



**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**

by
Workers' Action Centre
and Parkdale Community Legal Services

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Workers Action Centre

The Workers' Action Centre is a worker-based organization committed to improving the lives and working conditions of people in low-wage and unstable employment. We work with thousands of workers, predominantly recent immigrants, racialized workers, women, and workers in precarious jobs that face problems at work. We want to make sure that workers have a voice at work and are treated with dignity and fairness. The Workers' Action Centre provides information about workplace rights, strategies to enforce those rights and participates in campaigns to improve wages and working conditions in workplaces and in labour legislation.

Parkdale Community Legal Services

Parkdale Community Legal Service is a poverty law clinic providing assistance and legal representation concerning employment standards, employment insurance, human rights and occupational health and safety cases. In addition, we work with communities in low-wage and precarious work to improve labour standards.

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Schedule 9 (Bill 68) – Ministry of Labour and Employment Standards Act

1) Introduction

The number of complaints against employers for unpaid wages and other employment standards violations is on the rise. So too is the backlog in dealing with such violations. The Ministry of Labour is launching an “Employment Standards Modernization Strategy” to create a temporary task force to resolve 14,000 claims in backlog over a two year period. The task force would work in tandem with changes to the Employment Standards program’s intake and investigation process to prevent recurrence of a backlog. The changes contemplated in Schedule 9 of Bill 68, *Open for Business*, would provide the legislative framework for the Employment Standards Modernization Strategy.

The government’s commitment to address the backlog in claims and improve the claims process is commendable. Certainly we see the impacts on workers who must wait a year or more to have their complaint for unpaid wages investigated. Workers can wait up to two years to receive the wages they should have been paid in the first place. We believe, however, that the legal changes contemplated in Bill 68 and some of the changes proposed under the Employment Standards Modernization Strategy will not address the causes of the backlog nor meet the goals of addressing and preventing future backlogs.

Some of the strategies being proposed would add additional burdens and barriers to workers. In our experience, workers already bear a substantial burden in obtaining their employment standards rights. Workers must identify when their *Employment Standards Act* (ESA) rights have been violated. Workers generally request their employment standards rights from employers and, in all too many cases, face reprisals up to and including termination, for doing so. Workers who fail to obtain minimum entitlements then bear the responsibility of determining how much they are owed under the Act, how to make a complaint about violations and submit a complaint for investigation. These burdens are even greater for people with language and literacy barriers. Workers cannot take on more of the enforcement of minimum standards, particularly without support, as is proposed under Schedule 9 (Bill 68). This perspective was reiterated by people in precarious work from the Workers’ Action Centre and community caseworkers in focus groups held by the Ministry of Labour.

The Ministry of Labour’s Employment Standards Modernization Strategy and Schedule 9 of Bill 68 will make substantial changes to the employment standards complaints process. To meet the goals of addressing the claims’ backlog and improving the claims process, we recommend the following:

Do not require workers to first attempt self-enforcement before filing an ESA claim. Bill 68 requires workers to first try and enforce their ESA rights with their employer before filing an ESA claim. That means workers would have to identify their ESA rights, determine what rights were violated and amount of wages owed,

write up a request for unpaid wages, and contact their employer to request ESA entitlements. Only if the employer refuses can a worker then file a claim with the government. Bill 68 allows for some workers to be exempted from this requirement. We believe that this requirement for a first step self-enforcement will create barriers to workers seeking unpaid wages and ESA entitlements and reduce the effectiveness of the Branch in detecting ESA violations.

Do not require workers to provide information on claims before claim will be accepted. Bill 68 would require workers to provide certain information about their employer, violations and state their case before the claim will be accepted. We believe that the information requirement will create barriers to workers, particularly those with language and literacy barriers. Rather than make information a requirement, we believe the Ministry of Labour should provide assistance to workers making ESA claims to ensure that the information that is necessary for effective and efficient claims investigation is provided on the ESA claim form.

Employment Standards Officers can set time limits (e.g., 10 days) for employers and workers to provide information or require participation in a decision making meeting. If the employer or worker does not provide information in the required time or attend a meeting, the Employment Standards Officer (ESO) may make a decision on whatever information is available. Rather than providing new powers to the ESO to set time limits, we believe the Ministry of Labour should set clear and transparent time limits for employers to respond to complaints of ESA contraventions. Where the employer does not respond, the ESO shall render a decision on the basis of the complaint. This is the approach taken in human rights and small claims and would better serve to reduce the backlog and expedite the claims process.

No Facilitated Settlements. Bill 68 provides new powers to enable ESOs to facilitate workers and employers to enter into a settlement (this would usually be at amounts less than worker has claimed). If a settlement is not reached, the same ESO would make a decision about the violation and amount of monies owing to the worker. Mediation is usually used to avoid lengthy and resource-intensive court proceedings. Facilitating settlement in the ESA claims process may not provide the time and resource savings that the government is seeking. Further, facilitated settlement institutionalizes the contracting out of minimum employment standards which could lead to a lowering of the floor of standards. We believe the current rules on settlement should be maintained – that is, where employers and workers can elect to enter into settlement without the ESO being involved in negotiating or promoting settlement.

2) Ontario needs effective and enforced employment standards

Work is leaving all too many workers and their families struggling with job insecurity and poverty. More people are working part time or on contract, often juggling two or three jobs. The majority of Ontario's more than 6 million workers in over 370,000 workplaces¹ rely on employment standards. Only 28 percent of Ontario workers are unionized,² leaving most

¹ In 2008 there were 371,533 firms. Source: Statistics Canada (2008a)

² Ontario's union density is below the Canadian average of 31%. Statistics Canada (2009b)

workers on their own to enforce their minimum employment rights. It is workers in low-wage and precarious jobs that are least able to negotiate fair wages and working conditions that are most in need of accessible, effective and enforced employment standards.

Employment standards set minimum terms and conditions of work such as wages, hours, vacations, leaves, termination and severance of employment. These standards reflect society's norms about what standards should be met in our jobs and labour market. Such norms include the ability to earn wages that are sufficient to live on and decent conditions of work that allow a person to balance work and family life.³ Employment standards are supposed to establish a minimum floor of standards for those who have the least ability to negotiate fair wages and working conditions.

Not only is the *Employment Standards Act* (ESA) a central feature of labour market regulation, it is also an important social policy tool in fighting poverty. The Ontario government has stated that poverty reduction is a key goal of the Employment Standards program.⁴

Unpaid wages, overtime and other violations are not just from a few "bad apples". The few studies that have been done confirm substantial formal ESA violations. In the late 1990's, a federal government Labour Standards Evaluation surveyed employers and found that 25 percent of employers were in widespread violation of the Canada Labour Code and 50 percent were in partial violation.⁵ These findings were confirmed a decade later by Statistics Canada⁶ and the Workers' Action Centre.⁷

Ontario governments have failed to adequately fund enforcement over the past 30 years. Resources and staffing of employment standards regulation has not kept pace with increases in workers covered, workplaces, and complexity of working relationships. While the number of workers covered by the ESA has increased by 24 percent between 1997 and 2007, the funding for the Employment Standards Program decreased by 33 percent. Even recent increases to the Program in the 2009/10 budget leave the Program over 10 percent below 1997 funding levels.⁸

Less than one percent of workplaces are inspected for ESA violations so there is little risk of being detected. Employers only real risk of being found in violation of the ESA is when an employee, usually a former employee, files a complaint at the Ministry of Labour.

Left unchecked, violations of particular rights can become widespread over time. For example, violations of overtime and hours of work standards cut a wide swath across many industries and

³ Arthurs, Harry (2006) 47.

⁴ Ontario Ministry of Labour (2009)

⁵ Canada, Human Resources Development Canada (1997) 41

⁶ 2005 Statistics Canada Federal Jurisdiction Workplace survey of employment practices, cited in Arthurs, (2006) 192.

⁷ Workers Action Centre (2007) 46

⁸ These figures are not adjusted for inflation and therefore understate the decline in funding. Data derived from Ontario Ministry of Labour (2007); Labour Force Survey (2006); Ministry of Labour (2008); and Statistics Canada (2007)

sectors. With over one in ten Canadian employees working unpaid overtime (11.4%),⁹ one management-side law firm estimated that this represents more than \$22.5 billion in unpaid overtime and overtime premium pay.¹⁰ Workers loss of income also means loss of tax revenues and economic stimulus through consumer spending. Such gaps in labour market regulation create vulnerability for workers that need it most.

The majority of resources on enforcing employment standards rights still go to investigating individual complaints of employer violations. Saunders and Dutil noted in 2005 that the “practice of dealing with compliance one case at a time is expensive and risks overloading the available capacity.”¹¹ We have seen an increase in claims over the last 5 years from an average of 15,000 claims per year to over 20,000 claims per year. By 2010, a backlog in workers’ complaints against employers for unpaid wages had grown to 10,000. Some workers are waiting more than a year to have the Ministry of Labour begin investigation of their complaints of unpaid wages and entitlements. It is in this context that the Ministry of Labour has developed its Employment Standards Modernization Strategy and Task Force to address the claims back log and introduced changes to the ESA through the *Open for Business* omnibus Bill 68 to facilitate that strategy.

Recommendations for Schedule 9 - Bill 68

3) Remove Schedule 9 (Ministry of Labour - Employment Standards Act) from Bill 68

Bill 68 amends 100 regulations affecting 10 provincial departments, including the Ministry of Labour, Ministry of Environment and Natural Resources. There are substantial changes to the ESA in Schedule 9 of Bill 68 that would profoundly restructure ESA enforcement in this province. Such fundamental restructuring of the Employment Standards Branch investigation of complaints of employer violations requires broader consultation than is possible in the Committee’s review of this omnibus bill. As such, we recommend that Schedule 9, Ministry of Labour and the ESA, be removed from Bill 68. More comprehensive consultation is required on such substantial changes to Ontario’s employment standards enforcement.

4) Establish supports for workers facing unpaid wages, not barriers

Schedule 9 (Bill 68) proposes steps that workers must take before being allowed to proceed with a complaint for employment standards violation against their employer at the Ministry of Labour. Those steps are:

⁹ Some of these workers may be exempted from overtime hours of work provisions. Statistics Canada, (2008b).

¹⁰ Statistics Canada 2007 average hourly wage (\$19.13) x 9 hours (average hours of overtime worked) x 52 weeks x Statistics Canada January 2009 total employment (16,982,000) x 10% = \$15,203,712,888 straight time wages + premium pay (plus 50%) = \$22 billion. Rousseau (2009)

¹¹ Saunders, Ron and Patrice Dutil (2005) 2

a) Workers must inform their employer about employment standards violations and the amount of wages or other entitlements that the employer owes the worker. If the employer does not comply with the worker's request, then a worker may file a complaint. For the complaint to be accepted, the worker will be required to indicate in the claim form what information was given to the employer, how it was given and the response, if any, from the employer. There may be exceptions for this requirement.

b) Workers will be required to provide, in writing, specified information and evidence for their complaint before the claim will be accepted for investigation.

Complaints for unpaid wages and employment standards rights will not proceed unless these steps are taken (with some exceptions).

4 (a) No mandatory requirement for workers to attempt self-enforcement of ESA violations with employer prior to filing an ESA claim

The proposed mandatory (with some exceptions) requirement for workers to seek employer compliance prior to filing a claim will create significant barriers for workers to employment standards rights and should be rejected.

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%.¹² 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.¹³ Policy analysts and advocates from BC argue that it is not because workers are getting their unpaid wages. Rather, the decline is due in large part to barriers created by the mandatory 'self help step.'¹⁴

A requirement to seek compliance from employers effectively requires workers to have access to the internet to learn about 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 will have the skill set and confidence to confront their former employer about violations.

Most claims are filed after the employment relationship has broken down. The employer often treats employees very poorly in the process of termination and this has a huge psychological impact on the worker. Going back and asking an employer for wages can be a traumatic process. Job loss and income loss are recognized as some of the most significant life changes

¹² Graeme Moore, former BC Ministry of Labour Program Advisor, personal communication, Wednesday March 3, 2010.

¹³ Peter Severinson (2010)

¹⁴ David Fairey, (2005); Peter Severinson (2010) Graeme Moore, personal communication.

causing stress for workers and their families. Requiring workers in this situation to enforce their own rights may cause further stress to workers.

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

In our experience, workers often attempt to obtain their employment standards rights directly from their employer before filing an employment standards claim. In many of these cases, workers are fired for attempting to obtain these rights. A mandatory self-enforcement step 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.

Requiring workers to assess entitlements on their own outside of the ESA claims process during a mandatory self enforcement step will understate amount of wages owing and range of violations detected. Caseworkers and community agency workers interviewed for PCLS' Access to Justice research reported that very few workers can effectively use self help kits to determine violations and amounts owing. Caseworkers and agencies report that they must work through fact sheets and Ministry of Labour information with workers to assist workers in understanding the legal entitlements and interpret their meaning in the individual's case.¹⁵

Section 96.1 of the Schedule 9 (Bill 68) does not provide any right to appeal for claimants who are denied investigation of their complaint for not taking the required step of contacting the employer. So not only will workers face increased barriers to filing a claim, they will have no right to appeal being denied access to filing a complaint.

Exceptions

The Ministry of Labour is proposing that some workers be exempted from the requirement to seek compliance from the employer (e.g., 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).¹⁶ Such exemptions rightly recognize that workers face barriers in seeking employment standards compliance from their employer. At the same time, however, the exemptions may create a confusing framework for workers to understand. For example, what do workers do who have both monetary and non-monetary violations? Who determines if a person has sufficient language barriers to be exempted? Further, section 96.1 does not provide any appeal rights for workers whose claims are not accepted if there are disputes about who qualifies for the exemption.

¹⁵ Mary Gellatly, (2009)

¹⁶ Ontario Ministry of Labour (2010a)

The Ministry of Labour consulted about proposed requirements with a diverse group of workers, community legal workers and front line workers. In both focus groups, participants stated unequivocally that contacting the employer prior to filing a claim should remain entirely voluntary. While the Ministry of Labour is proposing some exemptions for groups of workers or situations, there are many other workers who would still face substantial barriers in contacting their employer. Further the proposed exempted workers and situations will create a confusing patchwork that itself will become a barrier to people understanding how to proceed.

In conclusion, we believe that requiring workers to first attempt to enforce their employment standards rights with their employer before being allowed to pursue a complaint at the Ministry of Labour (with some exceptions) will have unintended negative consequences. As the British Columbia experience with this requirement demonstrates and the experience of Ontario caseworkers predicts, the number of claims may be reduced, but not because more workers will be able to obtain unpaid wages from their employer. Rather, we believe that more workers will not obtain unpaid wages because the proposed requirement creates barriers that will block workers from pursuing employment standards rights.

Workers must be able to voluntarily choose 'self-enforcement' without losing the right to file an employment standards complaint. We urge the removal of this requirement.

4 (b) Provide assistance to workers filing claims for employment standards rights

Schedule 9 (Bill 68) provides the basis for 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 obtaining information from workers during the investigation to speed up the investigation and decision making process, thereby reducing backlogs in claims. This assumes, however, that claim forms are not being filled out because workers know or have access to the required information but are not including information in the claim form for some reason. In our experience, workers are unable to prepare or produce written information, evidence and make their case because they require assistance to do so.

The Ministry of Labour's employment standards complaints system relies heavily on individuals being able to access the website. Reliance on internet access creates significant barriers for many people in precarious work. Stats Canada reports that there is a digital divide in the rate of internet use on the basis of income, education and age. If you are poor, older, have less formal education, live in a rural community and were born elsewhere, you are less likely to use or have use of the internet.¹⁷ Recent immigrant communities face the lowest incomes and are more likely to be forced into temporary, part-time and precarious jobs. It is these workers, who often face

¹⁷ Although those immigrants arriving in the last 10 years that live in urban centres are slightly more likely to use the internet than Canadians as a whole. Statistics Canada (2008c)

language barriers, who are most in need of employment standards protection and assistance in accessing these rights.

Yet employment standards stand alone in the regulation of employment rights in having no government or quasi-government funded assistance for workers who believe their rights have been violated. The government provides direct and indirect funding for information, education and legal support in areas of Health and Safety, Workplace Safety and Insurance and Human Rights, (e.g., Occupational Health Clinics for Ontario Workers, Office of the Workers Advisor, Human Rights Legal Support Centre).

Few legal supports for workers requiring assistance in ESA matters exist. Ontario's Community Legal Clinic system provided ESA representation in 86 cases, 90 brief services and advice for just over 850 workers in 2008.¹⁸ There are no legal aid certificates for ESA matters. A survey of Ontario Community Legal Clinics in 2009 conducted by PCLS found that 88 percent of clinics said they would need additional staff to begin providing assistance on employment standards matters. The \$10,000 cap on ESA claims means that few private bar lawyers would represent workers on ESA matters.

So workers are left to learn how to make a complaint on their own. Workers have to go back and forth between the ESA guide (over 100 pages), the guide to the claim form and the claim form itself, often going through the three documents on the Ministry of Labour website. The Ministry of Labour recognizes that some workers with language, literacy and other challenges may need support in preparing claims form and consulted with community, labour and legal clinics on how to partner with organizations to support workers with new requirements in the claims process.

As discussed above, workers may need not only legal information about employment standards, but also how to connect that information to their particular situations; assistance in determining entitlements; and assistance in preparing the narrative of what happened and identifying supporting documentation. This perspective was strongly put forward to the Ministry of Labour by stakeholder focus groups of workers and caseworkers. To ensure that claim forms contain sufficient information for investigation, workers need direct assistance to prepare their claims. One of the most effective strategies to streamline the process and reduce the backlog would be to provide, as a first step in the claims process, assistance to workers to prepare their claim so that investigators can expeditiously adjudicate the matter. Further, a requirement that certain information be on the claim form prior to acceptance of the complaint will create barriers to workers, in particular for workers who face language and literacy barriers, and in general for workers unable to meet the requirement.

Do not make specified information a requirement before a claim is accepted for investigation. Provide assistance to workers filing claims.

¹⁸ Gellatly (2009) 18

5) No to Facilitated Settlement by the ESO

Section 101.1 of Schedule 9/Bill 68 will give employment standards officers new powers to “attempt to effect a settlement.” Under the current section 112 of the ESA, the employer and employee may enter into a settlement, but “it is not the role of the Officer to attempt to negotiate, promote or ‘broker’ settlement agreements between employers and employees.”¹⁹ The proposed changes would allow Officers to “facilitate settlements.” Employers and employees would be given the option of discussing settlement with the Officer playing a mediator role. Should settlement not be reached, the Officer would resume investigation and decision making.

Combining settlement negotiation and adjudication in an investigation with the ESO playing both roles is not a fair process. In other regimes (e.g., human rights), mediation and adjudication are kept separate. It is difficult for parties to have negotiations without prejudice if the decision maker is also the mediator. Workers and employers may feel they cannot refuse settlement negotiation lest they be penalized in the final decision on their claim.

ESA claims investigations involve unequal parties. Facilitating settlement is contrary to the remedial purpose of the legislation to address the power imbalance between employers and employees.

Worker advocates in the human rights process find it hard to mediate settlements with small workplaces because the situation between employer and employee often becomes poisoned. The majority of ESA claims involve workplaces of less than 50 employees.²⁰

Mediation is usually used to avoid lengthy and resource-intensive court proceedings. Facilitating settlement may not provide time and resource savings in comparison to decision making. Arguably, it could take the same time going between parties facilitating settlement as it would to hold a decision making meeting and rendering a decision. Rather than offering the employer a carrot of settlement at less than minimum standards, institute a stick approach with enforceable penalties for non-compliance that would ensure workers get the wages owed to them.

The Ministry says that mediation would be optional and used in cases where violations are not clear or in cases of ‘he said, she said’. It is in cases where employers are trying to evade or avoid the ESA (misclassification / work off the books, etc.,) that are less straight forward. Also, workers often only have their experience and not written documentation (especially in more informal work arrangements in construction, business services, care giving, home care etc.,) – it will be the situations most in need of regulation that will be shifted to mediation.

Institutionalizing facilitated settlements is a slippery slope. Even with principles or criteria to determine what cases would be mediated, there develops operational imperatives on individual

¹⁹ Ontario Ministry of Labour (2008a) 95

²⁰ 79 percent of claims involved workplaces of fewer than 50 employees. Ontario Ministry of Labour, (2007b)

ESOs to close files. The early 1990s saw a spike in ESA claims and resulted in claims process where ESOs were compelled to settle cases to close files. Without additional resources, pressure will be on ESOs to settle more cases and close files, reducing the enforcement effectiveness of the branch.

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. Moreover, institutionalizing a role for ESO facilitated settlement risks leading to general lowering of floor as employers come to expect that they can settle for less than minimum employment standards through the claims process. It would pay repeat offenders to settle claims to avoid detection and penalties.

No facilitated settlements. Maintain current rules on settlement.

6) Set clear and transparent time limits for employers

Proposed amendments to section 102 of the ESA would enable Officers to require employers and employees to provide evidence within time limits set by the Officer. Further Officers are empowered to make decisions on claims when either employers or employees fail to attend a decision making meeting or provide evidence on time.

The Ministry of Labour had the opportunity to set clear and transparent time limits for employers to respond to complaints of ESA contraventions and, where no response is provided, render a decision on the basis of the complaint. This is the approach in small claims and human rights. Unfortunately, Schedule 9 (Bill 68) does not take this approach. Clear time limits for employers to respond to complaints would have contributed to expediting claims and reducing backlogs.

Employers may have greater access to human resource professionals and legal services in preparing written submissions, while employees generally do not. Where decision making is based primarily on written submissions, workers should have access to assistance and support in understanding the ESA, claims process and how it relates to their individual experience of ESA violations before time limits are applied.

The different locations and legal responsibilities of employers and employees with respect to employment records make it more difficult for employees to provide documentary evidence. Employers are required to maintain employment records. Workers may not have pay records, work schedules, employment contracts; rather, workers must rely on their experience. Rendering that experience in writing is often difficult for some workers.

Complainants should be exempted from time limits on submitting evidence.

Establish clear and transparent time limits for employers. Give employers 20 days to either resolve the matter with the employee or provide submissions contesting the claim. Where an employer fails to respond or provide submissions, ESOs

should render decisions on available information provided by employees. Employers will be given the required impetus to participate in complaints of violations.

7) Conclusion

The ES Modernization Strategy shifts the model of ESA enforcement from detection of ESA violations and enforcement of minimum standards among unequal parties to dispute resolution between employers and workers. The goal of the Strategy is to encourage “workplace self-reliance.”²¹ This is not good social or economic policy.

Shifting to even greater self regulation by employers will result in more violations going unreported and unenforced. This will create a downward pressure on employers who do comply with employment standards as they compete against employers that do not. Compliant companies will get priced out of the market by substandard employment conditions. Practices of non-compliance will spread and become permanent features of a restructured labour market.

The proposed requirements for claims information, time limits and self-enforcement by employees create barriers to workers seeking unpaid wages while doing little to increase employer compliance.

Bill 68 may make Ontario “Open for Business” but it will be closed for workers seeking minimum employment rights. To open the doors for workers to get unpaid wages, the Schedule 9 (Bill 68) should be removed and the Ministry of Labour should shift resources to provide assistance to workers’ filing employment standards claims.

²¹ Ontario Ministry of Labour (2010b) 1

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