



Phase Three:
**Final Report
and Recommendations**



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I. ACKNOWLEDGMENTS

The *Employment Standards Act Comprehensive Review Panel* (the “Panel”) wish to acknowledge the time and efforts of stakeholder groups and individuals who contributed to the review process through written submissions and oral presentations. Stakeholder organizations advocating and speaking on behalf of Prince Edward Island business owners and workers as well as individuals who shared their personal experiences, helped bring the legislation to life. Their comments and evidence informed submissions increased the Panel’s understanding of their current situation, as well as their concerns, needs, and wishes regarding potential changes.

Additionally, these groups and individuals took the time to prepare submissions and deliver presentations, while also dealing with many competing demands and socioeconomic factors such as the impacts from the COVID-19 pandemic, post tropical storm Fiona, a tightening labour market, and rising inflation.

The Chairperson also wishes to recognize the high level of engagement of the employee and employer representatives throughout the review process. The representatives were equally bold and thoughtful as they endeavoured to balance the interests of Island workers and employers.

The Panel also valued the responsiveness and support provided by the Labour and Industrial Relations Division of the Department of Workforce, Advanced Learning and Population and its Director, Patricia McPhail, and dedicated Office Manager, Hazel Walsh-Scott.

II. BACKGROUND

The administration of the Prince Edward Island *Employment Standards Act*¹ falls under the Employment Standards Branch (the “Branch”) of the Labour and Industrial Relations Division of the Department of Workforce, Advanced Learning and Population. In the Fall of 2021, the Minister responsible noted, “Last year, we committed to conducting a comprehensive review of the *Employment Standards Act*, and I’m pleased to announce we are moving forward with that process to ensure individuals are supported and treated fairly in workplaces across Prince Edward Island.”²

The mandate within the review’s Terms of Reference (“Appendix I”) states in part, “The Panel is required to make recommendations on legislative changes to the *Employment Standards Act* and *Youth Employment Act*³, with a view to improving the effectiveness of the legislation.”

The Acts contain provisions that outline the rights and minimum obligations of employees and employers, administrative responsibilities involving the work of the Branch, and the structure and processes of the PEI Employment Standards Board (the “Board”). The provisions reflect a wide range of benefits and terms

1 [Employment Standards Act \(princeedwardisland.ca\)](https://www.princeedwardisland.ca/employment-standards-act)

2 Government of Prince Edward Island News Release - October 15, 2021; [Review of Employment Standards Act is underway | Government of Prince Edward Island](#)

3 [Youth Employment Act \(princeedwardisland.ca\)](https://www.princeedwardisland.ca/youth-employment-act)

and conditions of employment pertaining to wages, hours of work, holidays, leaves of absence, notice of termination, complaints and enforcement, and penalties.

Other Canadian jurisdictions have undergone or contemplated reviews over the past number of years or have been engaged in similar efforts to ensure their employment legislation remains relevant within evolving workplaces, e.g., Ontario's 2017 *The Changing Workplaces Review*⁴ and the 2018 British Columbia Law Institute *Report on The Employment Standards Act* prepared by the Members of the Employment Standards Act Reform Project Committee⁵.

The PEI *Employment Standards Act* was last reviewed seventeen years ago (2006) and since then, calls to complete a comprehensive review have been made by several interest groups and the Board. A review is also included as one of the "Key Actions: To help Islanders in need" within the *Belonging and Thriving: A Poverty Reduction Action Plan for Prince Edward Island (2019-2024)*⁶. The *Youth Employment Act*, which is being reviewed in conjunction with the *Employment Standards Act*, provides specific employment requirements for young persons under the age of sixteen.

Although a comprehensive review is arguably overdue, there have been numerous updates to the *Employment Standards Act* and Regulations⁷ since the last review, including the pay transparency (Bill No. 119) and pre-natal pregnancy loss (Bill No. 34) amendments to the *Employment Standards Act* and the introduction of the Domestic Violence, Intimate Partner Violence and Sexual Violence Leave Regulations⁸. The more recent introduction of the *Non-disclosure Agreements Act*⁹ and the *Temporary Foreign Worker Protection Act*¹⁰ are examples of other employment-related legislation, that are responsive to evolving workplace issues. Additionally, the 2021¹¹ and 2022¹² Employment Standards Board Minimum Wage Review Reports provide valuable in-depth analyses regarding the socioeconomic factors surrounding poverty, income, and the desire for a more predictable and responsive method for setting provincial minimum wage rates.

4 [The Changing Workplaces Review; An Agenda for Workplace Rights \(ontario.ca\)](https://www.ontario.ca/page/the-changing-workplaces-review-an-agenda-for-workplace-rights)

5 [BC Law Institute Review Employment-Standards-Act.pdf](#)

6 [pei-poverty-reduction-action-plan_web.pdf \(princeedwardisland.ca\)](#); p.12

7 [Employment Standards Act General Regulations \(princeedwardisland.ca\)](#)

8 [Domestic Violence, Intimate Partner Violence and Sexual Violence Leave Regulations \(princeedwardisland.ca\)](#)

9 [Non-disclosure Agreements Act \(princeedwardisland.ca\)](#)

10 [bill-19 Temp Foreign Wrkrs Protection Act Royal Assent May 6 2022.pdf](#)

11 [2021_employment_standards_board_minimum_wage_review_report.pdf \(princeedwardisland.ca\)](#)

12 [2022_minimum_wage_recommendation_signed.pdf \(princeedwardisland.ca\)](#)

III. PANEL AND REVIEW PROCESS

The comprehensive review was carried out by an independent advisory Panel consisting of a chairperson and an employer and employee representative. The side-panel members are mindful of how matters may affect employers and employees and the chairperson is neutral and does not hold affiliations with employer or employee organizations. The chairperson was selected through a request for proposals (RFP) process, side panel members were selected through Engage PEI¹³, and all members were then appointed by the Lieutenant Governor in Council (LGIC) and began their onboarding process in October 2021.

Chairperson, Andrew Thompson

Andrew is a Chartered Professional in Human Resources and has experience with employment matters in the PEI public sector. His previous employment includes senior human resources roles with the *City of Charlottetown, Health PEI*, and the *Province of PEI* including his appointment as CEO of the *PEI Public Service Commission*.

Employee Representatives, Hans Connor (Phase I) and Kendra Gunn (Phases II & III)

Hans is a lawyer who worked with the *PEI Union of Public Sector Employees* and has experience in dealing with employment matters on behalf of employees. He resigned from the Panel following Phase One, due to a temporary change in employment and his contributions to the review are appreciated.

Kendra joined the review following Phase One and is a lawyer with extensive experience dealing with employment matters on behalf of employees, including senior leadership roles with two provincial public sector unions.

Employer Representative, Isabelle Keeler

Isabelle is a lawyer currently employed with *Cox & Palmer* and has experience in dealing with employment matters on behalf of employers.

The Panel shares a belief that employee and employer interests are not mutually exclusive, and that balanced and equitable employment legislation is in the best interest of all stakeholders and the broader Island community. They also have respect for all people and their individual differences and completed training on the *Gender-based Analysis Plus (GBA+)* tool¹⁴ developed by the *Status of Women Canada* to enhance their related training, education, and lived experiences.

13 [Engage PEI | Government of Prince Edward Island](#)

14 [What is Gender-based Analysis Plus - Women and Gender Equality Canada](#)

The review process consisted of the following three Phases as outlined within its Terms of Reference:

Phase One

The initial phase involved the Panel carrying out research, consulting with organizational stakeholders, and producing an interim report to help guide a broader public consultation process. The Panel reviewed related reports, personal accounts, news articles, population and workforce statistics, and other cited works as part of its ongoing research to ensure a broad and evidence-informed review. Canadian interjurisdictional comparators, including Federal, Provincial and Territorial employment standards legislation and related policy work, helped situate Prince Edward Island and inform the Panel's analyses. In accordance with the Terms of Reference, this phase was completed within twelve months - October 2021 to September 2022.

The Panel sent over eighty (80+) invitations in late December 2021 and early January 2022 to a diverse group of stakeholders comprised of academics, the Board, the Branch, related government bodies, industry groups, unions, and other umbrella organizations representing the interests of employers and employees in Prince Edward Island. The objective was to gather information from these groups regarding their concerns with current employment standards and what they would like to see changed or put into the legislation. The Panel received twenty-four (24) written submissions and some participants also made in-person and virtual oral presentations. The issues raised were compiled within an Interim Report and were used to help guide the second round of consultations.

The Panel's invitations to participate coincided with the virulent COVID-19 Pandemic *Omicron* variant wave at the beginning of 2022 and several groups commented on the challenge of finding time to research and adequately consult with members. Accordingly, extensions were provided to many groups and several others declined to make a submission but expressed their intention to engage in the public consultation phase following the publication of the Interim Report.

The Panel met collectively for all stakeholder presentations and reached consensus on the Interim Report, which was published in September 2022, and advised Islanders of the full range of issues identified by stakeholders and their proposed options for change.

Phase Two

This included a second round of consultations wherein the broader public, stakeholders who made submissions in phase one, and those who were unable to provide input during phase one, were able to comment on the proposed options for change within the Interim Report and/or make other recommendations for change. Pursuant to the Terms of Reference, the period for receiving public feedback was not to exceed five months and not be less than two months.

This round of consultations took place between October 2022 and February 2023 inclusive and incorporated advertised opportunities for online comments, written submissions, and participation in four public meetings, i.e., Wellington, Summerside, and two in Charlottetown. The Communications and Public Affairs division of the Executive Council Office advertised and promoted the public meetings and provided onsite technical support. In total, there were seventeen (17) written submissions, six online commentaries, six in-

person presentations (two more were cancelled due to unforeseen circumstances), and one of the formal written submissions contained six employee testimonials. Again, the Panel appreciated the efforts of stakeholder organizations advocating on behalf of PEI business owners and workers, as well as individuals for generously sharing their experiences.

Phase Three

The Final Report represents the last phase of the review process and outlines evidence-informed recommendations for changes to the *Employment Standards Act* and *Youth Employment Act* for the Minister of Workforce, Advanced Learning and Population. The Panel was asked to also note employment and related matters raised by participants that might fall outside the scope of the *Employment Standards Act*.

This phase of the process took approximately five months, in keeping with the Terms of Reference, and involved numerous meetings wherein the Panel reviewed and discussed every subsection of both Acts and the Regulations in consideration of each submission and presentation, relevant research and data, and provincial and territorial comparators with a focus on the Atlantic Region, i.e., NB, NS, NF, and PE. The Panel worked collaboratively, listened, and openly discussed each issue while achieving consensus on every recommendation except one.

There is further commentary on the review process within sections V. Executive Summary and VI. Discussion and Recommendations 1. Review Process.

IV. CURRENT SETTING

Any potential changes to the *Employment Standards Act* and *Youth Employment Act* should be relevant within the current and near future environment in which they will be used. Stakeholder submissions referenced current social, economic, and labour force data and emerging employment themes that reflected today's work environment and supported their proposed changes to the *Employment Standards Act* and *Youth Employment Act*.

When the Government of PEI Department of Finance released its *Forty Eighth Annual Statistical Review 2021*¹⁵, the companion News Release stated, "The data shows that while external factors such as the COVID-19 pandemic and trade restrictions on the agriculture sector did keep certain sectors and areas of the economy stagnant, there were some significant areas of growth and signs of rebound during another challenging year . . ."¹⁶

15 [Annual Statistical Review](#)

16 [News Release; Government of PEI: Department of Finance; Published Date: Wednesday, July 13, 2022; Annual Statistical Review showcases PEI's resilience and growth in 2021 | Government of Prince Edward Island](#)

The following statistical highlights provide a brief population, socio-economic, and labour force ‘snapshot’ for PEI:

2021 Annual Statistical Review

- International exports increased by 12.5 percent, to reach \$1.7 billion in 2021;
- The value of total fish landings in 2021 almost doubled, increasing by 92.9 per cent to \$478.5 million, following a 28.9 per cent drop in 2020. Lobster landings reached 47.2 million pounds, valued at \$370.9 million;
- Retail sales in 2021 increased for the twelfth consecutive year, with a 19.7 per cent increase. Sales were valued at \$3.0 billion;
- Tourism was the industry that was most severely impacted by COVID-19, as it bore the brunt of travel restrictions, capacity limits and event cancellations. The total number of room nights sold at fixed roof accommodations rose by 68.0 per cent in 2021, following a decline of 63.9 per cent in 2020;

2022 Economic Indicators

- Real GDP increased 2.9 per cent in 2022 - the P.E.I. economy grew by 4.6 per cent in 2019, contracted 1.7 per cent in 2020, and grew by 7.9 per cent in 2021¹⁷;
- Annual average prices rose in all provinces in 2022, but consumers in PEI (+8.9%) felt it the most amid higher energy prices, such as fuel oil and other fuels (+68.1%) and gasoline (+34.0%)¹⁸;
- Farm cash receipts increased by \$195.4 million (36.7 per cent) in 2022 to an all-time high of \$727.7 million¹⁹;
- 2022 housing starts totaled 1,318, an increase of 4 per cent²⁰;

2022 Population Report²¹

- As of July 1, 2022, PEI’s population is estimated to be 170,688. This represents a yearly increase of 5,930 persons or a 3.6 per cent annual growth rate;
- Due to border restrictions in place during the COVID-19 pandemic, international immigration slowed considerably from April 2020 to June 2021. From July 2021 to June 2022, a total of 3,436 international immigrants came to the province, an increase of 184.2 per cent as compared the previous year. This follows a 41.8 per cent decrease in immigrants in 2020/21;
- The aging of the Island population is illustrated by the fact that the median age has risen from 24.8 years in 1971 to 42.4 years in 2021. Although the median age has declined from 43.9 in 2016, this

17 [Gross Domestic Product \(GDP\) by Industry | Government of Prince Edward Island](#)

18 [The Daily — Consumer Price Index: Annual review, 2022 \(statcan.gc.ca\)](#)

19 [PEI Farm Cash Receipts \(princeedwardisland.ca\)](#)

20 [Canada Mortgage and Housing Corporation, housing starts, under construction and completions, all areas, quarterly \(statcan.gc.ca\)](#)

21 [PEI Population Report \(princeedwardisland.ca\)](#); September 29, 2022

downward trend is not projected to continue. Furthermore, while only 11.0 per cent of the population was 65 years and older in 1971, this proportion had risen to 20.2 per cent in 2021;

*2022 Labour Force Survey Annual Report*²²

- Total labour force averaged 91,200 persons, an increase of 3.1 per cent from 2021;
- PEI's unemployment rate averaged 7.6 per cent in 2022, down 2.1 percentage points from 2021 and the lowest annual rate on record;
- PEI's average hourly wage rate was \$26.95 in 2022. This is an increase of \$1.61 or 6.4 per cent over 2021; and
- The average hourly wage rate was \$26.38 for females and \$27.53 for males in 2022.

The following excerpts were selected from the most recent *Women in PEI Statistical Review Fourth Edition (2020)*²³ and its "statistical snapshot of the female population in PEI based on sex and gender-disaggregated data on population, education, work and income, health, justice, violence, shelter services, and leadership". (p.5):

*According to 2016 census data, 2,735 individuals made up the Aboriginal population of PEI, including First Nations, Inuit, and Métis. 42 Sixty-eight percent (68%) of Aboriginal people identified as First Nations, followed by 26% Métis, and 2.7% Inuk (Inuit). Sixty-eight percent (68.3%) of First Nation respondents identified their ancestry as Mi'kmaq.*²⁴ (p.19)

*In total, 4.7% (6,640) of individuals in PEI identified as a member of a visible minority group²⁵, which represents a more than three-hundred and fifty percent (350%) from a reported 1,825 in 2006.*²⁶ (p.19)

*Approximately 26% of the PEI population age 15 and over lived with a disability. In 2017, there were a higher number of females (16,840) with disabilities than males (12,980) with disabilities in PEI. Overall, 28.3% of females in PEI lived with a disability, compared to 23.4% of males. This is consistent with data from other Atlantic Provinces but slightly higher than Canada.*²⁷ (p.22)

The PEI Department of Finance's, Statistics Bureau *2021 Census: Population and Dwelling Counts*²⁸ notes that Canada became the first country to provide census data on transgender and non-binary people. "Beginning in 2021, the precision of "at birth" was added to the sex question on the census questionnaire, and a new question on gender was included. (...) At the provincial level (PEI), of the 126,900 people aged 15 and older living in a private household, 420 were transgender (260) or non-binary (160), accounting for 0.33 per cent of the population in this age group, on par with the national percentage." (p.11-12)

22 [Microsoft Word - 2022 LFS Annual Report v3.docx \(princeedwardisland.ca\)](#)

23 [women_in_pei_a_statistical_review_2020.pdf](#)

24 PEI. Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510- X2016001. Ottawa; Released July 18, 2018

25 *Employment Equity Act* definition of visible minorities as "persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour"; PEI and Canada. Census Profile. 2016 Census. Statistics Canada Catalogue no. 98-316- X2016001. Ottawa. Released November 29, 2017

26 2006 Census. Statistics Canada Catalogue no. 92-591-XWE. Ottawa. Released March 13, 2007; [Visual census: Ethnic origin and visible minorities, Prince Edward Island \(statcan.gc.ca\)](#)

27 Statistics Canada. Canadian Survey on Disability (CSD); <https://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3251>

28 [2021_census_reports.pdf \(princeedwardisland.ca\)](#)

The *Atlantic Provinces Economic Council (APEC) Looking Ahead: Bulletin 4 - March 2021*²⁹ projected that Atlantic Canada's aging population and accelerated retirement age will shrink the labour force by 130,000 by 2040 and that this decrease must be offset by either more skilled workers moving into the region or a modest increase in participation by those already living here, e.g., women to the same rate as men, disabled persons, older workers, and within marginalized communities like Black Atlantic Canadians and Indigenous peoples. The report goes on to say that "Various policies and initiatives may be required to reduce barriers to participation and employment. This is important to help meet the region's labour challenge and to ensure inclusive growth." (p.4) If that is not achieved, they propose that the region will need "... even greater investments in new technology ... to boost output and thereby reduce the number of needed workers." (p.2)

V. EXECUTIVE SUMMARY

The *Employment Standards Act* and *Youth Employment Act* provide minimum employment standards and outline the associate rights and obligations of Island employees and employers. These terms and conditions of employment should be relevant within the current and near future environment in which they will be used and must strive to reflect modern workplace practices and broadly held societal ideals that are in the best interest of all Islanders. This includes an awareness that protections under the Act should apply to as many employees as possible, that workers deserve access to a minimum wage that enables them to meaningfully participate in the community, reasonable hours of work that allow for respite and work-life balance, and access to leaves of absence that provide job protection during special circumstances. The Acts must also create a level playing field for employers and reflect the need for clear rules, consequences for noncompliance, and well-defined administrative processes that enable predictability, operational flexibility, and equitable competition for employers.

Employment plays a vital role in the lives and health of individuals, families, communities, and the Island's broader population. The *2021 Chief Public Health Officer's Report*³⁰ identifies income and social status, and employment and working conditions, as two structural³¹ social determinants of health and notes that, "Employment provides income, identity, and daily structure to life." (p.51) As Dickson C. J. wrote in *Reference Re Public Service Employee Relations Act (Alta.)*³², "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." (p.91)

There have been numerous societal and employment related changes since the last review (2006) which

29 [Research Report - Looking Ahead - Atl Can Labour Challenge March 2021 .pdf \(ymaws.com\)](#)

30 [cpho21_report_web.pdf \(princeedwardisland.ca\)](#)

31 "how the structure of societies, through myriad social interactions, norms and institutions, are affecting public health..."; p.5;

32 *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313, <<https://canlii.ca/t/1ftnn>>, retrieved on 2023-06-12; Dickson C.J.; 91. [1987 CanLII 88 \(SCC\) | Reference Re Public Service Employee Relations Act \(Alta.\) | CanLII](#)

written submissions and twelve (12) presentations over two rounds of consultations.

When conducting its analysis, the Panel observed the emergence of the following **overarching themes** that might not be explicitly stated in the proposed amendments, but are fundamentally interwoven within the recommendations:

- The need for accessible education and training for employees and employers so they clearly understand their rights and obligations under the legislation;
- The importance of data collection, analysis and reporting to enhance accountability, decision-making, and strategic enforcement and compliance;
- The significance of transparency in legislated processes including investigations, hearings, Board decisions, and exemptions;
- The need to abide by the principles of diversity, equity and inclusion in the language, provision of benefits, and legislative processes; and,
- The requirement for the necessary technological and human resources to enable change and achieve intended outcomes.

VI. DISCUSSION AND RECOMMENDATIONS

This section provides general commentary on the review process and structure of the Act. This is followed by a comprehensive discussion on the potentially impacted provisions of the *Employment Standards Act* and *Youth Employment Act* and the associate recommendations formulated in consideration of the submissions during two rounds of consultations, relevant research, and interjurisdictional comparisons.

The Panel was not expected to ‘draft legislative language’ as part of this process, but in some cases, propose specific language, or point to other jurisdictions to illustrate the type of language recommended. There are also instances where the Panel does not recommend an amendment but discuss how additional information and education could enhance an employee, employer, and stakeholder’s understanding of the provision, or why a change is not recommended. In total there are 110 recommendations and suggestions (“Appendix II”). The Panel recognizes that it is solely an ‘advisory’ body and that these recommendations are subject to subsequent review and deliberation by the Minister, Government, the Labour and Industrial Relations division, related government entities, the Legislative Counsel Office, and ultimately the Legislative Assembly. Each recommendation will either be adopted, modified, or rejected.

General Comments

1. Review Process

The comprehensive review process was established with two rounds of consultations and an interim report to maximize opportunities for stakeholder and public input. Consequently, it was a rather lengthy process. A number of participants commented favourably on the opportunity to contribute to the modernization of the legislation and the quality of the Interim Report. On the other hand, a couple of stakeholders indicated that they expected more specific potential changes in the Interim Report and that its “general” nature and “often diverging opinions on numerous issues” limited their ability to provide meaningful feedback. That

said, both of those submissions included extensive and valuable information that helped guide the Panel's analysis. One of these submitters also noted an assumption that government had provided the Panel with some guidance on what changes it would like to see in the Act(s) and that this should have been outlined in the Interim Report.

The Panel wants to be clear that it carried out its work independent of government, other than the Branch providing an orientation, some related resource materials, and valuable intermittent administrative support. The Panel is an independent body and did not receive any guidance or 'signals' from government other than what was contained in the August 2021 Request for Proposals for the Chairperson role and the attached Terms of Reference. If it had, those would be included in the Interim Report.

The review process largely mirrors Ontario's 2017 *The Changing Workplaces Review*, an independent and comprehensive review of Ontario's *Employment Standards Act 2000* and *Labour Relations Act*, and the 2018 *Report on the Employment Standards Act* prepared for the British Columbia Law Institute by the Members of the Employment Standards Act Reform Project Committee. The scope and resources employed in these studies naturally surpassed this review, but the processes are comparable.

After reflecting on the process, the Panel sees an advantage with respect to Prince Edward Island's much smaller population and more direct access to stakeholders and the resulting opportunity to expedite the review process for subsequent legislative reviews, i.e., combining the two rounds of consultations with a final report and recommendations. Essential stakeholder input and public voices would still be heard through a merged consultation process and the subsequent lawmaking processes of the PEI Legislative Assembly, i.e., public debates and potential committee work. Additionally, although the Panel appreciated the quality and depth of stakeholder submissions, there is an opportunity to increase the quantity of input through the consultation process. One consideration is including an approach that optimizes access for workers who might not feel comfortable coming forward to share their concerns and personal situations, e.g., through varied stakeholder focus groups and/or surveying.

The last review of the PEI *Employment Standards Act* was completed in 2006 and while appreciating that the time and resources needed to carry out a review can understandably push the process further into the future, the Panel **recommends** an amalgamated and more accessible consultation process with the publication of one report, and more regular reviews, e.g., every 5-7 years. Hopefully, an expedited process will help to enable this outcome while also preserving the fundamental principles of public and stakeholder engagement.

2. Structure of the Act(s)

Numerous participants including those who regularly interpret and administer the legislation identified issues related to layout, sequencing, headings, and dated (inaccurate) references to other subsections within the Act. There were also comments regarding imprecise language and opportunities to reword various provisions to improve clarity and understanding. This modernization process provides legislative counsel and employees of the Branch an opportunity to address these concerns and improve accessibility by drafting legislation that is easier to navigate

and interpret. The Panel understands that legislative drafting is also aligned with the principles outlined in the Interministerial Women's Secretariat *Guidelines for Gender and Diversity Consideration in Policy Design and Implementation*.⁴¹

Employment Standards Act

The following is a sequential listing of the Panel's analysis and recommendations to the *Employment Standards Act* and *Youth Employment Act* broken out by **Heading** and **Section**:

Definitions - Section 1.

Where feasible, the Panel would like to see all definitions moved under the definitions section for consistency, clarity, and ease of interpretation. The following discusses relevant definition issues and recommended changes:

(c) **"employee"** means a person who performs any work for or supplies any services to an employer for pay, and includes (i) a person who is on leave from an employer, (ii) a person who is being trained by an employer to perform work for or supply services to the employer, or (iii) a person who was an employee;

(d) **"employer"** means a person, firm or corporation, agent, **manager**, representative, contractor or sub-contractor having control or direction of or being responsible, directly or indirectly, for the employment of an employee and includes a person who was an employer;

There was considerable discussion within submissions and presentations regarding the employment relationship along with suggestions that ranged from maintaining the current definitions of employee and employer, to expanding the definition of employee to include 'dependent contractors', to clarifying the inclusion of manager under the employer definition.

The definitions for employee and employer in other jurisdictions are closely aligned with PEI's. Eight other provinces and all three territories who responded to a jurisdictional scan, define an employer in part as a person '... having control or direction of or being responsible, directly or indirectly, for the employment of an employee ...'. Like PEI, four of those provinces (i.e., NB, NS, ON, and SK), have 'manager' included in their employer definitions - this does not mean they are classified exclusively as employers. Jurisdictions also vary in how a manager is characterized or defined and, in a number of cases, managers are subject to specific exclusions, e.g., holidays, provisions dealing with hours of work, and overtime pay.

Understanding the factors that give rise to an employment relationship is key to determining who has access to the terms and conditions of employment in the Act. When there is a clear and evident employee and employer relationship, the classification is straightforward. However, there are jobs where an individual may possess characteristics of both an employee and a "manager" or "contractor" and their status with respect to the Act is less clear.

When investigating and determining the existence of an employer-employee relationship, employment standards tribunals, including investigators and decision makers under the *Canada Labour Code*⁴²,

⁴¹ [Guidelines for Gender and Diversity Consideration in Policy Design and Implementation; Interministerial Women's Secretariat 2018; genderdiversity_guidelines_eng_2018.pdf \(princeedwardisland.ca\)](#)

⁴² [Canada Labour Code \(justice.gc.ca\)](#)

generally apply common law tests (e.g., *Control*⁴³, *Fourfold*⁴⁴, *Entrepreneur Test*⁴⁵, *Organization*⁴⁶, and *Employee vs. "Intermediate" /Dependent Contractor Status*⁴⁷), while also following the guidance established by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983.

*In Sagaz, the Court ruling in part stated, "There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks."*⁴⁸

It is also recognized that there is a category of workers along the employment relationship continuum between independent contractors and employees. As noted in the *British Columbia Law Institute Report on the Employment Standards Act*, "A category of worker intermediate between employees and independent contractors has long been recognized in Canada.⁴⁹ Workers in this category work outside a traditional employment relationship, but their situation resembles employment in terms of duration and a high level of economic dependence on a single client. This category of worker is commonly referred to as a dependent contractor"⁵⁰ (p.28) and is defined in the *Canada Labour Relations Code Definitions (3) (1) "dependent contractor" means (c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person;*

'Gig work' is also a growing category of work that was referenced in a number of submissions. This type of worker sits along the continuum between employee and employer with characteristics often aligned with both independent and dependent contractors. The *United Nations Economic Commission for Europe Handbook on Forms of Employment*⁵¹ define Gig work ". . . in terms of the short duration of the income-generating task, project, or job rather than with regard to the duration of the work relationship. Gig workers may have a variety of different durations of employment (tenure) in their situation. Gig work involves

43 1 Canadian Employment Law § 3:2 Canadian Employment Law Stacey Reginald Ball Part 3. Primary Components of the Relationship Chapter 3. Employer and Employee Status I. The Existence of the Relationship. [32 Control.pdf](#)

44 I.b.i.d 3:3. [33 Fourfold Test.pdf](#)

45 I.b.i.d 3:4. [34 Entrepreneur Test.pdf](#)

46 I.b.i.d 3:5. [35 Organization Test.pdf](#)

47 I.b.i.d 3:8. Employer and Employee Status II. Employee and Employer Status; [38 Employee vs Intermediate Dependent Contractor Status.pdf](#)

48 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 SCR 983, <<https://canlii.ca/t/51z6>>, retrieved on 2023-05-24; *CanLII – Canada Legal Information Institute*

49 See *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 (C.A.); *BC Law Insitute Review Employment-Standards-Act.pdf*

50 *Marbry v. Avrean International Inc.*, 1999 BCCA 172, 67 B.C.L.R. (2d) 102, at para. 38; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916; *Stewart v. Knoll North America Corp.*, 2007 BCCA 11 at para. 10; *Khan v. All-Can Express Ltd.*, 2014 BCSC 1429; *BC Law Insitute Review Employment-Standards-Act.pdf*

51 UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE Handbook on Forms of Employment; United Nations Geneva, 2022; ©2022 United Nations All rights reserved worldwide; [Forms of Employment_2210309E_ECE_CES_STAT_2022_4_WEB.pdf](#)

distinct, self-contained short-term tasks, projects or jobs, often done for different customers or employers. Gig workers are paid separately for each job, project, or task completed. Gig workers must take action on their own to find each separate task, project or job.” (p.62)

Statistics Canada’s 2019 research paper, *Measuring the Gig Economy in Canada Using Administrative Data* indicates that, “The share of gig workers among all workers rose from 5.5% in 2005 to 8.2% in 2016. Some of this increase coincided with the introduction and proliferation of online platforms. Gig workers are usually not employed on a long-term basis by a single firm; instead, they enter into various contracts with firms or individuals (task requesters) to complete a specific task or to work for a specific period of time for which they are paid a negotiated sum. This includes independent contractors or freelancers with particular qualifications and on-demand workers hired for jobs mediated through the growing number of online platforms.”⁵²

Statistics Canada’s December 2022 *Labour Force Survey*⁵³ provides the following snapshot of the scope and profile of Canada’s digital platform employment:

“ . . . 79,000 Canadians had provided taxi or rideshare services through an application or digital platform in the previous 12 months, while 207,000 had provided delivery services for food or other goods. For 58,000 of these workers, working through digital platforms or apps was their main job in the December LFS reference week, representing 0.3% of the approximately 19 million people who were employed in December (population aged 16 to 69; not seasonally adjusted). Those who had provided ride or delivery services were more likely to live in large urban areas, and nearly half of them (49.0%) lived in the CMAs of Toronto (22.4%), Montréal (14.0%) or Vancouver (12.6%). Among people who had provided ride or delivery services, 41.4% had postsecondary education below the bachelors level and 38.8% had a bachelors degree or higher. Men (73.1%) and landed immigrants (55.7%) represented the majority of rideshare and delivery drivers (population aged 16 to 69; not seasonally adjusted). Other common services that Canadians had provided through digital platforms for income in the previous 12 months include the creation of content such as videos, blogs, or podcasts (58,000 people), programming, coding, web or graphic design (42,000) and teaching or tutoring (41,000). In contrast to ride and delivery services, women represented the majority (58.4%) of people who created content for income through a digital platform or app (population aged 16 to 69; not seasonally adjusted). Future releases from Statistics Canada will focus on the prevalence of dependent contractor relationships and the number of Canadians involved in gig employment.”

Canada’s three largest provinces and one of the territories have taken steps to address the emergent employment relationship issues that accompany the growing gig economy. Québec and Yukon provide the following limited protections under their labour and employment legislation:

Québec’s Labour Standards Act⁵⁴ Section 1. Definitions of (10) “employee” means a person who works for an employer and who is entitled to a wage; this word also includes a worker who is a party to a contract, under which he or she i. undertakes to perform specified work for a person within the scope and in accordance with the methods and means determined by that person; ii. undertakes to furnish, for the carrying out of the contract, the material, equipment, raw

52 [Measuring the Gig Economy in Canada Using Administrative Data \(statcan.gc.ca\)](#); by Sung-Hee Jeon, Huju Liu and Yuri Ostrovsky; Date modified: 2019-12-16

53 [The Daily — Labour Force Survey, December 2022 \(statcan.gc.ca\)](#)

54 [QC Employment Act.pdf](#)

materials or merchandise chosen by that person and to use them in the manner indicated by him or her; and . . .

*Yukon's Employment Standards Act*⁵⁵ Part 1 Interpretation and Application 1 Interpretation (1) "employee" includes (c) a contract worker, and (...) "contract worker" means a worker, whether or not employed under a contract of employment, and whether or not furnishing tools vehicles, equipment, machinery, material, or any other thing owned by the worker, who performs work or services for another person for compensation or reward on such terms and conditions that (a) the worker is in a position of economic dependence on, and under an obligation to perform duties for, that person, and (b) the relationship between the worker and that person more closely resembles the relationship of employee to employer than the relationship of an independent contractor to a principal or of one independent contractor to another Independent contractor;

Ontario has pending legislation (Bill 88) which defines "digital platform work" under its Definitions 1 (1) means, subject to the regulations, the provision of for payment ride share, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform⁵⁶; and British Columbia's Ministry of Labour is in the midst of a public engagement process to learn about the challenges and benefits of app-based ride-hail and food-delivery work.⁵⁷

A couple of stakeholder submissions outlined characteristics of working on app-based platforms and what they consider to be the advantages of this type of employment. They shared their understanding that workers enjoy the flexibility of being able to "engage in this type of work alongside other work or commitments, studies, or as a supplement to other income" and that it "enables hundreds of Islanders to earn, on average, a few hours a week of extra income on their time" and that these workers are "stay-at-home parents or caregivers, freelancers, business owners, students, and retirees." One stakeholder expressed concerns if the definition of employee was expanded to include dependent contractors and the potential negative impact on earning opportunities for app-based workers and on the current labour shortage. They went on to state their support for "a consultative process that examines not only the possibility of providing app-based workers with improved benefits but also the possible impacts on workers, businesses and consumer access to services . . . without making significant changes to worker classification."

When examining the economic impact of a reclassification of app-based economy workers from independent contractors to employees in her 2022 article, *Economics of Flexible Work Schedules in The App-Based Economy*, Kathryn Shaw notes that, "Such a reclassification would impose additional regulations and costs to engaging these workers. The ability of app-based economy companies to offer workers the fully-flexible schedules that are currently available to independent contractors, allowing them to work when and where they want with essentially no limitations, would be substantially reduced. A range of evidence indicates that workers earning on these platforms place a significant value on scheduling flexibility and therefore, that reclassification as employees would lead to a loss in value to workers."⁵⁸

Employment and Social Development Canada's March 2023 Final Report, *What we heard: Developing greater*

55 [RSY 2002, c 72 | Employment Standards Act | CanLII](#)

56 [b088ra_e.pdf \(ola.org\)](#)

57 [Gig Workers - Province of British Columbia \(gov.bc.ca\)](#)

58 [Shaw, Kathryn; ECONOMICS OF FLEXIBLE WORK SCHEDULES IN THE APP-BASED ECONOMY; June 2022; Abstract; Microsoft Word - Shaw Report FINAL.docx \(independentmass.org\)](#)

*labour protections for gig workers*⁵⁹, outlines feedback received by Labour Program officials through various consultation activities with gig work experts, academics, the general public, Indigenous organizations, and labour groups. It discusses the opportunities and challenges for gig workers as well as possible policy options. They heard that gig work provides opportunities for more accessibility to the workforce and that in some cases this is due to limited access to more standard employment.

“Many labour and employer stakeholders and experts told us that the gig economy provides an opportunity for many workers to enter the labour market and accumulate meaningful work experiences. This is the case, for example, of young workers beginning their professional lives. It is also the case for many other groups that may find themselves marginalized from the traditional labour market, such as: Indigenous peoples; racialized persons; persons with disabilities; women; newcomers; and, persons who belong to linguistic minorities. Many marginalized workers may face labour market barriers that may be less prominent in the gig economy, such as language and geographical requirements, and rigid scheduling for persons with care responsibilities.” (...) “We also heard that many workers, particularly marginalized individuals, do not enter the gig economy by choice, but do so in response to a lack of more standard work opportunities or to supplement low wages earned in more traditional forms of employment.” (p.8)

In referencing the Law Commission of Ontario’s 2012 report on *Vulnerable Workers and Precarious Work*⁶⁰, the BC Law Institute Report noted that, “The Law Commission considered that the overriding concern was not the protection of dependent contractors as a class, but misclassification of employees as contractors. The solution was not a definitional one of creating new classes on the continuum between employees and independent contractors, but one based on proactive enforcement focusing on industries and sectors where misclassification is known to be prevalent, coupled with a campaign of public education to raise awareness of the issue and better training for employment standards officers.” (p.33)

In Ontario’s *The Changing Workplaces Review – Final Report*, the authors reference Katherine Gilchrist’s paper “Independent Contractors”⁶¹ which explored the problem of misclassification within the US, western European countries, and Australia, and concluded in part that, “The statutory definitions and case law criteria for an employment relationship, in the countries analysed, were all broadly similar, relying largely on control (also called subordination), economic reality, and mutual obligation, to define an employment relationship.” (p.266)

Employment and Social Development Canada’s *What we heard: Developing greater labour protections for gig workers* also notes that, “Misclassification happens when gig workers are treated as independent contractors by their employers, despite the fact that their relationship with the employer is more akin to an employment relationship than a contracting or business-to-business relationship. Misclassification can be intentional or unintentional, but the result is the same: it denies labour protections for workers and allows employers to avoid fiscal responsibilities (such as contributions to Employment Insurance and Canada Pension Plan). That said many gig workers are appropriately classified as independent contractors and enjoy the freedoms and fiscal benefits associated with this status. All participants in the consultation

59 [WWHR-Developing-greater-labour-protections-for-gig-workers.pdf](#)

60 [Layout 1 \(lco-cdo.org\)](#)

61 Katherine Gilchrist, “Independent Contractors”, prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review, July 25, 2016.

process voiced concerns over the quality of statistical information and data on the gig economy, and on gig workers more specifically.” (p.11)

This discussion highlights the difficulty of pursuing a new or expanded definition of employee and employer in an effort to more clearly define the employment relationship and the various types of work along the employment continuum, i.e., dependent contractors, gig work, and independent contractors. As noted, the interest is to ensure as broad an interpretation of employee as possible to allow appropriate protection for workers under the Act while also ensuring that independent contractors continue to enjoy the flexibility associated with that type of employment. The BC Law Institute Report spoke to this challenge and the potential unintended consequences when it discussed its decision not to include dependent contractors in the definition of employee, “That is an inflexible approach that would sweep in persons who prefer a nonstandard working arrangement over standard employment for valid personal and economic reasons.” (p.33)

The Panel is not recommending any changes to the “employee” and “employer” definitions notwithstanding the inclusion of a definition for manager and associated limits that will be discussed below. The determination of an employment relationship is a matter of classification that considers the statutory definitions of employee, employer, and manager alongside the referenced common law *Control, Fourfold, Employee vs. “Intermediate” /Dependent Contractor Status, Entrepreneur, and Organization* tests and the format established by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* The Panel **does recommend** that these considerations and sources be added to the Branch’s *Guide to Employment Standards* (“Guide”)⁶² to help educate employees, employers, and increase general public awareness. In doing so, the assessment and classification of workers along the employment continuum, including those within the gig workforce, will guide whether they are deemed to be in an employment relationship and a contract of service and therefore, should have access to the Act and the protections that provides; or, if they are more like an independent contractor in a contract for service and therefore, should benefit from the opportunities and flexibilities afforded that classification.

The Panel also **recommends** that the Branch (government) and Board monitor the next steps of the BC Ministry of Labour’s engagement process which “will explore the feasibility of benefit and pension plans for workers who do not otherwise have coverage”. This commitment was made pursuant to a 2022 public engagement process to understand the challenges and benefits of app-based ride-hail and food-delivery work. “The Ministry is working together with workers, platform companies and other parties on solutions to ensure appropriate standards and other protections are in place. This priority initiative is a key component of Government’s broader approach to make the economy work better for people living in B.C.”⁶³ The issue of access and portability of benefits is also discussed below under the layoff definition with respect to the emerging gig workforce and other nonstandard types of employment, including the Island’s established seasonal workforce.

62 [ESA Guide 2022_web_ready_version \(1\).pdf](#)

63 [Gig Workers - Province of British Columbia \(gov.bc.ca\)](#); Last updated: April 11, 2023

There was also discussion as to whether the employee and employer definitions are mutually exclusive categories and whether some employer representatives (i.e., managers) are also employees under the legislation. The Panel considered whether the term manager should be defined and whether there should be relevant exclusions from certain provisions of the Act for ‘fully functioning’ managers as is the case in other jurisdictions. In practice, not all managers exercise full managerial capacity and are commonly treated like employees under the Act.

As H.W. Arthurs pointed out in his 2006 Federal Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21st Century*⁶⁴, “Their (managers, superintendents, and professionals) present exclusion from the working time provisions of Part III (*Canada Labour Code*) rests on a number of assumptions: that labour standards are intended to protect only vulnerable and low-waged workers while managers, superintendents and professionals are neither; that they hold positions of trust and responsibility, which sometimes require them to compromise their own personal interests to fulfill their duties; that they receive higher remuneration, better benefits and (usually) monthly or annual salaries precisely so that they will not “watch the clock;” and that since they supervise their own work, there is no way for an employer to challenge their claim that they have worked additional or unsociable hours.” (p.67)

The Panel **recommends** the inclusion of a definition of manager to help clarify when a manager is more like an employee who should have access to the full minimum standards and protections of the Act, as opposed to circumstances where their duties and responsibilities are more aligned with the employer and should, therefore, be exempt from certain provisions within the Act, e.g., hours of work, overtime, and related employment records. The Panel points to section 2(1) of the Alberta Employment Standards Regulations⁶⁵ and the following definition used in British Columbia’s *Employment Standards Act Regulation*⁶⁶:

Definitions 1 (1) “manager” means (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity; Exclusions from hours of work and overtime requirements 34. Part 4 (minimum wages) of the Act does not apply to any of the following: (f) a manager; (and) Exclusions from statutory holiday pay requirements 36. Part 5 (hours of work and statutory holiday pay) of the Act does not apply to a manager.

The Panel also points to British Columbia’s *Guide to the Employment Standards Act and Regulation* and its section on definitions⁶⁷ as a best practice that could be replicated within the Branch’s Guide to assist employees, employers, and the general public when interpreting the legislation. For example, the BC Guide expounds on the above noted definition of manager when it states, “*Employment responsibilities of a manager include where the person exercises authority and discretion while performing certain actions or roles on behalf of the employer, and is personally accountable for the results. Accountability in this context is linked to the employer’s business objectives as opposed to the routine completion of a task. It is essential for the definition of “manager” that the responsibility that the employee has is principal to*

64 Arthurs, Harry W. *Fairness at Work: Federal Labour Standards for the 21st Century*. Gatineau, QC: Government of Canada, 2006; p.67; [Fairness at Work Federal Labour Standards for the 21st Century.pdf](#)

65 [Alta Reg 14/1997 | Employment Standards Regulation | CanLII](#)

66 [Employment Standards Regulation \(gov.bc.ca\)](#)

67 [Employment Standards Act & Regulation Definitions - Province of British Columbia \(gov.bc.ca\)](#)

their employment.” It goes on to discuss other terms used in the manager definition, i.e., *supervising and/or directing, other resources, and executive capacity*.

(f) **“extended family”** means the grandparent, grandchild, aunt, uncle, brother-in-law, sister-in-law, mother-in-law, father-in-law, son-in-law or daughter-in-law of an employee;

(g) **“immediate family”** means the spouse, child, parent, brother or sister of an employee;

There are family definitions throughout the Act that are inconsistent with the current definitions and seem to better reflect a modern societal view of family relationships, i.e., “family member” under s. 22.3 *Compassionate Leave* and s. 22.5 *Emergency Leave*, and “parent” under s. 22.11(1)(d) *Leave Related To Critically Ill Child* and s. 22.12(1)(c) *Leave Related To Crime-Related Disappearance Or Death Of Child*. There were suggestions that the more expansive and updated definitions should be integrated into the current extended and immediate family definitions and applied consistently across leave benefits. A scan of other jurisdictions revealed that some provinces solely use *family member(s)* as opposed to breaking out immediate and extended family and many have more expansive definitions of family and family types. Other jurisdictions also use the regulations to prescribe classes of persons falling under the definition(s) and in some cases the definition is tied to the family member definition found in the federal *Employment Insurance Act* Employment Insurance Regulations⁶⁸.

The Panel **recommends** the following modernized and more expansive definition of “immediate” and “extended family” (now “family member”) and move the definition of “parent” used in subsections 22.11 (1)(d) and 22.12 (1)(c) here under definitions (new language is bolded).

*“immediate family” means the employee’s child, **ward or guardian, any person who an employee considers to be like the preceding**, spouse, parent, foster parent, brother or sister, **any other person or class of persons that are prescribed to be immediate family members by the regulations**.*

*“family member” means the employee’s immediate family and grandparent, grandchild, aunt, **uncle, niece, nephew, brother-in-law, sister-in-law, mother-in-law, father-in-law, son-in-law or daughter-in-law, any other person or class of persons that are prescribed to be family members by the regulations**.*

“parent” includes (i) the spouse of a parent of a child, (ii) a person with whom a child has been placed for the purposes of adoption, (iii) a guardian or foster parent of a child, and (iv) a person who has the care and custody of a child, whether or not the person and the child are related by blood or adoption. [current 22.11 (1)(d) and 22.12 (1)(c)]

(i) **“layoff”** means a temporary interruption of the employment relationship at the direction of the employer because of a lack of work;

The definition for layoff is comparable across jurisdictions as a means to temporarily interrupt the employment relationship without terminating the employment of an employee. Jurisdictions vary in the timelines outlining the term of layoff and the thresholds to qualify for notice. Currently, an Island employee is entitled to a written notice of layoff if they have been employed by the employer for a continuous period of six months. No written notice is required if an employee is laid off for a period not exceeding

six consecutive days. There is also language under the General Provisions Concerning Leave (s. 23.3) that prevents an employer from laying-off an employee while the employee is on an approved leave of absence under the Act for reasons arising from the leave.

It was noted that there are situations where employers might wish to temporarily interrupt but not terminate the employment relationship for reasons not easily recognized as “a lack of work”. Rather than identify a list of potential reasons within the definition to help employers from unnecessarily terminating the employment relationship, the Panel **recommends** including information within the Guide describing the layoff process generally and outlining scenarios that would qualify as a shortage or lack of work using the Government of Canada Employment Insurance reasons for issuing a Record of Employment: Code A⁶⁹ – Shortage of work (layoff).

The layoff definition was also explored more broadly with respect to the interplay between seasonal employment and the various continuous employment qualifying periods needed to access benefits and protections under the Act, i.e., notice of termination and leaves of absence. The analysis focussed on the feasibility of including timelines and/or an hours worked threshold in light of the Island’s considerable seasonal workforce and those workers who have a reasonable expectation to be rehired annually by the same employer, but are not employed for a continuous period of six months.

PEI’s primary industries (i.e., agriculture, fisheries, and tourism) rely on seasonal employment, which, by its nature, is often nonstandard employment. A 2007 Statistics Canada *Labour Force Survey*⁷⁰ indicated that about 1 in 10 employees in Prince Edward Island (10.3%) and Newfoundland and Labrador (9.4%) were seasonal workers in 2007, the highest rate of all provinces. New Brunswick and Nova Scotia followed at 5.9% and 5.5%, respectively. PEI has the highest rate of seasonal workers of all provinces in Canada at 10.3% in 2007. *Indeed’s Career Guide*⁷¹ defines seasonal work as, “. . . temporary employment that recurs around the same time every year. Businesses that primarily have more customers during specific seasons hire seasonal employees for extra help during their busiest times. Other seasonal jobs require warm or cold weather, so companies shut down in the slow season.”

The Canadian Centre for Occupational Health and Safety, *OSH Answer Fact Sheets*⁷² define standard employment “as a situation where a worker is employed by one employer on a full-time, permanent basis, receiving decent wages and benefits, and has access to and effective protection from regulatory agencies.”⁷³ While “Precarious work (also referred to as nonstandard employment) is described as any deviation from standard employment and is characterized as being temporary or casual in nature, lacking benefits, lacking in certain legal protections, and usually associated with low income.” They go on to say that “Precarious employment describes work experiences that are associated with instability, lack of protection, and social-economic vulnerability.”

69 “(this list is not exhaustive): end of contract or season; end of casual/part-time work; end of school year; temporary shutdown of operations; permanent shutdown of operations; position eliminated/redundant; company restructuring; employer bankruptcy or receivership.”; [How to complete the record of employment \(ROE\) form - Canada.ca](#)

70 Statistics Canada, *Labour Force Survey*, CANSIM table 282-0080 [Seasonal workers, by province \(statcan.gc.ca\)](#)

71 [What Is Seasonal Work? Definition, How It Works, Types and How to Get a Seasonal Job | Indeed.com](#)

72 [Precarious Employment and Vulnerable Workers : OSH Answers \(ccohs.ca\)](#); Date modified: 2022-07-07

73 From: Vosko, L. (2006) *Precarious Employment*

It is recognized that not all of these characteristics of precarious work necessarily apply to the Island's seasonal workforce and, by extension, the referenced primary industries. An organizational stakeholder from one of these industries pointed out that many of their employers have expanded their periods of operation and have very competitive wages in excess of the minimum wage rate. Statistics Canada 2022 employee average hourly wage rates, for both full-time and part-time employees by industry, revealed the following for PEI: Total employees all industries averaged \$26.95/hour; Agriculture \$21.77/hour; Accommodation and Natural Resources (fishing, forestry, mining, quarrying, oil and gas) \$26.52/hour; Food Services \$16.87/hour; and Other services (except public administration) \$24.72/hour.⁷⁴

The OHS Fact Sheets also cite the Law Commission of Ontario which in its 2012 *Vulnerable Workers and Precarious Work Final Report* noted that "Although anyone may be precariously employed, precarity is more likely to affect workers in "already marginalized social locations"⁷⁵. This includes women, single parents (who are disproportionately women), racialized groups, new immigrants, temporary foreign workers, Aboriginal persons, persons with disabilities, older adults and youth." (p.19) The Fact Sheets also reference the "Poverty and Employment Precarity in Southern Ontario" (PEPSO) report⁷⁶ which ". . . notes that precarious employment affects community participation, creates social isolation, and often leads to less involvement in democratic processes such as voting."

As alluded to in the discussion on the employment relationship, the Government of PEI recognized the potential gap in access to benefits for workers in nonstandard employment when it made the following commitment within its 2023 *Budget Address*, "To level the playing field for gig economy workers, contract employees, or seasonal workers, our government will invest \$400,000 to begin the work to establish a Portable Health Benefits program to provide health, dental, and medical insurance for those who are not covered by an employer-sponsored plan."⁷⁷

Included in the discussion on nonstandard employment, a number of submissions raised concerns regarding the fair treatment of temporary foreign workers. The *PEI HR Toolkit*⁷⁸ notes, "The Temporary Foreign Worker (TFW) Program allows Canadian employers to hire foreign workers to fill temporary jobs when qualified Canadians are not available. There has been an increase in the number of TFWs on the Island over the past number of years. Although the Government of Canada runs the TFW Program, matters such as working conditions generally fall to the provinces. There have been calls over the past several years to create additional protections for TFWs. This proposed legislation will: Require foreign worker recruiters to be licensed, and employers who recruit and hire temporary foreign workers to be registered; Establish criteria for issuing, refusing, suspending or cancelling a licence or registration; Impose penalties for recruiters and employers who violate the legislation; Create a positive obligation on recruiters and

74 [Employee wages by industry, annual \(statcan.gc.ca\)](https://www150.statcan.gc.ca/n1/pub/75-602-x/2022001/article/00001-eng.htm)

75 "The concept of 'social location' has been developed to specify the ways in which political and economic conditions interact with class, ethnicity, culture, and sexual orientation to shape the meanings and strategies of working men and women": Fudge, Tucker & Vosko, "The Legal Concept of Employment", note 68, 7.

76 [CASE STUDY 1: PRECARIETY AND ITS IMPACT ON HOUSEHOLD AND COMMUNITY WELL-BEING — Poverty and Employment Precarity in Southern Ontario \(PEPSO\)](#)

77 At the First Session of the Sixty-seventh General Assembly of the Prince Edward Island Legislature; May 25, 2023; p. 11; [Budget Address-2023-0524c \(princeedwardisland.ca\)](#)

78 [PEI HR Toolkit » Proposed Temporary Foreign Worker Protection Act \(Feedback deadline: February 12, 2021\)](#)

employers to supply TFWs with written contracts and information on their employment rights.” These concerns are largely addressed within the pending *Temporary Foreign Worker Protection Act* (Bill-19) which received Royal Assent in May 2022 and is awaiting enactment.

The Panel does not recommend any changes to the layoff definition however, along with the needed protections under the pending *Temporary Foreign Workers Protection Act*, notes that a number of this report’s recommendations would provide greater access to minimum employment standards for those working in seasonal industries, i.e., notice of termination, leave qualifying periods, a formulaic approach to paid holidays, and standard work week exemptions.

(k) **“Minister”** means the Minister of Economic Growth, Tourism and Culture;

This will likely be addressed by legislative drafters but here are a few examples of language used in other jurisdictions to define Minister scripted in a PEI context:

“Minister” means the Minister determined under section 1 of the *Public Departments Act* as the Minister responsible for this Act

“Minister” means the member of the Executive Council to whom for the time being the administration of this Act is assigned

“Minister” means the Minister responsible for Labour

(q) **“regular rate of wages”** means the regular wage rate of an employee for an hour of work;

There is a need to address the calculation of wages for employees working variable hours or shiftwork. The Panel **recommends** either using the *Domestic Violence, Intimate Partner Violence and Sexual Violence Leave Regulations* section 3. *Calculating rate of pay during leave*, or a combination of this language and the language recommended later in the report under section 9. Pay for working paid holiday:

Domestic Violence, Intimate Partner Violence and Sexual Violence Leave Regulation section 3. *Calculating rate of pay during leave - Where the wages of an employee vary from day to day, the employee’s rate of pay for each day of leave pursuant to these regulations shall be at least equivalent to . . .*

(either) *the employee’s average daily earnings, exclusive of overtime, for the days on which the employee worked during the 30 calendar days immediately prior to the commencement of the leave. (EC188/19) . . .*

(or) the Saskatchewan *Employment Standards Act*⁹⁹ *Public holiday pay 232(1) (a) 5% of the employee’s wages, not including overtime pay, earned in the four weeks preceding the public holiday;*

(s) **“termination”** means the unilateral severance of the employment relationship at the direction of the employer;

The Panel **recommends** the use of “end” or “cessation” instead of the word severance to avoid any potential confusion surrounding the term severance and its broader use under common law, i.e., calculating reasonable notice and other termination considerations specific to a particular employee.

(u) **“wages”** includes salaries, commissions, and compensation in any form for work or service measured by time, piece or otherwise, but does not include vacation pay, pay in lieu of vacation, gratuities or benefits;

References to “pay” and “wages” appear continually throughout the Act and, although there are separate definitions, it appears that the terms are sometimes used interchangeably. The Panel is not recommending changes to either definition, however, suggests that these terms be applied purposefully and consistently if there is a redrafting of the Act.

Definitions: Possible Additions

- There were several proposals to remove the “farm labourer” and “salesperson” exceptions (discussed in s. 2. *Application*). Others noted that if these terms or some modified version remain, they should be defined along with the term “commercial undertaking” as used in s. 2.(5) *Farm labourers*. These terms are discussed and, to a certain extent, defined within the Guide and will be examined further within the Application Section.
- There was a suggestion to define partnership, but the term is not referenced in the Act, does not indicate an employment relationship, and is defined in section 3. of the *PEI Partnership Act*⁸⁰.
- The Panel **recommends** moving the director and corporation definitions from section 5.7 [Directors’ Liability] to section 1. Definitions, and using the definitions contained in the *PEI Business Corporations Act* 1. (1)(i) and (n), while maintaining the reference to a *co-operative association*:

“corporation” means a body corporate incorporated or continued under this Act and not discontinued under this Act, and includes a co-operative association;

“director” means a person occupying the position of director by whatever name it is called, and references to “directors” and “board of directors” apply to a single director;

Purposes - Section 1.1

1.1 Purposes *The purposes of this Act are as follows: (a) to ensure that employees receive at least basic conditions and benefits of employment; (b) to promote positive relationships and open communications between employers and employees; (c) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of Prince Edward Island; (d) to contribute in assisting employees to meet work and family responsibilities; (e) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.*

A few submissions referenced the purposes of the Act including a preference for keeping the purposes as opposed to some form of preamble. Others discussed the opportunity to articulate loftier standards that “reflect the value of work in peoples’ lives” and to include more contemporary language that reflects societal values of equity, diversity, and inclusion.

The Province of PEI’s 20019 *Diversity and Inclusion Policy*⁸¹ defines inclusion as, “. . . an attitude and approach that embraces diversity in the workplace where all employees feel valued and have a sense of belonging within an organization that applies the principles of equity and fairness in all aspects of its policies, practices, procedures and service delivery. An inclusive environment enables individuals and groups to

80 [Partnership Act \(princeedwardisland.ca\)](http://princeedwardisland.ca)

81 [diversityandinclusionpolicyenglish.pdf \(princeedwardisland.ca\)](http://princeedwardisland.ca)

feel safe, respected, engaged, motivated, and valued, for who they are and for their contributions toward organizational and societal goals.” (p.7)

In *The Uses and Audiences of Preambles in Legislation*⁸², the author outlines some of the potential advantages and drawbacks of using preambles when they noted, “By including narratives about why laws have been enacted, preambles have the potential to educate the citizenry and policy-makers. They can provide some of the narrative detail and storytelling often missing from legislation.” (p.132-133) “Preambles can make extravagant claims about what legislation achieves or hopes to achieve that are not supported by the text of the law. The appeal to the heart of the evocative narratives, aspirations, and symbols used in preambles may also lead to legislation that is unreasonable and unbalanced in its passion.” (p.132) “Although there is a risk that a preamble will oversell the legislation, preambles may also have a role in stating high aspirations, moral teachings, or “meta-legal messages”⁸³ that could not be realistically reduced to and enforced through the operative text of the law in a society that is liberal and free.” (p.133)

A jurisdictional scan revealed that only British Columbia and Prince Edward Island have stated purposes and Alberta is the only province with a preamble. The Panel **recommends** a Preamble subject to Legislative Counsel Office drafting protocols. A preamble provides an opportunity to speak to the intent of the legislation, be aspirational and forward looking, and speak to various audiences.

If a preamble is not feasible, there is also an opportunity to modernize the current purposes by referencing modern and fundamental principles such as equity, fairness, transparency, and inclusion.

Application - Section 2.

2. Application (1) *Except as otherwise expressly provided by this Act or the regulations, this Act and the regulations apply to all employers and employees.*

This section drew significant feedback ranging from the elimination of exemptions and the provision of minimum standards across the board for all employees and employers, to expanding or at the least maintaining specific exemptions, to implementing a modified and modernized exemption process.

A jurisdictional scan identified wide-ranging lists of exemptions for different types of workers from various provisions of their employment standards legislation, and all provinces have language excluding various types of ‘farming’ work and operations.

When considering the exemption of certain types of employees or industries from various or all provisions of the Act, the Panel recognized that the Act’s protections should be as broadly applied as possible. In the Supreme Court of Canada’s judgment in *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986 at 1002-1003, Justice Iacobucci noted the following when delivering part of the Court’s judgment:

“To quote Conant Co. Ct. J. in *Pickup*, *supra*, at p. 274, ‘the general intention of this legislation [i.e. the Act] is the protection of employees, and to that end it institutes reasonable, fair and uniform minimum

82 Roach, Kent. “The Uses and Audiences of Preambles in Legislation”. McGill Law Journal 129, 2002. [The Uses and Audiences of Preambles in Legislation - McGill Law Journal](#)

83 R. Sullivan, “Some Implications of Plain Language Drafting” (January 2000) [unpublished], especially Part 2, “The Meta-Legal Messages of R.S.C. 1985”

standards.' The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers. As stated by Swinton, *supra*, at p. 363:

... the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not."⁸⁴

Alongside this guidance, there are also practical industry-related economic and operational realities that need to be taken into consideration. The current slate of exemptions likely attempted to balance these countervailing factors but is missing a cogent set of exemption criteria and an associated transparent exemption process. The need to weigh the underlying principle of access alongside reasonable industry or operational realities was addressed by the Special Advisors to Ontario's *Changing Workplaces Review* who noted, "... an understandable preference for standards of general application should not preclude exemptions or sector specific regulation in appropriate circumstances. The caveat, however, is that there should be a transparent process in which the opinions, interests and suggestions of stakeholders are taken into account and that is designed to generate outcomes more precisely tailored to the needs and legitimate interests of employers and employees potentially affected. Exemptions, and specific regulations, if justified, should be focussed (not overly broad), balanced, decent and fair." (p.150) In response to this suggestion, the *BC Law Institute Report* further stated, "An entirely rigid and simplistic approach to employment standards is impractical, but this does not diminish the need to ensure that any partial or total exclusions from the Act are fully justified." (p.46)

The Special Advisors went on to say, "It appears that exemptions have been granted too easily, too broadly, with little or no rationale, little transparency and too little consultation with employees." (p.152) When overlaying this assessment within the PEI context, the Panel does not suggest that PEI's situation and the evolution of exemptions lacked justification, but that in the absence of a transparent exemption process, it is difficult to assess how exemptions were established. For example, exemption orders from the standard work hours draw upon the legislated factors outlined in subsections 15. (2)(3) as well as an established set of criteria used by the Board. That said, the analysis and rationale are not included within those orders.

The Panel agrees with the following *BC Law Institute Report* recommendation that: "Principles should be developed to govern future applications for exclusion of an industry, activity, occupational group, or class of workers from all or part of the ESA in order to ensure that the interests of employers and employees are fully taken into account and that existing exclusions from ESA standards should undergo a systematic review by government to determine whether they continue to be justified." (p.47)

84 *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986, <<https://canlii.ca/t/1fsd2>>, retrieved on 2023-05-26

The Panel **recommends** leaving 2. (1) as is and moving the exemptions in subsections (2) and (3) under the Exemption Regulations, i.e., farm labourers, salespersons, and home care workers. The Act will go on to describe a transparent application, consultation, and approval process for exemptions from the Act. The legislated process will include the noted requirement for a standard application to the Board, factors to be considered, consultation with affected parties, and a written Board decision that outlines the analysis and rationale for the decision. Where approved, the decision will also be contained within a published order.

The exemptions that move under the regulations are discussed further below and would be subject to future Board review in determining whether they remain as is, are modified, or repealed. This transparent approach to exemptions will also be discussed in relation to the standard hours of work exemptions in section 15. (2)(3) and is closely aligned with the Board's current annual Minimum Wage Review process. The Panel recognizes that this type of process and the associate vetting, consultation and analysis may require additional human resources for the Branch in support of the Board.

Exception, farm labourers and salespersons 2. (2) *Notwithstanding subsection (1), only those provisions of this Act relating to the payment and protection of pay (5.2-5.7) apply to the following employees:*

- (a) salespersons whose income is derived primarily from commission on sales; and*
- (b) farm labourers.*

Various types of farm workers and salespersons are described and exempted from various provisions across provincial jurisdictions. The Panel **recommends** moving these two exemptions as is under the Exemption Regulations and, as noted, have their continued exemption vetted through the recommended transparent review process. In the interim, the regulations should also provide an accompanying definition for Commission Salespersons and Farm Labourers as described the Guide.

Idem, home care workers 2. (3) *Notwithstanding subsection (1), the provisions of sections 5 and 15 do not apply to*

- (a) persons employed for the sole purpose of protecting and caring for children, persons with disabilities or aged persons in private homes; and*
- (b) employees of a non-profit organization who are required by the terms of their employment to live-in at a facility operated by the organization.*

This provision excludes this type of home care worker from sections 5 (Wages) and 15 (Hours of Work). As with the exemptions in subsection (2), the Panel **recommends** moving this exemption into the Exemption Regulations and have their continued exemption vetted through the recommended transparent review process.

Employees with a collective agreement 2. (4) *Notwithstanding subsection (1), only the following provisions of this Act apply to employees whose terms and conditions of work are established by a collective agreement pursuant to the Labour Act R.S.P.E.I. 1988, Cap. L-1:*

- (a) those provisions relating to maternity, parental, and adoption leave as contained in sections 18 to 22.02 and 23.3;*

- (a.1) those provisions relating to domestic violence leave, intimate partner violence leave and sexual violence leave as contained in section 22.4;
- (a.2) those provisions relating to an emergency leave of absence as contained in section 22.5;
- (b) those provisions relating to leave for reservists as contained in section 23.1;
- (c) those provisions relating to sexual harassment as contained in sections 24 to 28;
- (d) those provisions relating to pay, protection of pay, payroll records and pay transparency as contained in sections 5.1 to 5.3, 5.6, 5.10, subsection 30(1), and sections 31, 32 and 39.1;
- (e) those provisions relating to compassionate care leave as contained in sections 22.3 and 23.3;
- (f) those provisions relating to paid holidays as contained in sections 6 to 10;
- (g) those provisions relating to the protection of complainants or informants as contained in sections 30, 35, 36 and 36.1;
- (h) those provisions respecting the administration and enforcement of this Act and the regulations as contained in sections 3, 38 and 39.

During the organizational stakeholder consultation process, one submission remarked that the list of sections deemed to apply in unionized environments can be challenging to keep current. One suggested approach was to establish a blanket rule to have the minimum standards apply to all provincially regulated employees, with a provision allowing for the negotiation of those standards through a collective bargaining process. There was also a concern regarding jurisdiction and the possibility that disputes could come to the Board instead of going through a collective agreement's grievance process, i.e., subsections 2.(4)(g) and (h).

The Panel believes the list of sections deemed to apply in unionized environments are valid and is concerned that moving them to the regulations might decrease awareness and remove the checks and balances associated with the lawmaking process⁸⁵. Any new amendments or pieces of related employment legislation that are passed can be publicized pending any consequential amendments to this provision. The Panel **recommends** maintaining the current language and adding a provision that addresses the noted jurisdictional issue and directs employees bound by a collective agreement and who are able to file a grievance, to resolve disputes pursuant to that process as opposed to filing a complaint under the Act.

The Panel also **recommends** adding section 22.2 (4) Paid day of sick leave, to the provisions listed under 2. (4) to ensure a minimum threshold for all Island employees. This amendment should be accompanied by consultations with labour, e.g., the PEI Federation of Labour.

Farm labourers 2. (5) *For the purposes of subsection (2), "farm labourers" does not include employees in an undertaking that, in the opinion of the board, is a commercial undertaking.*

⁸⁵ "One important job for elected representatives is studying, debating, and voting on bills presented to the House. A bill can change a law that is already in place or it can introduce a new law."; found at [How a bill becomes law](#) | Legislative Assembly

The Panel **recommends** moving this to the Exemption Regulations in concert with 2. (2) and, as recommended above, provide an accompanying definition for farm labourers and a commercial undertaking as described in the Guide.

Administration - Sections 2.2 and 3.

Powers of investigation and entry 3. (2) *For the purpose of ensuring that the provisions of this Act and the regulations are complied with, an inspector may*

(a) at any reasonable time, and without a warrant, enter into or upon lands or premises where a person is employed, may be employed, or has been employed for the purpose of conducting an inspection, investigation or examination of the conditions of employment;

(b) enter into any office or premises where an inspector has reason to believe employment records are kept or stored;

(c) inspect and examine all books, payrolls and other records of an employer that in any way relate to pay, hours of work or conditions of employment affecting any of the employer's employees;

(d) take extracts from, or make copies of, with the employer's consent, any entry in such books, payrolls and other records; and

(e) verify, in such manner as the inspector requires, the entries contained in such books, payrolls and other records.

The Panel **recommends** updating the language in 3. (2) to allow an inspector to also “request copies of records” or “require the production of records” rather than having to attend the premises to “take” or “make copies” and adding a provision allowing an inspector to question a person for the purposes of ensuring compliance with the legislation.

Along with these powers, the Panel **recommends** balancing the authority of the inspector with responsibilities similar to the Saskatchewan *Employment Standards Act Inspection 2-83 (6)* which requires an employment standards officer to *(a) make those copies as soon as is reasonably possible; and (b) promptly return the books, records, papers or documents from which the copies were made to: (i) the place from which they were removed; or (ii) any other place that may be agreed to by the officer and the person who produced them.*

Employment Standards Board - Section 4.

“The primary role of the Employment Standards Board is to, in accordance with the *Employment Standards Act*, exercise the powers conferred on it by the Act, including: adjudicate appeals of employers/employees regarding orders issued by the Chief Employment Standards Officer; and annually review the Minimum Wage Order and recommend accordingly to the Lieutenant Governor in Council.”⁸⁶ As is apparent by this brief description, the Board plays a central role in the legislation. The Board was one of the key organizational stakeholders that provided detailed and valuable submissions during the consultation processes.

86 [Employment Standards Board | Government of Prince Edward Island](#)

Employment Standards Board 4. (1) *The Lieutenant Governor in Council shall establish, and appoint the members of, a board that shall be known as the Employment Standards Board and that board shall consist of not less than six persons equally representative of employees and employers respectively, and one additional person who shall be chairperson.*

The composition of the Board was discussed within a couple of submissions, including one which encouraged an inclusive recruitment process with a focus on diversity, equity, and representation from vulnerable employee groups. The Board members are currently appointed by LGIC following the recruitment of applicants through Engage PEI, whose webpage encourages all Islanders “. . . to apply to Engage PEI to serve as a volunteer member for any ABC (Agency, Board and Commission). It is a great opportunity to contribute to our Island community. It is also an important way to represent the public’s interests to government.” There is no direct reference to diversity or inclusion and the importance of agencies, boards and commissions being representative of the population they serve within the Engage PEI or Board⁸⁷ webpages. That said, the Engage PEI application does ask applicants to self-identify as a person with a disability, senior, youth, a member of the Island’s Acadian community, of Aboriginal descent or an Island Mi’kmaq Band, a newcomer to Canada, or part of an underrepresented group – presumably for the purpose of appointing more members from these groups.

The provincial government recently released *An Anti-Racism Action Plan for Prince Edward Island 2023-2028*⁸⁸ to improve the social, economic, educational and health outcomes for racialized and Indigenous people living in in the province. The report states that one of its anticipated outcomes is, “Diversity on Agencies, Boards and Commissions is increased” (p.16). The Panel agrees that an engaged and ‘qualified’ Board must be representative of the diverse stakeholders and population it serves and that recruitment processes should support this outcome.

Vice-chairpersons 4. (3) *The Lieutenant Governor in Council may appoint one or more vice-chairpersons and define the powers and duties of such vice-chairpersons.*

There was discussion regarding the intent of this provision in light of the standing practice of appointing only one vice-chairperson who acts as a standing member of the Board. The *Employment Standards Board Position Descriptions* document⁸⁹ describes the vice-chairperson role and indicates that it has “all the responsibilities of a member, performs the role of Chair when they are unavailable, and conducts hearings, makes rulings, and writes decisions”. There are no reservations regarding the value of the vice-chairperson role as it is currently carried out, but there is uncertainty as to whether it was intended to be a regular voting member of the Board. One stakeholder raised their unease with the vice-chairperson being a regular voting member considering the possibility their vote could upset or be perceived to upset the seeming intended balance of employee and employer representation as laid out in 4. (1). The governance model indicates that the majority of the votes of the Board rule and if the votes are equal, the Chair is the tie-breaking vote. All members are expected to be impartial, but the six-member body is equally

87 [I.b.i.d.](#)

88 [Province releases first Anti-Racism Action Plan | Government of Prince Edward Island](#)

89 [employment_standards_board_position_description.pdf \(princeedwardisland.ca\); p.4](#)

representative of employees and employers who are, by design, more attuned to the challenges and interests held by those groups.

The Panel understands that the vice-chairperson role is appointed by LGIC, and that the appointment is essentially another member of the Board with duties and responsibilities outlined in the position descriptions referenced above, as opposed to being appointed for a specific purpose or to chair a certain panel. It is also understood that there are not varied vice-chairperson appointments and, therefore, there has not been an attendant assignment of powers and duties by LGIC as described in this provision. The Panel does not recommend any changes to this provision but suggests that the Branch and Board re-examine the role of the vice-chairperson. This would include whether appointments should be for a specific purpose and for individuals with an associate skillset or background relevant to the matter at hand, (e.g., for a specific panel or purpose such as reviewing the minimum wage order), and whether the vice-chairperson should be a standing member with voting powers that could potentially upset the balance of the Board.

Functions 4. (7) *The function of the board is to exercise the powers conferred upon it under this Act and to determine all questions of fact or law that arise in any matter before it including any question as to whether*

(a) a person is an employer or an employee; or

(b) an employer or other person is doing or has done anything contrary to this Act or the regulations or has failed to do something required by this Act or the regulations.

To avoid any confusion that employers and employees are necessarily mutually exclusive terms, the Panel **recommends** breaking out the employer and employee references into separate subsections, i.e., *(a) a person is an employee; (b) a person is an employer; or (c) an employer or other person . . .*

Jurisdiction 4. (16) *The board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the board thereon is final and conclusive for all purposes, but nevertheless the board may at any time, if it considers it advisable to do so, reconsider any decision, interim order, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, interim order, direction, declaration or ruling.*

This subsection discusses the Board's jurisdiction and points out that its decisions are final and conclusive with the ability to reconsider its rulings and vary or revoke its decisions. As in other jurisdictions, reconsiderations are discretionary and, "The circumstances under which the board will do so are limited."⁹⁰ The purpose of this discretionary power is well laid out in the British Columbia Guide to the *Employment Standards Act* and Regulation, "The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system; and fair treatment of employers and employees. The reconsideration process was not meant to allow parties another opportunity to re-argue their case."⁹¹

90 [ESA Guide 2022_web_ready_version \(1\).pdf](#); p.5

91 [Reconsideration of Orders & Decision - Act Part 13, Section 116 - Province of British Columbia \(gov.bc.ca\)](#)

A couple of submissions noted that there is no guidance in the Act regarding what threshold should be met when considering the merit of a reconsideration request. Section 4. (1) of the *PEI Labour Act*⁹² is identical to this section of the Act and the Labour Act Regulations⁹³ provide the following guidance on when to entertain a request for reconsideration, i.e., *section 18. Where it appears that the Board has made a decision in ignorance of some material fact, or by reason of some technical irregularity, or if there is good reason for the Board doing so, the Board may entertain an application to reconsider a decision or order made by it under the Act.*

The New Brunswick *Employment Standards Act*⁹⁴ Jurisdiction of the Board section 54(2) outlines the finality of the Board's rulings and how they shall not be questioned or reviewed in any court, ". . . *except on the grounds of an excess of jurisdiction or a denial of natural justice, . . .*". The referenced BC Guide provides additional guidance to their legislation by noting, "The Tribunal may reconsider a decision if the Adjudicator failed to comply with the principles of natural justice or made a serious mistake in applying the law, or some significant new evidence has become available that would have led the Adjudicator to a different decision."

The *Ontario Labour Relations Board Information Bulletin No. 19* outlines their approach to requests for reconsideration as follows: "Generally, the Board will not reconsider a decision unless the requesting party has new evidence that would be practically conclusive of the case and that it could not have reasonably obtained earlier; or the party has new objections or arguments that it had no opportunity to raise earlier. Because of the need for finality in labour relations matters, the Board does not treat its reconsideration power as either a tool for a party to repair a deficiency in its case, nor as an opportunity to re-argue it. If the requesting party relies on matters that could reasonably have been raised at the original hearing, the Board will not normally reconsider a decision."⁹⁵

To provide the Board with more guidance on when to entertain a request for reconsideration and in keeping with the intended finality and fairness of the appeal process, the Panel **recommends** a more detailed discussion in its Guide on the jurisdiction of the Board and the types of circumstances that would give rise to the Board exercising its discretionary powers to reconsider one of its rulings. Publishing this type of instructive guidance improves transparency and provides more detailed instruction to employees, employers, representatives, and the Board.

Wages (Minimum Wage) - Sections 5.

This section received considerable feedback regarding the process for determining and publishing minimum wage orders and the vital role income and employment plays in the quality of life of workers and the broader community. A number of stakeholder organizations were proponents of a "livable income" that would enable workers to not only afford "cost of living increases", the "necessities of life", and "maintain a suitable standard of living" as referenced in section 5.3), but to also be able to "fully participate in the

92 [Labour Act \(princeedwardisland.ca\)](http://princeedwardisland.ca)

93 [Labour Act Regulations \(princeedwardisland.ca\)](http://princeedwardisland.ca)

94 [E-7.2.pdf \(gnb.ca\)](http://gnb.ca)

95 ONTARIO LABOUR RELATIONS BOARD INFORMATION BULLETIN NO. 19 Requests for Reconsideration; found at InformationBulletin-19-EN.pdf

community”, “live with dignity”, and have a “cushion” above the poverty line that allows for things such as “social inclusion”⁹⁶ and “small contingency budget” considerations.

The detailed analysis contained within the referenced 2021 and 2022 Board Minimum Wage Review Reports provided considerable data and information used by the Panel in its discussions on a recommended approach to “fix one minimum wage for all employees”.

Subsections 5. (1)(2)(3)

Powers of board to make orders 5. (1) *The board, subject to the approval of the Lieutenant Governor in Council, shall by order*

(a) *fix one minimum wage for all employees;*

(b) *fix the minimum wage upon an hourly, daily, weekly, monthly or other basis;*

(c) *specify when and under what conditions deductions may be made from the wages of an employee, and what notification the employee should be given thereof prior to such deduction;*

(d) *fix the maximum amount, if any, that may be deducted from the wages of an employee where the employer furnishes to the employee, board, lodging, uniforms, laundry or other services, and prescribe the notification required to be given to the employee prior to such deduction, and may exempt any employee or group of employees from the operation of any order made under clause(c) or (d).*

Review 5. (2) *The board shall meet at least once a year to review the Minimum Wage Order and, in conducting a review, shall solicit and consider written and in-person submissions from the public.*

Criteria, report 5. (3) *In advising the Lieutenant Governor in Council, the board shall issue a report taking into account the social and economic effects of the minimum wage rates in the province and shall consider among other matters*

(a) *any cost of living increase since any previous order affecting the cost to an employee of purchasing the necessities of life, including housing, food, clothing, transportation and health care and supplies;*

(b) *economic conditions within the province and the concept of reasonable return on private investment; and*

(c) *measures of poverty and the ability of an employee to maintain a suitable standard of living, and shall make this report public on the publication of a Minimum Wage Order in the Royal Gazette.*

Minimum Wages in Canada (Effective June 2023)

	BC	AB	SK	MB	ON	QC	NB ⁹⁷	NS ⁹⁸	NL ⁹⁹	PE ¹⁰⁰
2023	\$16.75	\$15.00	\$13.00 1Oct: \$14.00	\$14.15 1Oct: \$15.30	\$15.50 1Oct: \$16.55	\$15.25	\$14.75	\$14.50 1Oct: \$15.00	\$14.50 1 Oct: \$15.00	\$14.50 1Oct: \$15.00

The following outlines the manner in which the minimum wage rate is determined in the Atlantic Region

96 “The category would include expenses such as school supplies and fees, reading materials, minimal recreation and sports fees, art or music classes, child’s birthday or holiday gift, a small budget for entertainment (e.g. tickets for a movie, museum fees), restaurant meal, daytrip or children’s toys or games.”; *Charlottetown Living Wage 2020*; Christine Saulnier, Canadian Centre for Policy Alternatives; Nova Scotia; November 2020; p.12; [DOCUMENT TITLE \(policyalternatives.ca\)](#)

97 [MinimumWageOvertime.pdf \(gnb.ca\)](#)

98 [minimum-wage-review-committee-report-december-2022-en.pdf \(novascotia.ca\)](#)

99 [Minimum-Wage-Review-Committee-Report-May-2022.pdf \(gov.nl.ca\)](#)

100 [Minimum Wage Order \(Board and Lodging\) | Government of Prince Edward Island](#)

as outlined within their respective provincial employment standards legislation:

NB: LGIC may by regulations fix the amount of the minimum wage or specify the manner in which the minimum wage is to be determined for all employees or for any category of employees in any industry, business, trade, or occupation. Every two years the Minister (Minimum Wage Board) completes a review of the amount and the manner in which the minimum wage is determined. The review considers various social and economic factors and consults with stakeholders in a manner similar to PEI's Minimum Wage Reviews.¹⁰¹

NS: LGIC may fix a minimum wage for employees in different employments or in different classes or descriptions of an employment. There is also a Minimum Wage Review Committee comprised of an equal amount of employee and employer representatives appointed by the Minister. The Committee conducts an annual review of the minimum wage and submits a report with recommendations to the Minister who publishes the report and the Government's response.¹⁰²

NF: LGIC may make regulations respecting minimum wages including areas and classifications of employees to whom the minimum wages are to be applied. Every two years or a lesser period as decided by LGIC the Minister shall review these regulations.¹⁰³

The Board provided a comprehensive profile of minimum wage earners on PEI using various sources that are cited within their *2022 Minimum Wage Review Report* (p. 5-6) and included the following:

- Approximately 5,000 employees have worked for the minimum wage in recent years;
- Minimum wage earners represented 7.6% of the 67,300 employees in 2019;
- There were 85,600 employees in May 2022 (assuming the 7.6% of the total workforce from 2019, this would project to approximately 7,600 minimum wage earners);
- Women have comprised approximately 60% of the minimum wage workforce nationally in recent decades and the board observed a similar proportion in recent data for PEI. (i.e., since fiscal year 2016-2017);
- 51% of minimum wage employees worked full time and 49% worked part time in 2019 and minimum wage employees comprised 25% of all part time employees and 4.5% of all full-time employees; and
- In 2019 ~49% were 15-24 yrs old (~33.3% 15-19 and 15.7% 20-24); and ~25% were 40 or over. Using data provided to the Board, they further delineated these numbers calculating that ~30% of minimum wage earners were 15-18 years old and ~70% were 19 or older.

In its *2021 Minimum Wage Review Report* the Board noted the feedback it received with respect to poverty levels and a minimum wage review that in accordance with subsection 5. (3) considers the social and economic effects of the minimum wage rates in the province when it wrote, "Poverty was a theme raised in multiple submissions and the Board's background documents. The Board recognizes that poverty is a broad social issue that will not be eradicated solely through minimum wage orders. Still, the Board acknowledges the argument that viable employers in this jurisdiction should not be allowed to rely on

101 New Brunswick *Employment Standards Act* Part III – Sections 9-11; [E-7.2.pdf \(gnb.ca\)](#)

102 Nova Scotia *Employment Standards Code* – Sections 50-55; [Labour Standards Code \(nslegislature.ca\)](#)

103 Newfoundland and Labrador *Labour Standards Act* Part IV – Sections 27, 30, and 31; [RSNL1990 CHAPTER L-2 - LABOUR STANDARDS ACT \(assembly.nl.ca\)](#)

poverty wages. These considerations have informed the Board’s preliminary development of a transparent approach to setting PEI’s minimum wage.” (p.3) In its 2022 Report, the Board notes that poverty is a complex social problem that minimum wage increases are unlikely to solve in isolation. “Indeed, at many points in the review process participants recognized the need for targeted social support programs to maintain or improve the living conditions of low income workers and their families (e.g., Canada Child Benefit, Child Care Subsidy, dental program, rent subsidies and social housing, to name a few).” (p.9)

In 2019, the PEI Legislature also recognized this connection when it amended the *Employment Standards Act* s. 5(3) and added, “measures of poverty and the ability of an employee to maintain a suitable standard of living” to the criteria to be considered by the Board when advising Cabinet on the Minimum Wage Order. Prior to and alongside these amendments, the PEI Legislative Assembly explored the idea of a universal basic income to significantly reduce or potentially eliminate poverty in the province. In December 2016, the Assembly unanimously passed Motion #83¹⁰⁴ to “urge government to pursue a partnership with the federal government for the establishment of a universal basic income pilot project in Prince Edward Island.” In 2019, Motion #36¹⁰⁵ was unanimously passed to create a *Special Committee on Poverty* in PEI to consult and report back with recommendations to establish clear definitions and measures of poverty, and a living wage, with fully costed recommendations regarding the creation of a Basic Income Guarantee (BIG) pilot for PEI.

The pursuit of a BIG pilot for PEI is a commendable and evidence informed initiative that is aligned with the Act’s requirement to consider a workers’ ability to purchase the necessities of life and measures of poverty in calculating its minimum wage rates. The 2020 Report of the *Special Committee on Poverty in PEI*¹⁰⁶ recommended the adoption of the “Guiding Principles for BIG on PEI” which fundamentally addresses income levels, but is undoubtedly beyond the scope of the *Employment Standards Act* and the Panel’s mandate. This in no way discounts the important connection between income and efforts to eradicate poverty, along with other socio-economic measures such as taxation, childcare and housing funding, disability supports, public transportation, and of course, minimum wage rates.

Along with the stated need for a suitable standard of living or livable income, there were requests for a “transparent, fair and predictable” process for setting the minimum wage rate to enable businesses to better formulate their annual costs. Further, subsection (3)(c) directs the Board to consider the economic conditions within the province and a business’s ability to make a reasonable return or profit from its investments. There were also calls to maintain regular reviews to ensure responsiveness to variable socio-economic factors and a suggestion to increase the advanced notification requirements.

Wage rates, along with a number of other commonly understood considerations, like total compensation (health and dental plans, vacation, savings plans, etc.), flexible work arrangements, an emphasis on diversity, equity, and inclusion, employee recognition, and a safe and healthy work environment play a

104 [dms\(assembly.pe.ca\)](https://dms(assembly.pe.ca))

105 [dms\(assembly.pe.ca\)](https://dms(assembly.pe.ca))

106 [20-11-27-FINAL-REPORT-Special-Committee-on-Poverty-in-PEI.pdf\(basicincomecoalition.ca\)](https://20-11-27-FINAL-REPORT-Special-Committee-on-Poverty-in-PEI.pdf(basicincomecoalition.ca))

vital role in employee recruitment and retention.¹⁰⁷ The Tourism Industry Association of Prince Edward Island's 2022 *Tourism Workforce Action Plan*¹⁰⁸ discussed the importance of competitive compensation when it outlined short- to long-term objectives in response to a tighter labour market. Under "What We Heard", the report stated in part "Employers recognized that wages in the tourism industry need to increase to remain competitive. The province's minimum wage is \$13.70 per hour (effective April 1, 2022), and according to the Canadian Centre for Policy Alternatives, the living wage rate for Charlottetown, Prince Edward Island, is much higher."¹⁰⁹

Plans put forward in the Board's 2021 *Minimum Wage Review Report* appear to address some of the stakeholder proposals when it "signalled" a recommended \$15/hour minimum wage target for April 2024 and a formula-based approach founded on Statistics Canada's *Market Basket Measure (MBM)*, incorporating changes in CPI within its annual minimum wage review process (PEI's minimum wage rate is scheduled to increase to \$15/hour on October 1, 2023). The Board went on to note that, "The Legislative Assembly's *Special Committee on Poverty in PEI* recommended that Statistics Canada's MBM be adopted for policy and regulatory purposes (July 2020). The MBM also plays a central role in defining low income in Canada (*Poverty Reduction Act*, 2019)." (p.4)

The interests of workers, business owners and their respective advocacy umbrella organizations are not exclusive and have common interests for the provision of reasonable wages, business viability and its associate employment continuity, and the development of a fair and equitable process for determining the minimum wage rate. There are also inherent competing interests for employers to minimize expenses to offset the costs of running a business and for employees to maximize income to offset the costs of living. The Board has demonstrated a keen understanding of these interests through their consultations, in-depth research and analysis, and well reasoned recommendations within their annual Minimum Wage Review Reports. At the same time, they have grappled with the best approach to achieve a fair and predictable minimum wage rate calculation. Within the 2021 and 2022 Reports, the Board weighs the merits of various approaches and formulaic methods including the above noted Market Basket Measure, Consumer Price Index, Low Income Cut Offs, and Minimum Wage as a Percentage of Average Earnings.

This struggle is noted in its 2022 *Minimum Wage Review Report*, "The board understands stakeholders' desire for the board to provide recommendations for a particular target and predictable adjustment mechanisms. Some groups have advocated through this review, and may propose as part of the ongoing Comprehensive Review of the Act, that such processes be enshrined in legislation. The wisdom of a legislated procedure for this issue is unclear. For example, the board has noticed that some proponents of a formula based approach have heralded as examples of more predictable minimum wages jurisdictions that have departed from their formulas. The board suspects that formula departures may reflect the difficulty to identify a simple formula that provides a result perceived to be satisfactory over

107 [2021 Talent Attraction and Retention Survey - WTW \(wtwco.com\); Analysis of challenges to worker recruitment and retention, fourth quarter of 2022 \(statcan.gc.ca\); 15 Effective Employee Retention Strategies In 2023 - Forbes Advisor; Understanding the 17 Drivers of Employee Engagement | 15Five](#)

108 [MDB Insight - TIAPEI Tourism Workforce Action Plan](#)

109 "The living wage rate for Charlottetown, PEI is \$19.30 per hour." [Charlottetown Living Wage 2020 | Canadian Centre for Policy Alternatives; November 2, 2020; p. 12; Charlottetownlivingwage2020.pdf](#)

time. Finding or devising an approach widely accepted among stakeholders could help provide the desired transparency and predictability.” (p.10)

The Board pointed out that the “complexities associated with applying the MBM” may lessen versus improve the desire for clarity. A stakeholder who employs a significant number of minimum wage workers “. . . did not think the formula the board outlined in its 2021 report would provide the desired clarity for its members given complexities associated with applying the formula. The board agreed with those concerns. That does not mean, however, that the board could not use a MBM based (or other) formula to set and explain a target that could then be adjusted annually using a simple formula, and reset periodically when the MBM is updated.” (p.11)

The Board noted the following in their discussion on the merits of a formulaic approach based on CPI which has been adopted throughout the Atlantic Region, “The board and other stakeholders noticed, however, that minimum wage review committees in Nova Scotia (December 2021) and Newfoundland and Labrador (May 2022) have recommended a move to adjustments based on CPI+1%. The additional increase above CPI can be used to offset a lag in CPI increases when the previous year’s CPI is used to make a minimum wage adjustment (NFLD and Labrador, 2022). Another reason to include an additional 1% above CPI is to allow minimum wage earners to share in economic growth that exceeds inflation (Nova Scotia, 2021). That practice may align with the sentiment that employers “are not opposed to reasonable minimum wage increases that are predictable and linked to inflation and to growth in the economy.” (p.12) It should be noted that the 2022 Newfoundland and Labrador adjustment also includes a one-year *Transitional Support Program for Smaller Employers*. The program will provide 50 cents an hour, per employee, for employers with 20 or less employees.¹¹⁰

A January 2023 Government of New Brunswick News Release¹¹¹ stated, “In 2019, the government officially indexed minimum wage adjustments to New Brunswick’s consumer price index to allow employers and employees to be better prepared for increases when they occur. In 2022, it temporarily moved away from indexing to allow for a course correction that was necessary to make the province more competitive and improve the standard of living for minimum wage earners.” (...) “Following increases totalling \$2-per hour in 2022, the minimum wage is once again indexed to the province’s consumer price index, which grew by 7.3 per cent in 2022.” The New Brunswick *Employment Standards Act Minimum Wage Regulation 2022-15*¹¹² provisions outline an annual minimum wage adjustment based on the percentage change in the Consumer Price Index between the calendar year immediately before the date of adjustment and the calendar year two years before the date of adjustment. The Governments of Manitoba and Ontario also use a formula based on the previous two year’s CPI in the determination of their minimum wage.

The *BC Law Institute Report* found that, “While the minimum wage is fixed by regulation in most provinces and territories as in British Columbia, the majority now provide in their governing legislation either for a process calling for the input of an advisory board, indexation pursuant to a formula, or both of these

110 [Minimum-Wage-Review-Committee-Report-May-2022.pdf \(gov.nl.ca\)](#); p. 10

111 [Minimum wage to reach highest in Atlantic Canada \(gnb.ca\)](#)

112 [NB Reg 2022-15 | Minimum Wage | CanLII](#)

mechanisms.” (p.19) (...) “A majority consensus formed around a proposal combining indexation at regular intervals according to a statutory formula with residual discretion resting with the Lieutenant Governor in Council (in practical terms, the provincial Cabinet) to fix a minimum wage rate that is higher or lower than the rate derived from the indexing formula. Some members, but not a majority, also favour adding a requirement that the statutory provisions governing how the minimum wage is set should themselves be reviewed at five-year intervals.” (p.125-126)

The Panel weighed the numerous views and evidence informed proposals put forward by various employee and employer organizational stakeholders, the analysis contained within the Board’s 2021 and 2022 Minimum Wage Review Reports, and information extracted from the 2017 Ontario and 2018 British Columbia comprehensive reviews, when it considered the most balanced and equitable approach to fixing an annual minimum wage for all employees. The criteria used to determine an appropriate minimum wage rate and publication timelines are discussed below.

The Panel **recommends** a socioeconomically responsive and transparent three-pronged approach to fixing a minimum wage rate that is aligned with the Atlantic Region and other provincial jurisdictions. The following three tiers are analogous to the ‘three legs of a stool’ which are equally important and collectively support the valid interests of Island workers and businesses:

1. *Formula*: Include the CPI + 1 formula as an objective economic measure that is more predictable, understandable and grows in relation to the economy. This is a transparent criterion that is aligned with the Atlantic Region and other Canadian provinces.
2. *Biennial Reviews*: Every two years the Board will conduct a review aligned with its current annual consultations and consideration of relevant socioeconomic factors, e.g., MBM, GDP (+/- growth), and LICOs (Low Income Cut Offs) and will also review the manner in which the minimum wage is determined (i.e., the CPI+1 calculation). The Board will advise LGIC accordingly and, subject to LGIC approval, order one fixed minimum wage for all employees. This approach allows flexibility for a “course correction” similar to that taken by New Brunswick in 2022 in response to emerging socioeconomic conditions.
3. *LGIC consideration and approval*: The final leg of the stool and filter through which the other tiers are examined and approved by the LGIC. Cabinet would remain the final authority to consider the recommendation of the Board alongside other PEI specific emerging issues and public policy priorities for which it is accountable to the Legislative Assembly and can defend in the public sphere.

(**Note**: In its 2022 Report, the Board referenced the upcoming October 2023 \$15.00/hour minimum wage rate that was targeted in 2021 and stated that they did not necessarily consider this a starting point for potential CPI based increases. Their 2023 review is taking place at the same time as the writing of this Final Report.)

Comparison of Minimum Wage if increased by PEI CPI and CPI+1%

Effective Date	Actual		Increased by PEI CPI		Increased by PEI CPI+1%	
	\$/hr	% Change	\$/hr	% Change	\$/hr	% Change
2007-04-01	7.50		7.50		7.50	
2008-10-01	8.00	6.7%	7.63	1.8%	7.71	2.8%
2009-10-01	8.40	5.0%	7.90	3.4%	8.05	4.4%
2010-10-01	9.00	7.1%	7.90	0.0%	8.13	1.0%
2011-10-01	9.60	6.7%	8.03	1.7%	8.35	2.7%
2012-04-01	10.00	4.2%	8.27	2.9%	8.68	3.9%
2013-01-01	10.00	0.0%	8.43	2.0%	8.94	3.0%
2014-10-01	10.35	3.5%	8.60	2.0%	9.21	3.0%
2015-07-01	10.50	1.4%	8.74	1.6%	9.45	2.6%
2016-10-01	11.00	4.8%	8.74	0.0%	9.55	1.0%
2017-04-01	11.25	2.3%	8.79	0.5%	9.69	1.5%
2018-04-01	11.55	2.7%	8.95	1.8%	9.97	2.8%
2019-04-01	12.25	6.1%	9.16	2.3%	10.30	3.3%
2020-04-01	12.85	4.9%	9.27	1.2%	10.53	2.2%
2021-04-01	13.00	1.2%	9.27	0.0%	10.63	1.0%
2022-04-01	13.70	5.4%	9.74	5.1%	11.28	6.1%
2023-10-01	15.00	9.5%	10.60	8.9%	12.39	9.9%

As noted, in July 2019, the PEI Legislature amended the *Employment Standards Act* s. 5. (3) and added, “measures of poverty and the ability of an employee to maintain a suitable standard of living, ...” to the criteria to be considered by the Board, when advising LGIC on the Minimum Wage Order. The debate¹¹³ at that time recognized that the amended terminology did not have accompanying specific definitions but provided the Board with a more comprehensive ‘lens’ to consider relevant and evolving socioeconomic measures related to poverty and a suitable standard of living.

The various tools and suggestions related to measures of poverty and a suitable standard of living, as well as a livable wage within the context of BIG are all discussed in detail above. The Legislature has outlined its support of a BIG pilot in concert with federal government support and incorporates socioeconomic levers that go beyond the mandate of this review. That said, the Panel does see an opportunity to take another step forward in framing a “suitable standard of living” in consideration of submissions, presentations, and the above discussions.

¹¹³ Chamber 2019-06-25 2019-06-25 13-45-00 17 Finalize in Legislative Assembly 20000 and Chamber 2019-06-27 2019-06-27 13-45-00 17 Finalize in Legislative Assembly 20000

The Panel **recommends** adding clarity to the considerations listed within subsections 5.(1) i.e., integrating subsections (a) and (c) and separating out the “economic conditions within the province” and “the concept of a reasonable return on investment” considerations that are currently combined in (b), as well as replacing a “suitable standard of living” with more aspirational terminology that is better aligned with the role employment and income plays in the health and wellbeing of Island workers, their families and the broader Island community i.e., *(a) measures of poverty and the ability of an employee to maintain a suitable standard of living live with dignity and meaningfully participate in the community, any cost of living increase since any previous order affecting the cost to an employee of purchasing the necessities of life, including housing, food, clothing, transportation and health care and supplies; (b) economic conditions within the province; (c) and the concept of reasonable return on private investment, and shall make this report public on the publication of a Minimum Wage Order in the Royal Gazette.*

Posting orders 5. (4) *An employer shall post and keep posted in a conspicuous place in the work establishment, a copy of all applicable minimum wage orders.*

The Panel **recommends** updating the language to reflect modern “conspicuous” methods to ensure employees are made aware of all applicable orders in addition to posting hard copies.

Publication 5. (6) *Every order of the board shall be published in the Gazette and shall name a date, at least fourteen days subsequent to the date of publication, on which it comes into force.*

There were suggestions to increase the notification requirement beyond the current fourteen (14) days to provide more time for employers to prepare and budget for changes to the minimum wage. Regardless of the approach adopted with respect to fixing the minimum wage, the Panel **recommends** a six-month window between the notice and when the order comes into force. If the three tiered approach including the CPI+1% calculation is adopted, the Panel **recommends** considering the language and timing outlined in Manitoba’s *Employment Standards Code*¹¹⁴ to allow time for the Board to carryout its (biennial) consultations and time for employers to prepare for resulting labour costs - in particular seasonal industries such as the fishery, tourism and agriculture, i.e., *Publication of minimum wage 7(4) Before April 1 of every year beginning in 2018, the minister must publish on a government website the minimum wage that is to apply under this section starting on October 1 of that year.*

Pay and Pay Protection - Section 5.2

5.2 Payment of Pay (1) *An employer shall pay to an employee the pay to which an employee is entitled*

(a) in lawful currency of Canada;

(b) by cheque drawn upon a chartered bank, a credit union, trust company or other institution insured under the Canada Deposit Insurance Corporation Act R.S.C. 1985, c. C-3 and honoured and paid by such bank, credit union, trust company or other institution; or

(c) by direct deposit into an account of the employee in a chartered bank, credit union, trust company or other institution insured under the Canada Deposit Insurance Corporation Act.

The Panel **recommends** updating and broadening the methods of payment with the addition of a blanket subsection that captures other current and future modes of payment such as electronic transfers, i.e., *(d)*

by any other prescribed method of payment.

Some stakeholders raised the gender wage gap and there was a request to establish pay equity within the private sector¹¹⁵, equal pay for work of equal value wording within the *Employment Standards Act*, and language prohibiting wage discrimination based on sex, in keeping with Section 7 of the PEI *Human Rights Act*.¹¹⁶

*The Women in PEI Statistical Review Fourth Edition (2020)*¹¹⁷ states that, “The gender wage gap compares wages earned by females and males. A common method for calculating the gender wage gap is to compare the difference in full-time and full-year wages of females and males and noting discrepancies. A comparison of Statistics Canada Census data shows that females working full-time (and full-year) in PEI averaged \$46,855, or 84% of male’s average income of \$55,726. During this same period, females in Canada who worked full-time (and full-year) averaged \$55,510, or 75% of male’s average income of \$74,289. The gender wage gap in PEI is smaller than any other province in Atlantic Canada¹¹⁸.” (p.49) In 2021 the national hourly average gender wage gap for full-time employees stood at 90% and Prince Edward Island was once again lowest of all provinces at 102%.¹¹⁹

Along with considerations for women’s rates of pay, it is also important to recognize their prominent role as primary contributors to unpaid work within Canadian homes and communities. Statistics Canada’s 2018 gender-based statistical report on total work burden, unpaid work, and leisure noted, “... women effectively perform a “second shift” of unpaid work after their paid work. Qualitative research also highlights women’s retention of ultimate responsibility for the coordination of children’s lives; the smooth functioning of the household (e.g., planning meals; scheduling medical, dental, and other appointments; and arranging for repairs or deliveries); “emotion work” (i.e., the enhancement of relatives’ emotional well-being and provision of support); and “kin keeping” (i.e., the maintenance of relationships with immediate and extended family by keeping in touch; remembering and acknowledging birthdays and other milestones; and planning and organizing family celebrations and vacations) — even as their economic roles have expanded. Although women often spend substantial amounts of time doing such mental and emotional work, it is largely invisible to others (except in its absence), typically lacks social recognition, and goes unmeasured in time-use surveys”¹²⁰

Another Statistic’s Canada study on the economic value of unpaid household work¹²¹ in Canada (2022), “. . . shows that although women continue to perform the majority of household work, in terms of hours spent doing various household tasks, the economic value of their effort remains below that of men, primarily because of persistent differences in the average wages of men and women in Canada. When the presence

115 [Pay Equity Act \(princeedwardisland.ca\)](http://princeedwardisland.ca)

116 [Human Rights Act \(princeedwardisland.ca\)](http://princeedwardisland.ca)

117 [women_in_pei_a_statistical_review_2020.pdf](#)

118 NF: 72% NS: 77% NB: 62%

119 Statistics Canada. [Table 14-10-0340-02 Average and median gender wage ratio, annual](#)

120 Statistics Canada: “Time use: Total work burden, unpaid work, and leisure”; by Melissa Moyser, PhD and Amanda Burlock; Release date: July 30, 2018; [Time Use: Total work burden, unpaid work, and leisure \(statcan.gc.ca\)](http://statcan.gc.ca)

121 “Following the key principles of the definition of unpaid household work, included in this study are four broad categories of activities: 1) Household chores and maintenance; 2) Caring for children; 3) Caring for adults; and, 4) Shopping.”

of children is looked at for partnered households (households with two adults), the gap between men's and women's share of household work widens - from women contributing an average of 57.4% of hours without the presence children in the home, and increasing to 60.5% with children."¹²²

The Pay Equity Office of Ontario¹²³ uses the following language to distinguish between their definitions of pay equity and equal pay for work of equal value: "Pay equity is equal pay for work of equal value (and) compares jobs usually done by women with different jobs usually (traditionally) done by men." Whereas "Equal pay for equal work addresses situations in which men and women do the same work (and) require that men and women receive equal pay when doing the same job or substantially the same job such as two cooks or two machine operators on the same line." They go on to say, "Pay equity compares the value and pay of different jobs, such as nurse and electrician (and) equal pay compares the pay of similar jobs."

The Ontario *Employment Standards Act* Policy and Interpretation Manual¹²⁴ notes that, "Pay equity is different from equal pay in that the pay equity legislation compares wage rates of female job classes to male job classes to ensure that women performing jobs that are different from but of equal value to jobs performed by men will receive equal pay. Section 42 of the Employment Standards Act 2000, on the other hand, requires that women performing substantially the same job as men, and vice versa, receive equal pay."

Pay Equity and Equal Pay requirements are fundamental employment and human rights protections that are currently addressed and defined within the PEI *Pay Equity Act*¹²⁵ (public sector employers and employees) and PEI *Human Rights Act*¹²⁶, i.e., PEI *Pay Equity Act* Definitions 1. (j) "pay equity" means a compensation practice which is based primarily on the relative value of work performed, irrespective of the gender of employees, and includes the requirement that, subject to section 8, no public sector employer shall establish a difference between the wages paid to male and female employees, employed by that employer, who are performing work of equal or comparable value; (and) the PEI *Human Rights Act* S. 7. Discrimination in pay prohibited (1) in part states, "No employer or person acting on behalf of an employer shall discriminate between his employees by paying one employee at a rate of pay less than the rate of pay paid to another employee employed by him for substantially the same work,..."

The Panel is reassured that pay discrimination on the basis of sex (or any other prohibited ground) is covered under provincial human rights legislation and that limiting pay equity legislation to the public sector is consistent within the Atlantic Region¹²⁷. Requiring private sector employers to employ a methodology of the scope and complexity of the public sector pay equity legislation would require further consultation and analysis specific to this type of provision. This said, the Panel sees an opportunity for the Branch to

122 Statistics Canada: "Estimating the economic value of unpaid household work in Canada, 2015 to 2019; Release date: March 17, 2022; [Estimating the economic value of unpaid household work in Canada, 2015 to 2019 \(statcan.gc.ca\)](https://www150.statcan.gc.ca/n1/pub/92-625-x/2022001/article/00001-eng.htm)

123 [Pay Equity v. Equal Pay For Equal Work | Pay Equity Office \(gov.on.ca\)](https://www.payequityoffice.on.ca/)

124 [Part XII - Equal pay for equal work | Employment Standards Act Policy and Interpretation Manual | ontario.ca](https://www.ontario.ca/document/employment-standards-act-policy-and-interpretation-manual)

125 [Pay Equity Act \(princeedwardisland.ca\)](https://www.princeedwardisland.ca/en/legislation/pay-equity-act)

126 [Human Rights Act \(princeedwardisland.ca\)](https://www.princeedwardisland.ca/en/legislation/human-rights-act)

127 Ontario's *Pay Equity Act* applies to the public sector and to private sector organizations with ten or more employees.

reinforce these key principles by including relevant information and references to the associated legislation within its Guide.

5.2 Payment on termination of employment (6) *Any pay to which an employee is entitled on the termination of his or her employment shall be paid by the employer to the employee not later than the last day of the next pay period after the termination of employment.*

One stakeholder noted that there can be circumstances when a terminated employee is unreachable for the purposes of providing them with their final pay. They went on to suggest that some form of ‘trust’ to protect and hold those wages could be beneficial to both the employer and terminated employees. As this approach is used in other jurisdictions, the Panel **recommends** a mechanism in this direction and points to Manitoba’s *Employment Standards Act* sections 89(1)(2)(3) which discharges this liability of the employer. The payment is held in trust for a period of time before being transferred to government’s Consolidated Fund during which time it continues to be available for payment to the employee.

5.3 (1) Pay statement and 5.6 (1) Pay records

The Panel **recommends** that pay statements and payroll records continue to be aligned with information commonly held as part of an employee’s pay documentation including the addition of “paid” leaves of absence under sections 5.3 and 5.6(1)(j.2). There is also an opportunity to provide employers, especially small business owners, with information and education regarding best practices and legislative compliance with respect to payroll and other employment record keeping, e.g., any flexible or averaging work arrangements. Periodic audits of employer pay records would also help enable learning opportunities and encourage compliance.

5.5 Deductions from Pay

Authorizations (2) *An employer may withhold, deduct or require the return of all or part of an employee’s pay if the employer*

(a) is required or authorized to do so under any other Act of Prince Edward Island or Canada, or any regulations made under such an Act;

(b) a court order; or

(c) an order made under subsection 5(1).

Pursuant to 5.5(2)(a), the Panel **recommends** language in the regulations outlining reasonable and transparent parameters for recovering employee overpayments due to an employer’s administrative error. For instance, a percentage of the employee’s earnings up to a maximum amount that can be deducted over a reasonable term until the overpayment is repaid.

5.5 Idem (3) *An employer may withhold, deduct or require the return of an amount of all or part of an employee’s pay if the withholding, deduction or required return*

(a) is related to a group benefit plan that the employee participates in;

(b) was requested by the employee as a contribution towards a savings plan; or

(c) is the result of a previous advance of pay to the employee.

A couple of stakeholders proposed the inclusion of language permitting an employer to automatically enroll employees in their workplace savings-pension plans in which membership is required as a term of employment, the employer is matching contributions, and employees have the ability to opt out. The submissions reasoned that a significant number of employees do not take advantage of their voluntary workplace plans and are, therefore, missing out on matching contributions from their employers and the prospect of longer-term financial security.

The Panel recognized the rationale and general financial benefit of this proposal, but also accept that employees make financial decisions based on various personal circumstances and that this requirement could be considered paternalistic. Employers are still able to offer beneficial and enticing savings plans, including matching contributions, and employees can still choose to participate under the current language without being automatically enrolled.

5.6 Pay Records Exceptions re hours of work of salaried employees *(2) Clause (1)(d) does not apply in respect of the salaried employees of an employer where the employer establishes a work week and makes and keeps a record showing the number of hours worked by such employees in excess of the work week.*

The Panel **recommends** including language ensuring that the rate of pay does not create a situation in which a salaried employee is being paid less than minimum wage plus 20%, or if it is a situation when overtime does not apply to that employee, e.g., a manager as defined in section 1. Definitions.

5.7 Definitions *(1) In this section, (a) "director" means a director of a corporation; (b) "corporation" includes a co-operative association.*

The Panel **recommended** that the definitions for director and corporation be moved under section 1. Definitions using the proposed amended language.

5.7 Directors' liability for pay *(3) Subject to subsection (4), the directors of a corporation that is an employer are jointly and severally liable with the corporation to an employee of the corporation for pay owing from the corporation to the employee, up to a maximum amount equivalent to six month's pay, that becomes payable while they are directors if either*

(a) the corporation is insolvent, the employee has filed a claim for unpaid pay with a receiver duly appointed in respect of the corporation or with the corporation's trustee in bankruptcy, and the claim has not been paid; or

(b) an inspector or the board has made an order pursuant to this Act requiring the corporation to pay an amount to the employee of the corporation on account of unpaid pay, and the corporation has failed to comply with the order within 30 days of the date the order was made.

5.7 Exception where due diligence exercised *(4) A director of a corporation is not liable for unpaid pay under this section where the director exercised the degree of care, diligence and skill to ensure that pay owing was paid that a reasonably prudent person would have exercised in comparable circumstances.*

A stakeholder suggested there should be a process to notify a director of their liability under subsection (3)(a)(b) and a timeframe for them to demonstrate they exercised due diligence pursuant to subsection (4). The Panel **recommends** amendments that add clarity related to due process for directors and points to Alberta's *Employment Standards Code*¹²⁸ Liability of directors of corporate employers section 112 which outlines circumstances under which a director is not liable for unpaid wages, and a clear process for notifying directors and allowing for a potential appeal.

The Panel also **recommends** language similar to one of H.W. Arthurs recommendations in his *Federal Labour Standards Review, Fairness at Work: Federal Labour Standards for the 21st Century* that addresses situations in which employers carry on their business through two or more corporations. In part, he recommended that "... associated or related works, undertakings or businesses under common control or direction are a single employer for purposes of the statute." (p.88)

Pay Transparency - Section 5.8

An *Act to Amend the Employment Standards Act* (Bill No. 119) received Royal Assent in November 2020 and new Pay Transparency language (s. 5.8-5.10 and ancillary amendments) came into effect on June 1, 2022. The new language stipulates that employers can not request an applicant's pay history, that publicly advertised job ads must contain the position's expected pay or pay range, and contains anti-reprisal language protecting employees from a variety of permissible activities related to these provisions. There were no submissions related to these subsections – likely due in part to the fairly recent commencement date.

5.9 Pay range information - Required information (2) *Every employer who publishes a publicly advertised job posting shall include in the posting information about the expected pay for the position or the range of expected pay for the position.*

It was noted that some publicly advertised expected pay ranges can be quite broad. The Panel recognizes that the eventual rate of pay in these cases is often subject to a number of valid variables including the local labour market and applicant qualifications, e.g., recent and relevant work experience, level of education, training and certifications, and other relevant merit-based competencies. That said, this is an area where the Panel suggests ongoing monitoring to assess compliance with the intent of pay transparency.

Paid Holidays - Sections 6.-10.

6. Paid holidays (1) *In this section and sections 7 to 10, "paid holiday" means*

- (a) *New Year's Day;*
- (b) *Islander Day;*
- (c) *Good Friday;*
- (d) *Canada Day;*
- (e) *Labour Day;*
- (f) *National Day for Truth and Reconciliation, observed on September 30;*

¹²⁸ [RSA 2000, c E-9 | Employment Standards Code | CanLII](#)

- (g) *Remembrance Day;*
- (h) *Christmas Day; and*
- (i) *a day prescribed as a paid holiday in the regulations.*

There are currently eight paid holidays and a provision allowing “a day prescribed as a paid holiday in the regulations.” A jurisdictional scan revealed a range of six to ten (6-10) paid holidays across all provinces and eleven plus (11+) for the federal government.

2022 Provincial Jurisdictional Scan – Paid Holidays

Paid Holidays	AB	BC	ON	QC	MB	SK	NS	NB	NL	PE
Days	9	10	9	8	8	10	6	7	6	8

There was a request to add *Thanksgiving* and a request to maintain the status quo given the impact on already escalating employer operational costs.

PEI leads the Atlantic Region in paid holidays, is at the median and average for all provinces, and has a provision enabling the addition of a paid holiday through the regulations, such as this past year’s day of mourning for the funeral of Queen Elizabeth II. The Panel is not proposing any changes to this provision.

7. Employees not entitled to paid holidays (1) *Subsection 6(2) and sections 8 to 10 do not apply to an employee in respect of a paid holiday if the employee*

- (a) *has been in the employ of his or her present employer for less than 30 calendar days prior to the paid holiday;*
- (b) *has not received pay for at least 15 of the 30 calendar days immediately preceding the paid holiday;*
- (c) *fails, without reasonable cause, to work on both the employee’s last scheduled work day before the paid holiday and the employee’s first scheduled work day after the paid holiday;*
- (d) *has agreed to work on the paid holiday and has, without reasonable cause, failed to report for and perform work on the paid holiday; or (NB same,*

The Panel **recommends** removing subsections (a) and (b) and in their place use a calculation that is fair and equitable for all employees working irregular hours and is also aligned with a number of other jurisdictions (SK, MB, ON, and QC). This could be followed by language noting that the provision does not apply to employees as described in subsections (c) and (d). The calculation described here would also remove the need for subsection 10. (2) *Certain employees to receive regular rate of pay.*

The Panel **recommends** removing subsection 10. (2) and using language similar to the following provision from the Saskatchewan *Employment Standards Act: Public holiday pay 2-32 (1) An employer shall pay an employee for every public holiday an amount equal to: (a) 5% of the employee’s wages, not including overtime*

pay, earned in the four weeks preceding the public holiday; or (b) an amount calculated in the prescribed manner for a prescribed category of employees. (2) For the purposes of subsection (1), an employer shall include in the calculation of an employee's wages: (a) vacation pay with respect to vacation the employee actually takes in the four weeks preceding the public holiday; and (b) public holiday pay in an amount required pursuant to subsection (1) if another public holiday occurs in the four-week period mentioned in clause (1)(a).

Vacation Pay - Section 11.

11. Annual vacation with pay (1) Where an employee works for an employer for a continuous twelve-month period, the employer shall,

(a) not later than four months after the twelve-month period ends, give the employee

(i) an unbroken vacation of at least two weeks, if the employee has less than eight years of continuous employment with the employer, or

(ii) an unbroken vacation of at least three weeks, if the employee has at least eight years of continuous employment with the employer;

(b) at least one week before the employee's vacation begins, notify the employee of the date the employee's vacation begins; and

(c) at least one day before the employee's vacation begins, pay the employee

(i) an amount at least equal to four per cent of the employee's wages for the twelve-month period during which the employee established the right to a vacation, if the employee has less than eight years of continuous employment with the employer, or

(ii) an amount at least equal to six per cent of the employee's wages for the twelve-month period during which the employee established the right to a vacation, if the employee has at least eight years of continuous employment with the employer.

The current PEI thresholds for annual vacation with pay are two weeks for an employee who works for an employer for a continuous twelve months and three weeks after working eight years.

2022 Provincial Jurisdictional Scan – Annual Vacation

Vacation (After)	AB	BC	ON	QC	MB	SK	NS	NB	NL	PE
12 months	2wks	2wks	2wks	3wks	2wks	3wks	2wks	2wks	2wks	2 wks
3 years				4wks						
5 years	3wks	3wks	3 wks		3wks					
8 years							3wks	3wks		3 wks
10 years						4wks				
15 years									3wks	

Vacation leave is an important benefit for employees and employers as it contributes to life-work balance, rewards committed service to one employer, contributes to workforce retention, and can be used by employees as a paid leave of absence for reasons other than vacation. It is likely that a number of employers provide a vacation package that surpasses this minimum requirement, as vacation leave can be used as an incentive for recruitment purposes, and the financial impact is lessened in workplaces where the employer does not need to backfill an employee's absence. This said, many workplaces do have to backfill employees on vacation leave and consequently assume the associated cost or, in the case of small business owners, may work extra hours to cover an employee's absence.

As illustrated in the annual vacation comparison table, eight provinces, including PEI, provide two weeks vacation after twelve months, and five provinces provide three weeks vacation after five years. Two other provinces provide three weeks vacation after twelve months, and the entire Atlantic Region lags the country in the provision of three weeks vacation.

Along with proposals regarding the duration and thresholds for vacation leave, there were suggestions that an employee should be able to access their earned vacation sooner than the current twelve-month qualifying period. The Panel considered that an employer's liability for vacation pay begins when an employee commences employment, and an employer is required to pay out this benefit if an employee's employment ceases at any point before the twelve-month threshold per section 11. (2).

There is also recognition that employers typically and more easily pay employees for their vacation within the employee's regular pay period as opposed to "*one day before the employee's vacation begins*" as provided in (1)(c).

The Panel **recommends** reducing an employee's qualifying period for three weeks vacation leave from eight to five years, reducing the qualifying period for accessing their vacation accrual from twelve to six months (no advancement), and modifying the language in (c) to reflect the conventional practice of paying an employee during the regular pay period while they are on an approved vacation leave.

11.1 Waiver of entitlement to vacation with pay (1) Where an employee

(a) works for an employer for a continuous twelve-month period; and

(b) works less than 90 percent of the normal working hours of the employee during that period, the employee may waive the employee's entitlement to vacation with pay under subsection 11(1) in return for the payment provided under subsection (2), by giving the employer written notice of the waiver prior to the end of the twelve-month period.

The Panel **recommends** amending the language in 11.1 (1)(b) from "... 90 percent of the normal working hours of the employee ... " to wording that is more aligned with what is understood to be the intent of the provision and as outlined in the Guide, i.e., "... 90 per cent of the employer's normal working hours ... " (p.24)

Hours of Work (Overtime) - Section 15.

15. Standard number of hours of work (1) *The standard number of hours of work that an employer may require of an employee during a work week is 48 hours.*

An interjurisdictional scan revealed that effective June 2023, the standard hours of work during a work week are forty hours (40 hours/week) in five provinces, forty-four in three (44 hours/ week), and forty-eight (48 hours/week) in two. Four provinces also provide overtime beyond an eight-hour day (8 hours/day) with BC escalating to double time after twelve hours (12 hours/day).

Provincial Jurisdictional Scan – Hours of Work Per Week and Day

Hours of Work/Week	AB	BC	ON	QC	MB	SK	NS	NB	NL	PE
1.5 OT Over	44	40	44	40	40	40	48	*44	*40	48
Hours/Day	AB	BC	ON	QC	MB	SK	NS	NB	NL	PE
1.5 x OT Over	8	8	N/A	N/A	8	8	N/A	N/A	N/A	N/A
2 x OT Over	N/A	12	N/A	N/A						

* For those earning minimum wage

There were submissions requesting that PEI move to a standard forty-hour work week (40 hours/week) and an eight-hour day (8 hours/day) while others requested the status quo.

The Panel **recommends** reducing the standard hours of work that an employer may require of an employee during a work week to forty-four hours (44 hours/week). This number is more closely aligned with other jurisdictions and represents an incremental move toward the median of forty hours per week (40 hours/week). The effects on employers and employees were considered alongside the Board's authority to exempt specific employers or classes of employers from the standard work week subject to the factors in 15. (3) and discussed below.

A reduction in the standard work week will impact payroll costs when an employer requires an employee to work overtime between 44-48 hours per week and presumably have less of an impact for those employers and industries with employees working part time or irregular hours amounting to less than forty-four (44) hours per week, and will have no impact within the three industries who currently have a fifty-five (55) hour work week exemption and those who employ farm labourers (non-commercial undertaking) and salespersons pursuant to their exemption under subsections 2.(2)and(5). The ability to offset the potential impact is aggravated within the context of high workforce participation rates and a tight labour market.

A reduced standard work week reflects a more contemporary approach to life-work balance and accordingly, compensates employees at an enhanced rate when required to work beyond the standard threshold. A move to the prevailing national forty (40) hours per week was considered too significant a move while a move to forty-four (44) hours allows time to assess the impact and weigh a potential further reduction alongside the socio-economic and labour environment at that time. If there is a move to a forty-four (44)

hour work week, Nova Scotia will be the only province with a longer standard work week (48 hours/week).

15. Exemptions (2) *The board may, by order,*

(a) prescribe standard work weeks, other than the one established in subsection (1), comprising the number of hours of work in excess of the number established in subsection (1) that the board considers appropriate;

(b) prescribe

(i) the specific employers or classes of employers, and

(ii) the specific employees or classes of employees of such employers,

to whom a standard work week prescribed under clause (a) applies; and

(c) exempt the employers and employees, or any classes thereof, for whom a standard work week is prescribed in an order made under this subsection from the standard work week established in subsection (1).

There are four standard work week exemption orders for the following Island industries: Highway Construction and Maintenance, the Seafood Processing Industry and Trucking at fifty-five (55) hours per week; and the Health Care Industry (community care facility employees) after ninety-six (96) hours in a two-week period. The current Exemption Order (listing these industries) is dated November 13, 2019 - there is no rationale for the requests or the Board's decision attached to that order. Farm Labourers (working within non-commercial undertakings), salespersons whose income is derived primarily from commission on sales, and home care workers are also exempt from the standard work week as discussed in Application - Section 2.

These standard number of hours of work exemptions presumably flow from valid seasonal and industry related factors that are aligned with this provision. For example, the highway construction and maintenance, and seafood processing industries have limited weather and market related windows to carry out their operations, while their employees have the same limited window to maximize their hours of work and income. Further to the exemption discussion in section 2., these practical grounds for exclusion should be assessed alongside the obligation to extend the minimum protections of the Act to as many employees as possible. As with the exemptions in section 2. the Panel understands the practical realities for exemptions, but also recognizes the need for a transparent and well-defined application and approval process.

Similar to the broader exemption review process recommended in section 2., the Panel **recommends** that the Board's rationale for an exemption order should be published, and that current and future orders should be reviewed on a regular and recurring basis, to ensure the rationale and revised hours remain valid. As with other recommendations resulting in expanded responsibilities and accountabilities for the Board, the Branch will likely need to explore associate resource requirements.

15. Factors considered (3) *Before making an order under subsection (2), the board shall take into account the following factors:*

(a) the seasonal nature of the work;

(b) the effect of the extended hours on the health and safety of workers and the public;

(c) work requirements that include the need to have employees in the work premises while not always engaged in work-related activities; and

(d) the duration of the work schedule customary in the industry.

As noted, the factors outlined in this provision are valid and practical considerations for determining hours of work exemptions. It is the Panel's understanding that these factors are supplemented by the following questions established and used by the Board since 1993:

Board established criteria to determine standard work week exemption:
1. Is the work seasonal by nature?
2. What are the effects of extended hours on the health and safety of workers and the public?
3. Do the work requirements include the need to have employees on the work premises while not always engaged in work-related activities?
4. What is the duration of the work schedule proposed by the employer or customary in nature?
5. How many similar businesses are there and would you be giving this company an unfair advantage over them?
6. How frequently are the employee(s) required to work overtime?
7. What is the range of hours worked?
8. Is there an existing occupation within an industry the exemption would fall under?
9. What are the number of hours required versus hours approved for similar industries?
10. How has the business changed over the past 3 - 5 years? Have they always paid straight time in the past based on minimum wage?
11. Is the exemption necessary for the entire year?
12. Are there other options available to the employer to eliminate the need for an exemption?

The New Brunswick *Employment Standards Act* has similar factors within section 8(1) that outline how an employer can apply for an exemption from "any provision" of the Act if they can show, (d) *the employer suffers a special hardship in complying with the provision that is not suffered by other employers; and (e) the employee receives other benefits or advantages that can be viewed as reasonable compensation for the sacrifice of the benefit, advantage, privilege or protection offered by the provision in respect of which the exemption is sought;*

... The Branch did not receive any responses to interjurisdictional requests for information regarding the criteria or working guidelines used by other provinces to examine their various exemptions.

The Panel **recommends** that this provision should include language allowing for the consideration of other factors as prescribed in regulation (i.e., *Employment Standards Act Exemption Regulations*). The other factors should include the following: the current criteria listed in the table above; whether the business or industry primarily employs minimum wage workers; whether there are similar exemptions within the region; whether the business or industry suffers a special hardship that is not suffered by other employers; and that applicants and the Board must consider available disaggregated data examining the impact of an exemption on diverse groups of individuals or employees including women, immigrants, Indigenous peoples, youth, persons with disabilities and minorities. Placing these factors in the regulations enables responsiveness and the ability to add other factors in consideration of relevant and emerging socioeconomic and employment requirements.

15.1 Overtime hours - pay rate (1) *An employer shall pay an employee at the rate of one and one-half times the employee's regular rate of pay for each overtime hour of work performed by the employee for the employer during a work week.*

There was some discussion on whether there should be language regarding an employee's limited right to refuse overtime. Most jurisdictions, like PEI, do not have this type of language, except Saskatchewan, which requires an employee's consent to work beyond specified thresholds except for unexpected, unusual, or emergency situations;¹²⁹ and Quebec, which has similar right to refuse provisions in its *Labour Standards Act*¹³⁰, notwithstanding a number of unique and critical circumstances. Further, employment contracts sometimes contain stipulations requiring an employee to work additional hours that, if refused, could result in a breach of contract.

The Panel is not recommending any changes to this provision including an employee's limited right to refuse overtime and the would be associated need to describe and define the circumstances which might give rise to that entitlement. It is reasonable to assume that employers avoid situations where they would require an employee to work overtime hours contrary to the employee's wishes or personal circumstances. Similarly, employees are likely willing to work overtime in situations where the employer requires their time to address unscheduled operational demands or a potentially dire situation. To help mitigate the impact of requiring an employee to work overtime, the Panel suggests including language in either the Act or Guide that, subject to operational requirements, compels an employer to make reasonable efforts to provide advance notice when requiring an employee to work overtime.

Proposed Additions to Section 15 - Hours of Work

On Call or Standby: There are no provisions that deal with situations where an employee is required by their employer to be available for work. The Guide includes the following definition for "wait time": *An employer who asks or tells an employee to wait at the place of work must consider that time as work time. This means*

¹²⁹ Overtime hours not to be required section 2-12; [SK.pdf](#)

¹³⁰ An employee may refuse to work section 59.0.1; [QC Employment Act.pdf](#)

that the employer must pay the employee for all hours including waiting time. (p.25) There was discussion on whether employees should receive pay for being ‘on call’ versus only when they are called in to work. Those jurisdictions that deal with this type of scenario address it mostly in terms of waiting or being available at the place of work or another location designated by the employer. The Panel **recommends** including language similar to Saskatchewan’s *Employment Standards Act* which deals with circumstances when “an employee is required or permitted to work or to be at the employer’s disposal.”¹³¹

Trial or Training: The Panel **recommends** language similar to Quebec’s *Labour Standards Act* section (4) where an employee is deemed to be at work “during any trial period or training required by the employer”.

Telework: In Statistics Canada’s *Working from home: Productivity and preferences* report, the authors noted the increase in telework, “At the beginning of 2021, 32% of Canadian employees aged 15 to 69 worked most of their hours from home, compared with only 4% in 2016.”¹³² In recognition of the growing number of employees who are working from home, the Panel **recommends** the addition of language similar to what is included in British Columbia’s *Employment Standards Act*¹³³ definition of work, i.e., *Definitions 1 (1)* “work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

Averaging Agreements: The *BC Law Institute Report* noted that, “The concept of averaging is a part of the landscape of employment law in several provinces and territories as well as in the federally regulated sector. It is also an accepted practice under the only International Labour Organization (ILO) convention on hours of work¹³⁴ that Canada has ratified.” (p. 63) A number of jurisdictions have language permitting written averaging agreements within their employment standards whereby an employer and an employee or group of employees can average their hours of work over multiple weeks where the average is not greater than the standard hours of work week – overtime only applies if that is the case.

Along with the BC Law Institute’s Project Committee, the Panel agrees with the Thompson Commission¹³⁵ when it noted that, “. . . some flexibility in hours of work and overtime requirements is necessary for the ESA (*Employment Standards Act*) to be “consistent with the realities of the modern workplace.” (p.104) The Panel **recommends** enabling language for mutually beneficial and agreed flexible work arrangements between an employer and employee or group of employees – the averaging would also apply to a potential compressed workweek or work period, e.g., ninety-six (96) hours over fewer than ten (10) days/shifts in a two week pay period (or eighty-eight (88) hours if the forty-four (44) hour/week standard hours of work week is accepted).

Notice: The Panel **recommends** language requiring an employer to provide notice regarding an employee’s work schedule. This is intended to balance an employee’s need to have some predictability in their personal and work life (including scheduling work with other employers if they are working part

131 For example, used in subsections 2-11(3) and (4)(c); 2-16(1)(a) and (2); 2-17(1)

132 [Working from home: Productivity and preferences \(statcan.gc.ca\)](https://www150.statcan.gc.ca/n1/pub/92-627-x/2021001/article/00001-eng.htm); Tahsin Mehdi and René Morissette; April 1, 2021; Catalogue no. 45280001

133 [Employment Standards Act \(gov.bc.ca\)](https://www2.gov.bc.ca/gov2/employment_standards_act)

134 ILO Hours of Work (Industry) Convention, 1919 (No. 1); [Convention C001 - Hours of Work \(Industry\) Convention, 1919 \(No. 1\) \(ilo.org\)](https://www.ilo.org/dyn/convenc/declaration/1919/C001)

135 [thompson.pdf \(bcest.bc.ca\)](https://www2.gov.bc.ca/gov2/employment_standards_act/thompson.pdf)

time or irregular hours of work), with an employer's authority to schedule an employee's hours of work within the parameters of the Act and to maintain their operational flexibility, e.g., the time when work or each shift begins and ends over the course of at least one week. This would not limit an employee's ability to exchange shifts with a co-worker pursuant to the employer's approved workplace practices, or an employer's ability to reschedule in response to an "unforeseen circumstance", e.g., a bus tour is unexpectedly delayed or rescheduled.

Disconnecting: Ontario is the only province to enact a 'right to disconnect' law. The *Working for Workers Act*, 2021 amended the *Employment Standards Act 2000* in part by adding Part VII.0.1 *Written Policy on Disconnecting from Work*¹³⁶ which requires employers with 25 or more employees to ensure it has a written policy in place for all employees with respect to disconnecting from work. Section 21.1.1 interprets "disconnecting from work" as *not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work*. The Panel agrees that disconnecting from work is important for employee wellbeing and **recommends** that this principle and the importance of life-work balance be discussed within the Guide.

Rest Periods - Section 16.

16. Rest day (1) *An employer shall provide each employee, except those employees excluded by the regulations, with an unpaid rest period of at least twenty-four consecutive hours in every period of seven days and, whenever possible, that rest period shall include Sunday.*

The Panel noted that legislation should not address what could be considered a religious tenet of the majority when it references Sunday as a suggested day of rest and, therefore, **recommends** removing that specific reference. Further, a 2021 Statistics Canada census report identified that, "Just under 1 in 3 (28.5%) Prince Edward Islanders reported having no religious affiliation or having a secular perspective (atheist, agnostic, humanist and other secular perspectives)."¹³⁷

16.1 Refuse to work on Sunday (1) *An employee who, immediately before the day this section comes into force, is employed by an employer engaged in a retail business to which the Retail Business Holidays Act R.S.P.E.I. 1988, Cap. R-13.02 applies, may refuse to work on any Sunday for that employer if the employee gives the employer verbal or written notice of refusal at least seven days before any Sunday to which the refusal applies.*

In keeping with the above reference to Sunday, the Panel recognizes that this provision is dated but also understands that it involves another provincial statute. The Panel suggests that the relevance of this provision be examined by the Ministry responsible for the *Retail Business Holidays Act*.

Proposed Additions to Section 16 - Rest Periods

Rest between shifts and the practice of scheduling 'split shifts' were noted as possible gaps within this section. A number of jurisdictions require eight consecutive hours of rest in a day or between shifts; and

¹³⁶ Ontario, Canada: Bill 27, Working for Workers Act, 2021 Receives Royal Assent | Littler Mendelson P.C.

¹³⁷ 2021_census_reports.pdf (princeedwardisland.ca); p. 44

that ‘split shifts,’ which fulfill the day’s hours of work in two shifts as opposed to consecutive hours with assigned rest periods, are completed within twelve hours of the start of the first shift. The Panel is mindful of an employer’s need to maintain flexibility in scheduling to address fluctuations in operational demands (e.g., restaurants and slow periods between mealtimes) and an employee’s desire to maximize their hours of work within industries with varied and valid operational considerations. The Panel **recommends** including language that balances these legitimate interests by requiring eight consecutive hours of rest in any day (notwithstanding unforeseen exceptional circumstances) and that an employer must ensure that an employee working a split shift completes the shift within twelve hours of starting work.

Reporting Pay - Section 17.

17. Reporting pay *Each time an employee is required to report to work or for a work related activity, the employer shall pay the employee wages at the employee’s regular rate of pay for not less than three hours.*

The Panel is not recommending any changes and notes that all provinces, with the exception of British Columbia, provide a minimum of three hours reporting pay for an employee required to report to work. In BC, the employer must pay the employee a minimum of two hours wages, whether or not the employee starts work – this requirement shifts to a four hour minimum if the employer had previously scheduled the employee to work more than eight hours that day unless, in part, the work is suspended for reasons completely beyond the employer’s control, including unsuitable weather conditions.

Tips or Gratuities - Section 17.1

17.1 Tips and gratuities *(1) Tips and gratuities are the property of the employee to whom or for whom they are given.*

Although it is likely understood and practiced by Island employers, the Panel **recommends** adding a clarifying statement, like Quebec¹³⁸, that requires the employer to pay at least the prescribed minimum wage to an employee without accounting for any gratuities or tips the employee receives.

17.1 (11) Idem *An employer shall advise an employee, in writing, of any pooling policy in effect at the time the employee is hired.*

The Panel **recommends** that not only should employers advise new employees in writing of any pooling policy in place at the time of hire, but that it should be openly posted in the workplace.

Leaves of Absence

Qualifying Periods:

The Panel noted that qualifying periods for unpaid ‘special’ leaves vary across jurisdictions including the Atlantic Region as evidenced in the following comparator table:

138 *Québec Act Respecting Employment Standards Sections 50 ; QC Employment Act.pdf*

Qualifying Period for Unpaid Leaves of Absence	NS	NB	NL	PE
Family	N/A	None	30 Days	3 Months
Court	None	None	N/A	None
Compassionate Care	3 Months	None	30 Days	None
Critical Illness	3 Months	None	30 Days	3 Months
Death/Disappearance of a Child	3 Months	None	30 Days	3 Months
Domestic Violence	3 Months	None	30 Days	3 Months
Emergency	None	None	None	None
Bereavement	None	None	30 Days	None
Unpaid Sick	*N/A	90 Days	30 Days	3 Months

These leave entitlements are provided in response to various personal and family related crises and challenges that periodically impact employees and, by extension, employers. The leaves ensure employees have job protection during some of the most difficult times in a person's life. The Panel **recommends** moving the qualifying period where it is currently 3 months to 30 days, in alignment with Newfoundland and at the median within the region, i.e., Nova Scotia almost entirely uses 3 months, and New Brunswick primarily has no qualifying period. Additionally, all leave requests must be in writing.

Proposed Additional Leaves of Absence:

The Panel is **recommending** the addition of *Citizenship Ceremony Leave*, *Organ Donation Leave*, *Gender-Affirming Leave*, and *Apprenticeship Programs (Block Release Training) Leave*. These leaves are recommended to modernize the special leaves to reflect current and emerging social policy initiatives and to be aligned with the principles of diversity, equity, and inclusion.

Gender-Affirming Leave: "Gender-affirming care can be understood as the processes through which a health care system cares for and supports an individual, while recognizing and acknowledging their gender identity and expression."¹³⁹ The Panel **recommends** the development of a gender-affirming unpaid leave of absence intended to support employees who are medically transitioning. "Transition refers to the unique process a person goes through so they can live and express their gender identity in ways that **feel right for them**."¹⁴⁰ The leave is also supported in relation to a recently approved Health PEI policy that

139 Trans Care BC; Provincial Health Services Authority; Copyright © 2023 Provincial Health Services Authority; [Glossary \(phsa.ca\)](#)

140 I.b.i.d.

CBC reported is meant to, “. . . broaden the scope of what is considered medically necessary surgeries to increase access to more services, including out-of-province surgical procedures.”¹⁴¹

Citizenship Ceremony Leave: This leave is also aligned with the principles of diversity, equity, and inclusion and public policy intended to facilitate immigration and support newcomers to PEI. The Panel **recommends** up to one day of unpaid leave for an employee to attend their citizenship ceremony and points to language similar to Nova Scotia’s *Labour Standards Code* section 60J (1) *An employee is entitled to an unpaid leave of absence of up to, at the employee’s option, a maximum of one day on the day of and to attend a citizenship ceremony to receive the employee’s certificate of citizenship under the Citizenship Act (Canada) . . .*

Organ Donation Leave: The Panel **recommends** the inclusion of an unpaid leave of absence for organ donation that is aligned with Saskatchewan’s *Employment Standards Act* Organ Donation Leave 2-52 (1) . . . *for the period, as certified by a duly qualified medical practitioner, required for the organ donation and recovery from the procedure. (3) The maximum leave for an organ donation and recovery is 26 weeks.*

Apprenticeship Programs (Block Release Training) Leave: “Apprenticeship training combines on-the-job training with classroom training (Block Release Training) and results in a professional certification in a designated skilled trade.”¹⁴² The Panel **recommends** an unpaid leave of absence leave for apprenticeship block release training¹⁴³ in one of PEI’s designated trades.

Maternity, Parental and Adoption Leave - Section 18.

18. Unlawful dismissal etc. *No employer shall dismiss, lay off or suspend an employee by reason only of the fact that the employee*

- (a) is pregnant;*
- (b) is temporarily disabled because of pregnancy;*
- (c) has applied for maternity leave in accordance with section 19; or*
- (d) has applied for parental or adoption leave in accordance with section 22*

One submission expressed concerns that the term maternity leave is exclusionary as it “either excludes or confuses roles within same-gender relationships” and proposed terminology to “ensure more inclusivity and further represents the reality of non-heterosexual couples as well as parents who do not identify with a binary gender”, i.e., replace the term maternity with parental and parental leave with primary care giver leave. The federal employment insurance benefit still uses the terms maternity, parental and adoption and indicates that parental benefits “are payable only to the biological, adoptive, or legally recognized parents while they are caring for their newborn or newly adopted child or children.”¹⁴⁴ The parental benefits definition appears broad enough to ensure that both parents regardless of gender are entitled

141 [MLAs pledge support for LGBT community as Health P.E.I. updates gender-affirming surgery policy](#); [Shane Ross](#) · CBC News · Posted: May 24, 2023 8:07 PM ADT; [MLAs pledge support for LGBT community as Health P.E.I. updates gender-affirming surgery policy](#) | [CBC News](#)

142 [Apprenticeship Program](#) | [Government of Prince Edward Island](#)

143 “In-school training is typically five to ten weeks of classroom training for each level of apprenticeship. Each trade has different weeks required.” [Apprenticeship In-school Training](#) | [Government of Prince Edward Island](#)

144 [Maternity and Parental Benefits - Canada.ca](#)

to the same benefits (78 weeks combined) as heterosexual couples. The language in this provision is aligned with federal employment insurance benefit language but the Panel does agree that either gender neutral or modernized gender inclusive terminology should be reflected within their maternity, parental and adoption benefit language. In turn, this provision could be amended to replicate any modernized amendments made to the federal terminology.

Sick Leave - Section 22.2

22.2 Sick leave (1) *Where an employee has been employed by an employer for a continuous period of at least three months, the employer shall, at the request of the employee, grant the employee leaves of absence without pay of up to three days, in total, for sick leave.*

A jurisdictional scan of the Atlantic Region revealed that Nova Scotia provides three days unpaid sick leave for family illness, or medical or dental appointments, Newfoundland and Labrador has seven days of unpaid “sick and family responsibility leave”, and New Brunswick five unpaid sick days and three days family responsibility leave. Other provinces range from three days up to twenty-six weeks, i.e., ON, BC, and MB: up to 3 days; AB: up to 5 days; SK: up to 12 days if the injury is not serious and up to 12 weeks if it is serious; and QC: up to 26 weeks.

The Panel **recommends** increasing the unpaid sick leave allotment from three to four days during a twelve calendar-month period. This allotment of unpaid leave is equivalent to Newfoundland and Labrador when PEI combines the four days with its three unpaid days of family leave (7 days total), and still lags New Brunswick’s five unpaid sick days.

The Panel also examined circumstances where an employee is dealing with a serious illness or disease and requires access to longer-term job protection and unpaid sick leave. This consideration is also in response to the December 18, 2022, extension of the Federal Employment Insurance (EI) Sickness Benefit from fifteen (15) to twenty-six (26) weeks.¹⁴⁵ As one submission noted, “While income support is covered under the EI program, it is solely up to each province and territory to determine the length of job-protected leave for employees who are sick.” The Panel **recommends** language that provides up to twenty-six (26) weeks unpaid leave for the treatment and recovery from serious or life-threatening diseases and illnesses. This is aligned with other current longer-term unpaid leaves within the Act (including the above noted recommendation for organ donation) and with associate EI sick benefits. As recommended under *Leaves of Absence: Qualifying Periods* above, the qualifying period for unpaid sick leave would be thirty (30) days.

22.2 Medical Certificate (2) *Where an employee requests a leave of absence under subsection (1) that is three consecutive calendar days in length, the employer may require the employee to provide the employer with a certificate signed by a medical practitioner certifying that the employee is or was unable to work due to illness or injury.*

There were suggestions to remove requirements for medical certificates (‘sick notes’) citing the *Canadian Medical Association’s (CMA) 2018 presentation*¹⁴⁶ to Ontario’s *Standing Committee on Finance and Economic*

145 [EI sickness benefits: What these benefits offer - Canada.ca](#)

146 [MAINTAINING ONTARIO’S LEADERSHIP ON PROHIBITING THE USE OF SICK NOTES FOR SHORT MEDICAL LEAVES - BR2019-03.pdf \(cma.ca\)](#)

Affairs. The presentation identified the following concerns along with the administrative burden and associated pressure on the healthcare system: “In addition to adding a physical strain on patients who are ill, the requirement for employees who are ill to get a sick note, may also contribute to the spread of viruses and infection. Allowing employers to require sick notes may also contribute to the spread of illness as employees may choose to forego the personal financial impact, and difficulty to secure an appointment, and simply go to work sick.” (p.4)

Statistics Canada *Health Facts Sheet Primary health care providers*¹⁴⁷ notes that, “In 2019, 14.5% of Canadians aged 12 and older (roughly 4.6 million people) reported that they did not have a regular health care provider they see or talk to when they need care or advice for their health (14.9% for PEI). Significantly more males (17.4%) than females (11.7%) reported they were without a regular health care provider in 2019. Among both males and females, compared to all age groups, those aged 18 to 34 were most likely to be without a regular health care provider. (...) Among Canadians who had a regular health care provider, 38.7% indicated they could receive a same day or next day appointment with someone from their regular healthcare provider’s¹⁴⁸ office when they needed immediate care for a minor health problem (PEI – 28.7%).”

A review of the Atlantic Region identified that in New Brunswick, an employer may require a certificate from a medical practitioner, physician, nurse practitioner, or midwife if the employee’s absence is four or more consecutive days and in Newfoundland and Labrador, an employee must provide a certificate from a physician or nurse practitioner if the employee’s absence is three or more consecutive days. The Panel is also aware that Nova Scotia has pending amendments that would require a certificate from a qualified medical professional which includes not only physicians, but any person who holds a license to practice a regulated health profession in Nova Scotia if the absence continues for more than five consecutive working days or the employee has had at least two non-consecutive absences of five or fewer working days in the prior 12 months.

The Panel accepts the principles outlined in the CMA’s 2018 presentation to Ontario’s *Standing Committee on Finance and Economic Affairs* and understands the associate demands on the Island’s healthcare system and challenges for timely and appropriate access to a “medical practitioner”. It should be noted that the current language does state that the employer “may” (not shall) require a certificate and it is expected that employers exercise this discretion when weighing the need for clarifying documentation, e.g., a pattern of above average sick leave use, or to constructively explore and better understand issues contributing to an employee’s leave.

The Panel **recommends** increasing the threshold from three, to four days consecutive days which would be aligned with the above recommended increase to four unpaid sick days. The Panel also **recommends** implementing the more expansive and flexible term of “qualified health professional” used in Nova Scotia’s pending amendment which extends to all relevant and regulated health professionals. There should also be language to clarify that the four-day threshold includes both the unpaid sick leave under subsection (1)

¹⁴⁷ Statistics Canada, *Primary health care providers, 2019*, Health Fact Sheets, Release date October 22, 2020; found at [Primary health care providers, 2019 \(statcan.gc.ca\)](https://www150.statcan.gc.ca/n1/pub/82-625-x/2020001/article/00001-eng.htm)

¹⁴⁸ A regular health care provider is defined as a health professional that a person sees or talks to when they need care or advice about their health. This can include a family doctor or general practitioner, medical specialist, or nurse practitioner.

a 10-day illness, workers are entitled to at least 7 days of paid leave in Australia, Austria, Belgium, Finland, Germany, Greece, Iceland, Luxembourg, Netherlands, Norway, Sweden, and Switzerland. Canada is one of only 5 of these 22 countries where employers are not required to pay for paid sick days for short-term illness (except for minimal paid sick days in Quebec, PEI, and for federally regulated workers).” (p.14)

This benefit was referenced in most submissions and encompassed a wide range of suggestions for additional paid sick days (2-10 days) as well as calls for the status quo. Some submissions suggested that if there is an increase in this benefit, that it should only apply to sick days without pay or a decrease in the five-year eligibility period. There were concerns with respect to the cost of increased paid sick days and questions regarding how an increase would be funded. One organizational stakeholder referenced a related survey of small businesses in which one respondent stated, “Covid almost buried us as a small business. We can’t afford any additional expenses.” That same survey indicated that there was considerable support (58%) for additional paid sick days if the associated costs were fully taken on by the government and less so (37%) if half of the costs were taken on by government. Forty-three percent (43%) of the respondents did not support any paid sick leave program (either employer or government funded).

A November 2021 News Release¹⁵⁵ from the BC Ministry of Labour noted the following when announcing its amendment and the inclusion of five paid sick days in their *Employment Standards Act*: “The Province looked to other jurisdictions that have mandated paid sick leave, including in the United States, Australia, New Zealand and several European countries. Their experiences have shown the cost increases for most business were less than expected. They also experienced significant benefits, including increased productivity and retention of trained staff, reduced risks of injury, improved morale and increased labour-force participation.” Sonia Furstenau, leader of the BC Green Party also noted, “A paid sick leave policy should be developed and measured based on how it moves us towards those outcomes - less illness, greater equity, and more economic stability. Most OECD countries have 10 days or more of paid sick leave. That’s because paid sick leave is an essential public health measure, and an important basic standard for business.”¹⁵⁶

An associated report on the estimated gross cost of BC’s paid sick day provisions by *The Centre for Future Work Economic* noted, “To some observers, requiring employers to cover up to 10 days paid sick leave for all workers sounds like a daunting change in employment practice – akin to having to pay out an extra two weeks’ worth of wages or salaries to all workers every year. This level of protection is the norm in other industrial countries,¹⁵⁷ however, and is already met by many Canadian employers.¹⁵⁸ And in practice, the final impact of a requirement for 10 days paid sick leave will not have nearly as dramatic an impact on total business operating costs as is implied in these dire business predictions. The ultimate gross impact of this measure on bottom-line business costs will in fact be muted by several intervening factors:

155 [Five paid sick days coming Jan. 1 \(gov.bc.ca\)](https://www2.gov.bc.ca/gov/content/employment-steps/employment-standards-act/changes/2021-11-15)

156 [Move to 5 days paid sick leave not enough to bring B.C. in line with OECD standard - BC Green Party \(bcgreens.ca\)](https://www.bcgreens.ca/news/move-to-5-days-paid-sick-leave-not-enough-to-bring-bc-in-line-with-oecd-standard)

157 Most OECD countries already require paid sick leave of two weeks or more; see OECD (2020), Heymann et al. (2020), Hyeet al. (2020), and Raubet al. (2018)

158 As discussed within the report, about half of Canadian workers are already covered by paid sick leave benefits.

- Not all workers will qualify for the full 10 days paid sick leave entitlement (since the benefit, in most proposals, is phased-in as a worker accumulates tenure in a job).
- Many employers already offer similar benefits, and hence will experience little or no increase in compensation costs.
- On average, not all entitled paid sick days will be claimed by workers.
- Even when workers are absent on paid sick days, not all will be replaced with alternative staff during their absence.
- Labour compensation costs account for a relatively small share of total business expenses, and this further dilutes the final impact on gross expenses¹⁵⁹.

The *Women in Prince Edward Island Statistical Review Fourth Edition (2020)* illustrates how access to sick benefits and other types of personal leave has more of an impact on women than men when it noted, “In 2020, females in PEI lost an average of 15 days per worker, compared to 14.3 days for females nationally. Males in PEI lost an average of 9.2 days per worker, which is on par with the national average for males . . . Females working full-time lost more hours of work due to illness or disability. Although this table (data) does not include additional time spent doing unpaid work such as providing care to children, vulnerable adults, and seniors, it does show that females lost more hours of work due to personal and family reasons than males.” (p.45) Section 5.2 Pay and Protection of Pay further discussed the prominent role women play as primary contributors to unpaid work.

Statistics Canada 2022 data reveals that Canadian workers took an average of 10.2 days and PEI 8.9 days of leave for illness and disability, and when broken out by the sexes, nationally males took an average of 8.9 days and PEI 7.0 days while females in Canada took an average of 11.8 days and on PEI an average of 11.3 days.¹⁶⁰ Their 2022 data on annual work absences of full-time employees in Canada broken out by tenure indicates that workers absences (including due to illness and disability) correlate with tenure, i.e., 1-12 months job tenure were absent an average of 9.3 days and over 1 to 5 years averaged 11.3 days lost, while over 5 to 9 years lost an average of 12.3 days.¹⁶¹ When examining work absence of full-time employees by public and private sector in Canada in 2022, the total days lost¹⁶² per worker in a year in the public sector averaged 16.7 days versus 10.9 days lost in the private sector¹⁶³ and, when doing the same by union coverage¹⁶⁴, those workers with union coverage averages 17.8 days lost by a worker in a year versus 9.7 days in the private sector.¹⁶⁵ The *Ontario Science Table’s* science brief, *Benefits of Paid Sick Leave During the COVID-19 Pandemic*¹⁶⁶ noted that, “In Canada most people without paid sick leave earn less than \$50,000 in

159 [BC-Sick-Days-Cost-Report.pdf](#); p.5

160 [Work absence of full-time employees, annual \(statcan.gc.ca\)](#)

161 [Work absence of full-time employees by job tenure, annual \(statcan.gc.ca\)](#)

162 Data beginning in 1997 exclude maternity leave. However, men on paid paternity (in Quebec only) or parental leave are included in the calculation until 2006. Days lost per worker are calculated by multiplying the inactivity rate by the estimated number of working days in the year (250). To ensure respondent confidentiality, estimates below a certain threshold are suppressed (...) in Prince Edward Island, estimates under 200 are suppressed.

163 [Work absence of full-time employees by public and private sector, annual \(statcan.gc.ca\)](#)

164 Employees who are members of a union and employees who are not union members but are covered by a collective agreement or union contract.

165 [Work absence of full-time employees by union coverage, annual \(statcan.gc.ca\)](#)

166 Ontario Science Table [Science-Brief_Paid-Sick-Leave_20210504_version-1.1_published2.pdf \(covid19-sciencetable.ca\)](#) Version 1.1 Published: April 28, 2021

annual income, and more than 60% of seasonal, casual, or contract workers have no paid sick leave at all.” (p.3)

There appears to be a common understanding of the personal, workplace and public health benefits of having workers stay at home when they are unwell and potentially contagious. It is also clear that workers who have access to paid sick leave are in an advantageous position relative to those workers who do not have access to paid sick leave and its accompanying job and salary protection. What is less apparent, is the data needed to accurately assess the financial impact of providing employees with paid sick leave. Weighing these factors was central to the Panel’s assessment and recommendation.

The cost of sick days was discussed extensively within the PEI Legislature during the debate of Private Member’s Bill 128, *An Act to Amend the Employment Standards Act* (No. 4) in which the Official Opposition called for up to ten paid sick days leave per year. There was relevant information contained in two documents tabled on November 16, 2022, which include costing assumptions and related statistical information. One was prepared by the Ministry responsible for the legislation at the time, the Department of Economic Growth, Tourism and Culture entitled, *Policy Analysis and Technical Review of Proposed Official Opposition Bill - Amendments to the Employment Standards Act Paid Sick Leave*,¹⁶⁷ and one prepared by the Official Opposition entitled, *Paid Sick Leave Briefing Note*.¹⁶⁸

Both documents outline an evidence informed approach to calculating the global costs of ten paid sick days for Island employers. They contain similar acknowledgements that their data is incomplete with a number of unquantified variables that prevent a reliable estimate; however, both use similar and reasonable assumptions to help refine the estimated range. At the end of the analysis, their stated conservative estimates ranged from \$60-\$70.7 million to \$83 million across all employers, if employees took full advantage of the benefit. The calculations assume that up to 58%¹⁶⁹ of Island employees do not have access to sick leave given the following factors: approximately 33.4% of the workforce is unionized¹⁷⁰ and likely contain collectively bargained sick leave benefits; the Act does not apply to the self-employed workforce (independent contractors); these two groups (unionized and independent contractors) likely include a number of employees in the higher range of the average hourly wage calculation; and, a number of nonunionized private sector employers¹⁷¹ likely offer benefit packages including paid sick days.

Along with the obvious salary and job protection for employees and the public health benefits for the community, there are other potential mitigating factors to employer costs such as: the spread of illness within the workplace and customers; situations not requiring the backfilling of an employee’s absence; employers who already have sick leave benefits at or exceeding three days; situations where employers

167 [TVSher.Altass.11162022.Analysis of bill 128-paid sick leave-by EGTC in February 2022.pdf](#); February 2022; (numbered 3.)

168 [TVSher.Altass.11162022.Paid sick leave briefing note.pdf](#); (numbered 4.)

169 “The most recent data available, from 2016, reveals that 58% of workers in Canada do not have a single paid sick day — ranging from 51% to 61% provincially.” BEFORE IT’S TOO LATE: How to close the paid sick days gap during COVID-19 and beyond p.4; [DWHN_BeforeItsTooLate.pdf](#); [Ability to work from home and paid sick leave benefits by precarious employment and socioeconomic status. PWHR.ubc.ca. <http://pwhr.sites.olt.ubc.ca/files/2020/06/GSS-COVID-19-Research-Brief-2020-Updated-June-3.pdf>. Updated June 3, 2020.]

170 [Number of unionized workers, employees and union density, by sex and province \(statcan.gc.ca\)](#)

171 Approximately 30% of Island establishments have a workforce of 100-500+ employees; Statistics Canada. [Table 14-10-0068-01 Employment by establishment size, annual \(x 1,000\)](#); 2022; Date modified: 2023-06-06

informally and compassionately continue to pay employees who are sick and miss a scheduled day(s) of work; employees who will not use any or less than the available sick days in any given year; and, once an employee has five years of committed employment with an employer, they might be less likely to use a paid sick day if they are not sick. At the same time, it is not unreasonable to deduce that employees might use paid sick days when they are not sick and choose to substitute vacation time to get a 'break' from work or for purposes not covered by other benefits within the Act, or that there will be employees who simply have a 'use it or lose it' mindset – especially in the absence of a carryover provision.

During the pandemic, the federal government introduced the *Canadian Emergency Response Benefit* (CERB) to provide financial support to Canadians during the COVID-19 pandemic.¹⁷² Additionally, the PEI provincial government introduced the *COVID-19 Special Leave Fund*¹⁷³ to provide temporary wage support for workers and self-employed people who were not eligible for federal benefits including those unable to work due to illness and those who did not have access to paid sick leave or the ability to work from home. "More than two-thirds of people aged 15 and over on PEI (69.3 per cent), or 87,920 people, received payments from one or more of the federal, provincial or territorial pandemic relief benefits."¹⁷⁴ These funds were used to mitigate the public health and socioeconomic impacts from the pandemic by redistributing public money for the greater public good.

There was consensus amongst the Panel with respect to the value of salary and job protection for employees who are unable to attend work due to illness and the workplace and public health benefits by them staying home. However, the Panel **was not able to reach consensus on the recommended minimum standard or the qualifying period for one day of paid sick leave** – this was the only subsection where the Panel was unable to reach a consensus recommendation. That said, there was agreement that if a recommendation to increase the paid sick leave benefit is adopted, there should be consideration given to some form of corresponding funding to assist small business owners.

As noted, a similar approach was used by the Government of Newfoundland and Labrador's *Transitional Support Program for Smaller Employers*¹⁷⁵ which accompanied its recent accelerated minimum wage adjustment to help small businesses offset the consequential labour costs. A May 2022 Government of Newfoundland and Labrador News Release¹⁷⁶ stated, "The Provincial Government is also creating a one-year Transitional Support Program for Smaller Employers. The program will provide 50 cents an hour, per employee, for employers with 20 or less employees. The program is application-based and further details will follow on the application process in the coming weeks." Statistics Canada indicates that there were 26,400 employees (36% of the reported 73,400 total employees in all industries) working within establishments with less than 20 employees - there was no corresponding number for PEI.¹⁷⁷ The *PEI Workers Compensation Board* compensation system is another shared funding approach and uses assessment rates calculated

172 [Archived - COVID-19: Financial support for people, businesses and organizations - Canada.ca](#)

173 [COVID-19 Special Leave Fund for Islanders | Government of Prince Edward Island](#)

174 PEI Statistics Bureau; 2021 Census of Population Reports; 2021_census_reports.pdf (princeedwardisland.ca); p.34

175 [Transitional Support Program for Smaller Employers - Environment and Climate Change \(gov.nl.ca\)](#)

176 [Provincial Government Releases Minimum Wage Review Committee Report - News Releases](#)

177 [Employment by establishment size, annual \(statcan.gc.ca\)](#)

per \$100 of assessable payroll. The Chair of the *Workers Compensation Board* noted that, “The WCB is proud to contribute to the fair compensation of injured workers while balancing financial sustainability for employers.”¹⁷⁸

In *The Case for Paid Sick Leave* World Health Report (2010) Background Paper, No 9 the authors noted that, “At the global level, as many as 145 countries provide for paid sick leave. Usually, provisions include both time for leave and wage replacement during sickness. However, the benefit schedules for paid sick leave differ widely among countries. (p. 8) (...) A large number of governments in all regions of the world have recognized the need for paid sick leave and have included guaranteed paid sick leave into legislation, be it state-funded or in the form of social and national insurances or employer-based schemes.” (p.10)

After weighing all of these considerations and in an effort to make a balanced and measured proposal, **the majority of the Panel recommends** moving the qualifying period from five years to one year for one day of paid sick leave and adding two additional paid sick leave days after five years. There **was consensus that the recommendation** would not include any year-over-year accrual liability for employers, would not be included in a payout pursuant to employee layoff or termination, that the benefit would extend to unionized employees¹⁷⁹ with a less favourable benefit, and, as noted, consideration should be given to an accompanying funding approach to assist small business owners.

Domestic Violence, Intimate Partner Violence or Sexual Violence Leaves - Section 22.4

22.4 Domestic violence, intimate partner violence or sexual violence leave (1) *Where an employee has been employed by an employer for a continuous period of three months or more, the employer shall, at the request of the employee, grant the employee*

(a) *leaves of absence with pay of up to three days, and*

(b) *leaves of absence without pay of up to seven additional days,*

which the employee may choose to take intermittently or in one continuous period, during a twelve-calendar-month period, taken at the employee's discretion, for a domestic violence leave, intimate partner violence leave or sexual violence leave.

There was positive feedback regarding this provision and its associated regulations and encouragement “to continue being a leader with respect to respectful workplaces education and training”. This provision and entitlements are aligned with the Atlantic Region.

The Panel was told that in 2021/2022, the *Government of PEI's Victim Services* had approximately 441 new referrals related to family violence. This further highlights the importance of training and education for employers regarding the dynamics of family violence, as well as the need to track this and other leaves for the purpose of reporting and increasing public awareness.

Emergency Leave - Section 22.5

22.5 Unpaid leave of absence (3) *In an emergency, an employee is entitled to an unpaid emergency leave of*

178 [WCB announces rates, surplus and pursuit of benefit enhancements](#)

179 Note: The Panel's recommendation to add Paid day of sick leave to Application 2. (4) to ensure a minimum threshold for all Island employees.

absence for the duration of the time when the employee cannot perform the duties of the employee's position because of the emergency.

In December 2020, the P.E.I. government announced the following addition to the Emergency Leave Regulations to expand eligibility for employees with respiratory illnesses pursuant to section 41(1)(f.2) of the Act.

ESA Emergency Leave Regulations

2. Emergency unpaid leave of absence - diagnosis of communicable respiratory disease *For the purposes of section 22.5 of the Act, an employee who has been diagnosed pursuant to clause 4(a) of the Notifiable Diseases and Conditions and Communicable Diseases Regulations (EC560/13) under the Public Health Act R.S.P.E.I. 1988, Cap. P-30.1, as being infected with a communicable disease listed in clause 1.1(e) of those regulations, and is subject to control measures referred to in clause 4(b) of those regulations, is deemed to be a person who is entitled to an unpaid leave of absence pursuant to subsection 22.5(3) of the Act. (EC932/22)*

Bereavement Leave - Section 23.

23. Bereavement leave *(1) On the death of a member of the immediate family or extended family of an employee, the employer of the employee shall grant to the employee a leave of absence (a) of one day of paid leave and up to two consecutive days of unpaid leave, if the deceased person was a member of the immediate family of the employee; or (b) of up to three consecutive days of unpaid leave, if the deceased person was a member of the extended family of the employee.*

PEI is one of only three provinces that provide a paid day of bereavement leave on the death of an immediate family member (NL: 1; QC: 2). Every province provides a range of 2-5 unpaid days, with three days being the combined median number.

It should also be noted that the more expansive and modernized recommended definitions for "immediate family" and "extended family" (recommended "family member"), if adopted, would apply here.

Unpaid Leave for Reservists - Section 23.1

A submission proposed amending this section along with other provincial jurisdictions who have brought their employment standards in line with new *Canada Labour Code* provisions and updated their reservists' military leave provisions in the interest of moving to one national standard. The submission indicated that "PEI is home to more than 250 reservists, i.e., part-time sailors, soldiers and aviators . . . (and) given the value that reservists' military service represents for civilian employers and communities, it is important to optimize conditions for them to fulfil military commitments. At the same time, reservists' civilian employers deserve clarity and certainty when they grant military leave."

The proposed changes include specifying that leave for training would apply to "military skills training" and the minimum civilian-employment period before provisions become applicable, would decrease from six months to three; limiting permissible military leave to a total of not more than 24 months in a 60-month period, with exceptions permitted for national emergencies; and, extending the period an employer can defer the return-to-work of a reservist-employee, from two weeks to four.

The Panel **recommends** amending this provision so that it is aligned with the *Canada Labour Code* and other provincial jurisdictions who have done the same.

General Provisions Concerning leave - Section 23.3

23.3 Payment of cost of participation (5) *Where the employee chooses, in writing, to maintain any benefit plan to which subsection (3) applies, the employee shall enter into an arrangement with the employer to pay the cost required to maintain the benefit plan, including the employer's share thereof, and the employer shall process the documentation and payments as arranged.*

The Panel **recommends** amending subsection 23.3 (5) to ensure that in circumstances when a benefit plan is cost shared, both the employer and the employee continue to pay their share of the cost of the plan to which subsection (3) applies (and any other potential provisions enabling extended employment insurance eligible unpaid sick leave).

Sexual Harassment - Section 24.

Given the July 2020 introduction of the *Occupational Health and Safety Act Workplace Harassment Regulations*, there was discussion regarding the feasibility of removing this provision from the Act. The current provisions simply define sexual harassment, state that employees are entitled to employment free of sexual harassment, require employers to issue a policy statement concerning sexual harassment, and direct employees to the *Human Rights Act* for remedy. Although these are beneficial provisions, the Occupational Health and Safety Regulations, along with the *Human Rights Act*, are more comprehensive in their definition of "workplace" harassment (which includes sexual harassment), detailing worker and employer responsibilities, and providing investigative and remedial processes. Accordingly, the Panel **recommends** removing this provision as it most appropriately belongs solely within the *Occupational Health and Safety Act Workplace Harassment Regulations*. Along with this, the Panel **recommends** including a section in the Guide which briefly discusses this protection and directs employees, employers, and other stakeholders to the Occupational Health and Safety Regulations.

Notice of Termination - Section 29.

29. Termination of employment by employer, notice period (1) *Except where an employer has just cause to terminate an employee, and subject to subsection (2), an employer shall not terminate or lay off an employee who has been employed by the employer for a continuous period of six months or more without having given the employee at least*

(a) two weeks notice in writing, where the employee has been employed by the employer for a continuous period of six months or more but less than five years;

(b) four weeks notice in writing, where the employee has been employed by the employer for a continuous period of five years or more but less than ten years;

(c) six weeks notice in writing, where the employee has been employed by the employer for a continuous period

of 10 years or more but less than 15 years; or

(d) eight weeks notice in writing, where the employee has been employed by the employer for a continuous period of 15 years or more.

This provision ensures employees are given advance warning of termination of employment or pay in lieu of notice so they can prepare accordingly and plan for other employment. This obligation does not apply when an employer has just cause or when dealing with the exceptions outlined in subsection (2).

Notice of Termination Jurisdictional Scan – updated May 2022

PROV- INCE:	AB	BC	ON	QC	MB	SK	NS	NB	NL	PE
No no- tice	< 3mo	< 3mo	< 3mo	< 3mo	< 30 days	< 13wks	< 3mo	< 6mo	< 3mo	< 6 mo
1 week	3mo - 2yr	3mo - 12mo	3mo - 1yr	3mo - 1yr	30 days - 1yr	13wks – < 1yr	3mo - 2yr		3mo - 2yr	
2 weeks	2yr - 4yr	12mo - 3yr	1yr - 3yr	1yr - 5yr	1yr - 3yr	1yr - 3yr	2yr - 5yr	6mo - 5yr	2yr - 5yr	6mo - 5yr
3 weeks		3yr - 4yr	3yr - 4yr						5yr - 10yr	-
4 weeks	4 - 6yr	4 - 5yr	4 - 5yr	5 - 10yr	3 - 5yr	3 - 5 yr	5 - 10yr	> 5yr	10 - 15yr	5 - 10 yr
5 weeks	6yr - 8yr	5yr - 6yr	5yr - 6yr						> 15yr	
6 weeks	8yr - 10yr	6yr - 7yr	6yr - 7yr		5yr - 10yr	5yr - 10 yr				10 - 15 yr
7 weeks		7yr - 8yr	7yr - 8yr							
8 weeks	> 10yr	> 8yr	> 8yr	> 10yr	> 10yr	> 10yr	> 10yr			> 15 yr

Starting point for notice being required:

Amount of Notice	Length of Employment Required	Provinces
1 week	Three months	AB, BC, ON, QC, NS, NL, SK (expressed in weeks)
	Six months	NB, PE
	Thirty days	MB

There were stakeholder proposals to reduce the eligibility requirement for written notice or pay in lieu of notice from six to three months of continuous employment with an employer, and one proposal that asserted employers require the six months to properly assess the suitability of employees. It was noted that PEI and NB are the only provinces without any notice requirements until six-months of continuous employment, whereas six other provinces require notice after three months, Manitoba after thirty (30) days, and Saskatchewan thirteen (13) weeks. Furthermore, PEI and NB require two weeks notice after six months of employment with five provinces after one year and three others after two years. The other notice of termination thresholds continue to vary as they progress up to a maximum of eight weeks notice. Further, as demonstrated within other jurisdictions, three months of employment appears to be considered a fair and reasonable period

for employees to demonstrate their suitability.

The Panel **recommends** introducing the requirement for one week of notice of termination for an employee who has been continuously employed by an employer for three months or more but less than one year and decreasing the two week notice requirement to one year or more but less than five years. There are no recommended changes to the four, six, and eight week thresholds. This effectively reduces the requirement for written notice of termination from six to three months and reduces the two week notice requirement to one week for continuous employment between three months and one year. If this recommendation is approved, this requirement would be on a go-forward basis.

There were also proposals to consider adding notice rules for group terminations including the requirement to notify the Minister responsible. This type of provision exists within every other province due to the scope of the impact on affected employees, the community, and the prospective demand on government workforce adjust programs and services.

The Panel **recommends** the inclusion of group termination language with accelerated notice periods for affected employees along with a requirement to notify government. The Panel points to the language in New Brunswick's *Employment Standards Act* as a possible guide, i.e., at least six weeks notice to employees and the Minister where the employer intends to terminate or layoff in a four week period more than 10 employees if they represent at least 25% of the workforce.¹⁸⁰

There was also a suggestion to define and possibly codify the criteria for an employer to establish "just cause" to terminate an employee and another proposal to consider language dealing with constructive dismissal¹⁸¹.

The Panel **recommends** including a requirement to provide written notice where an employer dismisses an employee for cause and suggests including additional information within the Guide and other accessible materials to further educate employers and employees regarding layoffs and terminations, and the factors surrounding just cause, the duty to accommodate, and constructive dismissal. The Panel further **recommends** language similar to Manitoba's *Employment Standards Code* to clarify that an employer cannot effectively 'make' an employee take paid vacation during the notice period, i.e., *Effect of notice of termination 43 Where an employer or employee gives notice of termination of the employee's employment, (a) no part of the employee's annual vacation may be used to calculate the required notice period unless, in the case of an employee giving notice, the employer otherwise agrees; and (b) the payment of a vacation allowance to the employee does not affect any other amount payable to the employee in respect of the termination.*

29. Exceptions, termination without notice (2) Subsection (1) does not apply to

(a) a person who is employed to perform a definite task for a period not exceeding twelve months;

180 [LayoffTermination.pdf \(gnb.ca\)](#)

181 "A constructive dismissal may occur when an employer makes a significant change to a fundamental term or condition of an employee's employment without the employee's actual or implied consent. The employee would have to resign in response to the change within a reasonable period of time in order for the employer's actions to be considered a termination of employment for purposes of the ESA . . . Constructive dismissal is a complex and difficult subject." [Termination of employment | Your guide to the Employment Standards Act | ontario.ca](#); Published: November 22, 2017; Updated: June 15, 2022

- (b) a person who is laid off for a period not exceeding six consecutive days;
- (c) a person who has been offered reasonable other employment by his or her employer;
- (d) a person who is terminated or laid off for any reason beyond the control of the employer, including
 - (i) the complete or partial destruction of a plant,
 - (ii) the destruction or breakdown of machinery or equipment,
 - (iii) the inability to obtain supplies and materials, or
 - (iv) the cancellation or suspension of, or inability to obtain, orders for the products of the employer, if the employer has exercised due diligence to foresee and avoid the cause of termination or layoff; or
- (e) a person who is terminated or laid off because of labour disputes, weather conditions or actions of any governmental authority that affect directly the operations of the employer.

The Panel recognized that the non exhaustive list of examples in subsection (2)(d) is somewhat dated and primarily reflects an industrial or manufacturing frame of reference. The language is not dissimilar from other jurisdictions and the Panel agrees with one submission which noted, “. . . it is not intended to apply to more predictable operational problems or business failures”. In other words, it is an unforeseen circumstance that is, as stated in subsections (2)(d) “beyond the control of the employer” and as stated in subsections (d)(iv) contingent upon whether “the employer has exercised due diligence to foresee and avoid the cause of termination or layoff”. In light of this, the Panel **recommends** removing the examples in subsections (2)(d) and replacing it with ‘catchall’ language like, *for any reason beyond the “foreseeable” control of the employer*. The Guide could then be used to provide further explanation and an updated list of examples including those currently outlined under (2)(d).

29. Period of notice if employed for more than six months (4.1) *Where an employee has been employed continuously for longer than six months, the employer shall not terminate the employment without giving the employer, in writing, at least*

- (a) one weeks notice where the employee has been employed by the employer for a continuous period of six months or more but less than five years; and
- (b) two weeks notice where the employee has been employed by the employer for a continuous period of five years or more.

To avoid confusion, the Panel **recommends** using the term resign instead of “terminate the employment”, i.e., *the employee shall not terminate the employment “resign” without giving the employer, . . .*

Complaints and Enforcement - Section 30.

This section is intended to clearly outline the complaint and enforcement process beginning with a complaint or an inspector having reasonable grounds that there was a contravention of the Act up to a potential hearing and resolution before the Board. The section appears to have evolved over time and consequently requires considerable work to outline a more comprehensive step by step approach to the investigation, complaints, enforcement, tribunal, and appeals processes along the lines of what is provided

within Parts 10-13 of the *BC Employment Standards Act*¹⁸².

With an updated approach, the Panel also sees an opportunity to bring the parties together early in the process to find ways to equitably resolve matters informally and hopefully preserve an ongoing constructive employment relationship. In some cases, it might simply be a matter of assisting employees and employers to better understand and interpret their rights and obligations under the Act. In doing so, matters can be resolved early in the dispute resolution process and the parties can potentially avoid a protracted and disruptive formal intervention and remedy.

The Panel agrees with a number of submissions which spoke to the limitations of a complaint-based system and the benefits of a more strategic approach to enforcement and compliance. One noted drawback of a complaint-based system is the possible hesitation of vulnerable or precariously employed workers coming forward to file a complaint against their employer. The Special Advisors for the *Ontario Changing Workplaces Review* stated, “We agree with the Court and with many commentators in this field that the barriers can be psychological or social (such as lack of knowledge of the availability of substantive rights) and may also include factors such as limited language skills, the elderly or young age of claimants, minority status of all kinds, gender, immigration status and fear of reprisals.” (p. 22-23)

The *British Columbia Law Institute Report* also noted that, “Enforcement of the ESA is primarily complaint-based, although power exists to investigate non-compliance whether or not a complaint has been made. In practice, investigations are seldom conducted without a prior complaint.” (p. xxxv) Examples of a more strategic approach to compliance and enforcement might include building capacity to conduct regular proactive audits and inspections, collecting and analyzing data to identify priority areas for non-compliance, annual reporting to highlight accountabilities, an emphasis on public and stakeholder outreach, and the provision of accessible education-based approaches especially with vulnerable workers.

To assist with a more strategic approach to enforcement and compliance it is important to have an up-to-date registry and profile of Island employers, and data regarding incidents and types of noncompliance. The Panel **recommends**, a review of current data collection and reporting systems and a strategy to address any identified gaps to enable targeted outreach initiatives and strategic enforcement. As previously noted, such an assessment should be accompanied by an analysis of the associated technological and human resources needed to support a more proactive approach.

Given the vital role that public education plays in generating greater awareness and, in turn, broader compliance, the Panel also **recommends** including language in this section or within a prospective preamble that clearly states this obligation such as the following provisions within British Columbia’s *Employment Standards Act*: *Promoting awareness of employment standards* 5 *The director must develop and carry out policies to promote greater awareness of this Act. Informing employees of their rights* 6 *An employer must make available or provide to each employee, in a form provided or approved by the director, information about the rights of the employee under this Act.* To support this type of legislative requirement for employers,

182 Part 10 – Investigations, Complaints and Determinations; Part 11 – Enforcement; Part 12 – Employment Standards Tribunal; and, Part 13 – Appeals; [Employment Standards Act \(gov.bc.ca\)](http://www.gov.bc.ca)

the Panel suggests the development of an employment standards communication plan with an emphasis on public education and modernized and accessible educational materials for employees, employers, and the general public using various tools and methods, e.g., relevant courses, social media channels, partnerships with stakeholder organizations, continued best practice of multilingual posters and other pamphlets, and online resources and materials.

The provision of accessible education, along with clear employment standards, effective monitoring, and penalizing instances of noncompliance, helps create a level playing field and eliminate potential advantages for employers who might intentionally sidestep their obligations under the legislation. In Osgoode Hall's *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada* research paper, the authors noted that, "Proactive inspections may be used in forms of 'strategic enforcement', where employers in sectors known to have high levels of violations are targeted for inspection. The underlying assumption of this strategy is that the proactive approach will not only detect un/underreported violations, but also that the fear of possible inspection will create pressure for employers in these sectors to improve compliance."¹⁸³

The following includes recommendations for specific subsections and highlights the need for investigative and enforcement best practices, procedural fairness, alternate dispute resolution, and consistent terminology and timelines for employees and employers.

Subsections 30. (2), and (2.1), and (3)

Complaint respecting benefits 30. (2) *Where an employer has failed or refused to provide any benefit to which an employee is entitled, but which is not required to be paid directly to the employee, the employee may, within twelve months of the alleged violation, make a complaint to an inspector and the inspector shall determine the amount to which the employee is entitled.*

Complaint respecting pay transparency 30. (2.1) *Where an employer has failed to comply with section 5.10, the employee may, within twelve months of the alleged violation, make a complaint to an inspector, who may make a determination in the matter.*

Inquiry 30. (3) *Where an employer has failed or refused to provide any benefit to which an employee is entitled, but which is not required to be paid directly to the employee, the employee may, within twelve months of the alleged violation, make a complaint to an inspector and the inspector shall determine the amount to which the employee is entitled.*

The language in subsections 30. (2)(2.1)(3) outline an inspector's responsibilities in responding to employee complaints or when they have reasonable grounds to believe there has been a violation of the Act. However, these provisions do not address situations where someone other than an employee may be aware of a potential failure to comply with the Act, or if an inspector has the authority to refuse a vexatious or unsubstantiated complaint.

To facilitate uncovering and addressing potential wrongdoing and to mitigate situations where an

¹⁸³ Leah F Vosko et al, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada*, [Source not specified], 2011 CanLII Docs 170, <<https://canlii.ca/t/297p>>, retrieved on 2023-06-19 (Vosko, Thomas and Gellatly); Page 10 | [New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada](#) | CanLII

employee might not be aware of a violation or is reluctant to file a complaint against their employer, the Panel **recommends** language like that found in PART 7 Investigations initiated by inspector of the *Temporary Foreign Worker Protection Act* wherein “a person” may complain to an inspector, or New Brunswick’s *Employment Standards Act* Complaint to Director 61(1) which permits not only an employee but “any person who believes that (a) there has been a violation of Part III by an employer, an employee or any other person” to make a complaint to the Director.

With respect to the ability to refuse a complaint or appeal, the Panel **recommends** language similar to that used in PART 7 - Investigations, Complaints and Determinations subsections 35. (2) Authority to refuse, etc. and 65. (1) Powers of board after appeal is filed within the PEI *Temporary Foreign Worker Protection Act* or as found in other jurisdictions including Alberta’s *Employment Standards Code*, When complaints may be refused 83 *An officer may refuse to accept or investigate a complaint if (a) the officer considers that (i) the complaint is frivolous or vexatious, (ii) there is insufficient evidence to substantiate the complaint, or (iii) there are other means available to the employee to deal with the subjectmatter of the complaint that should be pursued before the complaint is accepted or investigated, or (b) the employee is proceeding with another action in respect of the subjectmatter of the complaint or has sought and obtained recourse in respect of the subjectmatter of the complaint before a court, tribunal or arbitrator or by some other form of adjudication.*

30. Order of inspector (4) *Where, on inquiry, an inspector determines that an employer has contravened a provision of this Act within the preceding twelve months, the inspector shall notify the employer of any determination made under subsection (1), (2) or (2.1) and may, by order in writing, direct the employer to*

- (a) *do any act that, in the opinion of the inspector, constitutes full compliance with this Act;*
- (b) *rectify any injury caused to the person injured or make compensation for the injury; and*
- (c) *pay over to the inspector in trust, not later than a date designated in the order, any amount owing to an employee as determined under subsection (1) or (2), or both.*

As part of the investigative process and in consideration of the spectre of an outstanding liability, the Panel **recommends** that an inspector should also be required to provide employers with updates on the status of complaints and that it should clearly state that an employer will also be informed in writing if it is determined there was no violation. This type of requirement is referenced within the following provisions under New Brunswick’s *Employment Standards Act* and British Columbia’s *Employment Standards Act*:

(NB) Notification to complainant 66 *Where, after receiving a complaint under this Act, the Director determines (a) that the complaint is not one he is required to act upon; or (b) that, having acted upon the complaint, there has been no failure to comply with this Act or the regulations or with an order made under subsection 64(3), he shall so inform the complainant and advise him of his right to require the Director to refer the matter to the Board; and,*

(BC) Written Report 78.1 (1) *After completing the investigation of a complaint, the director must (a) summarize the director’s findings of the investigation in a written report, and (b) serve a copy of the written report on the following: (i) the person who made the complaint; (ii) the person against whom the complaint was made; (iii) any person the director considers should have the opportunity to respond to the report.*

Fundamental to the inspector's role and further to section 3. of the Act, there are expectations for investigative best practices including the noted requirement for reasonable grounds and procedural fairness. The *BC Law Institute Report* spoke to the importance of these tenets when it stated, "It is now well-established that a duty of procedural fairness exists at the investigative stage as well as at the decision-making stage of an administrative process that affects the rights, privileges or interests of an individual, or that may result in imposition of a penalty." (p.259)

30. Inspector may issue an order (4.1) *If, after conducting an investigation concerned with section 36(1), the inspector concludes that the employer has breached section 36(1), the inspector may issue an order requiring the employer to do any or all of the following:*

- (a) *to comply with section 36(1);*
- (b) *to pay any wages that the employee has lost as a result of the employer's failure to comply with section 36(1);*
- (c) *to restore the employee to his or her former position;*
- (d) *to post the order in the workplace;*
- (e) *to do any other thing that the inspector considered reasonable and necessary in the circumstances.*

The Panel **recommends** a clear reference to alternate dispute resolution processes as a way for the parties to work with an inspector or other trained individuals to resolve disputes arising from complaints and/or investigations. This can be a more efficient process than potentially working through a full investigative process or issuing an order, while still providing an opportunity for the parties to tell their stories, better understand one another's issues, and voluntarily reach a satisfactory settlement. If no remedy can be found, the complaint can still proceed to an investigation and/or hearing. Employment Standards Officers/Inspectors in other jurisdictions have the authority to affect a settlement using alternate dispute resolution processes.

Subsections 30. (5), and (8), and (9)

30. Content of order (5) *Where an inspector has received from an employer any amounts to which an employee is entitled under clause (4)(c), the inspector shall in any order made under subsection (4) specify the provision of this Act that has been contravened and advise the employer against whom the order is made of the right to appeal to the board within ten days of receipt of the order made under subsection (4).*

30. Complaint to board (8) *An employee who, having made a complaint to an inspector, is not satisfied with the result may make a complaint in writing to the board.*

30. Appeal (9) *Any employer affected by an order made under this Act by an inspector may, within ten days after the order is served, file an appeal with the board, and where no such appeal is filed the order of the inspector is deemed to be an order of the board.*

There were proposals noting the variation in the terms "complaint" and "appeal" processes and in filing periods for employers and employees, i.e., ten days versus no filing restriction respectively. One submission also contended that ten days does not allow an employer sufficient time "to understand an order and assess the prospect of an appeal".

The Panel **recommends** using “appeal” as the petition term for both employees and employers and to extend the timeframe for an appeal to the Board from ten to thirty days for both parties.

30. Parties (11) *In any proceeding before the board with respect to a determination pursuant to subsection (1), (2) or (2.1) or an appeal pursuant to subsection (9) the parties shall be*

- (a) the employer;*
- (b) the employee or group of employees;*
- (c) the inspector; and*
- (d) any other person specified by the board upon such notice as the board may determine.*

The Panel understands that in practice the inspector is not a party before the Board or active in decisions of the Board but may be made available to respond to questions of the Board. The Panel also acknowledges and appreciates why inspectors are not compellable witnesses as noted under Administration 3. (3)(4).

Other jurisdictions make direct reference to the Director being a party to board proceedings and having responsibility to present a case in support of any decision or order the Director has made - a Director in these cases plays a similar role as an inspector under this Act. In PEI, the Chief Employment Officer (inspector under the Act) investigates and issues orders that are heard before the Board. The Panel **recommends** that the current practice should be modified and that an inspector, or like role with legal training, should be an active party to the proceedings as outlined in this section. The Panel also points to the appeal process within the *Temporary Foreign Worker Protection Act* where the same Board, under section 4 of this Act, has jurisdiction and where the same inspector role is also named as a party to an appeal before the Board.

30. Procedure (14) *In any proceeding before the board pursuant to subsection (11), the board shall*

- (a) review the matter at a hearing;*
- (b) give the employer, employee, group of employees or the representative of any of them, full opportunity to present evidence and make submissions;*
- (c) decide whether or not a party has contravened this Act;*
- (d) determine the amount, if any, owing to the employee or group of employees; and*
(e) make an order in writing to the contravening party to
 - (i) do any act that, in the opinion of the board, constitutes full compliance with the provision contravened,*
 - (ii) rectify any injury caused to the person injured or make compensation for the injury, and*
 - (iii) pay over to the inspector in trust, not later than a date designated in the order, any amount determined to be owing to the employee or group of employees.*

As with other conventional practices, the pandemic gave rise to questions regarding the advisability and authority for the Board to conduct their business using videoconferencing technology and, in so doing, allowing virtual evidence and testimony. This has been tackled and the door has been opened to this type of approach across the country, “The use of technologies to conduct remote hearings in Canadian courts

and administrative tribunals is now seen as a natural progression and evolution of our time, which might continue post-COVID.”¹⁸⁴

There was a pre-pandemic unpublished Board decision on a preliminary objection for an appeal regarding a respondent participating in a hearing by way of videoconferencing. The preliminary objection was allowed in favour of the respondent attending the appeal hearing in person. As part of its analysis, the Panel of the Board observed that subsection 4. (12) of the Act contemplates that the Panel may receive evidence by videoconference in appropriate circumstances.

In this case, the Panel of the Board decided not to allow the virtual testimony after balancing the reasons for the request against the presumption that parties should generally be physically present to give evidence. Part of their analysis noted the following: “The Panel observes that, on Prince Edward Island, both the *Rules of Civil Procedures* and the *Criminal Code of Canada* contemplate evidence by videoconference in appropriate circumstances. And describe factors to consider in deciding whether or not to allow evidence by videoconference.”¹⁸⁵ The analysis went on to note that with most cases heard by administrative tribunals, the presumption is that the parties ought to be physically present to give evidence at a hearing. When speaking to the continued use of remote court hearings within the United States justice system, the *Brennan Centre for Justice* noted, “Because credibility determinations are often central to case outcomes, the effect of video appearance on credibility has important implications for the overall fairness of remote proceedings.”¹⁸⁶ To help make this determination, the Panel’s analysis also pointed to a *Supreme Court of Newfoundland and Labrador* decision which references a list of relevant factors that have been considered in deciding whether or not to allow evidence by videoconference in civil cases¹⁸⁷.

As alluded to above, subsections 4. (12) Evidence and (13) Procedure, provide the Board with discretionary power when it comes to receiving and accepting evidence it considers fit and proper, and the authority to make rules governing its practices and procedures. In light of this existing language and the relevant factors referenced in the *Supreme Court of Newfoundland and Labrador* decision, the Panel **recommends** adding language allowing a virtual hearing including witness testimony by videoconferencing when an in-person hearing or testimony is not feasible.

Offences and Penalties - Section 38.

38. Offences and penalties (1) Any person who (a) wilfully delays or obstructs the board or an inspector or any other official in the exercise of any of their duties under this Act; (b) furnishes false or misleading information in any statement or record required to be furnished under this Act; (c) fails to comply with any order, schedule, notice or requirement under this Act; or (d) contravenes any provision of this Act or the regulations made under this Act, is guilty of an offence and is liable on summary conviction to a fine of not less than \$200, and not more than \$10,000.

184 [Videoconferencing Technologies and How it Challenges the Fundamental Tenets of our Criminal Justice System in Canada - Slaw](#)

185 The Analysis at 31. Cited the *Prince Edward Island Rules of Civil Procedures*, Rule 1.07; *Criminal Code of Canada* R.S.C 1985. C. C-46, as amended, s. 714.1

186 [The Impact of Video Proceedings on Fairness and Access to Justice in Court | Brennan Center for Justice](#); Published: September 10, 2020

187 *Loveman v. Loveman*

Stakeholders proposed changes in this section to provide the Branch with powers to encourage compliance beyond just making an employee “whole” such as administrative penalties for failure to comply with the Act and/or the ability to issue tickets for offences. The provision currently allows for a fine pursuant to a summary conviction but does not provide the Branch authority to impose an administrative monetary penalty.

Employment and Social Development Canada describe an administrative monetary penalty (AMP) as a financial deterrent to non-compliance within the *Canada Labour Code* (Code), and related regulations. The goal of the penalty is to: encourage compliance, serve as a supplement to existing enforcement measures, and offer an alternative to prosecution. As a part of the compliance and enforcement process, the *Labour Program* focusses on supporting and encouraging employers to be compliant with the Code through education and awareness. In general, an AMP would only be issued: after voluntary compliance measures are exhausted, and non-compliance persists.¹⁸⁸

A jurisdictional scan identified that along with provisions for a summary conviction and a range of associate fines for contravening a provision within the Act or failing to comply with an order, most provinces also allow for monetary penalties and prescribe the terms and amounts within their respective employment statutes and regulations.

In some cases, the circumstances, and factors to be considered when determining the penalty are outlined in some detail including within graduated schedules to the regulations, e.g., Manitoba’s Employment Standards Regulations Schedule (Section 29) Administrative Penalties¹⁸⁹, and Alberta’s Employment Standards Regulation Schedule 2 Administrative Penalties¹⁹⁰. The *British Columbia Law Institute Report* noted that the “. . . Project Committee agreed that the amount of a penalty should depend on the gravity of the contravention as well as on the number of previous contraventions of the same provision, and the report recommends this.” (p.xxxix)

The Panel **recommends** a review of the current fine amounts to ensure they are up-to-date and aligned with other jurisdictions and recent provincial legislation. This should include language allowing the imposition of administrative monetary penalties with a range of fines relative to the type of contravention prescribed within the regulations.

The Panel also **recommends** language that would enable publishing violators’ names as an additional general deterrent and strategic enforcement tool like the following provision within British Columbia’s *Employment Standards Act* Publication of violators’ names section 101:

(1) The director may compile information relating to contraventions of this Act or the regulations, including information identifying the persons who, according to a determination or an order of the tribunal, committed the contraventions.

188 [Labour Program administrative monetary penalties \(AMP\) - Canada.ca](#)

189 [MB Regulations.pdf](#)

190 [Alta Reg 14/1997 | Employment Standards Regulation | CanLII](#)

(2) *Despite the Freedom of Information and Protection of Privacy Act, the director may (a) publish information compiled under subsection (1), and (b) make that information available for public inspection during regular business hours at offices of the Employment Standards Branch.*

This approach is supported by the principle of transparency and discussions on publication in section 39.1 below. It was also noted that this approach is consistent with the Public Health Office PEI's Environmental Health Division practice of publishing restaurant and food premises violation warnings¹⁹¹ pursuant to the PEI *Public Health Act* section 32.(2)¹⁹² and its Food Premises Regulations.

General (Posting Orders) - Sections 39.1-40.

39.1 Posting orders, etc *Every employer shall keep posted in a conspicuous place at any place of employment where the employees of the employer are engaged in their duties, copies of all orders under this Act relating to wages, hours of work or any other condition or term of employment governed by this Act and the regulations.*

A 2019 interjurisdictional scan revealed that every other province publishes decisions of their respective employment standards ruling bodies, including parties' names (except MB), and that PEI's Board is pursuing the same. Along with posting orders, there was also discussion on the feasibility of requiring employers to post *Employment Standards Act* and *Youth Employment Act* information sheets.

An excerpt from a December 2019 unpublished legal opinion for the Board stated, "Across Canada, the general practice among employment standards tribunals is to make decisions publicly available. The majority of these jurisdictions publish decisions issued from the mid-1990s to present. Decisions are typically available either via a tribunal's website and/or through legal publishing services such as Westlaw, eCarswell, and CanLII." The opinion went on to advise, "Publication of decisions is consistent with the "open court" principle, which dictates that public confidence in the integrity of the justice system and understanding of the administration of justice is fostered by openness and full publicity. The open court principle applies equally to quasi-judicial proceedings such as appeal and complaint hearings at the Board. The open court principle is most notably given effect by the publication of an adjudicator's decisions."

In 2005 the *Canadian Judicial Council* (CJC) released a report on the *Use of Personal Information in Judgments and Recommended Protocol*.¹⁹³ The CJC protocol strikes a reasonable balance in the tension between the principle of openness and the protection of personal information privacy concerns. The New Brunswick Labour and Employment Board adopted a set of *Privacy Directions* consistent with the CJC protocol and subject to the following practice and privacy guidelines:

i) Notice is provided to parties that any information contained in an application, reply or document which is filed with the Board, and any testimony provided in evidence, may be referred to in a decision of the Board, which may also appear online. ii) Board hearings are open to the public; however, in exceptional circumstances, the Board may grant a request that a hearing be closed to the public. iii) Exhibits that contain sensitive information about any individual may be sealed by order of the Board. iv) The identification of persons not directly affected by proceedings may be protected

191 [Restaurant and Food Premises Violation Warnings | Government of Prince Edward Island](#)

192 PEI *Public Health Act* 32. Publication of order (2) The Minister shall publish an order made under subsection (1) in one or more newspapers having general circulation in the province; found at [Public Health Act \(princeedwardisland.ca\)](#)

193 http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_UseProtocol_2005_en.pdf

by order of the Board. v) The Board will use its discretion to include in decisions only such personal information that is relevant and necessary to the reasons. vi) Decisions are not available or searchable on the Board's website; they are only available by subscription from specialized private publishers (e.g., LexisNexis, Quicklaw, eCarswell) or on public websites such as CanLII.¹⁹⁴

In keeping with the principle of transparency, the Panel **recommends** publishing all Board decisions with due consideration and discretion regarding personal information pursuant to the adoption of guidelines similar to the noted New Brunswick Labour and Employment Board *Privacy Directions*. The Panel further **recommends** that employers be compelled to post *Employment Standards Act* and *Youth Employment Act* information sheets.

Regulations - Section 41.

The Panel agreed that the Act should remain the primary source of employment standards 'guidance' for employees, employers, and the general public to facilitate accessibility and mitigate the potential confusion resulting from cross-referencing various directives. Further, the regulations should be limited, but used where referenced (e.g., exemptions) and where appropriate nuance and flexibility is required.

Employment Standards Act Regulations and Orders

Employment Standards Act General Regulations [Employment Standards Act General Regulations \(princeedwardisland.ca\)](http://princeedwardisland.ca)

Employment Standards Act Emergency Leave Regulations [Emergency Leave Regulations \(princeedwardisland.ca\)](http://princeedwardisland.ca)

Employment Standards Act Domestic Violence, Intimate Partner Violence and Sexual Violence Leave Regulations [Domestic Violence, Intimate Partner Violence and Sexual Violence Leave Regulations \(princeedwardisland.ca\)](http://princeedwardisland.ca)

Employment Standards Act Employment Standards Reciprocity Order (All Provinces and Territories excepting NU) [Employment Standards Act Employment Standards Reciprocity Order \(princeedwardisland.ca\)](http://princeedwardisland.ca)

Employment Standards Act Minimum Wage Order [Employment Standards Act Minimum Wage Order \(princeedwardisland.ca\)](http://princeedwardisland.ca)

Employment Standards Act Exemption Regulations [Exemption Regulations \(princeedwardisland.ca\)](http://princeedwardisland.ca)

2. Exemption Athletes while engaged in activities related to their athletic endeavours are exempt from the application of sections 5, 6 to 15.1, 17 and 29 of the Act. (EC574/17)

All provincial jurisdictions with major junior ice hockey teams in the Canadian Hockey League (CHL: WHL/OHL/QMJHL) have similar exemption language within their respective employment standards legislation, i.e., NB, NS, QC, ON, MB, SK, AB, and BC.

There was a presentation proposing the removal of this exemption and which asserted that an employment relationship exists between the CHL and its member leagues and teams and their major junior hockey players. To date, there have not been any employment standards complaints brought forward with respect to PEI's QMJHL team. The Panel considers this a matter of classification as discussed in the definitions (i.e., "employee" and "employer") and that it would, therefore, be subject to the same analysis and transparent review process proposed for other current and future exclusions from the Act and prescribed by these

¹⁹⁴ <https://www.gnb.ca/LEB-CTE/pp/8e.pdf>

Exemption Regulations.

Youth Employment Act

The *Youth Employment Act* outlines the rights and protections for young persons under the age of sixteen and the obligations and responsibilities of their employers. The Panel agrees with submissions encouraging a standalone Act to help ensure safe and age-appropriate terms and conditions of employment for youth and the need to consider a minimum age of entry to the workforce.

PEI 2021 population counts¹⁹⁵ reveal that there are 8,800 (5.7%) youth between 10-14 years of age and 8,560 (5.5%) between 15-19 years of age. PEI 2020 school enrollment data¹⁹⁶ indicates there were 8,261 students in grades 7-11.

The suggested amendments reflect the need to balance the benefits of young persons developing important job skills and earning spending money, contributing to household income, or saving for their education, with the abovementioned need for safe and age-appropriate work experience. Youth employment also benefits employers by supplying them with an employment cohort that helps maintain operations, flexibility in scheduling, and affording time off for their regular workforce.

As with the recommendation within the Complaints and Enforcement section 30. of the *Employment Standards Act*, the Panel **recommends** including British Columbia's *Employment Standards Act* language which highlights the necessity for employers to inform and educate youth and their parents regarding their respective rights and responsibilities under this Act. In support of this requirement, the Panel also suggests that the Branch consider the provision of educational materials for young workers akin to Manitoba¹⁹⁷ and Saskatchewan's¹⁹⁸ "work readiness certificate" for youth under the age of sixteen.

Finally, the Panel also suggests consultation with the *Office of the Child and Youth Advocate PEI*, so they can apply a children's rights lens to any prospective amendments to the *Youth Employment Act*.

Definitions – Section 1.

1. Definitions In this Act (a) "construction" has the same meaning as in clause 1(b) of the *Occupational Health and Safety Act R.S.P.E.I. 1988, Cap. O-1*; (b) "Director" means the Director of Occupational Health and Safety; (c) "inspector" means the inspector of labour standards appointed under section 62 of the *Labour Act R.S.P.E.I. 1988, Cap. L-1*; (c.1) "Minister" means the Minister of Justice and Public Safety and Attorney General; (d) "school" means a school as defined in the *Education Act R.S.P.E.I. 1988, Cap. E-.02*; (e) "young person" means a person under the age of sixteen years. 1990, c.66, s.1; 2006, c.43, s.1; 2009, c.73, s.2; 2010, c.31, s.3;

The age thresholds for youth employment are similar throughout the Atlantic Region with various restrictions depending upon the industry and requirements for parental consent. Other provinces have similar varied restrictions and conditions as well as a minimum age of work ranging from 12 (BC), to 13

195 [Profile table, Census Profile, 2021 Census of Population - Prince Edward Island \[Province\] \(statcan.gc.ca\)](https://www150.statcan.gc.ca/n1/pub/92-627-x/2021001/article/00001-eng.htm)

196 [ell k-12 enrolment 2020 2021.pdf \(princeedwardisland.ca\)](https://www.princeedwardisland.ca/en/education/k-12-enrolment-2020-2021.pdf)

197 [YWRCC Guide and Workbook \(manitoba.ca\)](https://www.manitoba.ca/education/ywrcc/)

198 [Young Worker Readiness Certificate Course | Employing Youth in Saskatchewan | Government of Saskatchewan](https://www.saskatchewan.ca/government/employment-and-labour-standards/young-worker-readiness-certificate-course)

(AB and MB), and 14 (SK, ON, and QC). The Panel recognizes that young workers require employment restrictions, as they are still developing their physical, social, and mental skills and judgment. There is also appreciation that these constraints should have flexibility to warrant exceptions in particular circumstances. Given these factors, the Panel **recommends** including a minimum age of thirteen with the opportunity for inspector approved exceptions for youth twelve years of age and younger including artistic endeavours as discussed in subsections section 6.(2)(3) below. To be clear, a “young person” would still be “*a person under the age of sixteen years*” but with a minimum working age of thirteen (13) years of age – notwithstanding authorized exceptions.

In keeping with the PEI *Employment Standards Act* definitions, the Panel **recommends** including the following definition of parent:

“parent” includes (i) the spouse of a parent of a child, (ii) a person with whom a child has been placed for the purposes of adoption, (iii) a guardian or foster parent of a child, and (iv) a person who has the care and custody of a child, whether or not the person and the child are related by blood or adoption. [current 22.11 (1)(d) and 22.12 (1)(c)]

The Panel **recommends** replacing the current definition of inspector with the definition of inspector within the *Employment Standards Act* 1. Definitions (h) “inspector” means an inspector appointed under subsection 3(1) – this is discussed further under Inspection – Section 7.

Application of the Act - Section 2.

2. Application of Act *This Act does not apply to employment (a) pursuant to any course of study at a trade school registered under the Trade Schools Act R.S.P.E.I. 1988, Cap. T-4; (b) in an enterprise in which only members of the employer’s family are employed; (c) of such descriptions as may be prescribed in the regulations. 1990, c.66, s.2.*

The Panel discussed whether the exemption in subsection (b) for an enterprise in which only members of the employer’s family are employed should remain in place recognizing that it could create a scenario where an employer is not subject to rules limiting hours of work, employment in the construction industry and other potential age-related restrictions.

There is an appreciation for the proposal to remove (b) altogether, but the Panel accepts that this practical reality exists and is inherent in certain Island family enterprises. Given this, the Panel **recommends** narrowing the scope of the family exemption in (b) by adding “immediate” to employer’s family (SK uses “immediate” and NB “his/her own family”) and indicate that “an enterprise” is still subject to section 4. In turn, the recommended definition for “immediate family” proposed under the *Employment Standards Act* should be included under Section 1. Definitions of this Act.

The Panel also suggests that section 4. should be clearly established as an overarching provision that puts a young person’s health and safety at the fore and ensures they are never exempt from this vital and overriding health and safety condition.

General Principle Governing Youth Employment – Section 4.

4. General principle governing youth employment *No employer shall employ a young person in employment that is or is likely to be harmful to the health or safety, or moral or physical development of the young person. 1990, c.66, s.4.*

As noted, this is a fundamental protection that should override any other consideration or potential exception.

Construction – Section 5.

5. Construction *No employer shall employ any young person in construction. 1990, c.66, s.5.*

The Panel **recommends** removing this provision in acknowledgement that young persons **still would not be permitted in the construction industry** as one of other potentially harmful and hazardous workplace settings subject to the overarching protections in 4. above, and the PEI *Occupational Health and Safety Act*¹⁹⁹ and its regulations²⁰⁰.

Exception – Section 6.

6. Exception (2) *The inspector may, upon application, exempt the employment of any young person from subsection (1) if he is satisfied that the employment (a) will not prejudice the attendance of the young person at school or the capacity of the young person to benefit from instruction at school; and (b) has been consented to by the parent or guardian of the young person.*

As referenced in Definitions Section 1., the Panel **recommends** mandating a minimum age of employment of thirteen years of age with the opportunity for exceptions for artistic endeavours for youth twelve years of age and younger, as defined in Alberta's *Employment Standards Code Regulation Definitions 51 (b)* "artistic endeavour" means work in (i) recorded entertainment, such as film, radio, video or television, including television and radio commercials, (ii) voice recording for video and computer gaming, and (iii) live performances, including theatre and musical performances.

In alignment with subsections (a) and (b), this exception would be subject to an application process requiring signoff by the young person and their parent, along with an examination and written decision by an inspector. Once again, inspector needs to be clarified to mean an inspector as defined in the *Employment Standards Act*.

6. Idem (3) *The inspector shall exempt the employment of any young person from subsection (1) if he has received a document in writing signed by the parent or guardian of the young person consenting to the employment. 1990, c.66, s.6.*

The Panel accepts that parents have unique insight and generally keep the best interests of the youth in mind when consenting to an exemption. That said, for consistency, safety, and standardization, the Panel **recommends** that the exemption procedure should follow the same process outlined in 6.(2). The process would still require parental and youth signoff but would also be subject to an inspector's examination and written decision.

199 [Occupational Health and Safety Act \(princeedwardisland.ca\)](http://princeedwardisland.ca)

200 [Occupational Health and Safety Act General Regulations \(princeedwardisland.ca\)](http://princeedwardisland.ca)

Inspection – Section 7.

S. 7. Inspection (1) *The Director, the inspector and any occupational health and safety officer appointed under the Occupational Health and Safety Act may at any time enter any premises in which a young person is employed and conduct an inspection to ensure compliance with the requirements of this Act or the Occupational Health and Safety Act.*

As with references to inspector in 6. (2) and (3), inspector would be referencing an inspector as defined in the *Employment Standards Act*.

S. 7. Order prohibiting employment in dangerous workplace (2) *Where the Director or an occupational health and safety officer has determined that any toxic substance or machinery or equipment in use in any industrial undertaking or any plant engaged in the processing of fish, agricultural products or forest products, is potentially dangerous to young persons, he may, by order, prohibit the employment of young persons in that undertaking or plant either generally or in a location proximate to that substance, machinery or equipment. 1990, c.66, s.7.*

The Panel discussed the potential confusion with respect to the seeming overlapping or shared responsibilities of an inspector as defined under the *Employment Standards Act* and the primary responsibilities for the Director and an inspector under the *Occupational Health and Safety Act*. Once again, the Panel turns to the overarching prohibition and general principle governing youth employment covered in section 4. of this Act and **recommends** removing this section to avoid any confusion and leave the critical assessment of a dangerous workplaces where it most appropriately belongs under the authority of the PEI *Occupational Health and Safety Act* and its regulations.

Obligations of the employer - Section 8

Where an employer employs a young person, he shall (a) act reasonably in assigning duties taking into account the age, knowledge, education and work experience of the young person; (b) identify any potential danger to health and safety known to him and give appropriate instruction to the young person; (c) personally supervise the work of the young person or ensure that at all times the work of the young person is supervised by an adult who has experience of the work; (d) provide adequate training and courses of instruction before authorizing the young person to perform unsupervised work. 1990, c.66, s.8

The Panel **recommends** clarifying whether the role for enforcing s. 8 falls to the Inspector under the *Employment Standards Act* or an Occupational Health and Safety Officer under the *Occupational Health and Safety Act*. Further, to ensure accessibility and the protection of all youth, the Panel suggests that any related education and training materials are clearly understood and translated for youth where English is an additional language similar to the helpful *What You Should Know About the PEI Employment Standards Act Posters*.²⁰¹

201 [Employment Standards Guide and Posters | Government of Prince Edward Island](#)

Offence - Section 9.

An employer who violates any provision of this Act or fails to comply with an order made under section 7 is guilty of an offence and liable on summary conviction to a fine of not less than \$200 or more than \$1,000. 1990,c.66,s.9

In keeping with the discussion on Offences and Penalties under the *Employment Standards Act*, the Panel **recommends** updating the current fine amounts to ensure they are up-to-date and aligned with other jurisdictions and recent provincial legislation.

VII. OTHER CONSIDERATIONS

This section highlights proposals and subject matter that was outside of the scope of the review and the Acts and takes a brief look at the role and work of the *Branch*.

Out of Scope

In keeping with the Terms of Reference 4. Responsibility²⁰², the Panel was asked to note areas of employment law and related matters raised by participants that fall outside of the scope of the review and the *Employment Standards Act* and *Youth Employment Act*.

Related Legislation and a Basic Income Guarantee: There were a number of stakeholder proposals that were connected to other Acts and are referenced within the body of the report that are considered relevant employment matters but deemed to be outside the scope of the review and legislation. These included: a *Basic Income Guarantee* and the PEI Legislative Assembly's related motion to pursue a livable income pilot in partnership with the federal government; refusal to work on "Sunday" as a day of rest that crosses over into the PEI *Retail Business Holidays Act*; pay discrimination which is fundamentally attached to human rights legislation; concerns regarding the fair treatment of temporary foreign workers that are incorporated within a number of recommendations within the report and are in large part addressed within the pending enactment of the *Temporary Foreign Worker Protection Act*; and, workplace health and safety matters such as sexual harassment, psychological safety, and dangerous workplaces that are addressed within the provincial *Occupational Health and Safety Act*.

Employer Training and Education: One consistent theme during the review and referenced alongside a number of the Panel's recommendations is the requirement for enhanced employee, employer, and public education.

The Government of PEI currently provides a number of workforce development and adjustment programs and services through the SkillsPEI Division of the Department of Workforce, Advanced Learning and Population. "SkillsPEI was established in 2009 to manage the design and delivery of employment and skills development programming funded by the Canada-Prince Edward Island Labour Market Development

202 Terms of Reference 4. Responsibility 4.4 3rd Bullet: "In conducting the review, the Panel must be mindful of certain factors: Elements of the ESA and YEA overlap with other areas of employment law, including matters which are in the jurisdiction of human rights and occupational health and safety. It is likely that participants in the consultation process will provide comments and feedback on these areas of employment law falling outside the scope of the ESA. The Panel is directed to take notice of comments on other areas of employment law and report on employment law issues falling outside the scope of the ESA in the Final Report."

Agreement and Canada-PEI Workforce Development Agreement.”²⁰³ These programs include its Workplace Skills Training²⁰⁴ and Group Based Training Programs²⁰⁵ funded by the provincial budget and in part by Island employers.

It is accepted that employers have a responsibility to orientate their workforce regarding their legislated employment rights and obligations and to support and develop their workforce through ongoing training and education. However, one scheme that came up during a stakeholder presentation was an employer funded training and development program in Québec that is outside the scope of the Panel’s work, but appears to be aligned with the noted work of SkillsPEI and in support of employee and workplace development. In brief, and for further consideration only, the Québec *Workforce Skills Development and Recognition Fund (WSDRF)* dictates that, “If your total payroll for the year is over \$2 million, you are required to participate in workforce skills development for the year by allotting an amount representing at least 1% of your total payroll to eligible training expenditures. If you have no eligible training expenditures or your eligible training expenditures are less than 1% of your total payroll, you will be required to pay into the WSDRF a contribution equal to the difference between 1% of your total payroll and the amount of your eligible training expenditures.”²⁰⁶

Employment Standards Branch

As mentioned, the *Branch* is one section of the Labour and Industrial Relations division of the Department of Workforce, Advanced Learning and Population. The most recently published Labour and Industrial Relations Annual Report (2021)²⁰⁷ states that the mandate of the Division is to assist in providing stable and fair workplace environments for industry and labour through policy leadership. The Division provides administrative support to the Employment Standards Board and Labour Relations Board, and Workers Compensation Appeal Tribunal.

The Branch has had one full-time dedicated employee, the Chief Employment Standards Officer (Inspector), with support from the Division’s Director and Office Manager, and recently hired a full-time Temporary Foreign Worker Protection Officer. The Chief Employment Standards Officer’s role is a blend of public education, regulatory inspection, and enforcement. The Division provides information to the public through telephone contact, office interviews, information seminars, routine inspections, and distribution of departmental literature. The Temporary Foreign Worker Protection Officer will support the Director in the administration of recruiter licencing and employer registry under the *Prince Edward Island Temporary Foreign Worker Protection Act* and serve as an investigator for the purposes of the *Temporary Foreign Worker Protection Act* and the *Employment Standards Act*.

203 [SkillsPEI | Government of Prince Edward Island](#)

204 “Workplace Skills Training is a program developed for employers to train new or existing employees to develop their skills and align with needs of the business. The employer determines the type of training and who will participate.”; [Workplace Skills Training | Government of Prince Edward Island](#)

205 “Group Based Training Programs encourage and support organizations in developing and implementing training projects that lead to employment and help industry deal with labour force adjustments and meeting human resource requirements or; Provide life and employability skills to underrepresented groups in order to support them in transitions to sustainable employment.”; [Group Based Training Program | Government of Prince Edward Island](#)

206 [Contribution to the Workforce Skills Development and Recognition Fund | Revenu Québec \(revenuquebec.ca\)](#)

207 [Annual Report - 2021 \(princeedwardisland.ca\)](#)

The 2021 Annual Report outlines extensive *Branch* activities in the areas of education, investigation, and enforcement, including managing approximately 10,000 inquiries, 145 formal complaints, the distribution of over 4,000 pieces of information²⁰⁸, visiting approximately 250 employers, carrying out six proactive inspections/audits and filing six formal Orders for non-payment of money owing to employees. Due to COVID restrictions, they were unable to provide their usual public outreach in the form of activities outlined in the 2018-2019 Annual report, i.e., providing seventy (70) information sessions involving five hundred fifty (550) employers/ employees; attending nine job fairs across the Island; setting up information booths at six locations across the Island, and visiting over two hundred seventy-five (275) individual employers.

These extensive duties and responsibilities are likely already stretched given the Island's growing population and labour force, the complexities of evolving employment relationships, and understandable attendant public expectations for transparency and accountability.

These demands on the Branch will increase exponentially once the *Temporary Foreign Workers Protection Act* is enacted and if the Panel's recommendations are accepted regarding a strategic approach to enforcement and compliance, including modernized public education methods, expectations for modernized data collection and real time reporting, expanded outreach, and proactive inspections and audits. The Board will likely also require additional support if proposals are adopted with respect to the employee and employer exemption processes, along with their current ongoing work in adjudicating appeals and conducting comprehensive minimum wage reviews.

Given all of this, the Panel recognizes that the Branch will likely need to undergo an analysis of its current human and technological resources necessary to carryout its current and potentially expanded duties and responsibilities.

208 Including the 2016 Guide to Employment Standards; [guide_to_employment_standards.pdf \(princeedwardisland.ca\)](https://www.princeedwardisland.ca/guide_to_employment_standards.pdf)

APPENDIX I

TERMS OF REFERENCE

The Honourable Matthew MacKay, Minister of Economic Growth, Tourism and Culture, as confirmed by the Lieutenant Governor in Council, has appointed a Panel to review the *Employment Standards Act* and its associated regulations.

1. Background

- 1.1 The *Employment Standards Act (ESA)* and *Youth Employment Act (YEA)* were last reviewed over a decade ago (2006).
- 1.2 Since that time, the context of work, forms of employment relationships, social expectations for what is addressed by employers, the demographics of the workplace, and economic pressures have shifted and changed.
- 1.3 Over the past number of years, there have been several calls from interest groups, as well as recommendations made by the Employment Standards Board to government, to undertake a comprehensive review of the ESA.
- 1.4 A recommendation to complete a Comprehensive Review of the *ESA* was made in *Belonging and Thriving: A Poverty Reduction Action Plan for Prince Edward Island (2019-2024)*.

1 Mandate

- 1.1 The mandate of the Panel is to conduct a comprehensive review of the Prince Edward Island *ESA* and its associated regulations, and the *YEA*, taking into account the developments noted in the background above and any other factors considered relevant.
- 1.2 The Panel is to make recommendations on legislative changes to the *ESA* and *YEA*, with a view to improving the effectiveness of the legislation.

2 Membership

The Panel will consist of:

- 2.1 A neutral Chair, selected through RFP and retained by way of a Professional Service Agreement.
- 2.2 A member representing the views of employees, selected through EngagePEI.
- 2.3 A member representing the views of employers, selected through EngagePEI.

3 Responsibility

- 3.1 The Panel will examine employment standards legislation in other Canadian jurisdictions for the purpose of identifying contrasts and comparisons with Prince Edward Island's legislation.
- 3.2 The Panel will be responsible for producing an Interim Report, to be used for public consultations, and a Final Report for the Minister.
- 3.3 The Panel will engage in stakeholder and public consultation, including but not limited to consultations with labour and employer organizations, government entities that deal with labour legislation, and any other relevant and appropriate interest groups. The stakeholder and public consultation will follow the timeline and process as set out below.
- 3.4 In conducting the review, the Panel must be mindful of certain factors:

- Existing agreements between the Atlantic Provinces on harmonization of certain employment standards matters.
- Any International Labour Organization (ILO) Conventions that have been ratified by the Province of Prince Edward Island.
- Elements of the *ESA* and *YEA* overlap with other areas of employment law, including matters which are in the jurisdiction of human rights and occupational health and safety. It is likely that participants in the consultation process will provide comments and feedback on these areas of employment law falling outside the scope of the *ESA*. The Panel is directed to take notice of comments on other areas of employment law and report on employment law issues falling outside the scope of the *ESA* in the Final Report.
- The Panel must follow the rules respecting the collection and use of personal information under the Prince Edward Island *Freedom of Information and Protection of Privacy Act*.
- The Panel should ensure that it includes gender and diversity analysis during the process.

4 Timeline and Process

4.1 The Review Panel is tasked with conducting the review in the following manner, using the time-lines as guidance:

Stage 1	Initial consultations (ensuring employer groups, employee groups, the Employment Standards Board, Labour and Industrial Relations Division staff, other government entities involved with employment matters, and academics have been engaged) and production of an Interim Report to advise Islanders of the range of issues that have been identified and the options for change that have been proposed.	12 months
Stage 2	A second round of consultations with stakeholders and the public, using the Interim Report as a guide to assist in the solicitation of feedback on the proposed options for change.	5 months
Stage 3	Production of the Final Report, with recommendations on changes that should be made to the <i>Employment Standards Act</i> and <i>Youth Employment Act</i> , to be provided to the Minister.	5 months

5.2 It will be permissible for the Review Panel to shorten the time-lines for completing any of the stages.

5.3 If additional time is required to complete any of the stages of the review, the Panel shall request an extension from the Minister.

5.4 The Panel will present the final, written report to the Minister responsible for the *ESA* and *YEA* at the end of Stage 3.

5 Administrative Resources

5.1 The Labour and Industrial Relations Division, of EGTC, will provide assistance with research and administrative requirements of the Panel. This will include:

- Compiling background materials for the Panel, such as legislation, reports and reviews related to employment standards.
- Assistance with meeting logistics, including scheduling meeting times, locations and presenters.

APPENDIX II - Consolidated Recommendations

The following is an aggregate listing of the Panel's recommendations and suggestions. The Panel **strongly encourages** reading the report in its totality to understand the context, rationale, and sources used to support the recommendations.

Process

1. The last review of the PEI *Employment Standards Act* was completed in 2006 and while appreciating that the time and resources needed to carry out a review can understandably push the process further into the future, the Panel **recommends** an amalgamated and more accessible consultation process with the publication of one report, and more regular reviews, e.g., every 5-7 years. Hopefully, an expedited process will help enable this outcome while also preserving the fundamental principles of public and stakeholder engagement. (Pages 12-13)

Employment Standards Act

Definitions

2. The Panel is not recommending any changes to the "employee" and "employer" definitions notwithstanding the inclusion of a definition for manager and associated limits that will be discussed below. The determination of an employment relationship is a matter of classification that considers the statutory definitions of employee, employer, and manager alongside the referenced common and civil law *Control, Fourfold* and *Integration Tests* and other sources such as the CRA two-step approach and the format established by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* The Panel **does recommend** that these considerations and sources be added to the Branch's *Guide to Employment Standards* ("Guide") to help educate employees, employers, and increase general public awareness. In doing so, the assessment and classification of workers along the employment continuum, including those within the gig workforce, will guide whether they are deemed to be in an employment relationship and a contract of service and therefore, should have access to the Act and the protections that provides; or, if they are more like an independent contractor in a contract for service and therefore, should benefit from the opportunities and flexibilities afforded that classification. (Pages 14-19)
3. The Panel also **recommends** that the Branch (government) and Board monitor the next steps of the BC Ministry of Labour's engagement process which "will explore the feasibility of benefit and pension plans for workers who do not otherwise have coverage". (Page 19)
4. The Panel **recommends** the inclusion of a definition of manager to help clarify when a manager is more like an employee who should have access to the full minimum standards and protections of the Act, as opposed to circumstances where their duties and responsibilities are more aligned with the employer and should, therefore, be exempt from certain provisions within the Act, e.g., hours of work,

overtime, and related employment records. The Panel points to section 2(1) of the Alberta Employment Standards Regulations and the following definition used in British Columbia's *Employment Standards Act Regulation*:

Definitions 1 (1) "manager" means (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity; Exclusions from hours of work and overtime requirements 34. Part 4 (minimum wages) of the Act does not apply to any of the following: (f) a manager; (and) Exclusions from statutory holiday pay requirements 36. Part 5 (hours of work and statutory holiday pay) of the Act does not apply to a manager. (Pages 20-21)

5. The Panel also points to British Columbia's *Guide to the Employment Standards Act and Regulation* and its section on definitions as a best practice that **could be replicated** within the Branch's Guide to assist employees, employers, and the general public when interpreting the legislation. For example, the BC Guide expounds on the above noted definition of manager when it states, "Employment responsibilities of a manager include where the person exercises authority and discretion while performing certain actions or roles on behalf of the employer, and is personally accountable for the results. Accountability in this context is linked to the employer's business objectives as opposed to the routine completion of a task. It is essential for the definition of "manager" that the responsibility that the employee has is principal to their employment." (Page 21)
6. The Panel **recommends** the following modernized and more expansive definition of "immediate" and "extended family" (now "family member") and move the definition of "parent" used in subsections 22.11 (1)(d) and 22.12 (1)(c) here under definitions (new language is bolded):

*"immediate family" means the employee's child, **ward or guardian, any person who an employee considers to be like the preceding, spouse, parent, foster parent, brother or sister, any other person or class of persons that are prescribed to be immediate family members by the regulations.***

*"family member" means the employee's immediate family and grandparent, grandchild, aunt, **uncle, niece, nephew, brother-in-law, sister-in-law, mother-in-law, father-in-law, son-in-law or daughter-in-law, any other person or class of persons that are prescribed to be family members by the regulations.***

"parent" includes (i) the spouse of a parent of a child, (ii) a person with whom a child has been placed for the purposes of adoption, (iii) a guardian or foster parent of a child, and (iv) a person who has the care and custody of a child, whether or not the person and the child are related by blood or adoption. [current 22.11 (1)(d) and 22.12 (1)(c)] (Page 21)

7. ("layoff") The Panel **recommends** including information within the Guide describing the layoff process generally and outlining scenarios that would qualify as a shortage or lack of work using the Government of Canada Employment Insurance reasons for issuing a Record of Employment: Code A – Shortage of work (layoff). (Pages 21-22)

8. (“regular rate of wages”) The Panel **recommends** either using the *Domestic Violence, Intimate Partner Violence and Sexual Violence Leave Regulations* section 3. *Calculating rate of pay during leave*, or a combination of this language and the language recommended later in the report under section 9. Pay for working paid holiday:

Domestic Violence, Intimate Partner Violence and Sexual Violence Leave Regulation section 3. *Calculating rate of pay during leave Where the wages of an employee vary from day to day, the employee’s rate of pay for each day of leave pursuant to these regulations shall be at least equivalent to . . .*

(either) *the employee’s average daily earnings, exclusive of overtime, for the days on which the employee worked during the 30 calendar days immediately prior to the commencement of the leave. (EC188/19) . . .*

(or) *the Saskatchewan Employment Standards Act Public holiday pay 232(1) (a) 5% of the employee’s wages, not including overtime pay, earned in the four weeks preceding the public holiday; (Pages 24)*

9. (“termination”) The Panel **recommends** the use of “end” or “cessation” instead of the word severance to avoid any potential confusion surrounding the term severance and its broader use under common law, i.e., calculating reasonable notice and other termination considerations specific to a particular employee. (Page 24)
10. (“wages”) References to “pay” and “wages” appear continually throughout the Act and, although there are separate definitions, it appears that the terms are sometimes used interchangeably. The Panel is not recommending changes to either definition, however, **suggests** that these terms be applied purposefully and consistently if there is a redrafting of the Act. (Pages 24-25)

Definitions: Possible Addition

11. The Panel **recommends** moving the director and corporation definitions from section 5.7 [Directors’ Liability] to section 1. Definitions, and using the definitions contained in the *PEI Business Corporations Act* 1. (1)(i) and (n) while maintaining the reference to a *co-operative association*:

“corporation” means a body corporate incorporated or continued under this Act and not discontinued under this Act, and includes a co-operative association;

“director” means a person occupying the position of director by whatever name it is called, and references to “directors” and “board of directors” apply to a single director; (Page 25)

Purposes - Section 1.1

12. The Panel **recommends** a Preamble subject to Legislative Counsel Office drafting protocols. A preamble provides an opportunity to be speak to the intent of the legislation, be aspirational and forward looking, and speak to various audiences. If a preamble is not feasible, there is also an opportunity to modernize the current purposes by referencing modern and fundamental principles such as equity, fairness, transparency, and inclusion. (Pages 25-26)

Application - Section 2.

13. The Panel **recommends** leaving 2. (1) as is and moving the exemptions in subsections (2) and (3) under the Exemption Regulations, i.e., farm labourers, salespersons, and home care workers. The Act will go on to describe a transparent application, consultation, and approval process for exemptions from the Act. The legislated process will include the noted requirement for a standard application to the Board, factors to be considered, consultation with affected parties, and a written Board decision that outlines the analysis and rationale for the decision. Where approved, the decision will also be contained within a published order.

The exemptions that move under the regulations are discussed further below and would be subject to future Board review in determining whether they remain as is, are modified, or repealed. This transparent approach to exemptions will also be discussed in relation to the standard hours of work exemptions in section 15. (2)(3) and is closely aligned with the Board's current annual Minimum Wage Review process. The Panel recognizes that this type of process and the associate vetting, consultation and analysis may require additional human resources for the Branch in support of the Board. (Pages 26-28)

14. (*"Exception, farm labourers and salespersons"*) The Panel **recommends** moving these two exemptions as is under the Exemption Regulations and, as noted, have their continued exemption vetted through the recommended transparent review process. In the interim, the regulations should also provide an accompanying definition for Commission Salespersons and Farm Labourers as described the Guide. (Page 28)
15. (*"Idem, home care workers"*) As with the exemptions in subsection (2), the Panel **recommends** moving this exemption into the Exemption Regulations and have their continued exemption vetted through the recommended transparent review process. (Page 28)
16. (*"Employees with a collective agreement"*) The Panel **recommends** maintaining the current language and adding a provision that addresses the noted jurisdictional issue and directs employees bound by a collective agreement and who are able to file a grievance, to resolve disputes pursuant to that process as opposed to filing a complaint under the Act. (Pages 28-29)
17. (*"Employees with a collective agreement"*) The Panel also **recommends** adding section 22.2 (4) Paid day of sick leave, to the provisions listed under 2. (4) to ensure a minimum threshold for all Island employees. This amendment should be accompanied by consultations with labour, e.g., the PEI Federation of Labour. (Page 29)
18. (*"Farm labourers"*) The Panel **recommends** moving this to the Exemption Regulations in concert with 2. (2) and, as recommended above, provide an accompanying definition for farm labourers and a commercial undertaking as described in the Guide. (Page 29-30)

Administration - Sections 2.2 and 3.

19. The Panel **recommends** updating the language in 3. (2) to allow an inspector to also “request copies of records” or “require the production of records” rather than having to attend the premises to “take” or “make copies” and adding a provision allowing an inspector to question a person for the purposes of ensuring compliance with the legislation. (Page 30)
20. The Panel **recommends** balancing the authority of the inspector with responsibilities similar to the Saskatchewan *Employment Standards Act Inspection 2-83 (6)* which requires an employment standards officer to (a) *make those copies as soon as is reasonably possible; and (b) promptly return the books, records, papers or documents from which the copies were made to: (i) the place from which they were removed; or (ii) any other place that may be agreed to by the officer and the person who produced them.* (Page 30)

Employment Standards Board - Section 4.

21. The Panel **agrees** that an engaged and ‘qualified’ Board must be representative of the diverse stakeholders and population it serves and that recruitment processes should support this outcome. (Pages 30-31)
22. (“*Vice-chairpersons*”) The Panel does not recommend any changes to this provision, but **suggests** that the Branch and Board re-examine the role of the vice-chairperson. This would include whether appointments should be for a specific purpose and for individuals with an associate skillset or background relevant to the matter at hand, (e.g., for a specific panel or purpose such as reviewing the minimum wage order), and whether the vice-chairperson should be a standing member with voting powers that could potentially upset the balance of the Board. (Pages 31-32)
23. (“*Functions*”) To avoid any confusion that employers and employees are necessarily mutually exclusive terms, the Panel **recommends** breaking out the employer and employee references into separate subsections, i.e., (a) *a person is an employee; or (b) an employer; or (c) an employer or other person . . .* (Page 32)
24. (“*Jurisdiction*”) The Panel **recommends** a more detailed discussion in its Guide on the jurisdiction of the Board and the types of circumstances that would give rise to the Board exercising its discretionary powers to reconsider one of its rulings. Publishing this type of instructive guidance improves transparency and provides more detailed instruction to employees, employers, representatives, and the Board. (Pages 32-33)

Wages (Minimum Wage) - Sections 5.

25. The Panel **recommends** a socioeconomically responsive and transparent three-pronged approach to fixing a minimum wage rate that is aligned with the Atlantic Region and other provincial jurisdictions. The following three tiers are analogous to the ‘three legs of a stool’ which are equally important and collectively support the valid interests of Island workers and businesses:

1. *Formula*: Include the CPI + 1 formula as an objective economic measure that is more predictable, understandable and grows in relation to the economy. This is a transparent criterion that is aligned with the Atlantic Region and other Canadian provinces.

2. *Biennial Reviews*: Every two years the Board will conduct a review aligned with its current annual consultations and consideration of relevant socioeconomic factors, e.g., MBM, GDP (+/- growth), and LICOs (Low Income Cut Offs) and will also review the manner in which the minimum wage is determined (i.e., the CPI+1 calculation). The Board will advise LGIC accordingly and, subject to LGIC approval, order one fixed minimum wage for all employees. This approach allows flexibility for a “course correction” similar to that taken by New Brunswick in 2022 in response to emerging socioeconomic conditions.

3. *LGIC consideration and approval*: The final leg of the stool and filter through which the other tiers are examined and approved by the LGIC. Cabinet would remain the final authority to consider the recommendation of the Board alongside other PEI specific emerging issues and public policy priorities for which it is accountable to the Legislative Assembly and can defend in the public sphere. (Pages 33-39)

(**Note**: In its 2022 Report, the Board referenced the upcoming October 2023 \$15.00/hour minimum wage rate that was targeted in 2021 and stated that they did not necessarily consider this a starting point for potential CPI based increases. Their 2023 review is taking place at the same time as the writing of this Final Report.)

26. The Panel **recommends** adding clarity to the considerations listed within subsections 5.(1) i.e., integrating subsections (a) and (c) and separating out the “economic conditions within the province” and “the concept of a reasonable return on investment” considerations that are currently combined in (b), as well as replacing a “suitable standard of living” with more aspirational terminology that is better aligned with the role employment and income plays in the health and wellbeing of Island workers, their families and the broader Island community i.e., *(a) measures of poverty and the ability of an employee to maintain a suitable standard of living **live with dignity and meaningfully participate in the community**, any cost of living increase since any previous order affecting the cost to an employee of purchasing the necessities of life, including housing, food, clothing, transportation and health care and supplies; (b) economic conditions within the province; (c) and the concept of reasonable return on private investment, and shall make this report public on the publication of a Minimum Wage Order in the Royal Gazette.* (Pages 39-41)

27. (“Posting orders”) The Panel **recommends** updating the language to reflect modern “conspicuous” methods to ensure employees are made aware of all applicable orders in addition to posting hard copies. (Page 41)

28. (“Publication”) Regardless of the approach adopted with respect to fixing the minimum wage, the Panel **recommends** a six-month window between the notice and when the order comes into force. (Page 41)

29. If the three tiered approach including the CPI+1% calculation is adopted, the Panel **recommends** considering the language and timing outlined in Manitoba's *Employment Standards Code* to allow time for the Board to carryout its (biennial) consultations and time for employers to prepare for resulting labour costs - in particular seasonal industries such as the fishery, tourism and agriculture, i.e., *Publication of minimum wage 7(4) Before April 1 of every year beginning in 2018, the minister must publish on a government website the minimum wage that is to apply under this section starting on October 1 of that year.* (Page 41)

Pay and Pay Protection - Section 5.2

30. (*"Payment of Pay"*) The Panel **recommends** updating and broadening the methods of payment with the addition of a blanket subsection that captures other current and future modes of payment such as electronic transfers, i.e., *(d) by any other prescribed method of payment.* (Page 41-42)

31. The Panel is reassured that pay discrimination on the basis of sex (or any other prohibited ground) is covered under provincial human rights legislation and that limiting pay equity legislation to the public sector is consistent within the Atlantic Region. This said, the Panel **sees an opportunity** for the Branch to reinforce these key principles by including relevant information and references to the associated legislation within its Guide. (Page 44)

32. (*"Payment on termination of employment"*) There can be circumstances when a terminated employee is unreachable for the purposes of providing them with their final pay - some form of 'trust' to protect and hold their wages could be beneficial to both the employer and terminated employees. The Panel **recommends** a mechanism in this direction and points to Manitoba's *Employment Standards Act* sections 89(1)(2)(3) which discharges this liability of the employer. The payment is held in trust for a period of time before being transferred to government's Consolidated Fund during which time it continues to be available for payment to the employee. (Page 44)

33. (*"Pay statement and 5.6 (1) Pay records"*) The Panel **recommends** that pay statements and payroll records continue to be aligned with information commonly held as part of an employee's pay documentation including the addition of "paid" leaves of absence under sections 5.3 and 5.6(1)(j.2). There is also an opportunity to provide employers, especially small business owners, with information and education regarding best practices and legislative compliance with respect to payroll and other employment record keeping, e.g., any flexible or averaging work arrangements. Periodic audits of employer pay records would also help enable learning opportunities and encourage compliance. (Page 44)

34. (*"Deductions from Pay"*) Pursuant to 5.5(2)(a), the Panel **recommends** language in the regulations outlining reasonable and transparent parameters for recovering employee overpayments due to an employer's administrative error. For instance, a percentage of the employee's earnings up to a maximum amount that can be deducted over a reasonable term until the overpayment is repaid. (Pages 44-45)

35. (*"Pay Records Exceptions re hours of work of salaried employees"*) The Panel **recommends** including language ensuring that the rate of pay does not create a situation in which a salaried employee is being paid less than minimum wage plus 20%, or if it is a situation when overtime does not apply to that employee, e.g., a manager as defined in section 1. Definitions. (Page 45)
36. (*"Definitions"*) The Panel **recommended** that the definitions for director and corporation be moved under section 1. Definitions using the proposed amended language. (Page 45)
37. (*"Directors' liability for pay"*) and (*"Exception where due diligence exercised"*) The Panel **recommends** amendments that add clarity related to due process for directors and points to Alberta's *Employment Standards Code* Liability of directors of corporate employers section 112 which outlines circumstances under which a director is not liable for unpaid wages, and a clear process for notifying directors and allowing for a potential appeal. (Pages 45-46)
38. The Panel also **recommends** language similar to one of H.W. Arthurs recommendations in his *Federal Labour Standards Review, Fairness at Work: Federal Labour Standards for the 21st Century* that addresses situations in which employers carry on their business through two or more corporations. In part, he recommended that "... associated or related works, undertakings or businesses under common control or direction are a single employer for purposes of the statute." (Page 46)

Pay Transparency - Section 5.8

39. (*"Pay range information - Required information"*) It was noted that some publicly advertised expected pay ranges can be quite broad. The Panel recognizes that the eventual rate of pay in these cases is often subject to a number of valid variables including the local labour market, and applicant qualifications, e.g., recent and relevant work experience, level of education, training and certifications, and other relevant merit-based competencies. That said, this is an area where the Panel **suggests** ongoing monitoring to assess compliance with the intent of pay transparency. (Page 46)

Paid Holidays - Sections 6.-10.

40. (*"Employees not entitled to paid holidays"*) The Panel **recommends** removing subsections (a) and (b) and in their place use a calculation that is fair and equitable for all employees working irregular hours and is also aligned with a number of other jurisdictions (SK, MB, ON, and QC). This could be followed by language noting that the provision does not apply to employees as described in subsections (c) and (d). The calculation described here would also remove the need for subsection 10. (2) *Certain employees to receive regular rate of pay.* (Pages 46-47)
41. The Panel **recommends** removing subsection 10. (2) and using language similar to the following provision from the Saskatchewan *Employment Standards Act*: Public holiday pay 2-32 (1) *An employer shall pay an employee for every public holiday an amount equal to: (a) 5% of the employee's wages, not including overtime pay, earned in the four weeks preceding the public holiday; or (b) an amount calculated in the prescribed manner for a prescribed category of employees. (2) For the purposes of subsection (1), an*

employer shall include in the calculation of an employee's wages: (a) vacation pay with respect to vacation the employee actually takes in the four weeks preceding the public holiday; and (b) public holiday pay in an amount required pursuant to subsection (1) if another public holiday occurs in the four-week period mentioned in clause (1)(a). (Pages 47-48)

Vacation Pay - Section 11.

42. (*"Annual vacation with pay"*) The Panel **recommends** reducing an employee's qualifying period for three weeks vacation leave from eight to five years, reducing the qualifying period for accessing their vacation accrual from twelve to six months (no advancement), and modifying the language in (c) to reflect the conventional practice of paying an employee during the regular pay period while they are on an approved vacation leave. (Pages 48-49)
43. (*"Waiver of entitlement to vacation with pay"*) The Panel **recommends** amending the language in 11.1 (1)(b) from ". . . 90 percent of the normal working hours of the employee . . ." to wording that is more aligned with what is understood to be the intent of the provision and as outlined in the Guide, i.e., ". . . 90 per cent of the employer's normal working hours . . ." (p.24) (Page 49)

Hours of Work (Overtime) - Section 15.

44. (*"Standard number of hours of work"*) The Panel **recommends** reducing the standard hours of work that an employer may require of an employee during a work week to forty-four hours (44 hours/week). (Pages 50-51)
45. (*"Exemptions"*) Similar to the broader exemption review process recommended in section 2., the Panel **recommends** that the Board's rationale for an exemption order should be published, and that current and future orders should be reviewed on a regular and recurring basis, to ensure the rationale and revised hours remain valid. As with other recommendations resulting in expanded responsibilities and accountabilities for the Board, the Branch will likely need to explore associate resource requirements. (Page 51)
46. (*"Factors considered"*) The Panel **recommends** that this provision should include language allowing for the consideration of other factors as prescribed in regulation (i.e., *Employment Standards Act Exemption Regulations*). The other factors should include the following: the current criteria listed in the table above; whether the business or industry primarily employs minimum wage workers; whether there are similar exemptions within the region; New Brunswick's subsection (d), i.e., *does the employer suffer a special hardship in complying with the provision that is not suffered by other employers*; and that applicants and the Board must consider available disaggregated data examining the impact of an exemption on diverse groups of individuals or employees including women, immigrants, Indigenous peoples, youth, persons with disabilities and minorities. Placing these factors in the regulations enables responsiveness and the ability to add other factors in consideration of relevant and emerging socioeconomic and employment requirements. (Pages 51-53)

47. (*"Overtime hours - payrate"*) To help mitigate the impact of requiring an employee to work overtime, the Panel **suggests** including language in either the Act or Guide that, subject to operational requirements, compels an employer to make reasonable efforts to provide advance notice when requiring an employee to work overtime. (Page 53)

Proposed Additions to Section 15 - Hours of Work

48. On Call or Standby: The Panel **recommends** including language similar to Saskatchewan's *Employment Standards Act* which deals with circumstances when "*an employee is required or permitted to work or to be at the employer's disposal.*" (Page 53-54)

49. Trial or Training: The Panel **recommends** language similar to Quebec's *Labour Standards Act* section (4) where an employee is deemed to be at work "*during any trial period or training required by the employer.*" (Page 54)

50. Telework: In recognition of the growing number of employees who are working from home, the Panel **recommends** the addition of language similar to what is included in British Columbia's *Employment Standards Act* definition of work, i.e., *Definitions 1 (1) "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.* (Page 54)

51. Averaging Agreements: The Panel **recommends** enabling language for mutually beneficial and agreed flexible work arrangements between an employer and employee or group of employees – the averaging would also apply to a potential compressed workweek or work period, e.g., ninety-six (96) hours over fewer than ten (10) days/shifts in a two week pay period (or eighty-eight (88) hours if the forty-four (44) hour/week standard hours of work week is accepted). (Page 54)

52. Notice: The Panel **recommends** language requiring an employer to provide notice regarding an employee's work schedule. (Pages 54-55)

53. Disconnecting: The Panel agrees that disconnecting from work is important for employee wellbeing and **recommends** that this principle and the importance of life-work balance be discussed within the Guide. (Page 55)

Rest Periods - Section 16.

54. (*"Rest day"*) The Panel noted that legislation should not address what could be considered a religious tenet of the majority when it references Sunday as a suggested day of rest and, therefore, **recommends** removing that specific reference. (Page 55)

55. (*"Refuse to work on Sunday"*) The Panel **suggests** that the relevance of this provision be examined by the Ministry responsible for the *Retail Business Holidays Act*. (Page 55)

Proposed Additions to Section 16 - Rest Periods

56. The Panel **recommends** including language that balances these legitimate interests by requiring

eight consecutive hours of rest in any day (notwithstanding unforeseen exceptional circumstances) and that an employer must ensure that an employee working a split shift completes the shift within twelve hours of starting work. (Pages 55-56)

Tips or Gratuities - Section 17.1

57. (*"Tips and gratuities"*) Although it is likely understood and practiced by Island employers, the Panel **recommends** adding a clarifying statement, like Quebec, that requires the employer to pay at least the prescribed minimum wage to an employee without accounting for any gratuities or tips the employee receives. (Page 56)
58. (*"Idem"*) The Panel **recommends** that not only should employers advise new employees in writing of any pooling policy in place at the time of hire, but that it should be openly posted in the workplace. (Pages 57)

Leaves of Absence

Qualifying Periods

59. The Panel **recommends** moving the qualifying period where it is currently 3 months to 30 days, in alignment with Newfoundland and at the median within the region, i.e., Nova Scotia almost entirely uses 3 months, and New Brunswick primarily has no qualifying period. Additionally, all leave requests must be in writing. (Page 57-58)

Proposed Additional Leaves of Absence:

60. Gender-Affirming Leave: The Panel **recommends** the development of a gender-affirming unpaid leave of absence intended to support employees who are medically transitioning. (Page 57)
61. Citizenship Ceremony Leave: The Panel **recommends** up to one day of unpaid leave for an employee to attend their citizenship ceremony and points to language similar to Nova Scotia's *Labour Standards Code* section 60J (1) *An employee is entitled to an unpaid leave of absence of up to, at the employee's option, a maximum of one day on the day of and to attend a citizenship ceremony to receive the employee's certificate of citizenship under the Citizenship Act (Canada).* (Page 57-58)
62. Organ Donation Leave: The Panel **recommends** the inclusion of an unpaid leave of absence for organ donation that is aligned with Saskatchewan's *Employment Standards Act* Organ Donation Leave 2-52 (1) . . . *for the period, as certified by a duly qualified medical practitioner, required for the organ donation and recovery from the procedure. (3) The maximum leave for an organ donation and recovery is 26 weeks.* (Page 58)
63. Apprenticeship Programs - Block Release Training: The Panel **recommends** an unpaid leave of absence leave for apprenticeship block release training²⁰⁹ in one of PEI's designated trades. (Page 58)

209 "In-school training is typically five to ten weeks of classroom training for each level of apprenticeship. Each trade has different weeks required."

Maternity, Parental and Adoption Leave - Section 18.

64. The language in this provision is aligned with federal employment insurance benefit language but the Panel **does agree** that either gender neutral or modernized gender inclusive terminology should be reflected within their maternity, parental and adoption benefit language. In turn, this provision could be amended to replicate any modernized amendments made to the federal terminology. (Pages 58-59)

Sick Leave - Section 22.2

65. ("*Sick leave*" – *unpaid*) The Panel **recommends** increasing the unpaid sick leave allotment from three to four days during a twelve calendar-month period. (Page 59)

66. The Panel **recommends** language that provides up to twenty-six (26) weeks unpaid leave for the treatment and recovery from serious or life-threatening diseases and illnesses. (Page 59)

67. ("*Medical Certificate*") The Panel **recommends** increasing the threshold from three, to four consecutive days which would be aligned with the above recommended increase to four unpaid sick days. (Page 59)

68. The Panel also **recommends** implementing the more expansive and flexible term of "qualified health professional" used in Nova Scotia's pending amendment which extends to all relevant and regulated health professionals. There should also be language to clarify that the four-day threshold includes both the unpaid sick leave under subsection (1) and paid leave under subsection (4). (Pages 59-60)

69. ("*Paid day of sick leave*") There was consensus amongst the Panel with respect to the value of salary and job protection for employees who are unable to attend work due to illness and the workplace and public health benefits by them staying home. However, the Panel **was not able to reach consensus on the recommended minimum standard or the qualifying period for one day of paid sick leave** – this was the only subsection where the Panel was unable to reach a consensus recommendation. That said, there was agreement that if a recommendation to increase the paid sick leave benefit is adopted, there should be consideration given to some form of corresponding funding to assist small business owners.

After weighing all of these considerations and in an effort to make a balanced and measured proposal, **the majority of the Panel recommends** moving the qualifying period from five years to one year for one day of paid sick leave and adding two additional paid sick leave days after five years. (Pages 60-66)

70. There **was consensus that the recommendation** would not include any year-over-year accrual liability for employers, would not be included in a payout pursuant to employee layoff or termination, that the benefit would extend to unionized employees with a less favourable benefit, and, as noted, consideration should be given to an accompanying funding approach to assist small business owners. (Pages 60-66)

Unpaid Leave for Reservists - Section 23.1

71. The Panel **recommends** amending this provision so that it is aligned with the *Canada Labour Code* and other provincial jurisdictions who have done the same. (Pages 67-68)

General Provisions Concerning leave - Section 23.3

72. (“*Payment of cost of participation*”) The Panel **recommends** amending subsection 23.3 (5) to ensure that in circumstances when a benefit plan is cost shared, both the employer and the employee continue to pay their share of the cost of the plan to which subsection (3) applies (and any other potential provisions enabling extended employment insurance eligible unpaid sick leave). (Page 68)

Sexual Harassment - Section 24.

73. The Panel **recommends** removing this provision as it most appropriately belongs solely within the *Occupational Health and Safety Act Workplace Harassment Regulations*. (Page 68)

74. The Panel **recommends** including a section in the Guide which briefly discusses this protection and directs employees, employers, and other stakeholders to the *Occupational Health and Safety Regulations*. (Page 68)

Notice of Termination - Section 29.

75. (“*Termination of employment by employer, notice period*”) The Panel **recommends** introducing the requirement for one week of notice of termination for an employee who has been continuously employed by an employer for three months or more but less than one year and decreasing the two week notice requirement to one year or more but less than five years. There are no recommended changes to the four, six, and eight week thresholds. This effectively reduces the requirement for written notice of termination from six to three months and reduces the two week notice requirement to one week for continuous employment between three months and one year. If this recommendation is approved, this requirement would be on a go-forward basis. (Pages 68-70)

76. The Panel **recommends** the inclusion of group termination language with accelerated notice periods for affected employees along with a requirement to notify government. The Panel points to the language in New Brunswick’s *Employment Standards Act* as a possible guide, i.e., at least six weeks notice to employees and the Minister where the employer intends to terminate or layoff in a four week period more than 10 employees if they represent at least 25% of the workforce. (Page 70)

77. The Panel **recommends** including a requirement to provide written notice where an employer dismisses an employee for cause and suggests including additional information within the Guide and other accessible materials to further educate employers and employees regarding layoffs and terminations, and the factors surrounding just cause, the duty to accommodate, and constructive dismissal. (Page 70)

78. The Panel further **recommends** language similar to Manitoba's *Employment Standards Code* to clarify that an employer cannot effectively 'make' an employee take paid vacation during the notice period, i.e., *Effect of notice of termination 43 Where an employer or employee gives notice of termination of the employee's employment, (a) no part of the employee's annual vacation may be used to calculate the required notice period unless, in the case of an employee giving notice, the employer otherwise agrees; and (b) the payment of a vacation allowance to the employee does not affect any other amount payable to the employee in respect of the termination.* (Page 70)
79. ("*Exceptions, termination without notice*") The Panel **recommends** removing the examples in subsections (2)(d) and replacing it with 'catchall' language like, *for any reason beyond the "foreseeable" control of the employer.* The Guide could then be used to provide further explanation and an updated list of examples including those currently outlined under (2)(d). (Pages 70-71)
80. ("*Period of notice if employed for more than six months*") To avoid confusion, the Panel **recommends** using the term resign instead of "terminate the employment", i.e., *the employee shall not terminate the employment "resign" without giving the employer, ...* (Page 71)

Complaints and Enforcement - Section 30.

81. The Panel **recommends**, a review of current data collection and reporting systems and a strategy to address any identified gaps to enable targeted outreach initiatives and strategic enforcement. As previously noted, such an assessment should be accompanied by an analysis of the associate technological and human resources needed to support a more proactive approach. (Pages 71-72)
82. The Panel also **recommends** including language in this section or within a prospective preamble that clearly states this obligation such as the following provisions within British Columbia's *Employment Standards Act: Promoting awareness of employment standards 5 The director must develop and carry out policies to promote greater awareness of this Act. Informing employees of their rights 6 An employer must make available or provide to each employee, in a form provided or approved by the director, information about the rights of the employee under this Act.* (Pages 72-73)
83. To support this type of legislative requirement for employers, the Panel **suggests** the development of an employment standards communication plan with an emphasis on public education and modernized and accessible educational materials for employees, employers, and the general public using various tools and methods, e.g., relevant courses, social media channels, partnerships with stakeholder organizations, continued best practice of multilingual posters and other pamphlets, and online resources and materials. (Pages 72-73)
84. ("*Subsections 30. (2), and (2.1), and (3)*") To facilitate uncovering and addressing potential wrongdoing and to mitigate situations where an employee might not be aware of a violation or is reluctant to file a complaint against their employer, the Panel **recommends** language like that found in PART 7 Investigations initiated by inspector of the *Temporary Foreign Worker Protection Act* wherein "a person"

may complain to an inspector, or New Brunswick's *Employment Standards Act* Complaint to Director 61(1) which permits not only an employee but *"any person who believes that (a) there has been a violation of Part III by an employer, an employee or any other person"* to make a complaint to the Director. (Pages 73-74)

85. With respect to the ability to refuse a complaint or appeal, the Panel **recommends** language similar to that used in PART 7 - Investigations, Complaints and Determinations subsections 35. (2) Authority to refuse, etc. and 65. (1) Powers of board after appeal is filed within the PEI *Temporary Foreign Worker Protection Act* or as found in other jurisdictions including Alberta's *Employment Standards Code*, When complaints may be refused 83 *An officer may refuse to accept or investigate a complaint if (a) the officer considers that (i) the complaint is frivolous or vexatious, (ii) there is insufficient evidence to substantiate the complaint, or (iii) there are other means available to the employee to deal with the subjectmatter of the complaint that should be pursued before the complaint is accepted or investigated, or (b) the employee is proceeding with another action in respect of the subjectmatter of the complaint or has sought and obtained recourse in respect of the subjectmatter of the complaint before a court, tribunal or arbitrator or by some other form of adjudication.* (Pages 74)

86. (*"Order of inspector"*) As part of the investigative process and in consideration of the spectre of an outstanding liability, the Panel **recommends** that an inspector should also be required to provide employers with updates on the status of complaints and that it should clearly state that an employer will also be informed in writing if it is determined there was no violation. This type of requirement is referenced within the following provisions under New Brunswick's *Employment Standards Act* and British Columbia's *Employment Standards Act*:

(NB) Notification to complainant 66 *Where, after receiving a complaint under this Act, the Director determines (a) that the complaint is not one he is required to act upon; or (b) that, having acted upon the complaint, there has been no failure to comply with this Act or the regulations or with an order made under subsection 64(3), he shall so inform the complainant and advise him of his right to require the Director to refer the matter to the Board; and,*

(BC) Written Report 78.1 (1) *After completing the investigation of a complaint, the director must (a) summarize the director's findings of the investigation in a written report, and (b) serve a copy of the written report on the following: (i) the person who made the complaint; (ii) the person against whom the complaint was made; (iii) any person the director considers should have the opportunity to respond to the report.* (Pages 74-75)

87. (*"Inspector may issue an order"*) The Panel **recommends** a clear reference to alternate dispute resolution processes as a way for the parties to work with an inspector or other trained individuals to resolve disputes arising from complaints and/or investigations. (Page 106)

88. (*"Subsections 30. (5), and (8), and (9)"*) The Panel **recommends** using "appeal" as the petition term for both employees and employers and to extend the timeframe for an appeal to the Board from ten to thirty days for both parties. (Pages 75-76)

89. (“Parties”) The Panel **recommends** that the current practice should be modified and that an inspector, or like role with legal training, should be an active party to the proceedings as outlined in this section. The Panel also points to the appeal process within the *Temporary Foreign Worker Protection Act* where the same Board, under section 4 of this Act, has jurisdiction and where the same inspector role is also named as a party to an appeal before the Board. (Page 76)
90. (“Procedure”) The Panel **recommends** adding language allowing a virtual hearing including witness testimony by videoconferencing when an in-person hearing or testimony is not feasible. (Pages 76-77)

Offences and Penalties - Section 38.

91. The Panel **recommends** a review of the current fine amounts to ensure they are up-to-date and aligned with other jurisdictions and recent provincial legislation. This should include language allowing the imposition of administrative monetary penalties with a range of fines relative to the type of contravention prescribed within the regulations. (Pages 77-78)
92. The Panel also **recommends** publishing violators’ names as an additional general deterrent and strategic enforcement tool like the provision within the British Columbia’s *Employment Standards Act* Publication of violators’ names section 101 and supported by the principle of transparency and discussions on publication in section 39.1 below. (Pages 78-79)

General (Posting Orders) - Sections 39.1-40.

93. (“Posting orders, etc”) The Panel **recommends** publishing all Board decisions with due consideration and discretion regarding personal information pursuant to the adoption of guidelines similar to the noted New Brunswick Labour and Employment Board *Privacy Directions*. (Pages 79-80)
94. The Panel further recommends that employers be compelled to post *Employment Standards Act* and *Youth Employment Act* information sheets. (Page 80)

Regulations - Section 41.

The Panel agreed that the Act should remain the primary source of employment standards ‘guidance’ for employees, employers, and the general public to facilitate accessibility and mitigate the potential confusion resulting from cross-referencing various directives. Further, the regulations should be limited, but used where referenced (e.g., exemptions) and where appropriate nuance and flexibility is required. (Page 80-81)

Youth Employment Act

The *Youth Employment Act* outlines the rights and protections for young persons under the age of sixteen and the obligations and responsibilities of their employers. The Panel agrees with submissions encouraging a standalone Act to help ensure safe and age-appropriate terms and conditions of employment for youth and the need to consider a minimum age of entry to the workforce.

95. As with the recommendation within the Complaints and Enforcement section 30. of the *Employment*

Standards Act, the Panel **recommends** including British Columbia's *Employment Standards Act* language which highlights the necessity for employers to inform and educate youth and their parents regarding their respective rights and responsibilities under this Act. (Page 181)

96. In support of this requirement, the Panel also **suggests** that the Branch consider the provision of educational materials for young workers akin to Manitoba and Saskatchewan's "work readiness certificate" for youth under the age of sixteen. (Page 81)
97. The Panel also **suggests** consultation with the *Office of the Child and Youth Advocate PEI*, so they can apply a children's rights lens to any prospective amendments to the *Youth Employment Act*. (Page 81)

Definitions – Section 1.

98. The Panel **recommends** including a minimum age of thirteen with the opportunity for inspector approved exceptions for youth twelve years of age and younger including artistic endeavours as discussed in subsections section 6.(2)(3) below. To be clear, a "young person" would still be "a person under the age of sixteen years" but with a minimum working age of thirteen (13) years of age – notwithstanding authorized exceptions. (Pages 81-82)
99. In keeping with the PEI *Employment Standards Act* definitions, the Panel **recommends** including the following definition of parent:
- "parent" includes (i) the spouse of a parent of a child, (ii) a person with whom a child has been placed for the purposes of adoption, (iii) a guardian or foster parent of a child, and (iv) a person who has the care and custody of a child, whether or not the person and the child are related by blood or adoption. [current 22.11 (1)(d) and 22.12 (1)(c)]* (Page 82)
100. The Panel **recommends** replacing the current definition of inspector with the definition of inspector within the *Employment Standards Act* 1. Definitions (h) "inspector" means an inspector appointed under subsection 3(1) – this is discussed further under Inspection – Section 7. (Page 82)

Application of the Act - Section 2.

101. The Panel **recommends** narrowing the scope of the family exemption in (b) by adding "immediate" to employer's family (SK uses "immediate" and NB "his/her own family") and indicate that "an enterprise" is still subject to section 4. In turn, the recommended definition for "immediate family" proposed under the *Employment Standards Act* should be included under Section 1. Definitions of this Act. (Page 82)
102. The Panel also **suggests** that section 4. should be clearly established as an overarching provision that puts a young person's health and safety at the fore and ensures they are never exempt from this vital and overriding health and safety condition. (Page 82)

General Principle Governing Youth Employment – Section 4.

103. As noted, this is a fundamental protection that should override any other consideration or potential exception. (Page 83)

Construction – Section 5.

104. The Panel **recommends** removing this provision in acknowledgement that young persons **still would not be permitted in the construction industry** as one of other potentially harmful and hazardous workplace settings subject to the overarching protections in 4. above, and the PEI *Occupational Health and Safety Act*²¹⁰ and its regulations²¹¹. (Page 83)

Exception – Section 6.

105. (“Exception”) As referenced in Definitions Section 1., the Panel **recommends** mandating a minimum age of employment of thirteen years of age with the opportunity for exceptions for artistic endeavours for youth twelve years of age and younger, as defined in Alberta’s *Employment Standards Code* Regulation Definitions 51 (b) “artistic endeavour” means work in (i) recorded entertainment, such as film, radio, video or television, including television and radio commercials, (ii) voice recording for video and computer gaming, and (iii) live performances, including theatre and musical performances.

In alignment with subsections (a) and (b), this exception would be subject to an application process requiring signoff by the young person and their parent, along with an examination and written decision by an inspector. Once again, inspector needs to be clarified to mean an inspector as defined in the *Employment Standards Act*. (Page 83)

106. (“Idem”) The Panel **recommends** that the exemption procedure should follow the same process outlined in 6.(2). The process would still require parental and youth signoff but would also be subject to an inspector’s examination and written decision. (Page 83)

Inspection – Section 7.

107. (“Order prohibiting employment in dangerous workplace”) Once again, the Panel turns to the overarching prohibition and general principle governing youth employment covered in section 4. of this Act and **recommends** removing this section to avoid any confusion and leave the critical assessment of a dangerous workplaces where it most appropriately belongs under the authority of the PEI *Occupational Health and Safety Act* and its regulations. (Page 84)

Obligations of the employer - Section 8

108. The Panel **recommends** clarifying whether the role for enforcing s. 8 falls to the Inspector under the *Employment Standards Act* or an Occupational Health and Safety Officer under the *Occupational Health and Safety Act*. (Page 184)

210 [Occupational Health and Safety Act \(princeedwardisland.ca\)](http://princeedwardisland.ca)

211 [Occupational Health and Safety Act General Regulations \(princeedwardisland.ca\)](http://princeedwardisland.ca)

109. Further, to ensure accessibility and the protection of all youth, the Panel **suggests** that any related education and training materials are clearly understood and translated for youth where English is an additional language similar to the helpful *What You Should Know About the PEI Employment Standards Act Posters*. (Page 84)

Offence - Section 9.

110. In keeping with the discussion on Offences and Penalties under the *Employment Standards Act*, the Panel **recommends** updating the current fine amounts to ensure they are up-to-date and aligned with other jurisdictions and recent provincial legislation. (Page 85)

Other Considerations

Employment Standards Branch

The Panel recognizes that the Branch will likely need to undergo an analysis of its current human and technological resources necessary to carryout its current and potentially expanded duties and responsibilities. (Pages 85-87)

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Phase Three:
**Final Report
and Recommendations**

