2,000 workers yearly. The primary reason that workers seek assistance from WAC is because they've experienced some form of ESA monetary violation. **Our organizers report that since 2020, roughly half of the workers we assist with wage theft matters work in the construction industry.**

The construction workers we meet work in both residential and commercial settings. Sometimes they are unionized but more often they are non-unionized, including working for non-unionized subcontractors on unionized job sites. We most commonly support workers who have been employed doing demolition and construction cleaning, drywalling, painting and taping, framing, and roofing. However, we have also helped workers who experienced wage theft while

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<sup>1</sup> Vosko, L.F., Noack, A., & Tucker, E. (2016). *Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution Under the Employment Standards Act, 2000*. Prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review.

<https://cirhr.library.utoronto.ca/sites/default/public/research-projects/Vosko%20Noack%20Tucker-%206A%20-ESA%20Enforcement.pdf>: Table 7.1a at p. 125: 27.8% of complaints filed between 2008-2015 were from the industrial sector with the NAICS code for Manufacturing and primary industries, which includes construction.

<sup>2</sup> *Ibid* at 109, Table 3.3a.

<sup>3</sup> Workers Action Centre, "The Crisis of Wage Theft in Ontario" (October 2025) at 1:

<https://workersactioncentre.org/wp-content/uploads/2025/10/WAC-Wage-Theft-Report-web.pdf>

<sup>4</sup> Ontario Construction Secretariat, "The Underground Economy in Ontario's Construction Industry: Estimates of the Revenue Losses to Governments" (May 2019) at p 5:

[https://iciconstruction.com/wp-content/uploads/2024/02/1904\\_Underground-Economy-Report.pdf](https://iciconstruction.com/wp-content/uploads/2024/02/1904_Underground-Economy-Report.pdf)

<sup>5</sup> *Supra* note 3 "Crisis of Wage Theft" at 26.

performing carpentry, electrical, plumbing, and other specialized forms of construction trade labour.

The workers we speak to in the construction sector are commonly misclassified as independent contractors. They are paid an hourly wage or day rate without receiving overtime premium pay, vacation, or public holiday pay, or other statutory entitlements such as WSIB, Employment Insurance or CPP. It is very common for a worker or group of workers to come to the Centre for assistance because their employer owes them for a few weeks or sometimes even a few months worth of wages. In the course of assisting them, workers learn about their ESA entitlements and realize that they are owed hundreds, if not thousands of dollars more than they realized they were owed.

Many of the workers we meet working in the construction industry are recent immigrants to Canada, and many of them have precarious immigration status: they are temporary foreign workers, refugee claimants, international students or undocumented workers. As new immigrants, they are unfamiliar with their rights at work, have unstable housing, and limited support networks. It is not uncommon for an employer to retaliate against workers who seek to recover their unpaid wages by threatening to call immigration authorities. Many workers are also vulnerable as they are in housing provided by the employer which they are also being charged significant amounts of money for. Because of their legitimate fear of retaliation, and because workers know they are unlikely to recover their unpaid wages through the ESA complaint process, many of the construction workers we meet decline to make a complaint to the Ministry of Labour. This lack of confidence only serves to further erode the ESA enforcement system and normalize wage theft in the construction industry.<sup>6</sup>

Here are just a few anonymized examples of workers we have recently assisted. We have selected these examples because they are typical of breadth of construction wage theft cases we hear about at the Workers Action Centre:

- Juan<sup>7</sup> performed drywall installation on new residential builds. He worked for the same employer for several months and lived in housing provided by the employer because he did not speak English and had only recently moved to Canada with his wife and young children. He was working on both unionized and non-unionized jobsites, though he himself was not unionized. His employer initially promised to pay him \$28 per hour (approximately \$1200/week), but ultimately paid him only \$350 per week. Juan worked significant overtime. The Ministry of Labour found that he was owed \$86,270.89 in unpaid wages and other ESA entitlements. His employer, who continues to work in drywall, has not paid him and no longer operates under the same corporate identity.

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<sup>6</sup> As Vosko and the Closing the Enforcement Gap Research Group point out, employees' decisions on whether or not to file a complaint relate to the culture of the industry they work in and workers' perception of the effectiveness of the complaint system as a means through which to seek redress: Vosko et al. *Closing the Enforcement Gap*. University of Toronto Press: February 2020 at p 67.

<sup>7</sup> Pseudonyms are used to maintain workers' anonymity.

- Isaac and his co-workers installed specialized metal framing for structures, mostly on commercial properties. They were misclassified as independent contractors. When their cheques started to bounce or arrive late the workers held a meeting to strategize collectively about what they could do to recover their unpaid wages. The boss found out and fired all the workers who attended that meeting. The Ministry of Labour found that the four workers were collectively owed \$35,415.13 in unpaid wages, overtime premium pay, vacation and public holiday pay. The employer still operates their business and has only partially paid the workers what they are owed.
- Mei worked for a residential construction company for about 6 months. Mei was paid \$160 per day. She often worked 12 or more hours per day, which means she was paid approximately \$13 per hour without receiving overtime premium pay, public holiday or vacation pay. In her last two months of work, the employer stopped paying her. She kept working because the boss kept promising that her wages were coming. After Mei finally quit, she continued to advocate for her unpaid wages until her boss came to her house and threatened to hurt her. Because she was afraid for her family's safety, Mei did not come to the Workers Action Centre until almost two years after she had stopped working for this employer. Even with the statutory limitation period cutting into her the awarded amount, the employer was ordered to pay Mei \$12,604.05 in unpaid wages and other ESA entitlements.

#### Impact on Workers and their families:

As outlined in our wage theft report, over 20 percent of survey respondents said wage theft caused them to go into debt, and over 26 percent said they had to borrow money after experiencing wage theft. Over 20 percent said they could not afford to pay rent or bills, while 17 percent had to use a food bank, and over 8 percent said they could not afford to buy essentials for their children.<sup>8</sup>

Most people, especially low-wage workers, are living paycheck to paycheck. Even one or two missing pay periods can send a worker into a financial crisis. It can be particularly challenging for newcomers to Canada, who face difficulties accessing credit and non-predatory loans to weather the effects of wage theft. Misclassified employees and workers with precarious immigration status generally cannot access Employment Insurance or the Wage Earners Protection Program, which inhibits their ability to leave a bad job or achieve stability after experiencing wage theft.

Because of the significant toll it can take on workers' health and well being, wage theft has been called an occupational health hazard. A recent Canadian study found that working unpaid overtime was associated with high levels of stress and burnout and presented a significant challenge to the mental health of workers.<sup>9</sup> Workers responding to our survey who experienced

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<sup>8</sup> *Supra* note 3 “Crisis of Wage Theft” at 29-34.

<sup>9</sup> Shahidi FV, Tracey M, Gignac MA, Oudyk J, Smith PM. “Unpaid overtime and mental health in the Canadian working population”. *American Journal of Industrial Medicine*- 67(8), June 1, 2024;67(8); 741-752.: [doi:10.1002/ajim.23622](https://doi.org/10.1002/ajim.23622).

wage theft reported significant mental and physical health effects. Over 41 percent reported feeling depressed, while 34 percent reported having trouble sleeping. Over 38 percent said their mental health was negatively impacted, and 28 percent said their physical health was negatively impacted. Understandably, it results in feelings of anger, frustration, profound disrespect and powerlessness – contributing in some cases to severe mental health issues. Moreover, workers who do not get paid cannot spend money to support their local economies, or contribute to taxes that fund public services.

**2. As an employee in the construction industry, have you experienced non-payment of wages for the work you completed? If so, what steps did you take to seek payment and were they effective?**

A major barrier to construction workers recovering their unpaid wages is that they are employed by small subcontractors or labour leasing companies who are difficult to track down. Often the worker does not have enough information to know who their legal employer is. They may think that their supervisor or team lead is their employer, or are surprised to learn that the company name on their uniform, or on documents they've signed to enter the worksite, is not their legal employer.

We often assist workers in trying to negotiate with their employers to seek payment before filing Employment Standards Complaints. It can be difficult to even initiate contact with an employer, since many workers only have a first name and maybe a phone or license plate number for their employer. After one or two phone calls, the employer will simply stop responding to us, or they may point the finger at another party in the subcontracting chain, claiming that they cannot pay because they themselves were not paid.

In this context, determining workers' full legal entitlements is often difficult, as many employers do not provide pay statements. Where employers fail to uphold their statutorily required record keeping obligations, the onus falls on workers to track down their employers' contact information, keep records of their hours of work, and any other relevant information. This can be extremely difficult for precariously employed workers who often have to do their best using screenshots of whatsapp or text message conversations and whatever notes or recordings they may have made on their phones.

Between 2008 and 2015, over 27 percent of ESA complaints filed were from the NAICS industrial sector which includes construction.<sup>10</sup> Over 18 percent of the claims filed were for employers who were out of business, while fully 44 percent of claims were filed against bankrupt or insolvent businesses.<sup>11</sup> That means that almost half of the claims filed in this industry category have virtually no chance of recovering their unpaid wages. Unsurprisingly, the same

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<sup>10</sup> *Supra* note 1 “Scan of Employment Standards”, Table 7.1a at p. 125.

<sup>11</sup> *Ibid.* From our experience assisting workers, we know that employees who are misclassified as independent contractors face additional barriers and are usually unable to recover wages from the federal-run Wage Earners Protection Program (WEPP).

study found that 53 percent of complaints in this same industrial sector were never satisfied or were only partially satisfied.<sup>12</sup>

Construction employers down the supply chain rarely have brick and mortar addresses for their businesses. They often do not feel obligated to cooperate with the Ministry of Labour or the Ministry of Finance because they can disappear overnight, declaring bankruptcy or setting up different corporate identities to operate under. Though Employment Standards Officers (ESOs) will issue orders against an employer even if they do not participate in the claim investigation process, the worker rarely recovers any of their unpaid wages when that happens. Even if employers are cooperative, small subcontractors tend to be undercapitalized; they do not have assets or property that can be liquidated to pay their former employees' unpaid wages.

### **3. If a subcontractor fails to pay their employee, who in addition to the employer, should be liable under the ESA for unpaid wages?**

The most effective enforcement approach would be to make the contractor and all intermediary parties jointly and severally liable for unpaid wages that arise down the subcontracting chain.

**There is precedent for this in Ontario and in other Canadian jurisdictions.**<sup>13</sup> Quebec and Saskatchewan's Employment Standards laws both hold employers responsible for the unpaid wages of their subcontractors and intermediaries.<sup>14</sup> Significantly, these joint and several liability provisions are not sector specific but rather apply to all employers and all types wages and pecuniary entitlements outlined in the employment standards legislation. British Columbia holds farm producers liable for the unpaid wages of their farm labour contractors, just as Ontario holds client employers jointly and severally liable for the unpaid wages of temporary help agency employees.<sup>15</sup> **These expanded liability provisions have been in place for several years without negatively impacting the economy in those jurisdictions.**

The complex subcontracting arrangements which give rise to it are not new to the construction sector. The Ministry of Labour is familiar with the enforcement challenges in the industry which is why Ontario's *Occupational Health and Safety Act (OHSA)* has long recognized that the health and safety of workers at a project are a shared responsibility. Though each employer at a project has significant responsibilities for the health and safety of their workers, the constructor is the party with the greatest degree of control over the entire project and is ultimately responsible for the health and safety of all workers. The constructor must ensure that all the employers and workers on the project comply with the OHSA and its regulations.<sup>16</sup> The same approach needs to be applied to the ESA, which like OHSA forms part of the minimum rights and protections that should be afforded to any worker.

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<sup>12</sup> *Ibid* at p 123, Table 6.2.

<sup>13</sup> See Appendix A: Canadian Joint and Several Liability Provisions.

<sup>14</sup> *Act respecting labour standards*, CQLR c N-1.1 at s 95; *The Saskatchewan Employment Act*, SS 2013, c S-15.1, s. 2-69.

<sup>15</sup> *Employment Standards Act*, 2000 SO 2000, c 41 at s 74.18; *Employment Standards Act*, RSBC 1996, c 113 at s 30.

<sup>16</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1 at s 23.

## What types of wages should be covered by this proposal?

The proposal should cover all wages which, as defined in the ESA, includes:

- (a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,
- (b) any payment required to be made by an employer to an employee under this Act, and
- (c) any allowances for room or board under an employment contract or prescribed allowances,

but does not include:

- (d) tips or other gratuities,
- (e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,
- (f) expenses and travelling allowances, or
- (g) subject to [subsections 60 \(3\)](#) or [62 \(2\)](#), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan; (“salaire”)<sup>17</sup>

One of the major incentives for employee misclassification is avoiding the cost of these full statutory entitlements. General contractor liability for all ESA wage entitlements (or greater contractual benefits) will serve as a strong deterrent to misclassification and other common forms of wage theft. Wage exemptions which apply to construction employees, such as the exemption for termination and severance pay, would continue to apply to the general contractor.

There is no policy rationale for limiting liability to only certain types of wages. Making the general contractor and intermediary contractors liable for the same wages as the direct employer will also limit the administrative burden on Employment Standards Officers, who will not need to recalculate what wages are owed to the worker when issuing orders to pay against parties up the subcontracting chain.

### Scope of Level of Accountability

- 5. Is it reasonable for contractors to be liable for wages if any subcontractor at any tier fails to pay wages to their employee (i.e. parties at the top of the contracting chain would be liable for wages owed under the ESA down the contracting chain)?**

It is reasonable and in fact necessary for the general contractor and/or the party at the top of the subcontracting chain to be jointly and several liability with all subcontractors and intermediaries working for them. This is best practice and will be the most effective way of curbing wage theft in

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<sup>17</sup> *Employment Standards Act, 2000*, SO 2000, c 41 at s1(1).

the construction industry.<sup>18</sup> There is a substantial body of research from Canada and the U.S., which suggests that workers are more likely to recover their unpaid wages where liability for unpaid wages is spread across the supply chain.<sup>19</sup> The International Labour Organization has called on governments to assign obligations and liabilities in multi-party situations so that workers at the bottom are not at risk of non-payment of wages and other basic standards.<sup>20</sup>

If liability is limited to one subcontractor above the direct employer, the Ministry of Labour will not effectively achieve its policy aims of improving Employment Standards enforcement in the construction sector.

## **6. Should the subcontractor be required to provide information pertaining to the payment of wages for all of the subcontractor's employees to the contractor?**

The Ministry should draw from the valuable experience it has gained while increasing accountability in the Temporary Help Agency sector. In that regulatory framework, record-keeping obligations were placed on both the client employer and temporary help agencies, while employees were given additional rights to certain information about who was hiring them. Similar measures in the construction industry will help to deter wage theft by increasing accountability and will also make it easier for workers and the Ministry of Labour to recover unpaid wages. For contractors, these measures will make it more likely that their subcontractors - the direct employer of the complainant - can be made to pay, without the employee needing to demand payment from other jointly and severally liable parties.

### **a. Contractors should obtain and retain information about their subcontractors' sub-subcontractors and employees:**

Contractors should be required to obtain and retain for three years the following information from all subcontractors for all employees employed on their jobsites;

- Names of all employees employed to fulfil the contract;
- Dates and times that all employees worked;

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<sup>18</sup> EU Policy Department for Citizens' Rights and Constitutional Affairs "Liability in Subcontracting Chains: National Rules and the Need for a European Framework" PE 596.798 (July 2017) at 22-23:  
[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL\\_STU\(2017\)596798\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

<sup>19</sup> Vosko et al. *Closing the Enforcement Gap*, University of Toronto Press, February 2020; Weil, *Fissured Workplaces*, 2010; Hardy, Tess and John Howe (2015) "Chain Reaction: A Strategic Approach to Addressing Employment Non-Compliance in Complex Supply Chains." *Journal of Industrial Relations*, 57(4), 563-84. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3175692](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175692); Rawling, Michael J. (2006) "A Generic Model of Regulating Supply Chain Outsourcing." In *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*. Edited by: Christopher Arup. Sydney, AU: Federation Press, 520-541.

<sup>20</sup> *Non-standard employment around the world: Understanding challenges, shaping prospects*, International Labour Office – Geneva: ILO. 2016, 276:  
[https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/%40publ/documents/publication/wcms\\_534326.pdf](https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/%40publ/documents/publication/wcms_534326.pdf)

- The number of hours the employee worked in each day and each week;
- The rate(s) of pay for all employees;
- The total earnings per pay period; and
- The date and method through which wages were paid for each pay period.

This is all information which an employer is legally required to keep record of as per ESA sections 12 and 15. The only additional requirement would be that the subcontractor must now also provide this information to the contractor.

Subcontractors should also be required to provide contractors with information about any sub-subcontractors employed, including:

- Business name and/or number of all sub-subcontractors;
- Name of corporate directors of all sub-subcontractors;
- Dates and times that all sub-subcontractors worked; and
- Upon request, the employment information outlined above, which the sub-subcontractor would be required to maintain and provide to its contractor.

This facilitates transparency for enforcement purposes, making it more likely that ESOs can obtain information needed to pursue claim investigations. This will actually make it more likely that the subcontractor will be held accountable, lessening the likelihood that the contractor will be left with the financial burden of their subcontractor's unpaid wages.

b. Employees entitled to basic information about their employers and general contractors:

Construction employees should be legally entitled to basic information about who they are working for, such as:

- The legal name of the subcontractor they are employed by, as well as any operating or business name of the subcontractor if different from the legal name;
- Contact information for their employer, including address, telephone number and one or more contact names;
- The legal name and contact information of the contractor and intermediaries that have hired their employer.

This very basic disclosure requirement will not place undue burden on employers, but will furnish employees with the minimal amount of information they need to proceed with an ESA or other type of workplace complaint, if their rights have been violated.

c. The Ministry should be entitled to information about all parties in the subcontracting chain

Finally, to facilitate their investigations and ensure that all potentially liable parties are identified, the Ministry of Labour and its representatives should, upon request to the general contractor and/or owner of a property, be entitled to basic information about all subcontractors and sub-subcontractors operating on a project, including:

- The legal name of the subcontractor, as well as any operating or business name of the subcontractor if different from the legal name;
- Contact information including address, telephone number and one or more contact names;
- The legal name and contact information of the contractor or intermediary that has hired that subcontractor or sub-subcontractor.

Arguably, Employment Standards Officers already have authority to request such information (s.91), but making it explicit will help ensure that claim investigations can be completed in an efficient and timely manner.

### **Applicability to Union vs Non-Union**

#### **8. What impact would this liability framework have on unionized and non-unionized actors employees in the construction industry?**

Though the proposed liability framework is more likely to apply to non-unionized workers, unionized workers will still benefit from an enhanced culture of minimum standards compliance within the industry.

Making contractors jointly and severally liable for workers' unpaid wages will reduce the unfair competitive advantage that non-union contractors have, because they will be responsible for the true cost of labour required to complete a project.

#### **9. How would, or should, this framework apply to unionized employees? How would it interact with collective agreements and the exclusive right of unions to represent members of a bargaining unit and how should it be enforced in that context?**

The proposed framework should apply to unionized employees. Like other ESA provisions, it would be an implied term of any collective agreement, which parties cannot contract out of. Like any other dispute that arises in the unionized context, unionized employees would go through the union grievance process to enforce the proposed framework.

### **Impacts to Industry**

#### **10. How would this liability framework impact the construction industry?**

Increasing accountability for Employment Standards violations through the proposed liability framework would have a positive impact on the construction industry. Specifically, it will help to ensure that law-abiding contractors are not as easily outbid by their less scrupulous competitors.

In the highly competitive construction tendering process, contractors can only remain competitive if they keep costs down. Economic pressure is passed down to subcontractors, who must also underbid their competitors. When employment standards are underenforced,

employers who *do not* commit wage theft are at a competitive disadvantage since their costs are higher. This incentivizes wage theft and drives wages down across the labour market, which hurts our economy overall.<sup>21</sup> General contractors tacitly endorse these practices by hiring subcontractors whose bids cannot logically be completed without violating workers' rights.<sup>22</sup>

The proposed liability framework will help level the playing field. Decreasing wage theft in the construction industry may also help temper labour shortages in the sector as workers are more likely to remain in the industry.

**11. What potential cost impacts and/or other unintended consequences should be considered?**

The proposed liability framework will shift the cost burden of wage theft from workers back on to employers.

**12. Should liability be limited to construction projects of a specific size (e.g. based on the number of units being built)? Why or why not?**

The proposed liability framework should apply to all construction projects. This is necessary because, as explained elsewhere in these submissions, wage theft occurs in both residential and commercial settings.

The proposed liability framework should not be limited to construction projects of a specific size. Wage theft and employee misclassification is endemic to small scale residential construction and renovation projects.<sup>23</sup> Any exemptions applied to smaller projects would severely undermine the purpose of the proposed liability framework.

ESA O. Reg 285/01 contains an appropriately broad and commonly used definition for construction employee and construction industry that should be applied to the proposed framework:

“construction employee” means,

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<sup>21</sup> *Supra* note 4 “The Underground Economy” at p 1. In the United States, wage theft in the construction industry has received more attention and in-depth study, though business practices are comparable in Ontario. The Attorney General for the District of Columbia found that the cost evasion of misclassifying workers was about 16.7 percent. Coupled with even a modest amount of wage theft (as is common in the industry) the cost evasion of doing business illegally can reach 27 percent, a massive amount in a competitive, bid-oriented industry: Dale Belman and Aaron Sojourner, *Illegal Worker Misclassification: Payroll Fraud in the District’s Construction Industry*, Office of Karl A. Racine, Attorney General of the District of Columbia, September 2019 at p. 1 (<https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf>). .

<sup>22</sup> *Supra* note 4 “The Underground Economy” at p 27.

<sup>23</sup> Buckley, Michelle. “Mapping Wage Theft in the Informal Economy: Employment Standards Violations in Residential Construction and Renovations” *Relations industrielles / Industrial Relations: Volume 75, Number 3, 2020*, pp. 423-625.

an employee employed at the site in any of the activities described in the definition of “construction industry”, or  
an employee who is engaged in off-site work, in whole or in part, but is commonly associated in work or collective bargaining with an employee described in clause (a);

“construction industry” means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

These definitions are substantially the same in scope as the construction industry definition in s. 1(1) of the Labour Relations Act, 1995, SO 1995, c 1, Sch A ("LRA 1995") and the employee definition in the Construction Industry part of that act. All parties affected by the proposed framework would be familiar with these definitions. Using these existing definitions would therefore facilitate a more seamless implementation of any new provisions.

### **Interaction with the *Construction Act***

#### **13. What potential interactions with the Construction Act should be considered?**

The Construction Act aims to ensure contractors, subcontractors, and suppliers get paid in a timely manner. Employees have no recourse to recover unpaid wages through that Act, which is why the proposed amendments to the ESA are necessary.

Though the two Acts may have some overlapping areas of regulation, there is nothing in the proposed ESA reforms which would impede or unduly complicate the functioning of the Construction Act.

Contracting parties in the construction industry often agree on indemnification terms, and will continue to do so. The Construction Act will continue to provide a dispute resolution mechanism for employers and may be a venue for contractors to seek repayment for unpaid wages they have had to pay out to employees of their subcontractors.

### **General Questions**

**14. Are there any other legislative or non-legislative approaches that the government should consider to better protect employees in the construction industry from the risk of not receiving wages?**

**15. Do you have any other comments related to contractor liability in the construction industry? Do you have any comments related to the proposed definitions in this consultation paper? We welcome any additional feedback.**

We appreciate that the Ministry of Labour is proactively seeking to protect workers in the construction industry who often work some of the most precarious and dangerous jobs in Ontario. Expanding ESA liability up the subcontracting chain is a crucial step towards improving ESA enforcement. However, it should be accompanied with complimentary administrative and policy actions:

- Information about potentially liable contractors and intermediaries should be obtained from employee claimants when they file their initial ESA claims (much the same way that information about the client employee is obtained from temp agency claimants);
- Potentially liable parties should be put on notice and demand for records should be issued to them early in the investigation process. This will also facilitate voluntary compliance as jointly liable parties will pressure the direct employer to fulfill their legal obligations;
- ESOs should be instructed to issue Orders to Pay against jointly and severally liable contractors no more than 60 days after the original order to pay is issued against the direct employer (similarly to how Director's Orders to Pay are issued for orders to pay that remain outstanding);
- The Ministry of Labour should initiate an investigation blitz for construction projects with a commitment to conduct unannounced investigations in at least 10 percent of all construction worksites (both residential and commercial);
- Hire an adequate number of ESOs to conduct workplace investigations and claims investigations with multiple liable employers. Claims in the construction industry often include elements of employee misclassification and reprisal. They are already time consuming and complex. ESOs need to be properly resources in order to do the extra work required to hold jointly and severally liable contractors and intermediaries responsible;
- Allocate resources to assess the reasons why the Ministry of Finance collection rate is so low (22 percent)<sup>24</sup> and what measures need to be taken to ensure that workers actually recover wages that are deemed owing to them;

Finally, the Ministry of Labour should address the legislative grey area that gives rise to employee misclassification. Enact the "ABC test" to simplify and clarify the test for employee status. The ABC test provides that a worker is *presumed to be an employee* unless the hiring entity can establish each of the following three factors:

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<sup>24</sup> Between 2013 and 2023, the MoL referred \$102.4 million to the Ministry of Finance (MoF) for collections. The MoF was successful in collecting just \$22.03 million of that amount for workers with confirmed violations of their rights. That means that less than 22 percent of money sent to collections were actually recovered: Ministry of Finance, Data obtained through Freedom of Information Requests: FOI A-22-111 and A-24-024.

- a. The worker is free from control and direction of the hiring entity in connection, both under the contract and in fact, for the performance of the work; and
- b. The worker performs work that is outside the usual course of the hiring entity's business; and,
- c. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

## Appendix A: Canadian Joint and Several Liability Provisions

Jurisdiction	Relevant Definitions	Extended Liability Provisions
<p><b>British Columbia</b></p> <p><i>Employment Standards Act</i>, RSBC 1996, c 113</p>	<p><b>"farm labour contractor"</b> means an employer whose employees work, for or under the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product;</p> <p>[...]</p> <p><b>"producer"</b> means a person who engages the services of a farm labour contractor;</p>	<p><b>Producer and farm labour contractor are liable for unpaid wages</b></p> <p>30 (1) A producer and a farm labour contractor are jointly and separately liable for wages earned by an employee of the farm labour contractor for work done on behalf of the producer.</p> <p>(2) Subsection (1) does not apply in respect of a producer if</p> <ul style="list-style-type: none"> <li>(a) the farm labour contractor is licensed under this Act at the time the producer engages the services of the farm labour contractor, <b>and</b></li> <li>(b) the producer satisfies the director that the producer paid the farm labour contractor for wages earned by each employee of the farm labour contractor for work done on behalf of the producer.</li> </ul>

<p><b>Saskatchewan</b></p> <p><i>The Saskatchewan Employment Act, SS 2013, c S-15.1.</i></p>	<p>1(1)</p> <p>(g) “employer” means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, either:</p> <p style="padding-left: 40px;">(i) has control or direction of one or more employees; or</p> <p style="padding-left: 40px;">(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;</p>	<p><b>Responsibility of certain employers and contractors re wages of subcontractor’s employees</b></p> <p>2-69(1) If an employer or a contractor contracts with any other person for the performance of all or part of the employer’s or contractor’s work, the employer or contractor shall provide by the contract that the employees of that other person must be paid the wages to which they are entitled according to law.</p> <p>(2) If the other person mentioned in subsection (1) fails to pay the wages as mentioned in that subsection, the employer or contractor, as the case may be, is liable to the employees to the extent of the work performed under the contract as if the employees were employed by the employer or contractor.</p>
<p><b>Quebec</b></p> <p><i>Act respecting labour standards, CQLR c N-1.1</i></p>	<p>7° “employer” means any person who has work done by an employee;</p> <p>[...]</p> <p>9° “wages” means a remuneration in currency and benefits having a pecuniary value due for the work or services performed by an employee;</p> <p>10° “employee” means a person who works for an employer and who is entitled to a wage; this word also includes a worker who is a party to a contract, under which the employee</p>	<p><b>95.</b> An employer who enters into a contract with a subcontractor, directly or through an intermediary, is responsible jointly and severally with that subcontractor and that intermediary for the pecuniary obligations fixed by this Act or the regulations.</p>
<p><b>Ontario</b></p> <p><i>Employment Standards Act 2000</i></p>	<p>1(1)</p> <p>“assignment employee” means an employee employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency; (“employé ponctuel”)</p>	<p><b>Agency and client jointly and severally liable</b></p> <p>74.18 (1) Subject to subsection (2), if an assignment employee was assigned to perform work for a client of a temporary help agency during a pay period, and the agency fails to pay the employee some or all of the wages described in</p>

	<p>[...]</p> <p>“client”, in relation to a temporary help agency, means a person or entity that enters into an arrangement with the agency under which the agency agrees to assign or attempt to assign one or more of its assignment employees to perform work for the person or entity on a temporary basis; (“client”)</p> <p>[...]</p> <p>“temporary help agency” means an employer that employs persons for the purpose of assigning them to perform work on a temporary basis for clients of the employer; (“agence de placement temporaire”)</p>	<p>subsection (3) that are owing to the employee for that pay period, the agency and the client are jointly and severally liable for the wages.</p> <p><b>Same, more than one client</b></p> <p>(2) If an assignment employee was assigned to perform work for more than one client of a temporary help agency during a pay period, and the agency fails to pay the employee some or all of the wages described in subsection (3) that are owing to the employee for that pay period, each client is jointly and severally liable with the agency for a share of the total wages owed to the employee that is in proportion to the number of hours the employee worked for that client during the pay period relative to the total number of hours the employee worked for all clients during the pay period. <a href="#">2014, c. 10</a>, Sched. 2, s. 5.</p> <p><b>Wages for which client may be liable</b></p> <p>(3) A client of a temporary help agency may be jointly and severally liable under this section for the following wages:</p> <ol style="list-style-type: none"> <li>1. Regular wages that were earned during the relevant pay period.</li> <li>2. Overtime pay that was earned during the relevant pay period.</li> <li>3. Public holiday pay that was earned during the relevant pay period.</li> <li>4. Premium pay that was earned during the relevant pay period. <a href="#">2014, c. 10</a>, Sched. 2, s. 5.</li> </ol> <p><b>Agency primarily responsible</b></p> <p>(4) Despite subsections (1) and (2), the temporary help agency is primarily responsible for an assignment employee’s wages, but proceedings against the agency under this Act do not have to be exhausted before proceedings may be commenced to collect wages from the client of the agency. <a href="#">2014, c. 10</a>, Sched. 2, s. 5.</p>
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