

**SUBMISSION
TO
HONOURABLE OLGA ILLICH**

TEMPORARY FOREIGN WORKERS ADVOCACY PROPOSAL

SUBMITTED JANUARY 15th, 2008 TO
HONOURABLE OLGA ILLICH, MINISTER OF LABOUR

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INTRODUCTION

Over the last 18 months the BC Building Trades Council office has become a centre for advocacy from migrant workers in the BC construction industry. We regularly take calls from migrants looking for help to resolve issues of employment standards and human rights abuse, exploitation, coercion and intimidation from their employers. So far we have worked on behalf of more than 45 workers. The two issues most commonly raised are labour brokers charging anywhere from \$6,000 to \$12,000 to place migrant construction workers and unfulfilled salary promises. Recently, we have received a report about a group of Mexican workers who were bedding down for the night at their workplace (it was in a half completed residential high-rise tower at lock-up stage). Another reliable source estimates that roughly 50% of the sub-contracted painting work on residential high-rises in Vancouver is tendered to employers who pay undocumented Mexican and Central American workers in cash. These black-market salaries average between \$7 and \$10 per hour (no deductions). These stories highlight the urgency of the issue of exploited migrant workers in BC's hot construction market.

Before we deal with the advocacy issue this submission begins with a discussion of the primary structural problem of the Temporary Worker Program. Specifically, the limitations placed on workers whose permits tie them to a single employer. In this opening section we review the impact of this fundamental structural problem in the context of the legislative and regulatory provisions of BC's *Employment Standards Act* and the inadequacy of the complaint driven system to monitor employers of migrant workers who are unable to communicate in English.

Next we look at some effective protections available to migrant workers through the Labour Code and Human Rights Tribunal.

Finally we deal with the need to provide pro-active, government sponsored advocacy for temporary workers and workers' rights orientation at the port of entry. The Alberta initiative for advocacy centres in Edmonton and Calgary is a welcome step. Unfortunately, there are some serious short-comings in that initiative. This submission calls on the BC government to sponsor its own advocacy centres with authority to pro-actively monitor worksites with migrant workers and conduct unannounced spot checks and audit reviews.

Over the course of the submission it becomes clear that advocacy alone will not be enough. The BCYT-BCTC experience in dealing with the fall-out from the poorly structured and haphazard foreign worker program leads us to the conclusion that there must be a review and amendments to existing legislation; provincially and federally. Vulnerable workers require pro-active monitoring and compliance mechanisms by government authorities in order to ensure fairness, justice and respect for human and employment rights.

Why vulnerable workers don't complain about abuse to the Employment Standards Branch

The fundamental structural problem with the temporary worker program is that worker permits are tied to a single employer. Coerced and exploited workers are unlikely to risk complaining unless there is a practical option to replace the loss of income that will result from employer retaliation (i.e. dismissal). Once fired from their employment a temporary worker can not legally work anywhere else. It is possible to have a new work permit issued (for a new employer) but this is a time consuming process. Complaints will not be made until the worker has a practical plan that will maintain their income while government processes address unfair retaliation.

We acknowledge that there exists an option to fast-track applications for new Labour Market Opinions (LMO) and thus a new work permit for fired workers. However, this option is only available when federal authorities are provided with evidence of abuse and are convinced that the employee was the victim of unfair treatment.

Federal authorities are willing to receive evidence of abuse but practically it requires intervention by Employment Standards staff investigating a complaint or by a sympathetic third party (usually a union, NGO or ecumenical organization). Temporary foreign workers without English proficiency are unable to communicate their complaint. The vast majority of migrant workers require interpretation and translation services.

Accessing this support and intervention by the BC Employment Standards is difficult. In BC workers with a complaint are asked to first attempt a resolution directly with the employer. The Employment Standards Branch website indicates that this self-help resolution stage may be waived, but only in "uncommon" situations. Illegal deductions to third party labour brokers that masquerade as services but are nothing more than placement fees are not included in the list of "uncommon" situations on the website. Also not appearing on the website list of "uncommon" situations are unfulfilled promises by employers to pay a pre-determined salary. These two complaints are the most frequent of those encountered by affiliates of the BCYT-BCTC. The issue of unfulfilled employer promises also topped the list as the most frequent complaint in the recent report on Temporary Foreign Workers by the Alberta Federation of Labour (see Alberta Federation of Labour web page; afl.org/campaigns-issues/tempworker). Yet, according to translated pages on the BC Employment Standards website, TFWs are expected to first try and resolve these issues with the assistance of a "self-help" kit (which is only available in English). We have been told that non-English speakers are exempted from using the "self-help" kit but nowhere in the translated fact sheets is this exemption mentioned.

Even if the federal authorities are convinced that the dismissal was unjust and are willing to expedite the process it will be nearly impossible for the worker to

replace lost income. First the fired worker must find a new employer, then comes the question of how long it will take to issue a new LMO and work permit. The absolute quickest scenario would be two weeks from the time the worker was fired. That's two weeks of lost income for a worker who is often supporting their family and two households (here and in their home country).

There is no provision for employment reinstatement (i.e. ordering the employer to re-hire the worker and pay back wages for the days lost) as a remedy after unjust dismissal under provincial employment standards legislation. Instead the initial step by Employment Standards is mediation. If this fails to facilitate a resolution the jobless temporary worker can then ask for an adjudication hearing about employer contraventions of the *Act*.

An adjudication hearing following a failed mediation is supposed to take place as soon as possible after mediation breaks down. Following the hearing the adjudicator is expected to render their decision, or determination, as expeditiously as possible. The determination may award the fired worker one week severance pay after three months of employment (two weeks of pay after six months of employment). The adjudicator's determination may also require the employer to pay unpaid wages which were originally promised to the worker. If the employer is unhappy with the determination they can apply for an appeal. The Employment Standards Tribunal will decide, in its turn, to hear the appeal if they believe the employer's case has merit.

All of this takes time and again there is no provision that enables the Employment Standards Branch or Tribunal to order reinstatement of employment. We return to the serious conundrum facing exploited workers when their work permit prohibits them from substituting their income from a new employer. For this reason Employment Standards provisions have failed to encourage workers' reports or complaints about unfulfilled salary promises, illegal deductions for labour broker placement fees and other abuses and exploitation.

Other legal options – Labour Relations Code – Human Rights Tribunal

Faced with impractical remedies from the Employment Standards Branch workers who are legally bound to a single employer are forced to look for other options. The primary option is organizing and having the exploited workers join a union. The Building Trades' involvement in organizing drives for migrant workers (e.g. Canada Line Workers) has been motivated by a desire to correct a wrong not collect dues. The BCYT-BCTC and its affiliate unions have spent hundreds of thousands of dollars on legal fees, union staff time, translation services and other settlement services to help these workers address their complaints about their employment condition. In addition we have enlisted the contribution of hundreds of hours of volunteer time to assist these workers in attempt to exercise their rights.

Union organization provided these workers with a practical defense against retaliation. Canada Line employees did file an Employment Standards complaint but they also wanted protection if the employer reacted by dismissing any of the crew. Starting a union organizing drive was one way to provide workers with an immediate remedy. The BC Labour Code regards the firing of a worker during an organizing drive as an unfair labour practice. A worker fired in the midst of an organizing drive is entitled to a hearing within three days application on the unfair labour practice. If the presiding LRB Vice-Chair concurs that the dismissal was retaliation, the Labour Code provides for immediate reinstatement of the worker and payment of lost wages. The organizing option does provide workers with an effective mechanism to protect income while making a complaint against exploitive and illegal employment practices.

Migrant workers' questions to Building Trades organizers best sum up the Labour Code option. With the stability and well being of their families in mind the vulnerable workers ask us "Tell me the least risky way to make a formal complaint?"

We answer; "It's impossible for us to know how each employer will react. Some will react irrationally and decide to fire you. Others will want to reason and see how to resolve the issue." Given the concrete protection for workers involved in an organizing drive we advise them to choose that route. It's ironic that the least risk and most protection comes from the most adversarial choice. It's counter intuitive.

In spite of the difficulty explaining this ironic twist in the law (in a foreign language to workers who are vulnerable to the whims of their employers) migrant workers always choose the Labour Code option.

A longer and more laborious remedy may lie with a complaint to the Human Rights Tribunal. The Canada Line workers' discrimination complaint is currently in hearings at the BCHRT, however it took over a year from the time of application before the first hearing date was scheduled. Latin American migrant workers on this project complain that their salary, roughly \$30,000 annually, is discriminatory compared to Europeans employed on the site who earn \$80,000-\$90,000 annually. The employer has already agreed that a substantial number of the workers in these two groups do exactly the same work. The BC Human Rights Tribunal has made an initial decision and ruled that the employer has engaged in coercion and intimidation. The BCHRT has ordered the employer to cease all communication with its workers it also offers a practical mechanism to have their complaint heard without fear of retaliation.

Advocacy and Workers' Rights Orientation at Ports of Entry

Alberta's new initiative to set up Employment Standards advocacy offices for migrant workers in Edmonton and Calgary is a welcome step. Unfortunately the new advocate service will do little to pro-actively prevent exploitation. If advocates decide that investigation and monitoring is called for, Alberta has made it clear that employers will be warned beforehand. Employers will be given 24 hours notice of inspections or audits. If you give a non-compliant employer a day to get ready you can be sure that the shredding machine will be active.

The same happened in BC during the Employment Standards investigation of the Canada Line workers' complaint. The employer was given ample warning before the ESB officer showed up to the employer's office to conduct an audit. By the time that audit took place the employer was already in the process of coming into compliance. There was no penalty for paying workers less than the minimum wage for the first two months of employment.

While monitoring in Alberta remains weak, so too does enforcement. Here the blame largely falls on the federal government. Employers who misrepresent job classifications and wages suffer no penalty. For the Canada Line workers CIC has always had access to documents that clearly contradict the reality for the workers. Workers were promised \$50,000 per year. The employer has openly agreed in hearings at the BC LRB and at the BC HRT that the workers are paid \$30,000. Somehow the employer has been able to convince CIC that accommodation and meals, valued at \$20,000 make up the rest of the wage package. This is a contravention of *Section 20* of the *BC Employment Standards Act*. *Section 20* requires that wages be paid in currency. You cannot pay workers with meals and/or accommodation. CIC has done nothing to penalize employers for the misrepresentations. As long as employers know they can get away with it they will be encouraged to deceive government officials in the applications forms that are filed.

Thankfully the advocate centres will be a source of information for exploited and vulnerable workers. The migrant worker often depends on their employer or labour broker for information about their employment and immigration rights while working in Canada. Employers commonly lie, misinform and threaten workers who ask about their rights and legal protections. A common example is the employer who tells his/her employees that Citizenship and Immigration (CIC) will deport any worker who is fired from the job. This is absolutely false. Similarly, employers tell workers that their temporary worker status prohibits migrant workers from joining and organizing a union. Again, this is wrong. The workers are vulnerable. The vast majority of migrant workers believe what their employers tell them.

This brings us to the idea of setting up orientation sessions for migrant workers right at the moment of entry into the country or at least within the first week of

their arrival to Canada. Migrant workers need the truth on immigration and employment law from government authorities. They need to hear this when they first enter the country and throughout their stay in Canada. Workers need to know that the only authority that can deport them from the country is CIC. Currently, if a worker is fired, they are still allowed to stay in the country until their Visa and Work Permit expire. They are not allowed to work for a new employer (unless a new work permit is issued), but their legal status in the country remains. Orientation is the partner program of advocacy centres. Orientation can help workers recognize and report abuse to the advocacy centres. Orientation and Advocacy Centres complement each other.

Conclusion and Recommendations

Employment Standards law and regulations were not designed for migrant workers who are locked into work permits that limit employment to a single employer. Employment Standards protections have proven ineffective because workers need to maintain their income during a complaint process, they can't do this if they are fired or suffer retaliation from their employer for complaining about abuses. We recommend that the Minister conduct a legislative review to make new provisions and allowances for the special situation and limitations placed on by migrant workers.

Orientation and advocacy programs must be backed up with programs that enable unannounced site inspections and monitoring of workplaces with a migrant workforce. Migrant workers are vulnerable. They cannot communicate in English, don't know their rights and can be easily intimidated and coerced by employers. Employers who want to use migrant workers as a source of cheap labour are free to do so when they see there is no monitoring, or at best prior notification before the monitoring takes place. Worse, has been a lack of will to enforce and ensure compliance of the rules for importing migrant workers. We call on the province and federal government to design an effective monitoring program and commitment to establish effective compliance mechanisms.