

‘Modernizing’ Employment Standards? Administrative Efficiency, Market Regulation, and the Production of the Illegitimate Claimant in Ontario, Canada

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ABSTRACT – In October 2010, the provincial government of Ontario, Canada enacted the *Open for Business Act* (OBA) to create “simpler, better and faster interaction” between government and business. A central component of the OBA is its provisions aiming to streamline the province’s *Employment Standards Act* (ESA). The OBA introduces, among other measures, new steps in the complaints process prior to a claim being assigned to an Employment Standards Officer (ESO). It creates an online severance pay decision tool accessible to employers and employees, sets more stringent timeframes on the complaints process, and gives ESOs new powers to facilitate negotiated settlements of claims. In this paper, we develop a critical analysis of the reforms to employment standards (ES) enforcement introduced under the OBA. Our central argument is that the OBA is the provincial government’s attempt to manage a crisis of ES enforcement that has grown out of a decades-long legacy of ineffective ES regulation. Rather than improving enforcement, the OBA further shifts responsibility for enforcement away from the government and employers onto individual workers and entrenches an individualized, complaints-based enforcement model. Specifically, the Act aims to make enforcement more efficient by screening those who are assumed to be lacking definitive and undisputable proof of violations out of the complaints process. The OBA therefore produces and polices a new category of ‘illegitimate claimants’ and attributes administrative backlogs to these people (rather than the extent of violations or poorly resourced enforcement agencies). In doing so, the state is repositioned as the champion of business interests rather than the protector of worker rights. Instead of improving the protection of workers through the ESA, the OBA embeds new racialized and gendered modes of exclusion in the enforcement process.

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Our government is committed to helping businesses focus on what they do best - creating jobs for Ontario families. We can protect the public interest without creating unnecessary barriers to business. The *Open for Business Act* will save businesses both time and money.

Sandra Pupatello, Ontario Minister of Economic Development and Trade¹

In an effort to ‘modernize’ government, the provincial government of Ontario, Canada enacted the *Open for Business Act* (OBA)² in October 2010. This omnibus legislation makes more than 100 amendments to a host of provincial regulations in order to create “simpler, better and faster interaction”³ between government and business. A central component of the OBA is its provisions aiming to streamline the province’s Employment Standards Act (ESA). The OBA introduces, among other measures, new steps (to be undertaken by employers and employees) in the complaints process prior to a claim being assigned to an Employment Standards Officer (ESO). It creates an online severance pay decision tool accessible to employers and employees, sets more stringent timeframes on the complaints process, and gives ESOs new powers to facilitate negotiated settlements of claims.⁴ These reforms to the enforcement process were implemented to aid in the resolution of a backlog of some 14,000 claims. According to legislators, they will benefit both workers and employers by “establish[ing] services that achieve fairness for workers, while helping business to be increasingly competitive in the global economy”.⁵ While the frame of “modernization” was not new, as it had been a catchword of employment standards reforms that date back to the late 1990s, the attention to the complaints procedures in the OBA reforms stand in contrast to earlier initiatives to ‘modernize’ the legislated standards themselves (Fudge 2001; Mitchell 2003; Thomas 2009).

In this paper we develop a critical analysis of the reforms to employment standards (ES) enforcement introduced under the OBA. Our central argument is that the OBA is the provincial government’s attempt to manage a crisis of ES enforcement that has grown out of a decades-long legacy of ineffective ES regulation (Thomas 2009). Rather than improving enforcement, the OBA further shifts responsibility for enforcement away from the government and employers onto individual workers and entrenches an individualized, complaints-based enforcement model. Specifically, the Act aims to make enforcement more efficient by screening those who are assumed to be lacking definitive and undisputable proof of violations out of the complaints process. The OBA therefore produces and polices a new category of ‘illegitimate claimants’ and attributes administrative backlogs to these people (rather than the extent of violations or poorly resourced enforcement agencies). In doing so, the state is repositioned as the champion of business interests rather than the protector of worker rights.

Our analysis proceeds in two sections. First, we review several phases of ES policy development between 2002 and 2010 in order to situate recent reforms to

employment standards enforcement in a context of deepening “regulatory degradation” (Tombs and Whyte 2010). This section demonstrates how the provincial government, in response to pressure to respond to conditions of precarious employment, adopted a regulatory focus revolving around, on the one hand, ‘bad apple’ employers defined as a small subset of employers who misunderstand the ESA and its workings and thus require better education for improved compliance, and, on the other hand, ‘vulnerable workers’ defined as “new Canadians who may not be fluent in English or French” and who may not know their employment standards rights.⁶ We demonstrate how this narrow approach did not address fundamental flaws in the system of enforcement, such as its highly individualized, complaints-based orientation, and led to the formation of a serious administrative backlog of individual complaints. The second section of the paper analyzes the new employment standards enforcement protocols introduced under the OBA that are intended to rectify the dysfunctional enforcement system. We demonstrate how the OBA’s amendments to the ESA have the effect of constituting the category of ‘illegitimate complainants’. Instead of improving the protection of workers through the ESA, the OBA embeds new racialized and gendered modes of exclusion in the enforcement process.

I: Regulating ‘Bad Apple Employers’ and ‘Vulnerable Workers’: New Employment Standards Regulation on Precarious Employment in Ontario (2002-2010)

ES are regulated in Ontario through the *Ontario Employment Standards Act* (ESA), which came into effect in 1969. The ESA combined previously existing minimum standards legislation – covering minimum wages, maximum hours of work, and paid vacations - into a comprehensive framework. The original ESA provided a minimum wage for both men and women and established maximum hours of work at eight per day and 48 per week. An overtime rate of time-and-a-half was set for weekly hours over 48 and the ESA established the right to refuse overtime. The *Act* also provided for time-and-a-half on seven statutory holidays and two weeks of paid vacation per year. The legislation was designed to both set minimum standards for Ontario’s labour market and provide legislative protection for those considered most vulnerable to exploitation (Thomas 2009). While the ESA does not contain a purpose clause, the need for the Act is justified because “fairness in the workplace is the right of all Ontarians”.⁷ A review of proven employer violations, posted monthly on the Ministry of Labour’s web site, reveals that infractions frequently involve the failure to pay overtime pay, provide compensation for work on public holidays or pay wages in a timely fashion after employment ends.

As a mechanism of social protection, the ESA emerged out of an approach to labour market regulation that was premised on the gendered norms of the standard employment relationship (Vosko 2000; Fudge and Vosko 2001). Specifically, the ESA was built upon minimum wages and hours of work legislation that was designed to protect those in forms of employment considered to be secondary or supplemental to a primary male income earner. Even though the explicitly gendered application of minimum standards had been abandoned by the time of the enactment of the ESA, the legislation was still much more likely to be required to set the minimum standards for women workers due to entrenched patterns of occupational segregation created through gendered divisions of labour. Moreover, as growing numbers of racialized workers

entered Ontario's labour market, particularly through immigration patterns beginning in the 1960s and 1970s, the poor standards of the ESA also contributed to patterns of racialized labour market inequality (Sharma 2006).

The Ontario Ministry of Labour, through the Employment Standards Program, is mandated to administer, enforce and promote compliance with the ESA and its regulations. The model of employment standards enforcement in Ontario relies on voluntary employer compliance (Thomas 2009) and, where that fails, on investigating individual worker's complaints of employer violations. Effectiveness of this model has traditionally been measured by reducing how long it takes to resolve complaints.⁸ As the Ontario Task Force on Hours of Work and Overtime determined in the late 1980s, the probability of detection, the probability of assessment and the expected penalty combine to create a low monetary cost for ESA violations.⁹ Dealing with violations one case at a time is expensive, risks overloading staff and does little to ensure employers comply with the Act for currently employed workers. With little increase over the years in funding and staffing resources to meet the growth in the number of workers to be protected under the ESA, the focus of attention during the 1980's and 1990's was to avoid large backlogs of unresolved claims. Inspections of workplaces were almost non-existent during that same period.

Along with a change in provincial government in 2003-04 came increasing evidence of the limits of the existing model of enforcement. Workers and supporters came forward with a number of cases during this period that highlighted gaps in enforcement and protection against unpaid wages. For example, in 2003, close to 40 workers owed nearly \$40,000 from selling subscriptions to a cable company exposed a failure of the Ministry of Labour to protect their wages.¹⁰ In early 2004, a group of 99 garment workers owed more than \$136,000 in wages went without payment because their employer was again successful in using bankruptcy to avoid paying workers' wages.¹¹

In a 2004 review of the Ministry of Labour's Employment Practices Branch, the Ontario Provincial Auditor concluded that the Ministry focused almost entirely on investigating complaints from individuals against their former employers and not protecting the rights of currently employed workers. This law reflects the ongoing project, as stated by provincial politicians, to "solve the problems of a few of the bad apples out there... a few bad apples that were simply breaking the existing rules".¹² While violations were confirmed in 70 percent of individual complaints, the Ministry was not fulfilling its mandate of protecting workers by extending investigations to protect the employment rights of currently employed workers who cannot file claims. Further while 40 to 90 percent of proactive inspections confirmed violations, such inspections were rarely done. Prosecutions were also not being undertaken with 51,000 substantiated claims in the previous 5 years only 18 prosecutions were commenced.¹³

The then Minister of Labour announced in April 2004 that the government was "putting enforcement back on the agenda."¹⁴ Changes introduced by the Minister alongside legislative change to hours of work provisions, focused on improving education and awareness of workers' rights and employers' obligations, shortening the time to process claims and dedicating resources to conduct 2000 proactive inspections of workplaces, improving collections and increasing the number of prosecutions.¹⁵

While leaving the core enforcement model of investigating individual complaints intact, the Ministry of Labour did add features to the model during this period. First, the

Ministry of Labour took steps to redirect resources, albeit limited, to protecting workers still in the workplace. It dedicated 17 Employment Standards Officers to conduct 2000 inspections¹⁶ in sectors it found to be at higher risk of ESA violations (garment, restaurants, building cleaners, telemarketing and retail). Further, the Ministry began to use its power to prosecute employers as a means of deterrence. It started 226 prosecutions of employers found in violation of the ESA in 2004 compared to 97 prosecutions over the previous 14 years.¹⁷ While steps forward, the new effort to target high risk sectors or ‘bad apples’, still assumes that the self regulatory model of voluntary compliance for the majority of employers is adequate.

By 2004, the Ministry began referring to protecting the ‘vulnerable worker’. During 2004-05, the Ministry of Labour translated basic ESA information into 21 languages and outreached to over 100 community groups with the new materials.¹⁸ In part, these steps reflect an assumption that workers are vulnerable to exploitation of their rights because of barriers to understanding those rights. The Ministry of Labour subsequently characterized changes during this period as a “shift [in] its focus from the investigation of employment standards complaints to proactively enforcing compliance, increasing outreach to vulnerable workers and, in the process, providing a level playing field for business across the province.”¹⁹ But in reality, the government retained its core enforcement model, adding steps to target bad employers and vulnerable workers.²⁰ Such an approach does not address the forces that push people into precarious forms of work with little protection, nor the institutional arrangements and power relations that make it difficult for workers to enforce their rights. Further, targeting sectors of known offenders narrows the lens of labour market regulation thus obscuring restructuring and employer practices that evade or bypass the ESA. Such an approach also fails to address the problem of dealing with compliance one case at a time and the risks of overloading the system.

Strains in ES enforcement grew between 2004 and 2009. Efforts to add proactive measures were being challenged by individual claims processing. In 2005-06, the Ministry of Labour shifted practices from receiving claims by mail or fax to electronic on-line filing of claims. At the same time, it closed down intake offices where workers used to get their claim forms and information about how to fill in the claim form. The Ministry of Labour posted a self-help kit in English to assist workers in filing claims on line. As the following table demonstrates, the number of new claims increased, as did the number of claims carried from one year to the next while the total annual number of completed claims investigation remained the same. The consequence was a growing backlog in claims. As more claims were investigated, less unpaid wages were recovered through claims investigations.

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In March 2007, \$3.6 million was added to the Ministry of Labour’s annual \$23 million budget. However, instead of committing the funds to proactive enforcement, funds were shifted to dealing with the growing backlog in claims.²¹ In late 2008, the Ontario government announced its Poverty Reduction Strategy that included “an additional \$10 million annually to hire new employment standards officers to improve

Employment Standards Act compliance and reduce the backlog of claims.”²² The government outlined the goals for this investment as follows:

These officers will be able to conduct investigations and workplace inspections, more effectively enforcing standards so that vulnerable workers will receive the money they are owed. This money can take the form of basic pay, overtime pay, vacation pay and termination pay. Improving compliance also helps vulnerable workers receive job protected leave to help them manage family emergencies and other responsibilities.

It is estimated that this initiative will gradually increase the number of inspections and will bring recoveries up to \$17.4 million annually from non-compliant employers, while reducing the backlog of investigations.²³

The cumulative 59 percent budget increase over 3 years was put toward the individual claims backlog. The government did say, however, that its “long term plan is to realign resources to improve enforcement and promote compliance.”²⁴

The provincial government attributes the increase in claims and claims backlog of 14,000 to its outreach activities and online claim filing system. Yet other factors also contribute to the rise in claims. During that same period of time, the number of workers in precarious jobs, and hence principally reliant on the ESA, increased as did the number of businesses, while the number of Ontario workers protected by unions decreased. Just as during the recession of the early 1990s, the numbers of claims per year rose to 25,000, similar to the current recession in Ontario. Labour market changes including new forms of work such as contract, temporary and subcontracting have created challenges to employment standards regulation as have shifts from manufacturing to more service-based economies in creating much more complex cases for workers to make in pursuing claims.

Targeting ‘Vulnerable Workers’ and ‘Bad Apple’ Employers through Legislative Initiatives

At the same time as the Ministry of Labour was grappling with a growing backlog in claims amidst calls to improve enforcement, pressure grew from workers’ groups to update the Employment Standards Act (ESA) to address changes in the labour market. To improve regulatory effectiveness in Ontario’s changing labour markets, there were calls to expand the scope of the ESA to include all who are deprived of employment rights, benefits and protection because their work arrangements do not conform to the standard employment relationship model underlying labour standards, policies and practices (Workers Action Centre, 2007: 64). Consistent with its narrowly targeted modifications to enforcement, the government responded to such pressure by extending limited forms of coverage to two categories of ‘vulnerable workers’ – temporary help workers and live-in caregivers.

In the first instance, in 2009 the province of Ontario, adopted the Employment Standards Amendment Act (Temporary Help Agencies) 2009. Then Minister of Labour, Fonseca indicated that one of the goals of the proposed legislation was to:

...help those vulnerable workers, those employees who are out there looking to find a job—sometimes their first job. Many of these employees are new Canadians just arrived here in Canada who don't know their rights, don't know that these types of practices are completely unacceptable and don't know where or who to call—where to get help. Bill 139, if passed, will change that for the better; it will bring accountability and transparency to the sector (April 23, 2009).²⁵

At the same time, the Ministry of Labour stated that another complementary goal was to get rid of those agencies operating at the bottom of the labour market:

I also want to say that I have met with many, many great temporary help agencies that are doing all the right things. They are addressing employees' rights. They are ensuring that the workplaces that they are sent to are healthy, safe, clean, are holding to high standards. For all of them, this legislation would help in terms of leveling the playing field and weeding out those unscrupulous organizations out there that are deceiving employees, that are not treating Ontarian workers the way that we would like them to be treated (April 23, 2009).²⁶

The Employment Standards Amendment Act (Temporary Help Agencies) 2009 preserves a role for temporary help agencies in the labour market while attempting to protect a narrow group of 'vulnerable' temporary agency workers. It achieves the former by constructing an employment relationship between an 'assignment employee', the term used to denote temporary agency worker, and a "temporary help agency" and by naming the 'client' as "a person or entity that enters into an arrangement with the agency under which the latter 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" (Ontario, 2009b: S.74.1 (1) and S.74.3). It addresses the latter goal by introducing a series of modest protections for temporary agency workers and curtailing the unscrupulous activities of 'bad apple employers'. Its obligations and prohibitions apply exclusively to the activity of temporary agency work. Thus, it does not cover a sizeable and overlapping segment of agencies comprising the employment services industry – those devoted to permanent placement, providing 40% of its revenues, and placing workers for a fee with similar implications.²⁷

To protect temporary help workers from bad apple employers, under the terms of the new section of the ESA, temporary help agencies are to provide certain information in writing to workers as soon as they become assignment employees, including the legal name of the agency and contact information, the conditions of work including pay, hours of work and the nature of the work to be performed. (Ontario, 2009b: S.74.5 and S.74.6). The new segment of the ESA extends public holiday pay, termination pay and severance to temporary agency workers on essentially equivalent bases to other employees (Ontario, 2009b: S.74.10-11). The Act also puts into place new limitations on agencies' ability to restrict assignment employees, through employment agreements, from entering into an employment relationship with the client and from preventing clients, through commercial agreements, from providing references for assignment employees (Ontario, 2009b: S.74.8(1) 4, 6-7). There is a related prohibition on agencies charging fees to clients in

connection with entering into an employment relationship with an assignment employee (Ontario, 2009b: S. 74.8(1)8). This prohibition is circumscribed by an exception: “the agency *may charge a fee* to the client” where the client enters into an employment relationship with an assignment employee “during the six-month period beginning on the day which the employee first began to perform work for the client of the agency” (Ontario, 2009b: S.74.8(1), italics added). This qualifier encourages temporary help agencies to cycle workers from short assignment to short assignment in order to retain the mark-up on their wages.²⁸

In the second instance, passage of the Employment Protection for Foreign Nationals Act (Live-in Caregivers and others) (2010), the legislative focus is on another category of vulnerable workers – namely, temporary migrant workers working in the province of Ontario under the auspices of the Federal Live-In Caregivers Program (LCP) – and those that recruit and employ them, especially those that behave unscrupulously by not abiding by basic ES norms and standards. Specifically, on the positive side, this legislation introduces new protections for LCP workers by banning recruitment fees, prohibiting reprisals against live-in caregivers for exercising their rights under the legislation, and prohibiting an employer or recruiter (the legislation uniquely covers recruiters) in Ontario from taking possession of a live-in caregiver’s property, including documents such as passports. Significantly, the Act recognizes the barriers to enforcing rights for caregivers created by the LCP which requires workers to serve approximately two years under the program before being allowed to apply for citizenship. The Act rightly acknowledges that caregivers are unable to file claims for rights during the service period and therefore allow live-in-caregivers up to three and a half years to make a complaint to recover prohibited fees.²⁹ It also authorizes Ministry of Labour ESOs to proactively enforce the legislation and to provide regulation-making authority to add other classes of temporary foreign workers.

Central limits of the legislation, however, are the location of many of its terms outside the ESA, making its provisions less secure and enforceable, and its narrow/exclusive focus on live-in caregivers and aspiring caregivers to the exclusion of many other temporary foreign workers in need of protection (S. 3). Even though recruitment is covered under the Act, that most LCP workers are recruited abroad – and many are tied to intermediaries outside Ontario – also make enforcing its core provisions difficult due to its jurisdictional limits³⁰. Like the new section of the ESA on temporary help agencies, this legislation is also devoted to plugging a very small (albeit symbolically important due to the racialized and gendered character of live-in caregiving) hole in a leaky boat by targeting a very limited group of workers and, at the same time, a set of unscrupulous employers and intermediaries (aka ‘bad apples’) limited to the small jurisdiction of Ontario, a profound limit given the international nature of recruitment.

In summary, over the past decade, the government of Ontario responded to crises in employment standards regulation through changes to both formal legislation and its enforcement. Beginning in the early 2000s, the Ministry of Labour began to supplement its individualized, complaints-based enforcement model with more targeted, proactive measures directed at the problem of ‘vulnerable workers’ and ‘bad apple’ employers. Such targeted measures have been limited and have not prevented the development of a severe administrative backlog of individual complaints, a development reflecting the growing number of workers reliant the ESA’s minimum standards and its individualized

enforcement model. A similar logic is evident in the government's approach to formal legislative reform. Exhibiting a desire to fill a gap in the legislation, the Ministry of Labour undertook legal reforms to extend limited protection to a subset of workers in precarious employment such as temporary help agency workers and live-in caregivers.

II: Employment Standards Reform under the Open for Business Act, 2010

The Ontario Open for Business Act (OBA), introduced in May 2010, is the latest initiative to reshape ES regulation in Ontario. Its provisions embed various efficiency-based reforms in the enforcement process. The rationale for the OBA is rooted in the now hegemonic administrative paradigm of new public management (NPM) as well as the regulatory reform agenda. NPM casts traditional forms of bureaucratic administration (consistent, rule-bound administrative procedures and specialization of tasks) as a source of organizational inertia. According to this paradigm, the deficiencies of bureaucratic administration can be rectified by adopting organizational principles of private sector firms such as performance benchmarking and other efficiency-seeking initiatives (Diefenbach 2009). Extending NPM reforms to the areas of employment, health and safety and environmental regulation is a central tenet of the regulatory reform agenda. Championed by the OECD (2002), business organizations and governments, this agenda calls on governments to mitigate so-called "regulatory burden" by streamlining regulations, and by implementing, where possible, a light-touch, compliance-based approach that replaces state enforcement with self-regulation. The provincial government framed the OBA along these lines as a way to promote transparent and de-bureaucratized relationships between business and government while simultaneously protecting the public interest.

As we will discuss below, however, the regulatory streamlining introduced under the OBA are premised on new measures making workers responsible for securing their own ES rights as well as the creation new channels for excluding complainants who are deemed to pose an administrative risk to the newly streamlined enforcement process. The OBA's changes to enforcement also facilitate the privatization of racism and sexism. They are therefore poised to exacerbate the regulatory failure described in the previous section of the paper by constituting large numbers of poor, racialized workers and women, those most reliant on minimum standards, as illegitimate claimants disentitled to protection against employment standards violations.

The response from the business community in Ontario was supportive of the measures proposed in the OBA. The Canadian Federation of Business (CFIB) cites 'red tape', their code for processes that they view as excessive regulation, as a serious detriment to competitiveness in Ontario (and Canada) as it absorbs both time and finances (CFIB 2010). The organization claims that Canadian businesses spend approximately \$30.5 billion annually to comply with government regulation. Employment standards are cited as among "the most common sources of red tape" (Ibid. ii). With respect to the OBA, the CFIB applauded the government's efforts to "reduce the regulatory burden on businesses" and called for the government to go even further in its efforts to cut 'red tape'.³¹

The Ontario Chamber of Commerce (OCC) was equally supportive. In its submission to the government regarding the OBA, it cited the need for a streamlined regulatory system in environmental and workplace standards regulation to give Ontario

businesses a competitive advantage, as the government's regulatory framework (pre-OBA) was an "impediment to sustained economic growth" due to an "accumulation of bureaucracy" with "intersecting mandates".³² The OCC specifically cited the process for resolving ES claims as one of the "most significant hurdles faced by business". In describing the OBA, the OCC claimed it offered useful steps to address regulatory problems, but characterized the Act as far from a "complete solution to the culture of regulatory unaccountability" and called for the government to work closely with businesses to advance the process of enhancing Ontario's competitive environment (ibid.). This shift of the role of the state from ensuring the protection of minimum standards to the serving as the gatekeeper for capital is indicative of the wider trend towards neoliberalism, with its masked yet powerful racialized and gendered undercurrent (Giroux 2008; Goldberg 2009).

Three central changes enacted in employment standards enforcement through the OBA contribute especially to such ends – namely, individualizing worker responsibility within the complaints process, the need for the timely provision of valid documentary evidence, and the institutionalization of mediation in the ES complaints process.

i) Individualizing Responsibility in the Complaints Process

The OBA brought in a requirement that workers first try and enforce their ES rights with their employer or former employer before filing an ES complaint at the Ministry of Labour for unpaid wages.³³ This requirement significantly expands responsibility of the worker who launches a claim. Workers are required to have access to the Ministry of Labour website to learn about their rights; knowledge about how to apply abstract legal rights to their specific conditions; the ability to gather evidence to prove their case; and the opportunity and facilities to assemble, package and deliver it to former employers. Most significantly, mandatory self-enforcement requires that workers have the skill set and confidence to confront their employer about violations.

This new requirement constructs claimants as being either the legitimate claimant, the entrepreneurial worker, who has clearly taken steps or the non-entrepreneurial worker who cannot or will not take the necessary 'steps' of contacting their employers in writing. The latter are not seen as worthy of further allocation of an officer's time. The assumption behind this is that "[m]ost employers want to do the right thing and they will often remedy the situation promptly and voluntarily, if they agree there is a valid claim".³⁴ The requirement for workers to first attempt self enforcement of their rights shifts responsibility for enforcement from the state to workers. Thus workers facing violations become the ideal neoliberal subject that is "not a citizen with claims on the state but a self-enterprising citizen-subject who is obligated to become an entrepreneur of himself or herself" (Ong, 2006:16).

There are substantial structural power imbalances between employers and employees that the ESA sees to address. This imbalance in power can create significant barriers to workers seeking ES compliance from employers. A mandatory requirement for workers to contact their employer about unpaid wages contravenes the purposes of the ESA to provide employees with an administrative process for employees to seek redress for contraventions of the Act.

Most claims are filed by workers after the employment relationship has broken down (Office of the Provincial Auditor of Ontario, 2004; Workers Action Centre, 2007).

That is because there is no real protection for workers to make complaints while on the job. The requirement for self-enforcement before a claim can be filed effectively ensures that to pursue a claim for unpaid wages, workers must already have left the workplace or be prepared to be fired for confronting their employer about ESA violations. This requirement heightens the opportunity for employer pressure to deter a complaint from going forward to the Ministry of Labour. It is well documented that employers often exercise undocumented and masked forms of often racist and sexist power such as the preferential allocation of easier work and the accommodation of workers' scheduling needs (Mirchandani et al, 2011). In this sense, the OBA increases workers' risks associated with launching claims which is especially significant given the contractually limited nature of many precarious jobs and in some cases uncertain immigration status. The OBA fails to mediate any long-term effects for workers – employers are free to simply not renew contracts or rehire temporary workers, including those migrant workers on temporary visas or with tenuous immigration status, exercising racism and sexism as forms of individual employer prejudice, safely hidden from regulatory intervention, thus eroding the discursive and institutional spaces for making claims to justice on the basis of difference (Brodie 2007).

Section 96.1 of the ESA does provide exceptions to the requirement for workers to seek employer compliance.³⁵ Some workers may be exempted because of structural constraints (e.g., the workplace has closed down, employer gone bankrupt, time limitations) and those unwilling to do so for individual reasons (e.g., they are young, disabled or afraid). Those who are unwilling to approach their employers to attempt to settle their claims cannot be certain that they will not be cast as unruly, expendable, irresponsible claimants. The exemptions are not outlined in the ESA and are therefore subject to policy changes within the Ministry of Labour. Further, there is no right to appeal for claimants who are denied investigation of their complaint for not attempting self enforcement of unpaid wages. Not only will workers face increased barriers to filing a claim for unpaid wages, they will have no right to appeal being denied access to filing a complaint.

Another Canadian province, British Columbia, introduced mandatory first step self-enforcement (called self-help) requiring workers to seek employer compliance prior to filing a claim. After introduction of this requirement in 2002, claims dropped from over 12,000 per year to between 3,400 and 6,500 – an immediate drop of 46%.³⁶ In 2009, the total was still 42 percent lower than what was reported in 2002, even though the labour force grew by 15 percent over that time.³⁷

ii) *The valorization of timely documentary evidence*

The OBA enables the Ministry of Labour to require certain information be provided in writing on the claim form before a worker's complaint will be allowed to proceed. The intent of this provision is to reduce the amount of time ESOs spend during investigation obtaining information about the violation. When consulting with workers' advocates about the proposed changes in the OBA, Ministry of Labour staff stated that a key problem contributing to the backlog was that claimants did not provide properly filled out claim forms. Inadequate claim forms require greater effort on the part of ESOs to investigate and resolve claims, thus contributing to the backlog.³⁸ This is a critical issue for understanding the growing backlog in claims. Claims may not be prepared properly

because workers need assistance in interpreting the meaning of complex legal information in light of their particular case. Workers may require assistance due to literacy, computer internet or language barriers yet they are not available.³⁹ The Ministry of Labour addressed the problem of poorly completed claim forms by making it a legal requirement to properly complete the form before it will be accepted. This requirement exemplifies the shift in orientation from protecting workers to viewing ‘vulnerable workers’ as a source of administrative breakdown.

Another set of changes to the ESA enable complaints to be expedited or closed in ways that enhance administrative efficiency but contravene due process and investigation integrity. Specifically, a new Section 102.1 allows ESOs to “deal with undue delays by making a decision on the best information available”.⁴⁰ If an officer determines that there is insufficient evidence provided by an employee or an employer, then the officer may make a decision based on available information.⁴¹

The ESA is remedial legislation, which is to remedy the power imbalance between employers and employees through enforcement of minimum standards. ESOs must investigate complaints of violations of that remedial legislation. Yet Officers are also instructed to “collect evidence in a way that is acceptable to administrative hearings and the Courts.”⁴² The Officer is to weigh the evidence and, on the balance of probabilities, make a determination if there has been a violation of the Act.⁴³ The complaints process should account for power imbalances between the employers and employees and the differences in employees and employers capacity to “provide evidence”.

The OBA places a greater burden on workers to provide evidence of employer violations (rather than a reverse onus on employers to refute allegations). Workers are at a distinct disadvantage in this process (for example, language and literacy barriers; difficulties attending decision making meetings or telephone interviews during the ESOs normal work day, reliance on verbal testimony, lack of computer or fax equipment to respond to ESO requests for information, lack of legal representation). Employers are more likely to be represented by lawyers or human resource professionals who can present information in a manner consistent with rules of evidence (Workers Action Centre, 2007). The assumption of meritocracy, in this context, attributes a lack of documentary literacy not to flaws inherent to the OBA, but to individual failings, which serves to silence difference and to suppress challenges to a discourse which is fundamentally racist and gendered (Roberts and Mahtani 2010; Giroux 2008).

The OBA thus constitutes two primary categories of ES complainants: the first is comprised of those entrepreneurial workers who are able and willing to provide documentary evidence of infractions. The second is those illegitimate claimants who are unwilling to approach their employers to attempt to settle their claims, those who are unable to communicate primarily in writing, those who are unable to provide documentary evidence of the violations, those who are unable to respond to requests for documentation as required by ESOs, and those who cannot be easily reached by telephone as per the officers’ schedules. These workers are largely in precarious jobs, and experience historical social inequalities based on gender and race that mediate their ability to ensure minimum employment standards.

iii) ESOs as Settlement Brokers

Consistent with the emphasis now placed on streamlined enforcement practices, amendments to the ESA through the OBA also promote a voluntary approach to ES regulation, specifically through amendments that give Employment Standards Officers a role in bringing employers and employees to a mediated settlement. A new Section 101.1 states that “[n]either party would have to participate in such a settlement unless they agree to it”.⁴⁴ The implications of this amendment are numerous. It privileges a mediated settlement over an actual award by an ESO officer, which may expedite the claims process but could reduce the value of the settlement achieved by a worker. ESOs are accorded wide-ranging powers to broker a settlement between workers and employers. The actual practices of settlement are neither subject to public scrutiny, nor open to appeal.⁴⁵ The settlement itself, once reached, is confidential and suggests no guilt on the part of the employer. ESOs, in aiming to reach a settlement, may use strategies on the basis of stereotypical constructions of racialized workers, ESL speakers and women. Rather than advocating for the law, ESOs serve to scrutinize claimants in an attempt to establish their legitimacy. In this sense, the OBA increases the likelihood that the exercise of sexism and racism remains “robust and unaddressed in the private realm” (Goldberg, 2009: 338) of the ESOs office. Mediation and adjudication is efficiently integrated in such a way that the ESO plays both the role of the ‘impartial’ mediator between the employer and the complainant and the role of the adjudicator who will make the ultimate decision in the case. Putting all the power in one person’s hands allows for the exercise of prejudice based on stereotypes without any public scrutiny. Racist and sexist discrimination is thus privatized and reduced to matters of “individual concerns to be largely solved through private negotiations between individuals” (Giroux 2008, 80). As Goldberg argues, “the state is restructured to support the privatizing of race and the protection of racially driven exclusions in the private sphere where they are set off-limits to state intervention” (Goldberg 2009, 337).

Under pressure of ensuring the ‘success’ of modernization evidenced through the quick resolution of claims through settlements, ESO practices might include advising workers assumed to possess limited cultural capital or language skills to accept reduced payments. As Giroux (2008) notes, “defined through the ideology of racelessness, the state removes itself from either addressing or correcting the efforts of racial discrimination, reducing matters of racism to individual concerns to be largely solved through private negotiations between individuals” (159). As the Workers Action Centre stated in a submission on the OBA, settlements would generally be below minimum standards: “establishing a role for ESOs to facilitate settlements institutionalizes the contracting out of minimum standards which is contrary to the Act”.⁴⁶ Moreover, regardless of the outcome of individual settlements, this orientation represents a transformation in the role of ES officers from those who make judgments based on fact-finding to mediators in a process that assumes two equal parties, when in fact the parties are far from equal.

iv) Eliminating the Backlog

In addition to the OBA, the Ministry of Labour struck an Employment Standards Task Force to address the backlog of 14,000 complaints that have accumulated in recent years.

The Task Force has a two-year mandate to clear this backlog and will operate under the aegis of the reformed ESA. Reflecting the elevation of administrative efficiency over other principles in ES enforcement such as due process and investigative integrity, the Task Force will investigate these existing claims “based on an officer's review of written materials and through telephone discussions with parties”⁴⁷ rather than engage in a process of proactive investigation into ESA violations. In some cases, where the ESO determines it is necessary, officers will hold in-person meetings to make decisions on claims. The Task Force will work with the goal of expediency utilizing the new complaints procedures that place the onus on complainants to provide evidence of ES violations. As indicated in the Backgrounder to the Employment Standards Taskforce: “If a party does not provide documents in the time provided, or fails to attend the meeting, officers will make decisions on the available evidence.”⁴⁸ Finally, the Task Force will utilize the new emphasis on voluntary, mediated settlements as a means to resolve claims efficiently.⁴⁹ In this context, the language of ‘backlog’, which is used to justify the new enforcement processes, is significant. The central problem identified through the use of this terminology is the *number* of complaints rather than the *extent* of violations. In addition, reducing and eliminating the administrative backlog may occur at the expense of investigative integrity and due process. It may allow governments to consolidate and project an image of administrative success in the face of an erosion of substantive enforcement capacity.

v: Cumulative Effects: Market Regulation and Administrative Performance via the Gendered and Racialized Production of Illegitimate Claimants

While it may be tempting to describe these aspects of the OBA as a form of labour market deregulation, it is more useful to conceptualize the transformations through the concept ‘market regulation’ developed by Standing (1999). Standing critiques the notion of unregulated or deregulated labour markets, to highlight the fact that processes of labour market regulation may be quite present even in the context of fundamental transformations to labour market policies that reduce or eliminate particular policy measures and forms of social protection. More specifically, Standing suggests that neoliberal policy reforms tend to enhance the ways in which labour markets are regulated through market forces, in particular relations of commodification. In this neoliberal context, legislation and labour market policies are often designed to “weaken protective regulations, restrict collective institutions and strengthen pro-individualistic regulations” (Standing 1999:42). Standing’s concept of market regulation draws attention to the fact that, through neoliberal policies like the OBA, labour markets may be *re-regulated* to promote the heightened commodification of labour power and increase workers’ exposure to market forces.

Similarly, in an analysis of reforms to health and safety legislation in the UK, Tombs and White (2010) advance the concept of “market-based regulation” to illustrate the multi-faceted impacts of neoliberal re-regulation. Specifically, they use this concept to describe regulatory processes that use market-based mechanisms to replace government regulation and enforcement. In a general sense, the policy reforms were meant to promote business self-regulation and to re-orient a mode of regulation premised on the need to promote workers’ rights towards a new mode of regulation based on the management/containment of risk to businesses. In the case of UK health and safety policy

reforms, these processes include: the naming and shaming of specific businesses that have violated legislation as a way to create incentives for compliance; an emphasis on employer education as a strategy to reduce violations; the promotion of partnerships and cooperation between employers and workers; and the introduction of a cost-benefit approach to managing health and safety risks.

These types of regulatory strategies create a shift towards voluntarism, with limited forms of proactive regulation reserved for “the small minority of troublesome firms in need of external regulation” (49). The assumption underlying this approach is that the vast majority of businesses is in compliance with the law, or would be if they were properly educated on regulations and procedures. These policy changes coincided with staffing cuts that contributed to a reduction in inspections. The process was framed through a policy discourse that emphasized ‘reducing business impediments’ in order to enhance the competitive environment. Overall this led to a situation of “regulatory degradation”, which includes both weaker legislative protections and a “collapse” of enforcement processes (62).

When taking this framework to assess the implications of the OBA, it becomes apparent that market regulation can be seen in the specific aspects of the OBA that emphasize an individualized, privatized, and voluntary process for regulating ES complaints and settlements. The implications of these shifts for workers in Ontario are clear in the results of similar processes undertaken elsewhere. As Tombs and White (2010) state:

if government withdraws from regulatory enforcement – making it less likely that workplaces will be inspected, less likely that inspections will result in enforcement, less likely the enforcement is of the more rather than less punitive type – and in the absence of countervailing power of trades union within and beyond workplaces, then regulation becomes increasingly reliant upon market-based mechanisms (50).

Thus, the market becomes the enforcement mechanism in lieu of legislation.

Workers in jobs that are most vulnerable to shifts in the market are therefore most disenfranchised through the OBA. Research on precarious employment demonstrates that the growing trend towards individualized and privatized systems of workplace regulation is increasing workers’ exposure to market forces. Precarious jobs characterized by job insecurity, lack of control over the labour process, limited access to union protection, and low income are spreading in Canada, particularly among women, migrants and immigrants, racialized groups, and people with disabilities (Wilton 2005; Galabuzi 2006; Vosko 2006; Creese 2007; Jackson 2010). Employment standards – setting minimum terms and conditions in areas such as wages, working time, vacations and leaves, and termination and severance of employment – are often the only source of workplace protection for workers in these jobs. Rather than providing protection for these workers, the OBA forces them to choose between risking employer retaliation or being deemed illegitimate claimants. Enforcement under the OBA serves to name and contain the actions of those deemed illegitimate claimant-citizens. Workers launching complaints are subject to subtle processes of criminalization and are treated with suspicion. Such practices are consistent with Wacquant’s (2009) insights into the way in which the production and shaming of illegitimate claimants across various fields of social

protection has become a cornerstone of the neoliberal strategy of criminalizing the poor. Data from Canada reveals a shocking shift in public expenditure over the past decade where spending on public services such as roads, libraries and parks has been on a steady decline alongside a forty-one percent per capita increase in police budgets (Morrow, 2011). Ong (2006) notes that citizenship rights are denied not only to those who are seen to reside illegally within national borders but also to those who are seen as “less worthy subjects” who lack the entrepreneurial traits valorized within neoliberalism. “Low skill citizens and migrants become exceptions to neoliberal mechanisms and are constructed as excludable populations in transit, shuttled in and out of zones of growth” (2006:16).

Conclusion

The purpose of the Open for Business Act is to minimize risks to business profitability in Ontario. Its provisions on ES enforcement thus stand in tension with the purpose of ES to mitigate power imbalances between employers and workers and to confer remedial employment rights on workers. In the name of ‘modernizing’ employment standards, the OBA shifts responsibility for enforcement away from the government and employers and onto individual workers seeking protection against ES violations. It masks the vastly unequal power dynamics embedded within the relationship between employer and worker.

The narrow approach to addressing ES violations taken by the provincial government of Ontario over the past decade has not resolved system-wide problems related to enforcement and has effectively entrenched the individualization and privatization of the enforcement process. With the passing of the OBA, the provincial government aims to recuperate a dysfunctional enforcement system by prioritizing administrative efficiency over the proactive enforcement of minimum standards for Ontario’s workers. Changes to enforcement under the OBA valorize employment standards claimants who facilitate administrative efficiency by demonstrating the requisite qualities of independence, flexibility and individual responsibility characteristic of neoliberal citizenship. The OBA also creates new ways to exclude claimants seen as not sufficiently responsible and active in securing their own rights and, thereby, as an impediment to administrative performance.

Given that employment standards legislation serves to establish *minimum* standards at work, it is primarily low wage workers employed in precarious jobs who are most likely to face violations and seek enforcement. As such, re-regulation in the form of the OBA specifically targets this group of workers who are comprised primarily of the working poor and racialized women and men (Fuller and Vosko 2008). The ability of these workers to ensure minimum employment standards is mediated by their historical experiences of racism and sexism. Concealing the role of unequal power relations between employers and workers, the new ES complaints process both disguises and reifies the power that sexism and racism hold within society, particularly with regards to employment relationships. ES enforcement procedures that increase pressures on individual workers and that shift the role of employment standards officers from enforcers of workers’ rights belie an understanding of the complex weaving of gender, race and immigration status that characterizes the uneven social relations that shape the experience of employment for many of Ontario’s workers. The new ESA provisions not only create barriers for gendered and racialized workers in precarious employment, but

also, serve to name a proportion of this group as “illegitimate claimants”. As such, rather than protecting worker rights, employment standards enforcement through the Ontario Open for Business Act extends and entrenches state functions of policing and racialized criminalization.

REFERENCES

Brodie, J. (2007) ‘Reforming Social Justice in Neoliberal Times’, *Studies in Social Justice*, 1 (2): 93-107.

Canadian Federation of Independent Business. (2010) *Prosperity Restricted by Red Tape*, CFIB, Toronto, Second Edition.

Cranford, C. and L. F. Vosko (2006). ‘Conceptualising Precarious Employment: Mapping Wage Work across Social Location and Occupational Context’, in L. F. Vosko (ed), *Precarious Employment: Understanding Labour Market Insecurity*, McGill-Queens University Press, Montreal and Kingston, pp. 43-66.

Creese, G. (2007) ‘Racializing Work/Reproducing White Privilege’, in V. Shalla and W, Clement (eds), *Work and Labour in Tumultuous Times: Critical Perspectives*, McGill-Queen's University Press, Montreal and Kingston, pp. 192-226.

Diefenbach, T. (2009) ‘New Public Management in Public Sector Organizations: The Dark Sides of Managerialistic ‘Enlightenment’’, *Public Administration*, 87(4): 892–909.

Fudge, J. (1991) ‘Reconceiving Employment Standards Legislation: Labour Law’s Little Sister and the Feminization of Labour’, *Journal of Law and Social Policy*, 7: 73-89.

Fudge, J. (2001) ‘Flexibility and Feminization: The New Ontario Employment Standards Act’, *Journal of Law and Social Policy*, 16: 1-22.

Fuller, S. and Vosko, L. F. (2008) ‘Temporary Employment and Social Inequality in Canada: Exploring Intersections of Gender, Race and Immigration Status’, *Social Indicators Research*, 88: 31-50.

Galabuzi, G.-E. (2006) *Canada’s Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century*, Canadian Scholars Press Inc., Toronto.

Giroux, H. (2008) *Against the Terror of Neoliberalism: Politics beyond the Age of Greed*, Paradigm Publishers, London.

Goldberg, D. T. (2009) *The Threat of Race: Reflections on Racial Neoliberalism*, Blackwell Publishing, Oxford, UK.

Jackson, A. (2005) *Work and Labour in Canada: Critical Issues*, Canadian Scholars Press, Toronto.

Mirchandani, K., Ng, R., Coloma-Moya, N., Maitra, S., Rawlings, T., Shan, H., Siddiqui, K., and Slade, B. (2011) 'The Entrenchment of Racial Categories in Precarious Employment', in N. Pupo, D. Glenday & A. Duffy (eds), *The Shifting Landscape of Work*, Nelson Educational Ltd, Toronto, pp. 119-138.

Mitchell, E. (2003) 'The Employment Standards Act 2000: Ontario Opts for Efficiency over Rights', *Canadian Labour and Employment Law Journal*, 10 (2): 269-86.

Morrow, A. (2011) 'What price for law and order?: Experts, policy-makers call for a rethinking of policing in Canada as crime rates drop and police budgets soar', *The Globe and Mail*. Saturday, Jan 8th 2011. A4.

OECD (2002) *The Evolution of Regulatory Policy in OECD Countries*. [Online], Available: <http://www.oecd.org/dataoecd/24/10/41882845.pdf> [accessed on 16 December 2010].

Office of the Provincial Auditor of Ontario (2004) *2004 Annual Report*. [Online], Available: http://www.auditor.on.ca/en/reports_en.htm [accessed on 29 March 2011].

Ong, A. (2006) *Neoliberalism as exception: Mutations in citizenship and sovereignty*, Duke University Press, Durham and London.

Roberts, D. J. and Mahtani M. (2010) 'Neoliberalizing Race, Racing Neoliberalism: Placing 'Race' in Neoliberal Discourses', *Antipode* 42 (2): 248-257.

Sharma, N. (2006) *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada*. University of Toronto Press, Toronto.

Standing, G. (1999) *Global Labour Flexibility: Seeking Distributive Justice*, MacMillan, London.

Thomas, M. (2009) *Regulating Flexibility: The Political Economy of Employment Standards*, McGill-Queen's University Press, Montreal & Kingston.

Tombs, S. and Whyte D. (2010) 'A Deadly Consensus: Worker Safety and Regulatory Degradation under New Labour', *British Journal of Criminology*, 50: 46-65.

Vosko, L. F. (2000) *Temporary Work: The Gendered Rise of a Precarious Employment Relationship*, University of Toronto Press, Toronto.

Vosko, L. F. (ed.) (2006) *Precarious Employment: Understanding Labour Market Insecurity in Canada*, McGill-Queens University Press, Montreal and Kingston.

Vosko, L. (2011) 'A New Approach to Regulating Temporary Agency Work in Ontario or Back to the Future?', *Relations Industrielles/Industrial Relations*, 65 (4): 632-653.

Wacquant, L. (2009) *Punishing the Poor: The Neoliberal Government of Social Insecurity*, Duke University Press, Durham and London.

Wilton, R. (2005) *Working at the Margins: Disabled People in Precarious Employment*. In Dianne Pothier and Richard Devlin (eds.), *Critical Disability Theory*. Vancouver: UBC Press, pp. 129-150.

Workers Action Centre (2007) *Working on the Edge*, [Online], Available: <http://www.workersactioncentre.org/Documents/pdfs%20policy/Working%20on%20the%20Edge-May%202007.pdf> [accessed on 29 March 2011].

Table 1: ES enforcement 2003-2009

Year	# of new claims	New claims & previous year's outstanding claims	claims with investigations completed	% of claims investigated of total claims in that year	unpaid wages & ESA entitlements recovered for workers	Number of proactive inspections
2003-04	16,175	19,375	15,771	81%	\$15.5 mil	151
2004-05	18,301	21,532	15,950	74%	\$15.7 mil	2,355
2005-06	18,972	23,496	15,776	67%	13 mil	2,515
2006-07	22,623	29,197	15,955	55%	\$17 mil	2,500
2007-08	20,789	34,031	18,533	54%	\$11.7 mil	1,250
2008-09	23,276	38,774	21,304	55%	\$11.6 mil	2,100

Sources: Ontario Ministry of Labour Fiscal Year Reports 2003-2007; Ontario Ministry of Labour Results Based Plans and Ontario Annual Reports; Employment Standards Program, Annual Report 2007-2009⁵⁰

Endnotes

- ¹ Ontario Ministry of Labour, News Release, 17 May 2010. Ontario Is Open for Business: McGuinty Government's Proposed Act Will Deliver Results for Business. Accessed 10 December 2010 at <http://news.ontario.ca/medt/en/2010/05/ontario-is-open-for-business.html>.
- ² An Act to Promote Ontario as Open for Business by Amending or Repealing Certain Acts.
- ³ http://www.ontariocanada.com/ontcan/1medt/en/news_2010_05_17_ofb_en.jsp.
- ⁴ Ontario Ministry of Labour, News Release, 17 May 2010. Proposed Open for Business Act. Accessed 10 December 2010 at <http://news.ontario.ca/medt/en/2010/05/proposed-open-for-business-act.html>.
- ⁵ http://www.labour.gov.on.ca/english/es/pubs/is_estf.php. Accessed 13 December 2010.
- ⁶ Ontario Ministry of Labour (2004) "McGuinty Government Makes It Easier For Ontario Workers To Understand Their Rights: Unveils New Multilingual Brochures On Employment Standards" Press Release October 25, 2004.
- ⁷ Employment Standards <http://www.labour.gov.on.ca/english/es/>
- ⁸ See for example, Ontario Ministry of Labour, Employment Practices Branch Fiscal Year Reports, from 1990-91 to 2000 – 01 (on file with authors).
- ⁹ Ontario Task Force on Hours of Work and Overtime, "Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime".
- ¹⁰ Anne Perry, (February 3, 2003) "Salesman Cut Out by Contracting Out" **Toronto Star** and Peter Gorrie, (May 30, 2003) "Focus Falls on Rogers over Ethics: Haven't been paid their work service workers say." **Toronto Star**.
- ¹¹ \$214 million in unpaid wages that the Ministry of Labour had assessed companies owed workers but did not pay. Peter Gorrie, "Immigrants take a stand for money they earned: 63,000 owed \$214 million, group says; Changes coming, labour minister vows" **Toronto Star**, Saturday May 29, 2004.
- ¹² http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2009-02-18&Parl=39&Sess=1&locale=en#PARA691. While the minister used the term 'bad apples' in the context of debates related to the Employment Standards Amendment Act (Temporary Help Agencies) 2009, we argue that this government position also applies to the current OBA.
- ¹³ The review was completed by March, 2004. Annual Report of the Offices of the Provincial Auditor of Ontario (2004) VFM Section 3.09 Employment Rights and Responsibilities Program pp 238 -255.
- ¹⁴ Ontario Ministry of Labour (2004) "New Legislation and Beefed Up Enforcement Reaches Out to Vulnerable Workers" April 26 Press Release.
- ¹⁵ Ontario Ministry of Labour (2004) "New Legislation and Beefed Up Enforcement Reaches Out to Vulnerable Workers" April 26 Press Release.
- ¹⁶ A target of 2,000 is still less than 1 percent of Ontario workplaces regulated by Employment standards and well below the 35,000 inspections of Ontario workplaces conducted by the Health and Safety Branch in the same period.
- ¹⁷ The increase in prosecutions is still modest. In 2005-06 the Ministry of Labour found that employers violated workers rights in 11,358 claims and that almost \$37 million in unpaid wages and entitlements was owing to these workers. Yet it only prosecuted four companies and two directors resulting in fines of \$55,901 under the Provincial Offences Act (Part III). Ontario Ministry of Labour, Employment Practices Branch: 2005-06 Fiscal Year Report.
- ¹⁸ Ontario Ministry of Labour, Annual Report 2004-05 (on file with author).
- ¹⁹ Ontario Ministry of Labour "Results-Based Plan 2008-09" (on file with author) 7.
- ²⁰ See for instance Employment Standards Work Group (December 15, 2004) "Proposed ESA Enforcement Strategy to Minister's Employment Standards Action Group". The Minister of Labour's Action Group on Enforcement was announced in June 2004 with representatives from employer and employee groups mandated to identify gaps in current operations, encourage innovative ideas, maintain fair workplaces, and foster compliance with employment standards legislation. Ontario Ministry of Labour, "Minister's action group to move quickly on employment standards issues" June 10 2004 Press release.
- ²¹ **Star Editorial** (2007) "Protect Ontario's poorest workers" **Toronto Star**, June 2.
- ²² The \$10 million commitment represents a 38% increase in the annual \$26 million budget for Employment Standards. Ontario Government, (2008) Breaking the Cycle of Poverty: Ontario's Poverty

Reduction Strategy. Online

<http://www.children.gov.on.ca/htdocs/English/breakingthecycle/report/index.aspx>.

²³ Ibid.

²⁴ Ontario Ministry of Labour (2009) Results-based Plan online:

<http://www.labour.gov.on.ca/english/about/pubs/rbp/2009/index.php>

²⁵ http://gateway.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2009-04-23&Parl=39&Sess=1&locale=fr

²⁶ http://gateway.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2009-04-23&Parl=39&Sess=1&locale=fr

²⁷ The section also includes a blanket exclusion for certain “assignment employees”: homecare workers subcontracted by the provincial government through what are known as Community Care Access Centres (Ontario, 2009b: S.74.2). The rationale for this exclusion stems from the government’s concern to protect Ontario’s Ministry of Health from liability for termination and severance costs arising from the new legislation and thereby exemplifies the practice of using statutory instruments to maximize reliance on market forces (see especially CUPE, 2009; see also Ontario, 2009d: M-177). The effect is to deny workers from a particular occupational group otherwise falling within the narrow definition of “assignment employees” access to protection – workers placed with a homecare agency, a group comprised of many women and immigrants.

²⁸ For an in-depth analysis of this legislation, see Vosko 2010.

²⁹ This provision is better than the ESA, which gives workers 6 months to make claims on unpaid wages).

³⁰ This is, of course, a perennial problem with protecting migrant workers, including through instruments like the Multilateral Framework on Migration, which offers some pretty interesting models of enforcement, many of which are unenforceable.

³¹ Canadian Federation of Independent Business, “CFIB Welcomes Ontario’s Early Steps to Tackle the \$11 Billion Red Tape Monster”. 17 May 2010.

³² Len Crispino, Ontario Chamber of Commerce, Letter to William Short, Re: Bill 68, *Open for Business Act, 2010*, 4 August 2010.

³³ http://www.labour.gov.on.ca/english/news/bulletin_ofba.php. Accessed 15 Nov 2010.

³⁴ http://www.labour.gov.on.ca/english/news/bulletin_ofba.php. Accessed 15 Nov 2010.

³⁵ For example, exceptions are made for young workers, live-in caregivers, people with language barriers or a disability, workers that are afraid to contact the employer, workers with non-monetary complaints, workers approaching the 6 month time limit or when the employer has closed or gone bankrupt. Such exemptions rightly recognize that workers face barriers in seeking employment standards compliance from their employer. At the same time, however, the exemptions create a confusing framework for workers to understand.

³⁶ Graeme Moore, former BC Ministry of Labour Program Advisor, personal communication, Wednesday March 3, 2010.

³⁷ Peter Severinson (2010)

³⁸ Focus Group, ESA Task Force and Modernization, Ministry of Labour, May 10 and 11, 2010.

³⁹ Employment standards stand alone in the regulation of employment rights in having no government or quasi-government funded supports for workers who believe their rights have been violated. In the area of human rights, health and safety and workers compensation, government services to support workers in enforcing their rights are provided. See Workers’ Action Centre and Parkdale Community Legal Services (2010) Submission to the Standing Committee on Finance and Economic Affairs regarding Schedule 9, Bill 68, An Act to promote Ontario as open for business by amending or repealing certain Acts. Online; http://www.workersactioncentre.org/docs/sb_Bill68_eng.pdf

⁴⁰ http://www.labour.gov.on.ca/english/news/bulletin_ofba.php. Accessed 15 Nov 2010.

⁴¹ *OBA*, Schedule 9.

⁴² Chapter 5, Investigations, Employment Standards Procedures Manual, -- Revised January 3, 2008 page 12 of 145. On file with authors.

⁴³ Ibid page 94 of 145.

⁴⁴ http://www.labour.gov.on.ca/english/news/bulletin_ofba.php. Accessed 15 Nov 2010.

⁴⁵ Parties can appeal a settlement agreement if it can be demonstrated that it was entered into in a coercive or fraudulent process.

⁴⁶ Workers Action Centre (2010) Submission to the Standing Committee on Finance and Economic Affairs regarding Schedule 9, Bill 68, An Act to promote Ontario as open for business by amending or repealing certain Acts http://www.workersactioncentre.org/docs/sb_Bill68_eng.pdf Accessed 13 Dec 2010.

⁴⁷ http://www.labour.gov.on.ca/english/es/pubs/is_estf.php. Accessed 15 Nov 2010.

⁴⁸ http://www.labour.gov.on.ca/english/es/pubs/is_estf.php. Accessed 15 Nov 2010.

⁴⁹ http://www.labour.gov.on.ca/english/es/pubs/is_estf.php. Accessed 15 Nov 2010.

⁵⁰ On file with authors.