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Changing Workplaces Review Final Report

May 23, 2017

Dear Clients and Friends,

Today, the Government of Ontario released the **Changing Workplaces Review** final report and recommendations, labeling it an "*An Agenda for Workplace Rights".* Touted as the first independent review of the *Employment Standards Act* and *Labour Relations Act* in more than a generation, the review was commenced in February, 2015.

For every Ontario employer, the recommended changes to the *Employment Standards Act* and *Labour Relations Act* are far reaching and will have significant impact.

The government has undertaken to announce its formal response to the report in the coming days, and may be aiming to table draft legislation modeled on all, or part, of the recommendations prior to the Legislature rising for summer recess (June 1, 2017). If that occurs we could see legislation make its way into force by late Fall or early next year.

Sherrard Kuzz LLP will review the report and government response and distribute a comprehensive briefing note, as we did following the release of the Interim Report (see Sherrard Kuzz LLP homepage). **In the interim, to review the report click here, and the summary report click here.**

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MAY 2017

THE CHANGING WORKPLACES REVIEW
AN AGENDA FOR WORKPLACE RIGHTS

Summary Report

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TABLE OF CONTENTS

THE CHANGING WORKPLACES REVIEW: AN AGENDA FOR WORKPLACE RIGHTS 03

The Mandate 03

Elements of the Review 04

General Observations & Upfront Recommendations 04

Guiding Principles, Values and Objectives 07

Trends in the Economy and the Workplace 08

RECOMMENDATIONS ON EMPLOYMENT STANDARDS 11

Changes to Basic Standards 17

RECOMMENDATIONS ON LABOUR RELATIONS 23

CONCLUDING RECOMMENDATIONS 29

Introductory Recommendations 29

Enforcement and Administration 30

Sectoral Regulation and Exemptions 37

Changes to Basic Standards 39

Who is an Employer and Who is an Employee 44

Exclusions 44

Exclusions from Collective Bargaining 44

Acquisition of Bargaining Rights 46

Related and Joint Employer 50

Remedial Powers of the OLRB 51

Right of Striking Employees 51

Just Cause Protection 52

Successor Rights 52

Ability of Arbitrators To Extend Arbitration Time Limits in the Arbitration Procedure 52

Conciliation Boards 52

Concluding Recommendations 52

THE CHANGING WORKPLACES REVIEW: AN AGENDA FOR WORKPLACE RIGHTS

THE MANDATE

In February 2015, the Minister of Labour initiated the Changing Workplaces Review (Review) building on government commitments in the 2014 Throne Speech and the Minister of Labour's 2014 Mandate Letter. We, C. Michael Mitchell and the Honourable John C. Murray, were appointed to lead the Review, with the Minister stating that:

The Changing Workplaces Review will consider the broader issues affecting the workplace and assess how the current labour and employment law framework addresses these trends and issues with a focus on the LRA and the ESA. In particular, the Special Advisors will seek to determine what changes, if any, should be made to the legislation in light of the changing nature of the workforce, the workplace, and the economy itself, particularly in light of relevant trends and factors operating on our society, including globalization, trade liberalization, technological change, the growth of the service sector, and changes in the prevalence and characteristics of standard employment relationships.

The Review focuses on the *Labour Relations Act, 1995* (LRA) and the *Employment Standards Act, 2000* (ESA). The majority of sections under both Acts are in scope for the Review, with the following exceptions:

(1) construction industry provisions of the LRA;

(2) minimum wage; and

(3) policy discussions for which other independent processes have been initiated.

Examples of the third category are other items included in the Minister of Labour's Mandate Letter: the gender wage gap, issues specific to migrant workers, and legislation dealing with compulsory interest arbitration for certain groups of workers.

We were tasked with examining academic and inter-jurisdictional research, and soliciting input from the general public and stakeholders by holding consultation sessions and accepting written submissions.

We reported back to the Minister of Labour with our progress in February 2016 and released an Interim Report in July 2016. Our final report and recommendations have now been submitted. This summary provides an overview of these recommendations.

ELEMENTS OF THE REVIEW

In conducting the Review, we relied upon the support of academics and consultation with experts in a variety of fields. We engaged frequently with leading academics who focus on workplace issues from a variety of perspectives, including economics, social science, and law. Several research projects were commissioned focusing on specific issues that were in the Review's scope.

During the review process, two phases of consultation took place to provide the general public and stakeholders with the opportunity to comment on how the LRA and ESA could be amended to reflect the changing nature of work. A discussion paper, titled, "Guide to Consultations" was released to initiate the review and consultation process.

In the first phase of consultation, there were 12 public sessions held across Ontario. Altogether, we heard over 200 public presentations and received over 300 written submissions. These comments contributed to the development of our Interim Report, which was released in July 2016 and contained approximately 50 issues and over 225 options for further consultation.

The second phase of consultation was initiated after the release of the Interim Report, and concluded in October 2016. We met with several groups and individuals and received over 280 written submissions in response to the Interim Report.

The final report and recommendations are based on the broad range of stakeholder and expert comment received, academic input, and research projects and information provided by the Ministry of Labour.

GENERAL OBSERVATIONS & UPFRONT RECOMMENDATIONS

This is the first independent review in Canada to consider specific legislative changes to both employment standards and labour relations in a single process. Considering both acts simultaneously, within the broader context of workplace and economic change, has provided a unique and original perspective to the issues.

We were mandated to consider the need for reform through the lens of the changes that have been occurring in the workplace and in the economy over a lengthy period of time. The recommendations are aimed at creating better workplaces in Ontario where there are decent working conditions and widespread compliance with the law.

These changes would benefit workers directly, and employers and society in general. Employees will benefit from a better workplace and an enhanced ability to assert their basic rights. Employers will benefit from happier and more productive workplaces and from more robust enforcement. Better enforcement will help to ensure that employers that play by the rules do not experience unfair competition from those that do not. Responsible, law-abiding businesses, that represent a vast majority of employers, are entitled to compete on a level playing field. All parties will benefit from a better knowledge and understanding of basic rights and obligations.

During hearings held across Ontario as part of the Review, we heard that the combination of low income, lack of control over scheduling, lack of benefits such as pensions and health care, personal emergency leave or sick leave, all together or in various combinations, creates a great deal of uncertainty, anxiety, and stress which undermines the quality of life and the physical well-being of a wide swath of workers in our society.

We found that there is no doubt that there are many legitimate social and economic concerns regarding vulnerable employees in precarious employment. The recommended changes seek, among other things, to improve conditions for those who find themselves in these circumstances.

The mandate also directed us to be supportive of business in a changing economy. The Ontario Chamber of Commerce and the Keep Ontario Working Coalition have said: "the goals of economic growth and improved employee rights are not mutually exclusive." There is a need to take a balanced approach to change, and we have endeavoured to strike this balance by taking the bona fide interests of all stakeholders into account in developing recommendations.

We recognize the importance of the role that businesses play in creating growth in the economy and how this contributes to the well-being of all Ontarians. With increased competitive pressures, it is necessary to consider the impact of any policy initiative on business costs. This means taking into account businesses' need for flexibility and reduced administrative burdens. It also means encouraging a level playing field by supporting employers in understanding and meeting their obligations.

A Workplace Rights Act & Greater Awareness

In the course of this review, we have noted that there is a widespread lack of knowledge and understanding of workplace rights under both Acts.

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Raising the level of knowledge and general consciousness about these rights, together with robust enforcement of the law, will raise the level of compliance and improve the quality of people's lives in the workplace. The goal is that both employers and employees are aware of their legal rights and responsibilities in the workplace and the law is easy to access, to understand and to administer.

The creation of a "Workplace Rights Act" is an important step in creating a culture of compliance. Currently, employee rights in the workplace are established by three pieces of legislation: the *Employment Standards Act, 2000*, the *Labour Relations Act, 1995*, and *Occupational Health and Safety Act*. These Acts should be consolidated into a single Act and should be more expressly focused on workplace rights.

Workplace parties should be educated on their obligations and rights with respect to:

a) basic decent working conditions,
b) a safe and healthy workplace,
c) the right to engage in unionization and meaningful collective bargaining.

The unification of the rights under the single umbrella of a Workplace Rights Act should also assist in education, interpretation, and enforcement.

Government, unions, employee advocates and employers should work cooperatively and all should invest in the education in all the rights and responsibilities of workers and employers.

Greater education of workplace parties and more robust enforcement, including better protection of employees seeking to enforce their rights, will put pressure on non-compliant employers and help to level the playing field for compliant employers.

Powers of Inspectors

In terms of administration and enforcement, it is impractical to combine the role of enforcement officers in occupational health and safety and employment standards immediately. However, government should consider some blending of the roles over time, sharing of information between regulatory programs and joint strategic approaches to enforcement. A first step could be to consider the necessary legislative and program changes to authorize and require officers to report any violation of labour legislation that comes to their attention.

> *"To effect sustainable change, it will be critical to foster a culture of compliance where respect for minimum terms and conditions of employment and the rights of employees to organize and to collectively bargain is universal."*

GUIDING PRINCIPLES, VALUES AND OBJECTIVES

Potential changes to legislation must be evaluated in light of the changing nature of the workforce, the workplace, and the economy. This initiative has been guided by the following six principles, values and objectives that have been identified by stakeholders, and through a review of earlier reviews and reports, academic studies, international standards, and judicial decisions.

1. The Decency Principle

Professor Harry Arthurs has stated that labour standards "should ensure that, no matter how limited his or her bargaining power, no worker… is offered, accepts or works under conditions that Canadians would not regard as 'decent'." This principle informs the overriding public policy goal of addressing precarious employment and building effective protection for vulnerable workers.

2. Achieving Respect for the Law through Meaningful Enforcement and a Culture of Compliance

To effect sustainable change, it will be critical to foster a culture of compliance where respect for minimum terms and conditions of employment and the rights of employees to organize and to collectively bargain is universal. The following factors are key to achieving this objective: the creation of rules that are easy to understand and administer; the provision of the necessary tools to help workplace parties understand their rights and obligations; and, consistent enforcement of the law.

3. Access to Justice

The Chief Justice of Canada has spoken on the importance of access to justice stating that: "In order to maintain confidence in our legal system, it must be, and must be seen to be accessible to Canadians." Access to justice has both procedural and substantive components. Especially in the employment arena, complaint procedures must afford ordinary Ontarians the opportunity for fair and just adjudication and enforcement of their rights. The recommendations in this Final Report aim to reduce barriers to accessing justice.

4. The Right to Freedom of Association and Collective Bargaining

Collective bargaining is now recognized as a fundamental constitutional right. The Supreme Court has made it clear that in the employment context, freedom of association guarantees the right of employees to associate meaningfully in the pursuit of collective workplace goals and includes a right to collective bargaining. The Court has recognized the importance of freedom of association in responding to the imbalance between the economic power of the employer and the relative vulnerability of individual workers. The Court has emphasized that collective bargaining is a fundamental aspect of Canadian society that enhances human dignity, liberty and the autonomy of workers.

5. Creating an Environment that is Supportive of Business in our Changing Economy

As stated earlier, we have considered the needs of business to remain competitive and for flexibility as very important objectives in making our recommendations.

6. Stability and Balance

We recognize the need for balance in our recommendations and for stability in the process of bringing change to the workplace. The law should not undergo diametrically opposed rapid swings if it is to produce stable expectations of what is required of its citizens – particularly when it comes to the exercise by Ontarians of fundamental Charter rights. In this process, we have endeavoured to craft recommendations for change that are balanced and, if implemented, will have a reasonable likelihood of being sustained by subsequent governments.

TRENDS IN THE ECONOMY AND THE WORKPLACE

The employment and labour legislation currently in place in Ontario reflect a different time and different circumstances and do not adequately address today's workplace issues. There has been a shift from manufacturing to service jobs many of which are low wage.

Technological advances and the transformation to the knowledge economy mean that the type of workforce that is needed now is very different from the past. In some cases, computers are superior to human labour and the scope of what can be done by machines is growing. Even those businesses that are not directly tied to technology have come to rely on information and communications technology for some day to day operations as trends such as global networking and offshore outsourcing become attractive for business.

Many industries that were formerly characterized by large workforces concentrated under a relatively small number of employers are being replaced by supply chains made up of networks of smaller businesses that provide goods and services to larger lead companies. This reorganization provides greater flexibility in the organization of work, flatter hierarchies and a leaner workforce.

Unionization in the private sector has dropped dramatically (from 19.2% in 1997 to 14.3% in 2015) making employment standards and their enforcement much more important for the non-unionized worker.

Globalization and trade liberalization have had a profound impact on the competitiveness of many Ontario businesses. There is an abundance of low-wage labour in many countries and, when combined with lower transportation costs, overseas production is often financially attractive. This has put pressure on many companies to lower costs and increase flexibility through changes to their workforce's compensation and hours of work.

The standard Monday to Friday work week, with predictable hours and wages, health benefits and a pension plan has declined in prevalence. Non-standard work made up of multiple jobs, unpredictable shifts, work through a temporary help agency (THA), temporary (often seasonal) limited term contracts

and/or solo self-employment has grown nearly twice as fast as standard employment (1997 to 2015 average annual rate of 2.3% per year).

> *"There has been a shift from manufacturing to service jobs many of which are low wage.*
>
> *Technological advances and the transformation to the knowledge economy mean that the type of workforce that is needed now is very different from the past."*

However, the mandate of the Review transcends the standard/non-standard classification of employment. It requires a focus not only on workers whose employment is contingent, uncertain or temporary, but also on full-time workers in low-paid employment without pensions or benefits, and on part-time employees in similar low-paid employment who often may not want to work more hours because of other education or family commitments.

Across the economy, there are a significant number of vulnerable workers in precarious jobs. This trend is particularly evident in certain sectors, including: retail, food services, child-care, custodial services, some parts of the public sector, agriculture, and construction. There are several characteristics that can create vulnerability and precarity, including: employment through a temporary help agency or on a temporary contract, working part-time or seasonally, unstable employment with little or no job security, low pay, and no access to pensions or benefits. The group experiencing such employment includes disproportionate numbers of women, but also increasing numbers of men, members of racial and ethnic minorities, immigrants, and youth.

RECOMMENDATIONS ON EMPLOYMENT STANDARDS

The following principles are particularly relevant to the ESA enforcement recommendations:

- increased awareness by employees and employers of their ESA rights and obligations;
- increased protection for employees who exercise their ESA rights;
- consistent and strategic enforcement;
- access to justice; and,
- stronger sanctions and deterrence.

We commented on the extent of, and reasons for, non-compliance, and concluded that there are too many people in too many workplaces who do not receive their basic rights.

Strategic Enforcement – A Combination of Existing and New Approaches

Strategic enforcement involves a set of policies and practices that have the goal of changing employer conduct so that breaches of the act do not occur. It is designed to address non-compliance at a systemic level and not only on the basis of complaints. We recommend a combination of existing and new measures for comprehensive strategic enforcement that include:

a) allocating more resources to pro-active enforcement initiatives (including spot checks, audits, and inspections);

b) increasing the use of targeted inspections particularly in sectors where there are large numbers of vulnerable and precariously employed employees;

c) increasing strategic capacity through data collection and analysis of complaint data;

d) focusing at the top of industry structures– the top of the supply chain or franchisor for example – where decisions are made that influence compliance by those lower in the chain; and,

e) developing the capacity to link quickly to other sources of government data.

Law Enforcement Agency

As part of strategic management, the Ministry must move closer to becoming a more traditional law enforcement agency and less an agency involved in customer service. There are several elements to this change, including obtaining the capacity to mount public campaigns against systemic violations of the Act and engaging in strategic litigation, but the most important change is moving away from a complaint dominated system of enforcement.

Campaigns to Counter Systemic Non-compliance

New sector-based enforcement strategies need to be designed to change employer behaviour and improve compliance with priority being given to those sectors where non-compliance is most problematic.

The Ministry should initiate action on a province-wide or sectoral basis to address systemic problems in the workplace such as unpaid internships and/or misclassification of employees as independent contractors. Both of these practices are illegal and widespread, poorly understood, and should be addressed systemically.

A Strategic Approach to Litigation

Currently, the Ministry does not see its role as defending the vast majority of the decisions and policies applied by its officials, but leaves it to the parties to do so. This often contributes to an uneven playing field where the resources of the employer outweigh the resources of the individual employee and creates a situation where strategically important decisions of ESOs may be undefended by the Ministry.

Consistent interpretation and application of the Act necessitate an active participation in litigation by the Ministry as part of strategic enforcement.

The Current Complaints-based System and the Necessity for Change

Currently in Ontario, worker-initiated complaints are the foundation for enforcing employment rights. A central focus of the Ministry's activities is processing all complaints with priorities set by the individual circumstances of the complainants. In this system, the Ministry cannot establish priorities and act strategically in the interest of broader workplace compliance.

If achieving a culture of compliance is a rational objective, new enforcement strategies are required. This does not minimize the importance of investigating complaints and recovering wages which will likely always remain a core function. However, a complaint-driven process — on its own — will not achieve the desired results.

The volume of complaints has leveled off at about 15,000 per year, but there is always a backlog of uninvestigated and unresolved complaints and there are lengthy wait times.

At the same time, the fundamental changes in the workplace have resulted in many vulnerable employees in precarious jobs whose basic employment rights are being denied. This occurs for many reasons; however, it is exacerbated by the overwhelming number of complaints and by the lack of resources required to make timely investigations.

A complaints-based system presents challenges and problems for employees who lack the knowledge that their rights gave been violated and fear reprisals.

Also, the frequency of individual complaints may not be an accurate indicator of a larger sectoral problem of non-compliance.

> *"For those complaints that are not investigated, we recommend a new system of adjudication that is intended to be accessible and cost effective.*
>
> *Complaints would be made to the Ontario Labour Relations Board (OLRB) which would have specialized regionally based adjudicators to conduct an informal dispute resolution process."*

The current policy of investigating all complaints must be reassessed. It is expensive, time consuming, and not the most effective means of identification and remediation of larger patterns of non-compliance. The only way in which the Ministry can fulfill its obligation to strategically enforce the statute is by changing the fundamental way it does business with respect to the processing of complaints.

An Accessible Process for Complainants to Have Claims Not Investigated by the Ministry of Labour Adjudicated

For those complaints that are not investigated, we recommend a new system of adjudication that is intended to be accessible and cost effective. Complaints would be made to the Ontario Labour Relations Board (OLRB) which would have specialized regionally based adjudicators to conduct an informal dispute resolution process. Access to justice for both employers and employees requires a process that is user-friendly without sacrificing the quality or fairness of outcomes.

The Ministry or the OLRB should facilitate access by self-represented parties by providing explanatory materials in plain language with respect to both the procedure and the applicable principles of law, including the burden of proof and basic rules of evidence.

Vice-Chairs of the OLRB who hear complaints in the first instance should be given, by statute, the power to consult with the parties as part of the decision-making process. Consultation is less formal and less costly and more efficient than an adversarial process.

Education and Outreach

As noted in the general recommendations, education and outreach are essential to enable compliance. With that goal in mind, we make several recommendations to increase awareness of the ESA among employers and employees.

We recommend that the Ministry's *ESA 2000 Policy and Interpretation Manual*, which is no longer available for purchase through an external publisher, be posted online so that the policies and interpretations of the Director of Employment Standards can be accessed.

We further recommend that the government consider including ESA information in the high school curriculum, similar to the steps that have been taken in relation to the *Occupational Health and Safety Act*. We also recommend that the Ministry assess the impact of the mandatory self-audit provisions on awareness and compliance. Finally, we recommend that the Ministry continue to work with employers, unions and worker advocacy groups to develop strategically educational materials and to continue to explore other educational and outreach strategies.

Related to education, we endorse an internal responsibility system for ESA matters similar to the system in the Occupational Health and Safety context. We recommend that the Ministry encourage but not require that employers establish such a system.

Increased Protection for Employees Who Seek to Enforce Their Rights

Timely and effective investigation of reprisal complaints, and timely and effective remediation of claims found to be established, go hand-in-hand with effective law enforcement. Fear of reprisal must be combatted by a rigorous, timely and effective response in cases of alleged reprisal, and by the availability and imposition (in appropriate cases) of meaningful sanctions to deter such conduct. Fear of reprisal presents a major barrier to filing employment standards complaints.

Delay in investigating and remedying a valid complaint of reprisal, as a matter of common sense, is a factor that likely acts as a disincentive to reporting contraventions particularly for the most vulnerable employees

An expedited process for the investigation and determination of reprisal complaints would have the effect of emphasizing the importance of the anti-reprisal provisions of the ESA particularly if combined with the imposition of appropriate sanctions designed to deter such conduct.

Education and awareness of rights and obligations and of anti-reprisal provisions generally could be increased by giving publicity to cases of reprisal.

We recommend that an office of Director of Enforcement be created which could seek significant administrative penalties of up to $100,000 per infraction. This would provide an important element of deterrence, and reflect the public policy importance of the reprisal issue.

Reprisal claims are currently not given priority by the Ministry. It takes approximately 90 days before claims are assigned to a Level 2 ESO for investigation, and on average it takes approximately 51 days to conclude an investigation. This is unacceptable in cases where an employee has been terminated.

Reprisal complaints alleging termination of employment should be given priority and the Ministry should not only announce to the public that reprisal complaints alleging termination of employment will be given priority but it should also develop tight timelines to deal with complaints which should be investigated and completed within a matter of days.

Temporary Foreign Workers

Both the Law Commission of Ontario and the Federal Labour Standards Review Commission have recommended that expeditious and fair processes be put in place for dealing with alleged reprisals against Temporary Foreign Workers and for hearing cases that could result in repatriation.

We recommend that in the case of temporary foreign workers, no termination of employment – whether for reprisal or for other alleged reasons – should be

effective unless and until an order is made by a neutral adjudicator permitting such termination.

Access to Justice

Recognizing that many employees may need assistance and advice throughout the ESA claims process, including in review applications, we recommend that supports be provided to employees and to employers by:

- increasing resources to expand the mandate of the Office of the Worker Advisor with a new funding model to help employees with claims;
- developing and publishing on its website a list of lawyers who are prepared to provide pro bono assistance to employees and employers; and,
- developing and publishing a list of worker advocacy groups, trade unions, legal clinics and others who are prepared to provide assistance to employees.

In terms of the claims process, we recommend the removal of the requirement that employees contact their employers before filing a claim, a step that is seen as a major barrier for some employees. We also support measures to encourage anonymous tips and to protect the anonymity of those who bring ESA issues to the Ministry's attention.

Several of our recommendations focus on the process for review at the OLRB. When the OLRB is reviewing an employment standards officer's ruling, all evidence relied upon by the officer should be included in the record, along with the officer's Reasons for Decision. The applicant (i.e., the party seeking a review) should have the burden to prove the officer's decision was wrong.

We also recommend that the OLRB have an increased regional presence and the authority to conduct consultations, and believe that there is a need for explanatory materials and legal support for the parties.

Remedies and Penalties

Enforcement mechanisms that encourage compliance, deter non-compliance and provide appropriate and expeditious restitution to employees whose ESA rights have been violated are an essential part of an effective compliance strategy.

We recommend several measures to contribute to a more effective compliance strategy. We recommend that the amount for tickets be increased from $295 to $1,000, and the penalties for Notices of Contravention be doubled. A new provision would allow the OLRB to issue administrative monetary penalties up to $100,000 per contravention. We further recommend that the OLRB have authority to order employers to pay the costs of an investigation, and that employees be paid interest on their unpaid monetary entitlements. Finally, we recommend that the ESA be amended to provide for undertakings enforceable by the OLRB to be entered into on a voluntary basis between the Ministry and an employer.

Security for Employee Remuneration

We made recommendations to improve the ability to recover employees' unpaid monetary entitlements by changing provisions to strengthen the director liability and collections schemes.

Sectoral Regulation and Exemptions

Our recommendation for sectoral regulation is designed to provide a consultation process with representative of employers, employees, and government when exemptions are reviewed or requested or where sector specific regulation is being considered. The process is designed to allow all stakeholders an opportunity to advance and protect their legitimate interests, to provide advice and solutions and to seek consensus on outcomes that address the bona fide concerns and interests of all participants.

The current 85 exemptions and special rules result in only a minority of Ontario workers being fully covered by the Act. The existing exemptions do not fit into a consistent policy framework and the "patchwork of exemptions"

disproportionately affects the disadvantaged and contributes to the precariousness of work and the presence of vulnerable groups.

However, Ontario has a broad and diverse economy and one size does not always fit all. Sometimes it is neither practical nor appropriate to insist on a single standard for all. While sector specific regulation often results in derogations from the statutory norms, it also means that the standard for employees in a sector could be better than elsewhere.

Simply put, uniformity and strict equality do not reflect the reality of the complexity of the modern economy. The caveat 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. Exemptions, and specific regulations, if justified, should be focused (not overly broad), balanced, decent, and fair.

The process recommended is designed to ensure that the interests and solutions proposed by employers and employees are heard by each other and by government, and to provide an opportunity to achieve outcomes based on consensus. Moreover, areas of potential sector specific regulation, such as scheduling, require a process in which the interests of those directly affected have a voice if the resulting regulations are to be fair, balanced, and workable.

Clearly, responsibility for decision-making lies with the government. However, in the world of employment and labour relations, the involvement of the stakeholders often results in better understanding of positions and in compromise. The government's understanding of the needs and interests of employers and employees, and the quality of its decision-making, will be enhanced if representatives of those most involved have an opportunity to be fully engaged in the problem-solving exercise, with government.

Review of Existing Exemptions

The existing exemptions should be reviewed expeditiously. Some of the substantive exemption provisions raise difficult questions about their purpose, origin, breadth, and ongoing justification. Many workers, especially vulnerable ones in precarious work, are being denied either minimum wages, or overtime or hours of work protection, or all of the above, without reasons that are apparent.

The Government should establish a Sectoral Committee Process that may be used when existing exemptions are being reviewed, when new exemptions are being considered, and when sector specific regulations are contemplated composed of representatives of employers and employees to provide advice to government.

The Government should make the review of existing exemptions a priority and adopt a sector specific approach to the regulation of scheduling through the same process.

If there are no exemption issues in the sector, then a committee should be established to set up a permanent process for discussion of:

a) the application of the provisions of the ESA to the sector; and,
b) enforcement issues and proactive enforcement in the sector.

We also provided some recommendations related to specific exemptions:

- elimination of exemptions related to students (student minimum wage rate and exemption for the "three-hour rule") because of their inconsistency with current values across Canada;
- phasing out of the liquor servers' minimum wage as it institutionalizes dependence on tips for servers and may disproportionately impact some vulnerable segments of the working population; and,
- on the basis that the current approach is inadequate, revising the exemption for managerial and supervisory employees so that both salary and job duties are considered.

CHANGES TO BASIC STANDARDS

Part-time, Casual, Temporary and Seasonal Employees

A key question raised is whether it is fair to treat part-time, casual, temporary, contract and seasonal employees differently than comparable full-time employees. We see this issue as one of the more important areas where the law should change.

We recommend a new rule that limits differential pay for these groups of employees unless there are objective grounds such as seniority, merit or other objective factors that justify a difference in pay. We explain our perspective that historically there have been negative entrenched attitudes towards part-time work. These attitudes arose possibly because of a fear in the last century that the rapid growth of part-time work would replace full-time work. They also arose because of discriminatory attitudes devaluing the work, as it was thought that women and young people who performed most of the work were less committed to their jobs. These attitudes do not and should not apply today.

We state that the principle that those who perform the work of comparable full-time employees should be paid the same accords with fairness and decency as it is grounded in equality of treatment. Absent objective factors that justify it, differential treatment based on part-time, casual, temporary, contract or seasonal status it is neither fair nor reasonable, but an arbitrary and unjustified distinction affecting up to one in four employees in Ontario.

> *"We state that the principle that those who perform the work of comparable full-time employees should be paid the same accords with fairness and decency as it is grounded in equality of treatment."*

Also, the present policy is leading to adverse impact discrimination among women, youth, and increasingly, older workers, and racial and ethnic minorities. It also negatively impacts vulnerable workers in precarious work as part-time workers are often low wage earners and are highly concentrated in the retail trades, accommodation and food services industries.

A similar recommendation was made by three other commissions in Canada starting in 1983 and was not followed. It is long past time for its adoption in Ontario and we believe it is unconscionable to ignore it any longer.

However, for several reasons, such as possible unintended consequences for full-time employees and significant costs to employers, we do not recommend extending the principle to the treatment of benefits and pensions. Instead, we recommend that the government initiate an urgent study as to how, at least a minimum standard of insured health benefits can be provided across workplaces, especially to those full-time and part-time employees without coverage, the self-employed and including small employers. We also recommend working with the Federal Government to review the private pension system and considering public programs such as the Guaranteed Income Supplement to assist low earning Ontarians.

Scheduling

The ESA does not include rules regulating work schedules. We assert that uncertainty in scheduling practices is a key contributing factor in making work precarious. Recognizing the need for predictable schedules for employees in certain sectors and the variability of scheduling requirements, but that one size cannot fit all in this complex area, we recommend a sector specific approach to the regulation of scheduling, prioritizing the retail and fast food sectors for review. To implement this, we recommend the development of a policy framework and the use of sectoral committees.

We also discuss the merits of an employee's "right to request" such things as changes in work hours' schedules, or location, with protection from retaliation by the employer. We recommend a new rule that provides an employee (after 1 year of service) the right to request, in writing, that the employer decrease or increase their hours of work, give them a more flexible schedule or alter the location of their work. The employer should be required to give the employee an opportunity to discuss the issue and provide reasons in writing if the request is refused. There should be no appeal of an employer's decision on the merits and the employer's obligation to respond should be limited to one request per calendar year, per employee.

Temporary Help Agencies

We generally focus our review of temporary help agencies on the part of the industry staffing unskilled or lower wage workers to client employers. In doing so, we assert that the triangular nature of the relationship between the agency, the client, and the assignment employee leads to these employees being among the most vulnerable and precarious in the workplace. For example: the employee may be removed from their work without notice by the client, may be placed in "permatemp" positions, may receive remuneration that is significantly lower than those hired directly by the client in the same job, and may face more dangerous work.

We outline three major categories for our policy objectives and recommendations: equality and permanent jobs; termination pay; and workplace safety for assignment employees.

We recommend limiting the amount of time during which an assignment employee can be paid less than the workers the client hired directly. This limit is not intended to limit the duration of the triangular relationship itself, if all parties wish to continue it, but differential pay cannot continue indefinitely. We recommend a qualifying period of six months before there is a requirement for equal pay; countries like the UK have a similar system.

We recognize that abuse of this rule is possible. For example: a client employer terminates the relationship the day before the 6-month qualifying period ends, and then brings the agency employee back after a short period, such that the requirement for equal treatment is never operational. We assert that there should be a minimum reasonable period of time (i.e., not less than three months) before the employee can be brought back.

Another goal is to encourage and make possible the achievement of permanent employment for assignment workers. In achieving this goal, we recommend that clients make their best efforts to ensure

assignment employees are aware of all available job openings with the client and that the client considers their application in good faith. Additionally, the client should consider whether the assignment employee is suitable for an available position prior to being terminated.

> *"Overall, we found that the existing system of hours of work and overtime pay regulation work effectively, but we also note that the approach is complex and somewhat unconventional, and that some provisions may pose difficult issues for employers which could be addressed at a sectoral level."*

In order to avoid impacting professional and higher skilled employees on longer assignments and projects, we have recommended an income cap on the operation of the recommendations requiring equal treatment after six months.

The termination pay provisions for assignment employees in the ESA are very complex. It is doubtful if many assignment employees fully understand their entitlement, and this lack of knowledge creates vulnerability. Under the current law, the agency has termination pay requirements, but the client employer has no direct obligations to the assignment employee in this regard. We find that applying the temporary layoff rules to assignment workers when an assignment to a client is terminated by the client, is not appropriate, and recommend an alternate scheme.

Our view is that the agency should provide the requisite notice to the agency employee as soon as the client employer wants to end the assignment, with obligations to pay the equivalent amount if notice is not given. The payment obligation would not be required if the assignment worker is assigned to work for another client within a period of 13 weeks.

Finally, in the context of workplace safety for assignment employees, all aspects of the risk and liability, including the responsibility for injuries suffered in the workplace, should be with the client employer, and not the agency.

Hours of Work and Overtime

Overall, we found that the existing system of hours of work and overtime pay regulation work effectively, but we also note that the approach is complex and somewhat unconventional, and that some provisions may pose difficult issues for employers which could be addressed at a sectoral level.

However, we recommend some changes to the system to lessen administrative burden for employers, such as: the elimination of the requirement to get Ministry of Labour approval for employees to work 48 – 60 hours a week (while maintaining ministry approval for weekly hours above 60) and the elimination of a blended overtime rate.

We also recommend that the Ministry enshrine in legislation its current policy that employee consent can be obtained electronically.

To give employers further flexibility, based on the concept that sectoral variation may be appropriate in some circumstances, we recommend an option for obtaining group consent to work overtime, or for other hours of work rules, through a secret ballot vote, if it is appropriate for that sector.

We also conclude that averaging overtime is a necessary and valuable tool for increasing employee flexibility in hours of work while not increasing employer costs, but that this ability to average should have limits. For this reason, overtime averaging should only be permitted where it would allow for flexibilities like a compressed work week, continental shift or other flexibilities in employee scheduling desired by employees, or to provide for employer scheduling requirements where the total number of hours worked does not exceed the threshold for overtime over the averaging period.

Personal Emergency Leave, Paid Sick Days, Other Leaves

We have highlighted the importance of personal emergency leave (PEL) and bereavement leave and recommend the extension of the entitlement to all employees - not only to those employed in workplaces with 50 or more employees.

We recommend that bereavement leave should be removed from the ESA's PEL provisions and be made an independent entitlement for up to three unpaid days for the family members covered by the current PEL provisions. We conclude, given the nature of bereavement leave, its availability should not be tied to or capped by the use of personal emergency leaves taken by an employee.

We further recommend the PEL provisions be amended to provide an annual entitlement of seven days, and be expanded to include domestic violence as a reason for absence.

As to the requirement to provide evidence of entitlement to PEL for illness, we recommend that employers be required to pay for doctor's notes if they request them from an employee.

With respect to paid sick leave, while we recognize that this protection would be beneficial, we conclude that the more important first step is the extension of PEL to all employees so that everyone has a basic right to time off in the case of personal emergency.

We recommend increasing the current Family Medical Leave provisions from 8 weeks in a 26-week period to 26 weeks in a 52-week period to mirror the recent federal Employment Insurance Act amendments.

> *"We recommend increasing vacation entitlement to 3 weeks per year after 5 years of employment with the same employer as Ontario is not currently on par with other Canadian jurisdictions."*

We also recommend the expansion of Crime-Related Child Death or Disappearance Leave to include the death of a child (non-crime related). Recognizing that the death of a child (whether crime-related or not) and the disappearance of a child are equally disabling to a parent, we recommend that the amount of leave offered should be the same (a leave of up to 104 weeks).

Public Holiday Pay

The Public Holidays law is extremely long, complex, and results in one of the most common contraventions. Many employers do not understand the provisions, while others rely on the intricacy of the provisions to attempt to not give employees their entitlements. Employees find it difficult to know if they have received their entitlements.

Everyone would benefit from simplified provisions but the complexity of the provisions arises as a result of complex trade-offs. We were attracted to the Construction Industry Model which is an addition of a specific percentage to all wage payments. For example, employees could be paid 3.7% of wages earned in each pay period and would not receive public holiday pay on each individual holiday but there are concerns and complications with this as well. The formula for the calculation of PHP is just one issue to consider and therefore we recommend that Part X of the ESA be reviewed in its entirety and revised and be replaced by statutory provisions that are simpler and easier to understand and apply.

Vacations

We recommend increasing vacation entitlement to 3 weeks per year after 5 years of employment with the same employer as Ontario is not currently on par with other Canadian jurisdictions.

Who is an Employer and Who is an Employee

The ESA's "related employer" provision allows separate but related legal entities to be treated as one employer if the requirements set out in the provision (section 4) are met. This provision creates

another source for satisfying employees' monetary ESA entitlements when their direct employer is unable to or refuses to pay. We conclude that one of the requirements – the so-called "intent or effect" test – has had the effect of undermining the original purpose of the provision and recommend that it be repealed.

We identify the issue of employees who are misclassified – intentionally or unintentionally – as independent contractors not covered by the ESA as a significant one and recommend that the Ministry make misclassification a priority enforcement issue. We further recommend that the term "dependent contractor" be added to the definition of "employee" in the ESA. Finally, we recommend that where there is a dispute about whether a worker is an employee, the person receiving the worker's services has the burden of proving the worker is not an employee and an obligation to provide all relevant evidence.

Exclusions from Basic Standards

The ESA applies to most employees and employers in Ontario. There are however exclusions from this rule of general application. We focus on two exclusions and recommend their elimination.

a) Interns and trainees

Interns and trainees (referred to as persons receiving training in the ESA) are employees for purposes of the Act and entitled to the minimum standards set unless several conditions are met. We recommend the elimination of this exclusion for various reasons including the abuse that is apparent by some employers. It is also difficult to understand and enforce.

b) Crown employees

Only certain parts of the Act apply to employees of the Crown or a Crown agency, and to their employer. "Crown" refers to the government of Ontario. We recommend the elimination of this partial exclusion due to the lack of an apparent rationale for its continuance.

RECOMMENDATIONS ON LABOUR RELATIONS

The *Labour Relations Act, 1995* (LRA) is the primary statute regulating labour relations for most Ontario workplaces, in the private and public sectors.

Exclusions from Collective Bargaining

The LRA does not apply to certain categories of employees. We recommend that some of these exclusions be removed.

The review of current exclusions is informed by the recent jurisprudence from the Supreme Court of Canada finding that the right to meaningful collective bargaining is an essential component of freedom of association, pursuant to section 2(d) of the *Charter*. On this basis, many of the exclusions in the LRA should be eliminated. In other words, these employees should enjoy the rights and protections afforded by the Act. In particular, we recommend that all of the following groups of employees that are currently excluded should be covered:

- Domestics;
- Hunters and trappers;
- Members of the architectural, dental, land surveying, legal or medical profession employed in a professional capacity; and,
- Agricultural and horticultural employees.

In regard to agricultural and horticultural employees, it is possible that a limited exception might be warranted to exclude some or all persons employed on a "family farm". In addition, we recommend that certain restrictions could be placed on strikes and lock-outs in respect of agricultural workers.

As with agricultural workers, we recommend that certain restrictions on strikes and lock-outs involving members of these particular professions may be appropriate.

Acquisition of Bargaining Rights

In this controversial area of policy, there have been many changes to the rules over the last 25 years by all political parties, without any independent or outside assessment. The correct approach must involve an integrated and comprehensive set of ideas, not a hodgepodge of compromises and cherry-picking. The most important considerations are the criteria that lie at the heart of the constitutionally-protected process of meaningful collective bargaining, namely employee choice and employee independence.

Freedom of choice by employees should be protected by a secret ballot vote process that protects both choice and secrecy, provided that the law also protects their independence to select or reject a bargaining agent. Employer (or union) misconduct that undermines employee independence destroys the reliability of the secret ballot process.

The current provisions of the LRA are not sufficiently responsive to the adverse impact that employer misconduct has on the rights of employees to free and independent choice. The premise that steps can be taken to ensure a second vote is sufficient to counter the effects of employer misconduct is flawed. While there may be rare cases where a union

could win a second vote following employer misconduct, we are of the view that given our collective experience over a lifetime of practice, the misconduct cannot be rectified and the second vote will generally be tainted by the misconduct. Employer conduct that is designed to raise, or results in, employee concern about the future stability or security of their employment leaves an indelible mark. Fear of supporting the union, or the hope of reward for voting against the union, which results from illegal threats or promises, is not likely rectified by a decision of a labour board even if coupled with a "mea culpa" statement made by the employer to employees as a result of a board order.

We recommend preservation of the secret ballot vote process for certification provided there are appropriate remedies for employer misconduct. Without effective remediation for unlawful employer conduct, there are compelling reasons for a return to card-based certification. If an employer unlawfully interferes with the employees' rights to freedom of association and honest independent choice so that the true wishes of the employee are unlikely to be ascertained, that conduct must trigger a meaningful remedy, namely certification without a vote and access to first contract arbitration.

The package of recommendations will result in a principled and workable system, which both unions and employers should be able to support. Unions should favour a system where employee free choice is maximized and unlawful employer interference is effectively remedied. Employers should support the preservation of the secret ballot, legitimate employer free speech and open discussion of the issues by unions and employees. Most employers understand that employers who engage in unlawful conduct should not be rewarded with the defeat of a union. The employer community, which is overwhelmingly law-abiding and respectful of the rights of its employees under labour law and the constitution, will have no interest in protecting those employers who violate the law and who undermine the integrity of the secret ballot process.

Accordingly, we recommend that the secret ballot process for certification should be preserved, provided that the following recommendations are also accepted:

a) Where the true wishes of the employees are unlikely to be ascertained because of employer misconduct, remedial certification and first contract arbitration should follow unless the union bargains in bad faith or otherwise disqualifies itself from first contract arbitration.
b) The "mediation-intensive" model introduced in British Columbia in 1993 should be considered as a reasonable model for Ontario that could significantly improve labour relations success in first contract negotiations, including after remedial certification.
c) To permit a decertification or displacement application to have priority over the intensive mediation or first contract arbitration process would undermine the recommended remedial approach, and such applications should be untimely until those processes are completed.
d) Provided they have appropriate support in a proposed bargaining unit, unions should be able to obtain contact information for employees in the proposed unit in advance of a certification application.

With respect to this last recommendation, the constitutional right of employees to effective and meaningful collective bargaining is founded on the freedom of employees to associate. Employees cannot band together to pursue their workplace goals if they don't know who the other employees are, where they work, how to contact them, or how many of them there are.

The secret ballot vote process is premised on an informed, free and accessible electorate of employees. Being unable to determine who comprises the electorate and being unable to communicate with them are barriers to achieving certification based on the wishes of a majority of employees in a secret ballot vote, and is inconsistent with the principles of employee

choice and independence. If the union or other employees cannot communicate effectively with the electorate, or if only the employer can communicate, there is a barrier to accessing meaningful collective bargaining. Otherwise, the result is a flawed democratic process. Those who champion the secret ballot process as the best mechanism for the expression of employee choice should be supportive of an informed electorate.

Workplaces can be large and geographically spread out and it can be very difficult and onerous, if not impossible, to know the number of employees and where they work. Moreover, in the changing workplaces of today, employees can be employed on numerous shifts, or on a part-time or temporary basis or away from the workplace altogether, and it can be difficult for other employees to know how and where to reach them. These many practical obstacles should not be placed in the way of the exercise of the constitutional right to freedom of association, especially when the employee contact information exists and can be easily provided.

Although privacy interests are important, there are also other public policy interests, and these interests must be balanced. For example, voters in a public election have no privacy interest not to be contacted or identified and there is a public list of voters and where they live. During an organizing campaign, an employer maintains the right and the means to communicate to their own employees, and it often does communicate as soon as it finds out an organizing campaign is occurring. To level the playing field, unions should have the information necessary to communicate effectively with the employees.

> *"We recommend preservation of the secret ballot vote process for certification provided there are appropriate remedies for employer misconduct."*

A union should be required to demonstrate that approximately 20% of the potential bargaining unit supports collective bargaining through joining the union in order to acquire the right to be provided with the information. A similar standard could be applied to employees seeking to de-certify a union. We recommend a number of measures to avoid this threshold from becoming the subject of extensive litigation. We also recommend measures to prevent the union from obtaining the list just by applying for it when it has no entitlement to it, and penalties if the union uses the list for improper purposes.

Electronic Membership Evidence and Electronic Voting

We also recommend that the OLRB, with support from the government, update its rules and practices to allow for electronic submission of information, including electronic membership evidence. Other recommended changes to certification include giving the OLRB explicit power to conduct votes outside the workplace, including telephone and internet voting.

Consolidation and Amending of Bargaining Units

Under the existing law, the parties are free to expand or to reduce the scope of bargaining units, but it is an unfair labour practice to take such issues to impasse (i.e., to make such a dispute the subject of a strike or lockout). We recommend that the OLRB have the power to modify bargaining unit structures, if satisfied that the bargaining unit or units are no longer appropriate for collective bargaining in the circumstances. We reject the idea that this should be restricted to cases where the same union is involved.

We further recommend that the OLRB have the power in sectors or industries where employees have been historically underrepresented by unions, to consolidate existing and/or newly certified bargaining units involving the same employer and the same union, to contribute to the development of effective collective bargaining relationships in these

sectors or industries. Single locations units of the same employer are unlikely to be viable, and they have concluded that the only way collective bargaining in those industries or sectors can likely be viable is if units can be certified on a smaller basis, such as by single location, and then varied or consolidated afterwards with additional locations. The OLRB would be given certain powers to implement this model; e.g., to direct that the terms of a collective agreement apply in the varied or consolidated unit.

Broader Based Bargaining

Concerns have been raised that our model of labour relations is not adequate to respond to the needs of the parties in the contemporary workplace, particularly in growing sectors of the labour market characterized by small workplaces, diversity in employment, and nonstandard work. "Broader based bargaining" has been advocated as a necessary alternative or addition to our traditional labour relations model. We discuss a number of existing or proposed models of broader based bargaining that have been put forward as illustrating the alternatives that could be considered, but only recommend proceeding with one model involving franchisees of the same franchisor.

Franchisees of the same franchisor would be treated in an analogous way as a single employer with multiple locations in industries where employees have been historically underrepresented by unions. We concluded that, similar to the finding with regard to a single employer with multiple locations, collective bargaining with a single franchisee is unlikely to be viable. The only way collective bargaining in those industries or sectors can likely be viable is if units can be certified on a smaller basis, such as at a single location, and then varied or consolidated afterwards with additional locations.

We found that it is reasonable to require franchisees of the same franchisor to bargain together. The essence of franchise operations is that they do not operate their businesses in a way that is materially different. They market the same brand, sell the same products and operate in the same market, under the same contracts and policy manuals of the same franchisor. Their staffing, labour costs, and methods of operation are either the same or so similar that any differences are manageable. Moreover, to the extent that there are material differences, collective bargaining has flexibility to accommodate them.

Competitors in an industry may operate either through a corporate model or a franchise model, or a combination of both, and there is no good public policy reason to treat one model differently from the other. The different organizational models, for selling competing brands in the same market, should not mean that one should be subject to unionization under a set of rules that does not apply to the other two. It is also unfair to employees of the many franchisees of the same franchisor not to have effective access to collective bargaining while the employees of a competitor, who has only corporate locations or some corporate and some franchise locations, do have effective access.

The OLRB would be given certain powers to implement this model; e.g., to direct that the terms of a collective agreement between a franchisee and union could be extended to apply, with or without modifications, to a newly certified bargaining unit. As with the previous recommendations related to bargaining unit consolidation, the goal is to contribute to the development of effective collective bargaining relationships in these sectors or industries.

We are not recommending a system where franchisees of different franchisors are compelled to bargain together or that the franchisor should be named as an employer with its franchisees, (unless it is already a related employer within the meaning of section 1(4) of the LRA).

We further recommend inquiries and further consideration of broader based bargaining models in respect of specific sectors (in particular: government-funded homecare and the arts and entertainment sectors). We also recommend further consultations on three issues related

to broader based bargaining, namely, accreditation of employer's organizations outside the construction industry, the compulsory formation of a council of unions, and multi-employer certification.

Related and Joint Employers

Questions sometimes arise under the LRA in regard to identifying the "true" employer and responding to complex relationships among related or joint employers. We describe this as one of the most difficult areas addressed in the review. While generally not recommending changes to the existing law, we make a recommendation specifically in relation to temporary help agencies that persons assigned by THAs to perform work for clients of the agency be deemed to be employees of the client rather than the THA for the purposes of the LRA.

Remedial Powers of the OLRB

Under the LRA currently, the OLRB has the power to make interim orders where workers are terminated or disciplined during an organizing campaign and certain conditions are met. We recommend that this be replaced with a broad power to make substantive interim orders on all matters that come before it, pursuant to the *Statutory Powers Procedure Act*. In our view, it is imperative that the OLRB be granted the power to issue interim relief in order to protect the constitutional rights of employees to organize and form unions.

Prosecutions and Penalties

Anyone who contravenes the LRA may be subject to OLRB orders and prosecution before the provincial courts. We recommend that the maximum fines for contravention of the LRA be increased to $5,000 for individuals and $100,000 for employers and unions. We otherwise recommend that the law in this regard remain generally the same.

Right of Striking Employees

The LRA provides, subject to certain conditions, that an employee engaging in a legal strike may make an unconditional application to return to work within six months of the commencement of the strike. In these circumstances the employer is generally required to reinstate the employee. We recommend that the LRA be amended to eliminate the six-month time period for striking employees to make an application to return to work. We further recommend that the LRA be amended to provide for arbitration of the refusal to reinstate an employee at the conclusion of a strike or lock-out, or any discipline of an employee by an employer during the course of a legal strike or lock-out or after the expiry of a collective agreement.

The recommendations are as beneficial to the efficient resolution of disputes and as good public policy in light of our *Charter* obligations and related considerations.

Successor Rights

The successor rights provision of the LRA protects employee and union rights where there is a sale of a business, providing that bargaining rights and collective agreement obligations of the original employer generally flow through to the new successor employer. This protection does not currently exist in the case of contracting out and re-tendering contracts in service sectors like security, food services, cleaning, and others.

We recognize that there are vulnerable workers in precarious work in this situation, and recommend that successor rights should be applied to the building services industries (specifically: security, food services, cleaning) and government-funded home care, and that a regulation-making authority be added to the LRA to allow for the possible expansion of coverage to other services or sectors in the future.

CONCLUDING RECOMMENDATIONS

In addition to the specific recommendations about the legislative framework and the administration of the programs, we also make the following general recommendations:

An Ontario Workplace Forum

There is a compelling case to be made for bringing together government, business, labour and employee advocate leaders, to discuss the broader trends and influences affecting work and the workplace, to foster broader understanding of what is occurring and potentially to find consensus on possible solutions.

Stakeholders often express their views to government, but it is rare for senior government officials to engage with business, labour, employee advocates in the same forum. The lack of interaction and ongoing discussion hinders the development of effective and balanced public policy. Open dialogue may lead to a better appreciation of interests and perspectives, and on some issues, there could be a convergence of interests.

In this regard, we recommend the creation of a Workplace Forum to bring together senior representatives of government, business, organized labour and employee advocates on a regular basis.

Institutionalizing the Process of Review

Both Acts should be reviewed periodically to consider their general effectiveness in light of the changing economic, social, demographic and legal trends that affect work and the workplace.

We note the highly-politicized context in which labour law reform has sometimes occurred in past decades. The Changing Workplaces Review aimed to examine the issues on an independent and apolitical basis, with full and open consultation and a wide range of views were heard and considered. This approach enables a discussion and a range of possibilities that is superior to a process driven simply by politics.

In this regard, Ontario should make an ongoing commitment to an independent review of the legislation every five to seven years.

INTRODUCTORY RECOMMENDATIONS

1. We recommend that the *Employment Standards Act, 2000*, the *Labour Relations Act, 1995* and the Occupational Health and Safety Act be consolidated under a single Workplace Rights Act and that the three parts of this new Act be entitled: Rights to Basic Terms and Conditions of Employment, Rights to Collective Bargaining, and Rights to a Safe and Healthy Workplace.

2. We recommend that the government initiate a program of education for employees and employers, both with respect to the Workplace Rights Act and the rights and obligations of employees and employers under each part of the Act.

3. We recommend that all Ministry of Labour inspectors and officials be authorized and required to report any violation of labour legislation that comes to their attention.

ENFORCEMENT AND ADMINISTRATION

Strategic Enforcement – A Combination of Existing and New Approaches

Proactive Inspections; Other Strategic Initiatives; Focusing at the Top

4. Concurrent with our recommendation for changing the current practice of investigating all complaints, the Ministry of Labour should allocate more resources to proactive enforcement initiatives, including spot checks, audits, and inspections.

5. The proactive model of enforcement should do the following:

   a) be strengthened by targeting monetary violations of the type being detected through complaints;
   b) continue to regularly collect and analyze statistical survey data on compliance to determine the likely extent of non-compliance;
   c) continue to regularly collect and analyze data on concentrations of vulnerable workers in various sectors of the economy; and
   d) continue to analyze incoming and processed complaints for data that may help to focus proactive compliance and enforcement initiatives within priority areas.

6. Strategically increase the use of targeted inspections, particularly in sectors and jobs where there are large numbers of vulnerable and precariously-employed employees and with respect to employers in specific sectors and geographic locations.

7. In the course of investigations of individual complaints, employment standards officers should continue to assess whether an expanded investigation or regular inspection should be initiated whenever there is an indication that the problem of non-compliance affects more employees than the complainant alone.

8. Employment standards officers should treat evidence of deliberate non-compliance uncovered in the course of complaint investigation as warranting, prima facie, an extension of the investigation, subject to any overriding priorities related to targeted inspections established as part of a strategic approach.

9. Further utilize enforcement strategies with a view to focusing on the top of industry structures – the top of the supply chain or franchisor, for example – where decisions are made that influence compliance by those lower in the chain. This

will involve the collection of data, during investigations, about industry structures in relation to such matters as common employers, management structures, franchising and ownership structures, and how decisions are made regarding personnel policies.

10. Develop the capacity to link quickly to other sources of government data, including information from other ministries of labour in other provinces, which may help identify areas with a propensity towards non-compliance.

11. The Ministry of Labour should be provided with additional funding sufficient to implement a comprehensive strategic enforcement approach and to hire more officers to increase the capacity for conducting proactive and targeted inspections.

A Strategic Approach to Litigation

12. Ministry of Labour counsel or representatives at review hearings before the Ontario Labour Relations Board should actively participate in proceedings to ensure that the best evidence and the law are before the adjudicator.

The Current Complaints-based System and the Necessity for Change

13. The *Employment Standards Act, 2000* should be amended to make it clear that the Employment Standards Program is not required to, and will not, investigate all claims.

14. The claims given priority for investigation should be claims of alleged reprisal and complaints that will likely lead to an expanded investigation in the workplace.

15. The Ministry of Labour should develop online assistance for complainants and employers in relation to complaints that are not being investigated, which will provide both parties step-by-step guidance and information regarding the available procedure for processing and filing complaints.

An Accessible Process for Complainants to Have Claims, Not Investigated by the Ministry of Labour, Adjudicated

16. The Ontario Labour Relations Board should be the forum for the adjudication of individual complaints not investigated by the Ministry of Labour, provided the Director of Employment Standards approves such complaints as ones to be filed and processed by the complainant.

17. The Director of Employment Standards should determine whether a complaint is to be investigated or processed by a complainant to the Ontario Labour Relations Board and, in making such a determination, the Director should have the authority not to approve a complaint to be heard by the Ontario Labour Relations Board, just as the Director is permitted, in certain circumstances, to decline to assign the complaint to an employment standards officer for investigation under the *Employment Standards Act, 2000*.

> *"The Ministry of Labour should be provided with additional funding sufficient to implement a comprehensive strategic enforcement approach and to hire more officers to increase the capacity for conducting proactive and targeted inspections."*

18. The Ministry of Labour should appoint part-time vice-chairs in each of the seven judicial districts in the Province of Ontario outside Toronto to hear complaints that are not investigated by an employment standards officer.

19. Vice-chairs who hear complaints in the first instance should have all the powers of an employment standards officer and the requisite authority to adjudicate complaints and make orders necessary to compel remediation of the violations

found to have occurred. In addition, without restricting the generality of the foregoing, the vice-chair should have the right to award wages, fees and compensation, interest on wages owed and the right to order the posting of notices in conspicuous places at the place of employment of the complainant or in other places deemed appropriate.

20. Vice-chairs of the Ontario Labour Relations Board who hear complaints in the first instance should have the power to consult with the parties as part of the decision-making process.

21. Employers who elect to contest an employee complaint (where there has been no investigation) should be required to produce copies at the hearing of all documents and business records relevant to the complaint and to the employer's response.

22. The Ontario Labour Relations Board, or the Ministry of Labour in consultation with the Board, should create explanatory materials for unrepresented parties regarding both the complaint procedure and the applicable principles of law, including the burden of proof and basic rules of evidence.

Education of Employees and Employers – Increasing Awareness of Rights and Obligations

Education and Outreach

Education and outreach are essential tools in creating a culture of compliance. We therefore recommend that:

23. The government should consider including basic instruction on the rights and entitlements of employees under the *Employment Standards Act, 2000* in the high school curriculum.

24. The Ministry of Labour should make its Policy and Interpretation Manual available online to be accessible by everyone.

25. The Ministry of Labour should continue to actively collaborate with employers, unions, worker advocacy groups, and employer associations to identify candidates for pro-active, strategic and targeted communications aimed at employees and employers in sectors where there are many vulnerable employees and high incidents of non-compliance.

26. The Ministry of Labour should target employers for self-audits pursuant to section 91.1 of the *Employment Standards Act, 2000*, particularly in sectors where there are many vulnerable employees and high incidents of non-compliance. In addition, the Ministry of Labour should assess the impact of the self-audit provisions on compliance and awareness.

27. The Ministry of Labour should continue to explore, be aware of and consider the efficacy and cost-effectiveness of implementing educational and outreach strategies, including those suggested by stakeholders and those used in other jurisdictions.

Internal Responsibility

28. The Ministry of Labour should encourage the establishment of internal responsibility systems by employers.

29. The Ministry of Labour should provide assistance and advice to employers who wish to establish such systems.

Increased Protection for Employees Who Seek to Enforce Their Rights

Greater Protection for Employees from Reprisals

30. The Employment Standards Program should develop, implement and publicize a policy for the speedy investigation of complaints by employees, including whistleblowers, alleging termination of employment based on the exercise of rights under the *Employment Standards Act, 2000*.

31. The policy should emphasize that reprisals, where termination of employment has occurred, will be given priority by the Ministry of Labour and that investigations will normally be commenced within five days of receipt of the complaint.

> *"The government should consider including basic instruction on the rights and entitlements of employees under the Employment Standards Act, 2000 in the high school curriculum."*

32. Complaints of termination of employment warranting speedy investigation should include cases where an employer has refused to allow an employee to return to work after a leave of absence, pursuant to the *Employment Standards Act, 2000*.

33. The Ministry of Labour should publish the policy and, in doing so, take steps to clearly communicate the purpose and substance of the anti-reprisal protections of the *Employment Standards Act, 2000*.

Temporary Foreign Workers

34. The Ministry of Labour should work with the appropriate federal agencies and ministries to develop and implement an expeditious and accessible procedure, which is available to address cases of alleged reprisals that result in termination or unjust dismissal for temporary foreign workers prior to repatriation under the terms of their work permit.

Access to Justice

Improving the Complaint and Review Process – Assistance to Employee Complainants

35. Increase the resources and expand the mandate of the Office of the Worker Advisor with a new funding model developed to help employees with claims under the *Employment Standards Act, 2000*.

36. The Ministry of Labour should, in all judicial districts in Ontario, develop and publish on its website a list of lawyers in those districts who are prepared to provide pro bono assistance to employees and employers.

37. The Ministry of Labour should develop and publish a list of worker advocacy groups, trade unions, legal clinics and others in Ontario who are prepared to provide assistance to employees.

Removing a Barrier to Claimants

38. The *Employment Standards Act, 2000* should be amended to remove the Director of Employment Standards' ability to require that an employee who is of the view that the Act has been or is being contravened inform the employer of the basis of his or her view.

Anonymous, Third Party, Whistleblower and Individual Complaints and Confidentiality of Identity of the Complainant

Anonymous Complaints

39. The Ministry of Labour should make available, and widely publicize on its website and elsewhere, an *Employment Standards Act, 2000* hotline for the receipt of tips by telephone or online.

Confidentiality

40. In relation to education, awareness programs and initiatives by the Ministry of Labour, it should be emphasized that good faith whistleblower reportings of violations are encouraged and protected under the *Employment Standards Act, 2000*.

41. The stated policy of the Employment Standards Program should be to protect against the disclosure to the employer of the identity of a whistleblower complainant who

wishes to keep that information confidential, with the qualification that the whistleblower's identity may be disclosed by order of a court or tribunal resulting from the investigation of the complaint.

42. Complaints from a whistleblower of alleged reprisal by an employer should be given priority by the Employment Standards Program, as should cases of reprisal brought by employees as discussed in Part 5.

43. The stated policy of the Employment Standards Program should be to protect against the disclosure to the employer of the identity of a third-party complainant who wishes to keep that information confidential, with the qualification that the third party's identity may be disclosed by order of a court or tribunal resulting from the investigation of the complaint.

44. The Ministry of Labour should implement a policy to not disclose (in documentation or otherwise) the identity of the whistleblower or third-party complainant to the employment standards officer assigned to investigate the complaint, to ensure that confidentiality is not inadvertently breached.

45. In cases of a complaint by an employee, whistleblower or third party, the Ministry of Labour should consider whether a targeted inspection or other strategic initiative is warranted instead of, or in addition to, conducting an investigation of a complaint.

Applications for Review

46. Employment standards officers, when they issue the reasons for their decision, should be required to include copies of all of the documents that they relied upon when reaching their decision (e.g., payroll records, disciplinary notices, medical certificates).

47. The *Employment Standards Act, 2000* should be amended to provide that, on an application for review, the burden of proof is on the applicant party to prove, on a balance of probabilities, that the decision made by the employment standards officer is wrong as a matter of fact and/or law and should be overturned, modified or amended.

48. Increase regional access by appointing part-time vice chairs of the Ontario Labour Relations Board to sit and hear review applications and employee complaints in each of the seven judicial districts in Ontario outside Toronto.

49. Vice-chairs of the Ontario Labour Relations Board who hear applications for review should have the power to consult with the parties as part of the decision-making process.

50. The Ontario Labour Relations Board, or the Ministry of Labour in consultation with the Board, should create explanatory materials for unrepresented parties regarding both the review procedure and the applicable principles of law, including the burden of proof and basic rules of evidence.

51. In all judicial districts in Ontario, the Ministry of Labour should develop and publish on its website lists of lawyers and legal clinics in those districts willing to provide pro bono legal assistance to parties with respect to applications for review.

Settlements

52. No changes are recommended.

Remedies and Penalties

Enforceable Undertakings

53. The *Employment Standards Act, 2000* should be amended to provide for enforceable undertakings to be entered into on a voluntary basis between the Ministry of Labour and an employer.

54. Enforceable undertakings should be enforced by the Ontario Labour Relations Board.

The Current Approach to Sanctions and Proposed Changes

55. Schedule 4.2 of O. Reg 950 under the Provincial Offences Act currently sets fines for violations of the Employment Standards Act, 2000 at $295. Schedule 4.2 should be amended to set the fine for a Part 1 prosecution under the Provincial Offences Act in the amount of $1,000 for the specified violations of the *Employment Standards Act, 2000*.

56. The penalties for notices of contravention should be raised from $250/$500/$1,000 to $350/$700/$1,500, respectively.

57. The Ontario Labour Relations Board should be given an expanded jurisdiction to impose administrative monetary penalties of up to $100,000 per infraction and the jurisdiction to order an unsuccessful respondent to pay the costs of the investigation.

58. The Ontario Labour Relations Board should be given the same remedial authority as an employment standards officer to make orders to compensate employees where violations have been shown to have occurred and to issue prospective compliance orders.

59. The Ministry of the Attorney General or the Ministry of Labour should appoint a designated officer of the Crown to act as a Director of Enforcement – a person with specific responsibility to determine when to initiate proceedings in which an administrative monetary penalty of up to $100,000 per infraction is sought against a named respondent(s) and to take carriage of the case as the applicant in the proceedings.

Note: This recommendation to give the Ontario Labour Relations Board jurisdiction to impose administrative monetary penalties is intended to replace the Part III *Provincial Offences Act* prosecution process.

60. Either the Director of Employment Standards should set interest rates pursuant to section 88 (5) of the Employment Standards Act, 2000; **or**

    The *Employment Standards Act, 2000* should be amended to provide that when orders are made by an officer or by the Ontario Labour Relations Board, complainants are to be awarded pre-order and post-order interest, calculated in accordance with the Courts of Justice Act.

Security for Employee Remuneration

61. Ontario should repeal the deemed trust and statutory lien provisions in the *Employment Standards Act, 2000* and *Personal Property Security Act* and replace them with legislative provisions that:

    a) create a priority statutory charge in favour of the Director of Employment Standards against all of an employer's property to secure unpaid employee remuneration, up to $10,000 per employee, similar to the priority charge arising under section 23 of the *Retail Sales Tax Act*, including provisions with respect to the enforcement of that charge in the same manner as a contractual security interest enforced under the personal property security legislation.

    b) enable the Director of Employment Standards to take security for the payment of employee remuneration, give the Director direct rights of action to recover employee remuneration, and give the Director the ability to take security for the payment of employee remuneration, similar to the rights afforded under subsections 37 (1) and (2) of the *Retail Sales Tax Act*.

    c) provide that the remedies should be available to the Director of Employment Standards, or to employees or a representative of the employees where the Director does not act.

    d) eliminate the requirement to file a certificate in a court of competent jurisdiction (except for reciprocal orders) and, instead, make an order valid and binding upon issuance, similar to section 18 of the *Retail Sales Tax Act*. However, it may be preferable to state in the legislation that the order of the Director of Employment Standards is enforceable like a judgment and no certificate is required, as a provision similar to section 18 of the *Retail Sales Tax Act* may not be effective in making the order a judgment. The intent would be to allow for immediate enforcement, similar to a judgement of the Court.

    e) provide for the ability to cancel and reissue an order for the purpose of making corrections without having to cancel the original order, for example, where a director named in an order turns out not to have been a director at the time the money became payable.

    f) provide the Ministry of Finance with the authority to demand information and to share information for the purposes of the administration and the enforcement of the *Employment Standards Act, 2000*.

Director Liability for Employee Remuneration

62. The existing provisions of the *Employment Standards Act, 2000* and the *Ontario Business Corporations Act* should be amended to provide that up to six months' wages and up to 12 months' accrued vacation pay are the responsibility of the directors of a corporation and that the only condition that must be met in order for an employee to receive these amounts is that the employee has not been paid these sums by the corporation.[1]

63. The provisions of the *Employment Standards Act, 2000* and the Ontario *Business Corporations Act* should be consistent.

64. An employee representative should be able to take proceedings or make a claim against directors on behalf of all employees.

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1. Note that the ability of an Employment Standards Officer to make an order under sections 81 (1) and 106 where insolvency proceedings have been commenced will have to be adjusted once the insolvency requirement is removed.

65. The Ministry of Labour should ensure that adequate resources are allocated, or continue to be allocated, and utilized for the recovery from directors of unpaid amounts owing by a corporation to an employee.

> *"The Ministry of Labour should ensure that adequate resources are allocated, or continue to be allocated, and utilized for the recovery from directors of unpaid amounts owing by a corporation to an employee."*

SECTORAL REGULATION AND EXEMPTIONS

66. The government should establish a committee process that may be utilized when existing exemptions are being reviewed, when new exemptions are being considered, and when sector-specific regulations are contemplated.

67. Committees should be composed of representatives of employers and employees for the purposes of providing advice to government.

68. The government should make the review of existing exemptions a priority.

69. In accordance with the recommendation in Chapter 7 of the full Changing Workplaces Review report, the government should adopt a sector-specific approach to the regulation of scheduling. The government should include scheduling in the scope of the review of existing exemptions on hours of work, overtime, and related matters, where warranted and practicable. As a priority, there should be a committee established to consider a sector-specific scheduling regulation in the retail and fast food sectors.

70. The committee process should be set out in the statute; however, it should not be mandatory and should provide for flexibility in the process, as required. The Minister of Labour should be able to initiate the committee process for the review of existing exemptions or the development of new terms and conditions of employment in a sector or subsector, or parties may request the Minister of Labour to invoke the process.

71. Sectoral and subsectoral committees should be established as necessary. If there are no exemption issues in the sector, then a committee should be established to set up a permanent process for the discussion of:
    a) the application of the provisions of the *Employment Standards Act, 2000* to the sector; and,
    b) enforcement issues and proactive enforcement in the sector.

72. The policy framework within which the committees operate should include the following:
    a) the *Employment Standards Act, 2000* should apply to as many employees as possible;
    b) departures from, or modifications to, the norm should be limited and justifiable; and,
    c) proponents of maintaining an exemption should bear the onus of persuasion that the exemption is still required;

73. The government should provide committees with costing information on the cost to employees and savings to employers of any exemptions from employment standards.

74. Although the government has responsibility for all regulations promulgated and must remain the ultimate decision-maker, committees should provide the government with assistance and advice with respect to exemptions.

75. The organization and work of the committees is to be supported by the government.

Sectoral Committees

76. The government would appoint the members with respect to the sectoral committees, recommended to be established, above. The committees would be composed of:

    a) a neutral chair, whose role as facilitator is to ensure the views of employers and employees are heard and to explore the possibility of consensus. (If consensus is achieved, the chair will communicate the consensus and recommendations to the Minister of Labour in writing. If consensus is not achieved the chair may make a recommendation to the government, if necessary. Chairs of sectoral committees could include, but would not necessarily be limited to, vice-chairs of the Ontario Labour Relations Board, either full-time or part-time. Resulting reports of the chair would be made public);

    b) representatives of both large and small employers, put forward wherever possible by employer organizations in the sector, including representatives of employers who have adopted "best practices";

    c) employee representatives, whom the government will appoint from among the following:

    i. employees, as suggested by community organizations, who are independent from any employer working in the sector and who have experience in the area, or who are otherwise selected;

    ii. representatives from community organizations, such as legal aid clinics, workers' groups, and other community organizations;

    iii. following consultations with other trade unions, unions with experience or interest in the sector, even in sectors where there are few unionized operations, as unions have experience in representing employee interests;

    iv. professional associations in the sector that represent employee interests; and

    v. other persons experienced in representing the interests of employees.

d) representative(s) of government who can provide advice or information and who function in a supportive role to the committee; and,

e) at the discretion of the government and upon the recommendation of the facilitator, an expert with specialized knowledge to advise and support the committee on issues, e.g., potentially, a scheduling expert or an industry expert.

77. Committees should be small to ensure they are workable.

78. Service on sectoral committees should be unpaid except for the chair and any experts whose advice is sought.

Recommendations on Specific Exemptions

Information Technology Professionals and Pharmacists

79. The current regulations with respect to information technology professionals and pharmacists present sufficient complications, warranting a more careful review through the process set out, above, before any final decisions are made with respect to these groups.

Residential Building Superintendents, Janitors, and Caretakers

80. An early review of the regulation applying to residential building superintendents, janitors, and caretakers is recommended because of the breadth of this group and the resulting anomalous treatment of these employees compared to other similarly-situated employees in the rest of the country.

Student Minimum Wage for Those Under 18

81. The minimum wage rate for students under age 18 should be eliminated over a three-year time frame.

Student Exemption from the "Three-Hour Rule"

82. The student exemption from the "three-hour rule" should be eliminated.

Liquor Servers' Minimum Wage

83. The liquor servers' minimum wage should be phased out over three years.

Managers and Supervisors

84. We recommend that the current test for managers be changed to a "salaries plus duties" test where, in order to be exempt from hours of work and overtime protection, a manager would have to perform defined duties, which would generally follow the U.S. tests for executive and administrative employees (these are, in broad strokes, compatible with the Ontario Labour Relations Board criteria). We recommend that the salary figure be 150% of the general minimum wage (currently $11.40), converted to a weekly salary of $750 per week, on the basis of a 44-hour work week, which is the threshold for the payment of overtime.

CHANGES TO BASIC STANDARDS

Part-time, Casual, Temporary and Seasonal employees

Equal Pay with Comparable Full-time Employees

85. We recommend the *Employment Standards Act, 2000* be amended to provide that no employee shall be paid a rate lower than a comparable full-time employee of the same employer. The rule would not apply when there is a difference in treatment between employees on the basis of: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) another factor justifying the difference on objective grounds. Section 42 (1) of the Act should be amended to reflect this same approach.

Benefit and Pension Plan Coverage

86. We recommend that the government initiate an urgent study on how to provide at least a minimum standard of insured health benefits across workplaces, especially to those full-time and part-time employees currently without coverage, and to the self-employed, including small employers.

87. We recommend that the provincial government urge the federal government to review the operation of the private pension system, in conjunction with public programs, such as the Guaranteed Income Supplement, with respect to how they affect low earning Ontarians.

Contract Employees – Renewable Contracts

88. The government should continue to monitor the use of fixed-term contracts in Ontario and to assess the impact of relevant legislation in other jurisdictions before engaging in legislative intervention.

Scheduling, Right to Request, and the 'Three-Hour Rule'

Sectoral Regulation of Scheduling

89. The *Employment Standards Act, 2000* should give the Ministry of Labour the authority to regulate the scheduling of employees by employers.

90. Recognizing the need for predictable schedules for employees in certain sectors and the variability of scheduling requirements, the government should adopt a sector-specific approach to the regulation of scheduling.

91. Scheduling regulation in some sectors, such as fast food and retail, should be a priority.

92. To the extent reasonably practicable, the Ministry of Labour should gather data and statistics related to other sectors to identify those sectors most in need of regulation and to determine priorities.

93. In accordance with recommendations made, herein, in relation to Sectoral Regulation and Exemptions, the Ministry of Labour will appoint sectoral committees to develop sector-specific scheduling regulations.

94. The Ministry of Labour should consider developing a policy framework for scheduling discussions by sector, describing issues, options and best practices.

95. In constituting sectoral committees for advising on sector-specific scheduling regulations, the Ministry of Labour should consider making available to the committees, experts on scheduling and/or others – for example, academics with the relevant employment standards expertise – who may help facilitate an educated discussion on the scheduling issues being considered.

Right to Request

96. The *Employment Standards Act, 2000* should be amended to provide that, after one year of service, an employee has a right to request, in writing, that the employer decrease or increase his or her hours of work, give him or her a more flexible schedule or alter the location of his or her work. The employer should be required to give the employee an opportunity to discuss the issue and provide reasons, in writing, if the request is refused in whole or in part. There should be no appeal of an employer's decision on the merits. The employer's obligation to respond to an employee's request should be limited to one request per calendar year, per employee.

97. Any "right to request" legislation must include protection from reprisal or retaliation for an employee who exercised the right.

The "Three-Hour Rule"

98. The *Employment Standards Act, 2000* should be amended to provide that, when an employee who regularly works more than 3 hours a day is required to report to work but works

less than three hours, he or she must be paid three hours at the employee's regular wage.

Temporary Help Agencies

Compensation Equality and Job Permanency

99. Assignment workers shall not receive less compensation than a comparable employee of the client performing similar work.

    This provision does not apply during the first six months that an assignment worker performs work for a client. Only a break in the assignment of longer than three months will negate the obligation to compensate the assignment worker equally to a comparable employee of the client performing similar work.

100. A client shall make best efforts to ensure assignment workers are aware of all available openings for jobs with the client and should consider, in good faith, any assignment worker who applies for a position.

101. Prior to terminating the employment relationship with an assignment worker, the client shall consider, in good faith, whether the assignment worker is suitable for an available position with the client.

    This provision does not apply to persons at or above a cap of 2.5 times the minimum wage (converted to a weekly or annualized salary, based on a 40-hour week).

Termination Pay

102. The existing rules with respect to notice of termination and termination pay for assignment workers, which rely on the temporary layoff provisions of the *Employment Standards Act, 2000* in relation to payment of termination pay, should be revoked and the following changes made:

    The agency should provide to the assignment worker notice with respect to the end of the assignment with a client, whether the termination was caused by the agency or the client, in an amount equivalent to the amount of notice currently required under the *Employment Standards Act, 2000*. If notice is not given, unless the employee is referred to work for other clients of the agency, termination pay is payable by the agency for the number of days equal to the amount of the notice, which amount must be paid within a period of 13 weeks following the end of the assignment. Each day of work reduces the amount of termination pay owing.

    This recommendation is not intended to have any impact on the amount of notice or termination pay owing by the agency if it terminates the employment of the assignment worker except that, if the end of the assignment and the end of employment by the agency coincide, only one payment is owing, the larger of the two payments.

Workplace Safety for Assignment Workers

103. With respect to the allocation of risk and liability, the government should accept the principle that the client, not the agency, is responsible for injuries incurred in a workplace by an assignment worker.

Hours of Work and Overtime

Employee Consent

104. The Ministry of Labour's practice of permitting employee consent agreements to be obtained electronically should be set out in the *Employment Standards Act, 2000* or in the Regulations.

105. An option for obtaining group consent to work overtime, or to other hours of work rules, should be made available through a secret ballot vote on a sectoral basis, if it is appropriate for that sector.

Requirement for Ministry of Labour Consent to Work Longer Than 48 Hours a Week

106. The requirement for obtaining Ministry of Labour consent to work 48 – 60 hours a week should be repealed.

The 11-Hour Rule

107. Maintenance of the status quo. The Ministry of Labour should be open to considering varying the 11-hour rule on a sectoral basis, if appropriate.

Overtime and Overtime Averaging

108. The trigger for overtime should remain at 44 hours per week.

109. Overtime averaging should only be permitted where it would allow for a compressed work week, continental shift or other flexibilities in employee scheduling desired by employees, or to provide for employer scheduling requirements where the total number of hours worked does not exceed the threshold for overtime over the averaging period. Overtime averaging should not be permitted for other purposes, unless a specific case can be made by an industry or sector for averaging on a sectoral basis.

Blended Overtime Rate

110. Overtime should be based on the rate in force for the work performed, not on a blended rate if an employee has more than one position.

Leaves of Absence

Personal Emergency Leave

111. We recommend the elimination of the 50-employee threshold and that the personal emergency leave provisions of the *Employment Standards Act, 2000* be made available to all employees in Ontario.

Personal Emergency Leave – Bereavement

112. We recommend that bereavement leave be removed from the *Employment Standards Act, 2000*'s personal emergency leave provisions and be made an independent entitlement of up to three unpaid days for each of the family members covered by the existing personal emergency leave provisions. It should not be limited by an annual restriction and it should be applicable to all employers.

113. We recommend that the personal emergency leave provisions be amended to provide an annual entitlement of seven days for all the reasons currently covered in the provisions, except bereavement.

Personal Emergency Leave – Domestic Violence

114. Section 50 of the *Employment Standards Act, 2000* should be amended to provide that an employee can use personal emergency leave days if the employee is or their minor children are a victim of domestic violence.

115. We also recommend that, in implementing domestic violence leave entitlement as part of section 50 of the *Employment Standards Act, 2000*, the Ministry of Labour consider the definitions of domestic violence and situations of domestic violence referred to in the Manitoba legislation as initial guidelines and should stipulate in the *Employment Standards Act, 2000* that domestic violence leave can be utilized for the purposes set out in the Manitoba legislation.

116. Finally, we recommend that the *Employment Standards Act, 2000* provide that all information related to, and given by, an employee to support the taking of domestic violence leave must be kept confidential, with restricted access to no more than two managerial or human resources personnel and must also be kept separate and apart from any personnel file otherwise maintained by the employer.

Sick Days

117. An employer should be obligated to pay for a doctor's note if the employer requires one.

Interaction between Company Policies and the Personal Emergency Leave Provisions of the Employment Standards Act, 2000

118. We recommend that section 50 of the Employment Standards Act, 2000 be amended to provide that employers must comply with all of its minimum requirements, but employers can decide to add to the entitlements provided under that section.

Other Leaves

Family Medical Leave

119. We recommend that the family medical leave provisions of the *Employment Standards Act, 2000* (section 49.1) be amended to provide for family medical leave of up to 26 weeks in a 52-week period.

Crime-Related Child Death or Disappearance Leave

120. We recommend that the *Employment Standards Act, 2000* be amended by expanding crime-related child death or disappearance leave to provide for a leave of up to 104 weeks with respect to:

- the death of a child
- the crime-related death of a child
- the crime-related disappearance of a child.

Public Holiday Pay

Number of Public Holidays

121. No changes are recommended.

The Rest of the Public Holiday Standard (Part X)

122. Part X of the *Employment Standards Act, 2000* should be reviewed in its entirety, revised, and replaced by statutory provisions that are simpler and easier to understand and apply.

Vacation with Pay

123. We recommend increasing vacation entitlement to three weeks after five years of employment with the same employer, and making a corresponding amendment to the vacation pay provisions (i.e. at least 6% vacation pay).

WHO IS AN EMPLOYER AND WHO IS AN EMPLOYEE

124. The "intent or effect" test of the related employer section in the *Employment Standards Act, 2000* (section 4) should be repealed. Section 4 should be amended by deleting paragraph 4 (1) (b). The section should otherwise remain unchanged.

    The new section 4 (1) would, therefore, provide as follows:

    4. (1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.

125. The definition of employee in the *Employment Standards Act, 2000* should be expanded to include a dependent contractor defined, as in the *Labour Relations Act, 1995*, as follows:

    "dependent contractor" means a person, 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 dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

126. The *Employment Standards Act, 2000* should provide that in any case where there is a dispute about whether or not a worker is an employee, the person receiving the worker's services has the burden of proving that the person is not an employee covered by the Act and has a concomitant obligation to adduce all relevant evidence with regard to the matter.

127. The Ministry of Labour should make misclassification a priority enforcement issue.

EXCLUSIONS

Interns

128. Section1 (2) of the *Employment Standards Act, 2000*, with respect to persons receiving training, should be removed.

Crown employees

129. The provision of the *Employment Standards Act, 2000* that provides a partial exemption for designated Crown employers should be eliminated.

EXCLUSIONS FROM COLLECTIVE BARGAINING

Domestic Employees

130. The domestic workers exclusion should be removed from the *Labour Relations Act, 1995*.

Persons Employed in Hunting or Trapping

131. The exclusion of persons employed in hunting or trapping should be removed from the *Labour Relations Act, 1995.*

Agricultural and Horticultural Employees

132. Agricultural and horticultural employees should be included in the *Labour Relations Act, 1995* and be given the same rights and protections as other employees.

133. The government should consider whether protection of the family farm is a pressing and substantial objective warranting the exclusion of some or all persons employed on a family farm from *Labour Relations Act, 1995* coverage. We offer no specific advice to the government on the appropriate definition of "family farm" but caution that any definition should not be overbroad so as to impair the Charter rights of other agricultural workers.

134. The *Labour Relations Act, 1995* should be amended to provide the Ontario Labour Relations Board with authority to prohibit or limit a strike by employees of an employer in the agricultural or horticultural sector where the employer's enterprise needs to be maintained to protect some or all of planting, growing and harvesting or the integrity, health and safety and/or security of plant or animal life.

135. Where a strike is prohibited, the Ontario Labour Relations Board should be given authority in the *Labour Relations Act, 1995* to be able, at its discretion, to require mediation of the collective bargaining dispute and to request the mediator, if the matter is not resolved, to make recommendations for terms of settlement of the labour dispute including a recommendation on an appropriate dispute resolution mechanism in the absence of a mediated settlement.

136. *The Labour Relations Act, 1995* should be amended to provide that the Ontario Labour Relations Board *must* impose an efficient and effective dispute resolution mechanism to resolve collective bargaining impasse *in any case where it has abrogated or limited the right to strike for agricultural or horticultural employees and where the impasse is not resolved on a voluntary basis by the parties to the dispute.* The mechanisms for final dispute resolution should include: final offer selection (including issue by issue final offer selection); mediation/arbitration; arbitration; or any other dispute resolution mechanism which is capable of resolving in a fair, effective and expeditious manner disputes that arise between employees and employers.

Provincial Judges

137. The exclusion of provincial judges should remain unchanged.

A Person Employed As a Labour Mediator or Labour Conciliator

138. The exclusion of a person employed as a labour mediator or labour conciliator should remain unchanged.

Members of the Architectural, Dental, Land Surveying, Legal or Medical Profession Entitled to Practice in Ontario and Employed in a Professional Capacity

139. Members of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity should be included in the *Labour Relations Act, 1995* and be given the same rights and protections as other employees.

140. With respect to the professionals whose inclusion may result from our recommendations, the *Labour Relations Act, 1995* should be amended to provide the Ontario Labour Relations Board with authority to prohibit or limit a strike by those providing essential services to a community.

141. Where a strike by professional employees is prohibited or limited, the Ontario Labour Relations Board should be given authority in the *Labour Relations Act, 1995* to be able, at its discretion, to require mediation of the collective bargaining dispute and to request the mediator to make recommendations for terms of settlement of the labour dispute, including a recommendation on an appropriate dispute resolution mechanism in the absence of a mediated settlement.

142. The *Labour Relations Act, 1995* should be amended to provide that the Ontario Labour Relations Board *must* impose an efficient and effective dispute resolution mechanism to resolve collective bargaining impasse *in any case where it has abrogated or limited the right to strike for professional*

employees providing essential services and where the impasse is not resolved on a voluntary basis by the parties to the dispute. The mechanisms for final dispute resolution should include: final offer selection (including issue by issue final offer selection); mediation/arbitration; arbitration or any other dispute resolution mechanism which is capable of resolving in a fair, effective and expeditious manner disputes that arise between professional employees and employers.

A Person Who Exercises Managerial Functions or is Employed in a Confidential Capacity in Matters Relating to Labour Relations

143. The exclusion regarding managers and those *employed in a confidential capacity in matters relating to labour relations* should remain unchanged.

> *"The Labour Relations Act, 1995 should be amended to enable an 'intensive mediation' approach similar to the approach currently in use in British Columbia."*

ACQUISITION OF BARGAINING RIGHTS

A Recommended Package

Certification Process

144. The secret ballot process for certification should be preserved, provided that the following recommendations, 145 -149 below, are also accepted:

Remedial Certification (Certification without a Vote)

145. We recommend that section 11 of the *Labour Relations Act, 1995* be revised to provide as follows:

    - Where an employer, an employers' organization, or a person acting on behalf of an employer or employer's organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, the Board, shall on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

First Contract Arbitration

146. Where remedial certification under section 11 is ordered, first contract arbitration under section 43 of the *Labour Relations Act, 1995* should be available, unless the union has bargained in bad faith or is uncompromising without reasonable justification. Where collective bargaining between the parties has not resulted in a collective agreement, the matter should be referred to an expedited and intense mediation/arbitration process and mediated either by a person selected by the parties or by the Ontario Labour Relations Board in the event the parties are unable to agree.

An Intensive Mediation Process for First Contracts

147. The *Labour Relations Act, 1995* should be amended to enable an "intensive mediation" approach similar to the approach currently in use in British Columbia. It should generally follow the statutory scheme in British Columbia with some different or additional elements:

    a) Either the employer or the union may apply to the Chair of the Ontario Labour Relations Board to appoint a mediator to help the parties reach a first collective agreement once the following thresholds have been met: (1) the parties have bargained collectively but failed to conclude an agreement; and

(2) the union has obtained a strike mandate.

b) The second requirement in (a), above, does not apply where the union has obtained remedial certification, or where the union can demonstrate that employer misconduct following certification has resulted in the union becoming unable to obtain a successful strike vote.

c) Once an application is filed, the parties cannot engage in a strike or lock-out unless subsequently so permitted by the Ontario Labour Relations Board.

d) An application must include a list of the disputed issues and the position of the party making the application on those issues. Within 5 days, the other party must give a list of disputed issues and their position on those issues to the other party and to the Ontario Labour Relations Board.

e) The Chair will appoint a mediator within 7 days of receiving the application.

f) If within 20 days the mediation is unsuccessful and a first collective agreement is not reached, the mediator must report back to the Chair and recommend the following steps:

- the terms of the first collective agreement for the parties to consider; and/or,
- a process for concluding the first collective agreement, including one or more of the following:
  - further mediation;
  - mediation/arbitration or arbitration alone, by a single arbitrator or by the Ontario Labour Relations Board; or,
  - strike or lock-out.

g) If the parties do not accept the mediator's recommended terms for the first collective agreement or if an agreement is not reached within 20 days of the mediator's report, the Chair must direct a method for resolving the dispute from the above list.

h) A union that has obtained remedial certification is prima facie entitled to have the dispute subject to mediation/arbitration or arbitration, unless its conduct in bargaining is found to disentitle it to such a remedy.

i) If the Chair orders further mediation or arbitration, the parties cannot engage in a strike or lock-out until subsequently permitted to do so.

j) Any agreement imposed upon the parties is for a term of two years and is binding.

Timeliness of Displacement and Decertification Applications

148. Where a union is certified under section 11 of the *Labour Relations Act, 1995*, applications for decertification or certification should be untimely until the open period of the collective agreement subsequently entered into, unless first contract arbitration is denied, in which case, the current timeliness rules should apply. Where a union or employer apply for intensive mediation under the new proposed rules or for first contract arbitration under section 43 of the Act, no application for decertification or certification should be allowed until that process is completed.

Access to Employee Lists and Contact Information

149. We make the following recommendations:

a) Upon application by a union, if it appears to the Ontario Labour Relations Board that a union has the support of approximately 20% of the employees in a bargaining unit, the Board shall require the employer to disclose to the union the list of

employees in the bargaining unit, together with the work location, address, phone number and personal email address of each employee. The same requirement shall apply if, upon application, it appears to the Board that approximately 20% of the employees in an existing bargaining unit have demonstrated that they no longer wish to be represented by a union; the same list shall be provided to the employee representative.

b) The Board may meet with the parties but is not required to hold a hearing or engage in a formal consultation process.

c) The Board shall not disclose the employer list to the union unless it considers it necessary to disclose some or all of the list in order to fairly determine the matter, in which case it shall disclose only as much information as may be necessary for the union to respond, and it may impose such terms as it considers necessary to preserve the confidentiality of the list so that the union does not obtain it on a permanent basis. The Board shall also not disclose to the employer the number of employees the union has demonstrated as being members of the union.

d) It shall not be a breach of the common law or of any statute for the employer to provide the list of employees in the proposed bargaining unit to the union upon a direction from the Board.

e) The union shall not use the list or any information taken from it at any time for any purpose other than to seek the support of members of the bargaining unit.

f) If the union is provided with a copy of the list pursuant to an order of the Board, employees in the bargaining unit may ask the employer for the same list and the employer shall provide it. The employees to whom the list is provided shall not use the information for any purpose unrelated to the organizing campaign.

g) The same procedure shall apply if approximately 20% of employees in an existing bargaining unit wish to decertify the union.

Electronic Membership Evidence

150. The government and the Ontario Labour Relations Board should prioritize the provision of funds to modernize the electronic submission of information to the Board.

151. The Ontario Labour Relations Board should modernize its rules permitting electronic membership evidence as soon as possible, using either the same tools as British Columbia or such other ones as it devises to ensure the authenticity of electronic membership evidence.

Electronic Voting

152. The Ontario Labour Relations Board should be given the explicit power to conduct voting procedures outside the workplace, including telephone and internet voting.

153. The Ontario Labour Relations Board should prioritize the investigation and development of electronic voting systems that are quick, efficient and preserve the secrecy of the ballot such that this becomes the standard form of voting.

154. Labour Relations Officers should have the explicit authority and duty to give binding directions and to make arrangements in the workplace that assure the neutrality of the voting process.

Consolidation and Amending of Bargaining Units

155. The *Labour Relations Act, 1995* should be amended based on section18.1 of the *Canada Labour Code* with the important

modification that the test should be that the Ontario Labour Relations Board can review the structure if it is satisfied that the bargaining unit or units are no longer appropriate for collective bargaining in the circumstances.

156. The *Labour Relations Act, 1995* should be amended to provide that where the Ontario Labour Relations Board certifies a union (or council of unions) for a bargaining unit, including certification without a vote under section 11, and the same union or council of unions is certified for a unit of employees in a separate location of the same employer or for an additional bargaining unit at the same location, whether or not a collective agreement is in effect in the prior certified unit, the Board, on request, can review the structure of the bargaining units and consolidate or vary the description as the Board may determine. The Board will have the power to apply, with or without modifications, the terms of an existing collective agreement between that employer and union, to the newly constituted unit. The section will apply in sectors or industries *where employees have been historically underrepresented by unions*.

The legal test should give the Ontario Labour Relations Board broad authority to determine which factors it considers appropriate and, also, whether the proposed new unit and/or terms of the agreement contribute to the development of an effective collective bargaining relationship and serve the development of collective bargaining in the sector/industry. The remaining provisions of the new section would mirror, as the context required, the provisions of section 18.1 of the *Canada Labour Code*. For example, votes would not be required since the unit being added would have already met the certification requirements.

> *"The Ontario Labour Relations Board should be given the explicit power to conduct voting procedures outside the workplace, including telephone and internet voting."*

Broader-Based Bargaining

Franchisees

157. We recommend a model wherein certified, or voluntarily recognized, bargaining units of different franchisees of the same franchisor by the same union in the same geographic area, could be required by the Ontario Labour Relations Board to bargain together centrally, with representatives of the franchisee employers in that area, as set out below:

a) An employer bargaining agency, composed of representatives of the franchisees, will represent the franchisee employers at the bargaining table. The Board should be given the authority to require the formation of an employer bargaining agency and set its terms, if necessary. The employer's obligation to bargain centrally would remain so long as the union held bargaining rights.

b) To mirror the recommendation on newly certified locations of a single employer, the Ontario Labour Relations Board would have the authority, if requested by a party involved, to direct that the terms of a collective agreement between a franchisee and a union could be extended to apply, with or without modifications, to a newly certified bargaining unit involving the same union and a different franchisee (in the same franchise organization). The Board would also have the power to require that the franchisee employers bargain centrally.

c) In exercising its authority, the Board should consider whether the proposed terms and bargaining structure contribute to the development of an effective collective bargaining relationship and serve the development of collective bargaining in the sector/industry.

d) Each franchisee would have individual responsibility for compliance with the resulting collective agreement and would sign an agreement binding on its location(s). In this model, agreements by the parties to distinct provisions applicable to some but not other franchisees can be dealt with in collective bargaining.

e) Multiple locations owned by the same franchisee, a common situation in the franchise industry, could be consolidated as a single bargaining unit by the Board in appropriate circumstances pursuant to the recommendation on newly certified locations of a single employer, but that employer would also participate in central bargaining under this recommendation as a franchisee of the same franchisor. Similarly, if corporate stores owned by the franchisor of the franchisees governed by central bargaining were certified, these could be consolidated as a single bargaining unit of the same employer pursuant to the recommendation on newly certified locations of a single employer as well. In addition, if it was the same union as the union centrally bargaining with the franchisees that certified the franchisor, collective bargaining with the franchisor employer would be part of the franchisee central bargaining process.

f) In centralized bargaining, any strike or ratification vote would involve the entire constituency of bargaining units and not the individual bargaining units.

Publicly-Funded Home Care

158. The government should conduct an expedited inquiry, in consultation with the parties involved in the government-funded home care industry, into whether and how sectoral bargaining could be established in the sector within a reasonable time frame. The inquiry should include the issue of dispute resolution.

Creative Sector

159. We recommend that Ontario conduct an inquiry and consultation with all affected interest groups to examine potential changes to the laws, which affect how personal services and labour are provided in the arts and entertainment sectors of the economy, for the purposes of supporting the artistic endeavour in those sectors and those who work in them.

Added Legislative Tools Needed to Facilitate Sectoral Bargaining

160. The government should convene a consultation on whether the *Labour Relations Act, 1995* should be amended to include:

- mandatory accreditation of employer bargaining agencies;
- mandatory councils of unions; and,
- mandatory certification for multiple employers.

RELATED AND JOINT EMPLOYER

Temporary Help Agencies

161. Persons assigned by temporary help agencies to perform work for clients of the agency, or persons assigned by other suppliers of labour to perform work for a person, shall be deemed to be employees of the client or of the person, respectively, for the purposes of the *Labour Relations Act, 1995.*

REMEDIAL POWERS OF THE OLRB

Interim Orders

162. We recommend that section 98 of the *Labour Relations Act, 1995* be repealed, and;

163. We recommend that the power of the Ontario Labour Relations Board to issue interim orders and decisions pursuant to section 16.1 (1) of the *Statutory Powers Procedure Act* be restored.

Prosecutions and Penalties

164. We recommend that the provisions of the *Labour Relations Act, 1995* relating to prosecutions and offences remain unchanged *except* for section 104 (1) of the Act where it is recommended that the maximum amount of fines potentially imposed on conviction be increased as follows:

Every person, trade union, council of trade unions or employers' organization that contravenes any provision of this Act or of any decision, determination, interim order, order, direction, declaration or ruling made under this Act is guilty of an offence and on conviction is liable,

a) if an individual, to a fine of not more than $5,000; or

b) if a corporation, trade union, council of trade unions or employers' organization, to a fine of not more than $100,000.

Our Recommendation should be seen in the context of and as an integral part of other recommendations in this report relating to the remedial jurisdiction of the Ontario Labour Relations Board, including giving the Board additional authority to order arbitration of collective bargaining disputes as well as the authority to make interim orders so as to be able to better protect the exercise of rights by employees under the *Labour Relations Act, 1995*.

RIGHT OF STRIKING EMPLOYEES

165. Section 80 of the *Labour Relations Act, 1995* should be amended by eliminating the six-month time period for striking employees to make an application to return to work. The section should otherwise remain unchanged.

166. The *Labour Relations Act, 1995* should be amended to provide for arbitration, by the Ontario Labour Relations Board or by an arbitrator, of:

a) the refusal to reinstate an employee at the conclusion of a strike or lock-out;
b) any discipline of an employee by an employer during the course of a legal strike or lock-out; and
c) any discipline of an employee by an employer after the expiry of a collective agreement.

JUST CAUSE PROTECTION

167. It is our recommendation that "just cause" protection should not be extended to all employees in a bargaining unit from the date of certification to the date of the first collective agreement.

Our Recommendation should be seen in the context of, and as an integral part of, other recommendations in this Report. In particular, it should be seen in the context of our recommendation on the Right of Striking Employees, above.

SUCCESSOR RIGHTS

168. Successor rights should be applied to the building services industries (security, food services, cleaning) and home care funded by the government.

169. A regulation-making authority should be added to the *Labour Relations Act, 1995* to allow for the possible expansion of coverage to other services or sectors in the future.

ABILITY OF ARBITRATORS TO EXTEND ARBITRATION TIME LIMITS IN THE ARBITRATION PROCEDURE

170. We recommend that section 48 (16) of the *Labour Relations Act, 1995* be amended to include the arbitration procedure, as well as the grievance procedure, so that an arbitrator has the power to relieve against time limits if he or she is satisfied that there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced.

CONCILIATION BOARDS

171. We recommend that the *Labour Relations Act, 1995* be amended to remove the conciliation board provisions.

CONCLUDING RECOMMENDATIONS

172. We recommend that Ontario create an Ontario Workplace Forum of senior business and labour leaders, employee advocates, and senior government officials, with an independent Chair facilitator. The Committee should meet no less than quarterly and have modest support from government. The Forum would discuss the impact of changes in the workplace and the economy from the perspective of the stakeholders and attempt to achieve consensus on appropriate measures that could be taken by government and by the stakeholders. The Forum would also monitor, support and make recommendations to improve any changes implemented by government as a result of this Review.

173. We recommend that Ontario make an ongoing commitment to the process of independent review of the new Workplace Rights Act every five to seven years.

THE CHANGING WORKPLACES REVIEW

AN AGENDA FOR WORKPLACE RIGHTS

Summary Report

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THE CHANGING WORKPLACES REVIEW
AN AGENDA FOR WORKPLACE RIGHTS

Final Report

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Contents

08....**Chapter 01** The Changing Workplaces Review – Final Report: An Agenda for Workplace Rights

18....**Chapter 02** Guiding Principles, Values and Objectives

29....**Chapter 03** Changing Pressures and Trends

41....**Chapter 04** Vulnerable Workers in Precarious Jobs

55....**Chapter 05** Enforcement and Administration

55..... **5.1** Goals and Objectives

55..... **5.1.1** Fostering a Culture of Compliance

57..... **5.2** The Extent of and Reasons for Non-compliance

59..... **5.3** Strategic Enforcement – A Combination of Existing and New Approaches

60..... **5.3.1** Proactive Inspections

64..... **5.3.2** Other Strategic Initiatives

67..... **5.3.3** Focusing at the Top

72..... **5.3.4** A Law Enforcement Agency

72..... **5.3.5** Impact of the Current Complaints-driven System on Enforcement Strategies

73..... **5.3.6** Systemic Campaigns to Counter Systemic Non-compliance

74..... **5.3.7** A Strategic Approach to Litigation

75..... **5.3.8** Current Complaints-based System and the Necessity for Change

80..... **5.3.9** An Accessible Process for Complainants to Have Claims, Not Investigated by the Ministry of Labour, Adjudicated

83..... **5.4** Education of Employees and Employers – Increasing Awareness of Rights and Obligations

84..... **5.4.1** The Proposed Workplace Rights Act

84..... **5.4.2** Education and Outreach

89..... **5.4.3** Internal Responsibility

93 ..... **5.5** Increased Protection for Employees Who Seek to Enforce Their Rights
93 ..... **5.5.1** Greater Protection for Employees from Reprisals
101 ..... **5.5.2** Temporary Foreign Workers
102 ..... **5.6** Access to Justice
102 ..... **5.6.1** Improving the Complaint and Review Process – Assistance to Employee Complainants
104 ..... **5.6.2** Removing a Barrier to Claimants
106 ..... **5.6.3** Anonymous, Third Party, Whistleblower and Individual Complaints and Confidentiality of Identity of the Complainant
106 ..... **5.6.3.1** The Current Provisions of the ESA
107 ..... **5.6.3.2** Anonymous Complaints
108 ..... **5.6.3.3** Confidentiality
115 ..... **5.6.4** Applications for Review
121 ..... **5.6.5** Settlements
123 ..... **5.7** Remedies and Penalties
123 ..... **5.7.1** The Current Law
126 ..... **5.7.2** Voluntary Compliance Measures
127 ..... **5.7.3** Enforceable Undertakings
129 ..... **5.7.4** The Current Approach to Sanctions and Proposed Changes
134 ..... **5.8** Security for Employee Remuneration
134 ..... **5.8.1** The Concern
135 ..... **5.8.2** Other Provinces
137 ..... **5.8.3** Practical Impact of Bankruptcy
137 ..... **5.8.4** Federal Protection for Employee Remuneration Claims
138 ..... **5.8.5** Analysis
140 ..... **5.8.6** Director Liability for Employee Remuneration

148 .... **Chapter 06** Sectoral Regulation and Exemptions
152 ..... **6.1** Review of Existing Exemptions
155 ..... **6.2** Sectoral Committees:
156 ..... **6.3** Recommendations on Specific Exemptions
156 ..... **6.3.1** Information Technology Professionals, Pharmacists, Residential Building Superintendents, Janitors, and Caretakers
156 ..... **6.3.1.1** Information Technology Professionals and Pharmacists
157 ..... **6.3.1.2** Residential Building Superintendents, Janitors, and Caretakers
157 ..... **6.3.2** Student Minimum Wage for Those Under 18
161 ..... **6.3.3** Student Exemption from the “Three-hour Rule”
162 ..... **6.3.4** Liquor Servers’ Minimum Wage
166 ..... **6.3.5** Managers and Supervisors

172....**Chapter 07** Changes to Basic Standards
172.....**7.1** Part-time, Casual, Temporary, Seasonal and Contract Employees
172.....**7.1.1** Part-time Employees
177.....**7.1.2** Equal Pay with Comparable Full-time Employees
179.....**7.1.3** Casual, Temporary, Seasonal and Contract Employees
180.....**7.1.4** Casual and Seasonal Employees
181.....**7.1.5** Temporary and Contract Workers
182.....**7.1.6** Benefit and Pension Plan Coverage
186.....**7.1.7** Contract Employees – Renewable Contracts
187..... **7.2** Scheduling, Right to Request, and "Three-hour Rule"
187..... **7.2.1** Scheduling
192..... **7.2.1.1** Sectoral Regulation of Scheduling
193.....**7.2.2** Right to Request
198.....**7.2.3** "Three-hour Rule"
198..... **7.3** Temporary Help Agencies
198..... **7.3.1** Triangular Relationship
205 .....**7.3.2** Compensation Equality and Job Permanency
209 .....**7.3.3** Termination Pay
212.....**7.3.4** Workplace Safety for Assignment Workers
218..... **7.4.** Hours of Work and Overtime
218..... **7.4.1** Employee Consent
220 .....**7.4.2** Requirement for Ministry of Labour Consent to Work Longer Than 48 Hours a Week
222 .....**7.4.3** 11-hour Rule
223 .....**7.4.4** Overtime and Overtime Averaging
223 ..... **7.4.4.1** Overtime
223 ..... **7.4.4.2** Overtime Averaging
225 ..... **7.4.4.3** Blended Overtime Rate
226 ..... **7.5** Leaves of Absence
226 .....**7.5.1** Personal Emergency Leave
229 .....**7.5.2** Personal Emergency Leave Entitlement
235 .....**7.5.3** Bereavement Leave
236 .....**7.5.4** Personal Illness and Family Emergencies
242.....**7.5.5** Domestic Violence
243 .....**7.5.6** Sick Days
245.....**7.5.7** Interaction between Company Policies and the Personal Emergency Leave provisions of the ESA
247.....**7.5.8** Summary of Personal Emergency Leave Recommendations
248.....**7.5.9** Family Medical Leave
249.....**7.5.10** Crime-Related Child Death or Disappearance Leave

250 ..... 7.6 Public Holiday and Vacation Pay
250 ..... 7.6.1 Number of Public Holidays
250 ..... 7.6.2 The Rest of the Public Holiday Standard (Part X of the ESA)
251 ..... 7.6.3 Public Holiday Pay Calculation
254 ..... 7.6.4 Qualifying and Disqualifying Criteria
255 ..... 7.6.5 Paid Vacation

256 ...Chapter 08 Who Is an Employer and Who Is an Employee Under the ESA
256 ..... 8.1 Who is an Employer?
256 ..... 8.1.2 Related Employers
262 ..... 8.2 Who is an Employee?
262 ..... 8.2.1 Scope and Coverage of the ESA
262 ..... 8.2.2 Misclassification of Employees
265 ..... 8.2.3 Definition of Employee in the ESA
269 ..... 8.2.4 Independent Contractors

273 ....Chapter 09 Exclusions from Basic Standards
273 ..... 9.1 Interns/Trainees
275 ..... 9.2 Crown Employees

277 ....Chapter 10 Scope and Coverage of the LRA
277 ..... 10.1 Coverage and Exclusions
278 ..... 10.1.1 Freedom of Association and Collective Bargaining
281 ..... 10.1.2 The Right to Strike for Essential Service Employees
283 ..... 10.1.3 The Obligation of Government to Eliminate Barriers to the Exercise and Realization of Rights of Freedom of Association
284 ..... 10.1.4 The Current LRA Exclusions
286 ..... 10.2 Domestics Employed in a Private Home
288 ..... 10.3 Persons Employed in Hunting or Trapping
288 ..... 10.4 Agricultural and Horticultural Employees
289 ..... 10.4.1 Agricultural Employees
293 ..... 10.4.2 *The Agricultural Employees Protection Act, 2002*
294 ..... 10.4.3 Employees Engaged in Agriculture – Factors To Be Taken into Account
298 ..... 10.4.4 The Defects of the AEPA
301 ..... 10.4.5 Other Canadian Jurisdictions
304 ..... 10.4.6 Horticultural Employees
306 ..... 10.5 Provincial Judges
306 ..... 10.6 A Person Employed As a Labour Mediator or Labour Conciliator
307 ..... 10.7 Professionals – Members of the Architectural, Dental, Land Surveying, Legal or Medical Profession Entitled to Practice in Ontario and Employed in a Professional Capacity
310 ..... 10.8 A Person Who Exercises Managerial Functions or is Employed in a Confidential Capacity in Matters Relating to Labour Relations

312....**Chapter 11** Access to Meaningful Collective Bargaining: The Decision to Unionize
315.....**11.1** Criteria for our Recommendations
322..... **11.2** A Recommended Package
325..... **11.2.1** Remedial Certification (Certification Without a Vote)
326..... **11.2.2** First Contract Arbitration
327..... **11.2.3** An Intensive Mediation Process for First Contracts
331..... **11.2.4** Timeliness of Displacement and Decertification Applications
332..... **11.2.5** Access to Employee Lists and Contact Information
338 ..... **11.2.6** The Recommendation Package: Recap and Rationale
339 .....**11.3** Electronic Membership Evidence
340 .....**11.4** Voting
343 .....**11.5** Consolidation and Amendment of Bargaining Units
352.....**11.6** Broader-Based Bargaining
357..... **11.6.1** Franchising in Restaurants, Fast Food, and Similar Specified Sectors/Industries
361..... **11.6.2** Publicly-funded Home Care
364 ..... **11.6.3** Arts and Entertainment: the Creative Industries
366 ..... **11.6.4** Added Legislative Tools Needed to Facilitate Sectoral Bargaining
367..... **11.6.5** The Future of Sectoral Bargaining

369 ...**Chapter 12** Who Is the Employer Under the LRA?
374..... **12.1** Franchising
375..... **12.2** Temporary Help Agencies

381....**Chapter 13** Other
381..... **13.1** Remedial Powers of the Ontario Labour Relations Board
381..... **13.1.1** Interim Orders
388 ..... **13.1.2** Prosecutions and Penalties
394 ..... **13.2** Right of Striking Employees to Return to Work
395 ..... **13.2.1** The Right to Return to Work After Six Months From the Beginning of a Legal Strike
399 .....**13.2.2** Should Employees Engaged in a Lawful Strike or Lock-out, Who Are Disciplined or Discharged for Strike- or Lock-out- Related Misconduct, Have Access to Arbitration?
405 ..... **13.3** "Just Cause" Protection from Certification to Date of First Collective Agreement
409 ..... **13.4** Successor Rights
413..... **13.5** Ability of Arbitrators to Extend Arbitration Time Limits in the Arbitration Procedure
415..... **13.6** Conciliation Boards

416....**Chapter 14** Concluding Recommendations

01 | The Changing Workplaces Review – Final Report: An Agenda for Workplace Rights

Introduction

This is the first independent report in Canada to consider, as a unified exercise, the need for specific legislative changes to two separate but related pieces of workplace legislation, namely, the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act* (LRA). By the terms of our mandate, we have considered the need for reform through the lens of changes that have been occurring in the workplace over a lengthy period of time.

Previous reviews in Ontario and Canada have considered the desirability and necessity for change from the perspective of what might be required to improve the labour relations system at a particular point in time, or to improve minimum standards, which affect mostly non-unionized workplaces. By simultaneously considering how the changes that have occurred, and are still occurring, in workplaces across Ontario are giving rise to the need for reform in both statutes, we have been mandated to bring a unique and original perspective to the issues.

Our recommendations are aimed at creating better workplaces in Ontario, where there are decent working conditions and widespread compliance with the law.

A society where decent labour standards are observed and respected in the vast majority of workplaces, and where rights to meaningful collective bargaining are acknowledged and not undermined, would ideally result in an economy based on a sound and ethical foundation and workplaces that are productive and fair. Overall, our society would be a better place and we would all benefit.

Certainly, employees will benefit from a better workplace. Employers, too, stand to benefit from happier and more productive workplaces, more robust enforcement of the law and more education of employees and employers with respect to the rights of employees and the obligations of employers. Responsible and law-abiding employers, who are in the vast majority, are entitled to know that they can compete on a level playing field with those who might otherwise gain an unfair advantage by not playing by the rules.

These goals of a culture of decency and compliance will be advanced by all the individual measures we are urging be adopted here, measures that are a combination of substance and process, decency and enforcement. Foremost among our recommendations is a new Workplace Rights Act, to herald a new era of workplace decency and compliance with the law.

A Workplace Rights Act

What has been striking about this process to us is the consensus view of employers, employees and unions that, in most of our workplaces, there exists a profound lack of knowledge and understanding about fundamental rights under both the *Employment Standards Act, 2000* and the *Labour Relations Act*. It is ironic that, in the workplaces where most of us spend the majority of our lives, and where terms and conditions of our employment are vital to our well-being, there is such a lack of understanding of the rights and responsibilities of employees and employers.

What needs to be communicated forcefully and effectively is that those who are employed in a workplace have basic rights and are entitled to have those rights observed and respected. As employees come to understand that they have important rights, they will expect them to be observed. In turn, the employers who do not comply with the law will also come to understand that they have to respect those rights and are at serious risk if they do not. Raising the level of knowledge will raise consciousness and, together with robust enforcement of the law, will raise the level of compliance and improve the quality of people's lives in the workplace.

As we elaborate in our chapter on *Employment Standards Act, 2000* enforcement, one of our goals in this process is to achieve a culture of compliance with employment standards and the rights of workers under the *Labour Relations Act*, while continuing to promote health and safety obligations. However, the goal is that both employers and employees are aware of their legal rights and responsibilities in the workplace and that the law is easy to access, to understand and to administer.

If a culture of compliance with the law existed in all of our workplaces, it would be unacceptable not to provide workers with the minimum requirements that the law demands, as employees would be aware of their rights and would feel safe in asserting them. Widespread abuse of basic rights would not only be legally impermissible but culturally and socially unacceptable. There would be a strong element of deterrence in the system as those who engaged in deliberate flouting of the law would be dealt with, not only by having to make restitution but also by being liable for significant administrative monetary penalties.

Accordingly, one of our main policy goals is to increase awareness, understanding and compliance with rights in the workplace by employers and employees. The imbalance in the power relationship between employers and employees leads many employees to be reluctant to pursue their rights. This lack of power, together with the lack of knowledge by employees of their rights, makes already vulnerable workers even more vulnerable. Ignorance of legal requirements and the complexity and obscurity of the law require that priority be given to the widespread communication of rights and responsibilities, the education of all concerned, and the simplification of the law. To this must be added robust enforcement strategies and penalties for non-compliance, which will give workers confidence that society takes their rights seriously and lets employers know there will be serious consequences if they fail to comply. As we reiterate, the goal over time is nothing less than the development of a culture of compliance with statutory norms and rights.

There are many ways this can be accomplished and it will take a variety of measures to make substantial progress towards that goal. In our enforcement section on employment standards, we address specific measures. An important recommendation designed to create a culture of compliance is that the critical components of workplace rights be packaged together under a common umbrella, to be communicated and marketed together as a comprehensive “Workplace Rights Act”.

In our judgement, in order to promote education and understanding of entitlements, and expectations and obligations in the workplace, the structure of the legislation in Ontario governing the workplace must be reformed. Just as the name “Ontario Human Rights Code”, gave rise to an understanding among the population that there are fundamental human rights that have to be respected, so too must we change the names of these laws to convey the fact that fundamental rights, entitlements and obligations arise in the workplace and must be respected.

Creating a culture of compliance requires increased awareness, understanding and compliance with basic rights in the workplace. The creation of a Workplace Rights Act is an important and necessary step in conveying to all Ontarians that being an employee in a workplace carries with it fundamental rights. It will serve as a constant reminder to employees of those rights and to employers of their obligations and the need to respect the rights of employees.

Currently, employee rights in the workplace are established by three pieces of legislation: the *Employment Standards Act, 2000* the *Labour Relations Act and the Occupational Health and Safety Act* (the Acts).

Having three statutes – none of which refer to "rights" of employees in the title – does not contribute to a broad understanding of workplaces and the rights of people who work in them. These three statutes should be consolidated into a new Workplace Rights Act composed of three parts. The first part would consist of what is now the *Employment Standards Act, 2000*, which sets out minimum terms and conditions of employment for all workplaces and provisions for securing compliance and enforcement. It could be referred to as "Rights to Basic Terms and Conditions of Employment". The second part of a new, consolidated Act would be the current *Labour Relations Act*, which governs the rules surrounding the formation of unions, the acquisition and termination of bargaining rights, collective bargaining in workplaces and unfair labour practices. It should be referred to as "Rights to Collective Bargaining". The current OHSA would be the third part of a new Act. It deals with the creation, maintenance and enforcement of rules designed to make workplaces safe. It should be referred to as "Rights to a Safe and Healthy Workplace".

The term "employment standards" fails to convey that there are statutorily mandated rights and obligations. This legislation establishes the right of employees to basic terms and conditions of employment in the workplace. The name of the Act should convey the message of "rights".

Just as "employment standards" is an archaic term, the use of the term "labour relations" does not convey that the legislation is the codification of employees' constitutional rights to freedom of association. Few understand what "labour relations" means.[1]

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1 The term is sometimes used as a synonym for "industrial relations" or as the rules for managing unionized employment relationships. It is used to describe the sense of prevailing attitudes between unions and employers as in "labour relations climate" or to describe activities, as in "labour relations activities". It is also used by some practitioners in the field to mean the body of best practices and attitudes that enhance relationships between unions and employers.

The same criticism applies to the title of the OHSA. This legislation deals with safety and health in the workplace; the title of the act should not obscure that. In short, nothing will be lost[2] and much can be gained from the elimination and disuse of these existing titles.

Employees should be educated that their status as an employee in a workplace entitles them to three basic pillars of rights, which are:

a. basic decent working conditions;

b. a safe and healthy workplace; and,

c. the right to engage in unionization[3] and meaningful collective bargaining.

A combined Act will help to educate everyone in our society to speak and to think in terms of the rights that go with workplaces as opposed to having a separate set of discrete rights spread among different statutes with different conceptual frameworks. It is crucial to develop a broadly-based public understanding that important rights derive from the status of being a worker in a workplace. To facilitate that goal, it is important to have fundamental rights contained within one Workplace Rights Act and to communicate to employees and to employers the three pillars upon which the new Act will stand.

Government should communicate clearly to both employees and employers that basic rights flow from the status of being an employee. Of course, the elements of all three "pillars" are also important to communicate, but a Workplace Rights Act will underscore that there are fundamental rights that inure to all those employed in the workplace and that those rights all need to be respected.

Unifying the most important rights that arise in a workplace under the single umbrella of a Workplace Rights Act may also assist in the many administrative areas of the different statutes, such as education, interpretation, and enforcement.

At present, the cost of administering OHSA is borne by employers covered by the *Workplace Safety and Insurance Act, 1997*[4] and OHSA training and education is extensive. However, the education and training of employees and employers as to

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2 "OSHA" has an identity and something of a brand that promotes safety, but it would be far more powerful if it contained the words "right", "workplace", and "safety" which would convey that there is a right to a safe workplace, as opposed to using an acronym.

3 The *Labour Relations Act* now uses the word "trade union" to describe unions. This is an anachronistic historical term and only serves to obscure for the population what it means. Its usage should be discontinued.

4 Section 22.

their rights and obligations under the *Employment Standards Act, 2000* is not as effective as it should be. The education of employees of their rights to unionize and to engage in collective bargaining is virtually non-existent, if not discouraged, in many non-unionized workplaces. This lack of education and understanding of the fundamental rights that attach to an employee in the workplace is a barrier to the creation of a culture of compliance in which the provision of basic decent working conditions, respect for the right to bargain collectively and a safe workplace, are all central components.

Government, unions, employee advocates and employers all need to invest in the education relating to all the rights and responsibilities of workers and employers. Charging MOL with the responsibility to provide comprehensive education with respect to all three pillars of the Workplace Rights Act would be more efficient and effective than operating exclusively within silos. Education regarding the right to basic terms and conditions of employment and the constitutionally-guaranteed right to engage in collective bargaining will be significantly enhanced through a more active and centralized approach designed to educate and increase the awareness of all employees of their rights in the workplace.[5]

Greater education of employees, the communication of a commitment that government will enforce the law, the development of a role for MOL as law enforcement agency, and the knowledge that employees can easily notify government of employer failure to comply with the law, will put pressure on non-compliant employers and will enhance competition of all employers on a level playing field.

Administration and enforcement of a single Act, will also lead to efficiencies and more rational policy administration. The Ontario Labour Relations Board (OLRB) already has important responsibilities for interpretation and adjudication in aspects of all three Acts. One recommendation in this review, if accepted, would enlarge and strengthen the role and the powers of the OLRB to enforce employment standards. Over time, its role in adjudicating enforcement could be extended to a broader range of health and safety matters where the OLRB already has expertise. It ought to have a key oversight and adjudicative role in the interpretation and application of the new Act. Consolidating the Acts into one and expanding the role of the Board under the new Act would be efficient and leverage its experience and expertise in the law of the workplace.

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5 For example, instead of a single *Employment Standards Act* poster, employers should also be required to post and to circulate in their workplaces an overarching Workplace Rights Act Notice which delineates the essence of the three pillars of the new Act.

In terms of administration and enforcement, we do not think it is practical at the moment to combine enforcement officer roles in occupational health and safety and employment standards. However, over time, there could be some blending of roles, sharing of information regarding non-compliant employers and joint approaches to enforcement strategies. As a first step, all MOL inspectors and officials should be authorized and required to report any violation of labour legislation that comes to their attention.

Improving Security and Opportunity for Vulnerable Workers in Precarious Work

Our mandate requires us to consider the needs of vulnerable workers in precarious work and the need to support business in the Ontario economy. We set out, below, how we have approached our mandate and some of our key findings.

We explained in our Interim Report that our mandate requires us to consider, not exclusively but primarily, all workers in Ontario whose employment:

- makes it difficult to earn a decent income;
- interferes with their opportunities to enjoy decent working conditions; and/or
- puts them at risk in material ways.

Our interest is not limited to those in non-standard employment,[6] which, as a category of employment, is not wholly comprised of vulnerable workers in precarious work. Although there is some strong correlation between non-standard employment and vulnerable workers in precarious jobs, we recognize that some who work in non-standard employment are not vulnerable, such as highly-paid contract workers or highly-paid self-employed contractors. Our mandate transcends the standard/non-standard classification of employment and requires a focus, not only on workers whose employment is contingent, uncertain or temporary, but also on workers in low-paid employment without pensions or benefits who are full-time, and on part-time employees in similar low-paid employment who often may not want to work more hours because they must take care of their families, or go to school, or are older. We do not think it makes public policy sense to limit our inquiry to only non-standard employment.

6 This includes mainly involuntary part-time, temporary, multiple-job holders and self-employed workers who do not employ others.

No one doubts that a temporary worker, or a part-time worker who wants a full-time job but is working in a minimum wage or low-aid job without a pension or benefits, is vulnerable and is employed in precarious work. But there is also a real vulnerability, for example, in a low- paid employee, earning somewhat above minimum wage in a full-time job without a pension or benefits. So, too, is there a real vulnerability for a single mother who works part-time for low wages without a pension or benefits because she cannot work full-time due to her child care responsibilities. Both are classified in what is described as standard employment, but the lack of security inherent in those jobs creates uncertainty and insecurity for the worker, which justifies regarding it as precarious employment and recognizing the vulnerability of these workers.

There is no doubt that there are many legitimate social and economic concerns regarding vulnerable employees in precarious employment. Their problems are widespread and significant. Indeed, in many respects their situation cries out to be addressed, and our report, in some important aspects, provides a variety of responses to issues facing vulnerable employees in precarious employment.[7]

We have considered the point of view of the Ontario Chamber of Commerce (OCC) and the Keep Ontario Working Coalition (KOWC) that the issue of precariousness in our society has been overstated. Respectfully, we do not agree and we have tried to quantify the number of vulnerable workers in precarious work in Ontario and to set out all the other relevant data in Chapter 4. Even if the number of affected workers had been significantly smaller than we have estimated, our conclusion is unaffected, as the issues arising out of the changed nature of workplaces present our society with serious policy concerns that should be addressed.

In our view, there are, across our economy, particularly in certain sectors, a significant number of vulnerable workers in precarious jobs. These sectors include: retail, restaurants, food services, child care, custodial services, some parts of the public sector, agriculture, and construction. Some are employed through temporary help agencies and some are “contract employees”. This group includes a disproportionate number of women but also increasing numbers of men,

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7 Our particular recommendations on the inclusion of domestics and agricultural and farm workers in the *Labour Relations Act*, acquisition of bargaining rights generally, who is the employer under the *Labour Relations Act and Employment Standards Act, 2000* consolidation of single-employer multiple-location bargaining units, deemed employer status for temporary help agency workers, successor rights, greater enforcement, rights of part-time, casual, temporary and seasonal workers, exemptions under the *Employment Standards Act, 2000* misclassification, scheduling, student minimum wage, liquor server minimum wage, new temporary help agency rules, and personal emergency leave, to name just some of our specific proposals, are specifically geared to improving opportunity and security for vulnerable workers in precarious work.

members of racial and ethnic minorities, immigrants, and youth who are working in low-wage jobs, many of them temporary, many of them in unstable employment with little or no security, and mostly without pensions and/or benefits.

Among this group of vulnerable employees is a large number who are subject to unpredictable and varied hours of work and subject to scheduling practices of their employers where too little account is taken of the employees' needs for predictability in their lives.

In our hearings across Ontario and in our meetings, we found a great deal of uncertainty, anxiety and stress undermining the quality of life and the physical well-being of a wide swath of workers in our society. The combination of low income, uncertainty, lack of control over-scheduling, lack of benefits, such as pensions and health care, personal emergency leave or sick leave, all together or in various combinations, creates stress and many other difficulties which affect the quality of life, mental health and overall physical health of many employees. We have tried to address some of these concerns in our recommendations.

Supporting Business in a Changing Economy

The mandate directed to us was to be supportive of business in a changing economy.

We recognize the importance of the role that businesses play in creating growth and jobs in the economy and how this contributes to the well-being of all Ontarians. With increased competitive pressures, it is necessary to consider the impact of any policy initiative on business costs. This means taking into account businesses' need for flexibility and reduced administrative burdens. It also means encouraging a level playing field by supporting employers in understanding and meeting their obligations.

The Ontario Chamber of Commerce and the Keep Ontario Working Coalition have said: "the goals of economic growth and improved employee rights are not mutually exclusive". We agree and, based on the mandate, it is apparent the MOL does also. While these two objectives are not mutually exclusive, they underscore the need for a balanced approach to change and, in the context of our mandate, we have endeavoured to strike a balance by taking the bona fide interests of all the stakeholders into account in making our recommendations. Others will assess whether the balance has been struck.

Recommendations:

1. We recommend that the *Employment Standards Act, Labour Relations Act* and *Occupational Health and Safety Act* be consolidated under a single *Workplace Rights Act*[8] and that the three parts of this new Act be entitled: Rights to Basic Terms and Conditions of Employment, Rights to Collective Bargaining, and Rights to a Safe and Healthy Workplace.

2. We recommend that government initiate a program of education for employees and employers both with respect to the Workplace Rights Act and the rights and obligations of employees and employers under each part.

3. We recommend that all MOL inspectors and officials should be authorized and required to report any violation of labour legislation that comes to their attention.

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8 We recognize that there will continue to be some rights, such as pay equity, and some workplaces that will continue to be governed by other tribunals and statutes, such as those for public servants, police and fire fighters, teachers, and colleges. These require their own sets of rules and separate statutes. But the general goal should be a single source of workplace rights for minimum standards, collective bargaining and health and safety. For this reason, we are also opposed to a transfer of adjudicative functions from the OLRB to other tribunals.

02 | Guiding Principles, Values and Objectives

Our Terms of Reference state that the objective of this Review is to improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians. We are directed to:

> *… consider the broader issues affecting the workplace and assess how the current labour and employment law framework addresses these trends and issues with a focus on the LRA and the ESA. In particular, the Special Advisors will seek to determine what changes, if any, should be made to the legislation in light of the changing nature of the workforce, the workplace, and the economy itself, particularly in light of relevant trends and factors operating on our society, including, globalization, trade liberalization, technological change, the growth of the service sector, and changes in the prevalence and characteristics of standard employment relationships.*[9]

An important focus is on vulnerable workers in precarious jobs in the context of employment standards and labour relations. It is trite to observe that effective protection of workers under both statutes depends on the education of employees and employers concerning:

- their respective legal rights and obligations;
- respect for the law;
- consistent enforcement; and
- effective compliance strategies.

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9 "Terms of Reference – Changing Workplaces Review," Ontario Ministry of Labour, last modified February 2015, http://www.labour.gov.on.ca/english/about/workplace/terms.php

This focus on vulnerable workers in precarious jobs requires us to address:

- minimum standards of work;
- the labour relations framework; and
- whether the current legal framework effectively protects the rights of such workers.

Our mandate is to make recommendations on how the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995* might be reformed to better protect workers while supporting businesses in our changing economy. We must determine what changes, if any, should be made to the legislation in light of the changing nature of the workforce, the workplace, and the economy.

Before turning to principles, values and objectives, we would like to mention two contextual and overarching themes. The first is the importance of work to all Ontarians. In this regard, we can do no better than to quote the former Chief Justice of the Supreme Court of Canada Brian Dickson on the central importance of work:

> *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. Accordingly the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.*[10]

Recognition of the central importance of work is the context in which we articulate the principles guiding our recommendations.

A second important contextual factor is the inherent power imbalance and inequality of bargaining power between employer and employee, or what the Supreme Court has stated to be "the presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker."[11] This power imbalance manifests itself in almost every aspect of the employment

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10 Reference Re Public Service Employee Relations Act (Alta.), (1987) 1 SCR 313, para. 91.
11 *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, (2013) SCC 62, 3 SCR 733, para. 32.

relationship, particularly in a non-union environment. As the Supreme Court has observed: "Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers."[12] A recognition of this power imbalance has always informed the need for and the content of legislation of basic employee rights and employer obligations where the law acts as a countervailing force to the power imbalance in the employment relationship. Without legislation of basic employee rights and corresponding employer obligations, most employees would be powerless and vulnerable to the unilateral exercise of power by employers.

In the first phase of our consultations we asked for, and received, advice on the principles, values and objectives that should guide our work. These are the key principles, values and objectives that governed us in making our recommendations.

Decency at Work

In *Fairness at Work*, Professor Harry Arthurs stated that labour standards "should ensure that, no matter how limited his or her bargaining power, no worker… is offered, accepts or works under conditions that Canadians would not regard as 'decent'".[13]

We believe that decency at work is a fundamental and principled commitment that Ontario should accept as a basis for enacting all of its laws governing the workplace.

Not only does the concept of decency at work relate to minimum acceptable workplace standards, but it also applies to the furtherance of decency through the expression of a collective voice and the facilitating of harmonious labour relations between employers and employees.

The International Labour Organization describes decent work as follows:

> *Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.*

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12 *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, para. 70.
13 Harry Arthurs, Fairness at Work: Federal Labour Standards for the 21st Century (Gatineau: Human Resources and Skills Development Canada, 2006), p. 47.

It is beyond the scope of our mandate and of labour standards laws to legislate decent work. Creating the conditions for decent work necessarily involves numerous stakeholders – government, employers, employees and their representatives – working together to ensure working environments where the dignity of employees is respected, in conditions which do not keep employees or their families in poverty, in which the potential inherent in every employee can be realized, and which do not put at risk employee health and safety. Ideally, actions of government and of workplace stakeholders will focus on making changes that not only eliminate poor employment practices but also which seek to change the conditions that produce such practices.

This focus will of necessity involve:

- education;
- increased training and skills development;
- efforts to eliminate discrimination; and
- efforts to consistently enforce employee rights.

Some, but not all, of these objectives are within the scope of this Review.

We are committed to making recommendations for minimum terms and conditions of employment and for a labour relations system that are consistent with – and will help pave the way to – the ultimate objective of creating decent work Ontarians, particularly for those who have been made vulnerable by changes to our economy and workplaces. Furthermore, we are committed to do this within an overall framework that respects employer needs.

Respect for the Law and a Culture of Compliance: Meaningful Enforcement

We regard as critically important that there be a respect by all Ontarians for the laws of the workplace, and that we as a society recognize the importance of compliance with the law. We need to foster a culture where compliance with minimum terms and conditions of employment – together with respect for the rights of employees to organize and to bargain collectively – is widespread. Rules that are easy to understand and administer, and that provide workplace parties with compliance tools, together with enforcement that is consistent, are key to achieving these objectives.

In the absence of respect and general compliance with the laws governing the workplace, together with a meaningful ability to enforce those laws and to gain access to justice, the passage of laws by itself is relatively meaningless. There is probably nothing that causes more long term disrespect for the law than laws which are widely disregarded, exist only on paper and have no meaningful impact on people's lives. We agree that:

> *Ontarians also live in a society that strives to maximize access to justice for its citizens. Sophisticated and highly evolved rights and obligations are of little value if they cannot be asserted or enforced effectively and economically.*[14]

Access to Justice

The Chief Justice of Canada has spoken on the importance of access to justice stating that: "In order to maintain confidence in our legal system, it must be, and must be seen to be accessible to Canadians."[15]

Access to justice has both procedural and substantive components. Especially in the employment arena, complaint procedures must afford ordinary Ontarians the opportunity for fair and just adjudication and enforcement of their rights. Such opportunity for dispute resolution should be efficient, proportionate and accessible to self-represented individuals.

Our recommendations should recognize and attempt to reduce barriers to access to justice. Procedural efficiency and timely adjudication, if achievable, are designed to minimize or eliminate an economic barrier. But as the Supreme Court has reminded us[16] an economic barrier to access to justice is not the only barrier that should concern legislators; this is particularly true when the barriers have such profound implications for many vulnerable working Ontarians.

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

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14 Advisory Committee on Class Action Reform, Report of the Attorney General's Advisory Committee on Class Action Reform (Toronto: Ontario Ministry of the Attorney General, 1990), p. 16.

15 *Bourgoin v. Ouellette et al.*, (2009) 343 NBR (2d) 58.

16 *AIC Limited v. Fischer*, 2013 SCC 69.

status and fear of reprisals. While the availability of resources and the uniqueness of individual circumstances may – as a practical matter – impair the ability of government to respond in a meaningful way to every barrier a claimant might face, we must be sensitive to the barriers and consider recommendations that may ameliorate them.

Consistent Enforcement and Compliance and a Level Playing Field

Consistency in the law is a value that in the labour and employment context means– among other things – consistent enforcement. Consistent enforcement means not only a level playing field for employers and business; it is also necessary for the law to be reputable. As Professor Arthurs observed:

> *Labour standards ultimately succeed or fail on the issue of compliance. Wide spread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law.*[17]

Consistent enforcement and encouraging a culture of compliance will ensure a level playing field for all business. A level playing field "ensures that all those who are similarly situated should be regulated according to the same rules, and that the law should guarantee equal protection for all its intended beneficiaries." A level playing field "serves to protect not only workers but also the majority of fair-minded employers who wish to meet their legal obligations without the risk of being undercut by those who do not. Clear laws, effective oversight, consistent interpretation and certainty of enforcement are critical to ensuring observance of the level playing field principle."[18]

Policies designed to encourage compliance and remedies designed to sanction the illegal behaviour of non-compliant parties are necessary. To encourage compliance, viable enforcement proceedings and strategies must be available and fines and penalties sufficient to deter non-compliance must be an integral part of achieving a culture where the law is respected and compliance is normative.

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17 Arthurs (2006), *op. cit.*, p. 53.
18 *Ibid.*, p. 53.

Freedom of Association and Collective Bargaining

In previous reviews of labour law in the province of Ontario, freedom of association for the purpose of collective bargaining and the right to strike had not yet been fully and forcefully established as a constitutional right. This is the first review of the *Labour Relations Act* where account must be taken by government that in Canada the right to meaningful collective bargaining is a critically important constitutional right. The source of this right is The *Canadian Charter of Rights and Freedoms* that contains the guarantee of freedom of association in section 2(d).

The Supreme Court of Canada has provided significant jurisprudence relating to freedom of association under section 2(d) of the *Charter* that has, in the main, developed with respect to labour relations. The Court has given freedom of association a robust and purposive interpretation that is binding on all governments in Canada. In numerous cases, the Court has unambiguously set out the importance of the constitutional right that is protected. In the *Mounted Police Association case*,[19] the Court said:

> *Freedom of association … stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.*

As in other labour cases, the Court, in *Mounted Police*, made it clear that in the employment context, freedom of association guarantees the right of employees to "meaningfully associate in the pursuit of collective workplace goals" and furthermore "includes a right to collective bargaining."[20]

> *Without the right to pursue workplace goals collectively, workers may be left essentially powerless in dealing with their employer or influencing their employment conditions. This idea is not new. As the United States Supreme Court stated in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), at page 33:*
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> > *Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation;* that a single employee was helpless in dealing with an employer*; that he was dependent ordinarily on his daily wage for the maintenance of himself*

19 *Op. cit.*, para 49.
20 *Ibid.*, para. 68.

> *and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment ... [Emphasis added.]*

On numerous occasions the Court has recognized the importance of freedom of association in responding to the imbalance between the employer and its economic power and the relative vulnerability of individual workers:[21]

> *… section 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of section 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.*

In *Mounted Police*, the Court emphasized that collective bargaining is a fundamental aspect of Canadian society that enhances human dignity, liberty and the autonomy of workers:

> *Collective bargaining constitutes a fundamental aspect of Canadian society which "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (Health Services, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.*[22]

The Court has emphasized that to be meaningful the process of collective bargaining must provide a process for employees to pursue their goals:

> *The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in*

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21 *Ibid.*, paras. 70-71.
22 *Ibid.*, para 82.

> *a meaningful way (Health Services; Fraser). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in Health Services: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees …" (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d)."*[23]

Creating an Environment Supportive of Business in our Changing Economy

As highlighted in the "Guide to Consultations" paper, current labour and employment standards legislation were introduced in the context of an expanding labour market anchored in the manufacturing and resource sectors. These often featured a relatively large, stable workforce consisting primarily of full-time workers whose jobs were protected by tariffs and limited international competition.

The shift away from manufacturing to service and retail industries has changed the nature of work for many. Some workplaces are now smaller, more flexible and leaner, requiring more highly skilled workers and flatter hierarchies. Ontario businesses face an increasingly competitive global environment where capital is mobile. As the Guide states:

> *Canada is one of the most open and "globalized" jurisdictions in the world. According to the federal government, trade is linked to one in five Canadian jobs. In Ontario, exports and imports of goods make up nearly two-thirds of gross domestic product (GDP). Over half of the province's manufacturing output is exported. Therefore, fostering an innovative, globally competitive economy is a priority for Ontario.*[24]

Technological change continues to alter the nature of work and the skills required by employers; it will continue to affect the competitiveness of employers. In some important manufacturing sectors, just-in-time manufacturing has had a significant

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23 *Ibid.*, para 71.
24 Ontario Ministry of Labour, Changing Workplaces Review: Guide to Consultations (Toronto: Ontario Ministry of Labour, 2015), p. 8.

impact not only on manufacturing processes and the high quality of goods manufactured but also on suppliers' response time. The growth of "the sharing economy" continues to challenge business, lawmakers and regulators.

Ontario's market economy must compete for business and investment. In addition to decent standards of work for employees, we must be sensitive to the legitimate concerns of business regarding its need for flexibility and reduced administrative burden to compete successfully. Every change regulated by government has some impact on employer flexibility. The day is long gone where employers could operate without regard for decency, safety, appropriate minimum terms and conditions of employment, and the rights of employees to associate and to bargain collectively. It is important to encourage a level playing field by helping employers to understand and meet their obligations.

We must recognize the diversity of the Ontario economy, its businesses, and the competition they face. A "one-size-fits-all" regulatory solution to a problem in a sector or an industry could have negative consequences if applied to all employers. The unique requirements of some businesses and/or of some employees may – in appropriate circumstances – support differentiation by sector or by industry rather than province-wide regulation.

Professor Gunderson has said that: "… any policy initiatives must consider their effect on business costs and competitiveness especially given the increased competitive global pressures, the North-South re-orientation and the increased mobility of capital." We agree that there is a need for "smart regulations" that can foster equity and fairness and at the same time also foster conditions that support the needs of the employers for efficiency and competitiveness.

The regulation of labour and employment law must not be so burdensome as to impair unnecessarily the competitiveness of Ontario business. We must be aware of regulatory regimes in competing jurisdictions – particularly in other Canadian provinces, American states and other developed countries. This is not to suggest that Ontario should abandon the goal of decent standards or embrace any concept of a "race to the bottom" because some Ontario business is required to compete with jurisdictions where standards are unacceptable to us or where acceptable and decent standards are not enforced. With these important caveats, we recognize that the regulation of the workplace in other jurisdictions may provide useful information, experience and guidance.

Stability and Balance

We recognize as two objectives of our Review, the need for balance in our recommendations and for stability in bringing change to the workplace.

In the last 20 years, Ontarians have seen significant alterations to the *Labour Relations Act*, accompanying changes in the governing political party.

Ideally, changing political ideology or the strength of a lobby should not drive fundamental change in legislation to enable employees to exercise their fundamental constitutional rights. These rights are entrenched and should remain relatively constant. Politicization of laws relating to the manner of exercise of an individual's constitutional rights leads to unpredictability, uncertainty and, in all likelihood, to dissatisfaction and mistrust. While changes in the law may well be required to respond to changing conditions and circumstances, the law should not undergo rapid "pendulum" swings if it is to produce stable expectations of what is required for Ontarians – particularly when it comes to their exercise of fundamental *Charter* rights. In *Seeking a Balance*, the Sims Task Force (relating to Part 1 of the *Canada Labour Code*) made the point:

> *Our approach has been to seek balance…. We seek a stable structure within which free collective bargaining will work. We want legislation that is sound, enactable and lasting. We see the too frequent swinging of the political pendulum as being counterproductive to sound labour relations. We looked for reforms that would allow labour and management to adjust and thrive in the increasingly global workplace.*[25]

We will endeavour to craft recommendations for change that are balanced and, if implemented, will have a reasonable likelihood of being sustained by subsequent governments differently composed.

On the other hand, we recognize that laws change to meet the evolving needs of society. They must. Indeed, it is the radically altered nature of the workplace over many years that has informed this Review and which will require a meaningful response. We will therefore consider ways to build in procedures to facilitate on-going review and change in the context of a changing workplace.

In making our recommendations we have tried our best to find the appropriate balance.

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25 Human Resources Development Canada, *Seeking a Balance: Canada Labour Code, Part I* (Ottawa: Human Resources Development Canada, 1995), p. 6.

03 | Changing Pressures and Trends

Under our Terms of Reference, the objective of this Review "is to improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians in 2015." This requires that we reflect on the pressures and changes that have been and are occurring. Most of the pressures we describe are the subject of extensive literature and analysis by experts. We can do no more here than describe them in the briefest of terms.

Our understanding of the economic pressures, how the workplace has changed in ways relevant to this Review and who are vulnerable workers in need of greater protection, is based on our own reading and on a number of academic papers prepared for us, and especially two background reports prepared for the Review: Morley Gunderson, *Changing Pressures Affecting the Workplace, 2015; and, Implications for Employment Standards and Labour Relations Legislation, 2015*, from which we have borrowed significantly. However, the views expressed here are our own.

Introduction

This Chapter discusses the inter-related factors that have contributed to the changing workplace.

The starting point is to recognize that the basic structural and conceptual framework for the two Acts (LRA and ESA) we are reviewing was set decades ago. While these Acts have been significantly amended over the years, the basic conceptual frameworks and approach for each of them has remained. Accordingly, we must evaluate how well they are operating to meet the needs of

vulnerable workers today, and potentially develop new approaches that may be required in light of workplaces that have changed over a long period and continue to change.

If this Review must re-evaluate the laws and regulations that were designed for an earlier time, it must be recognized that the existing framework of both Acts was designed largely for an economy dominated by large fixed-location worksites, where the work was male-dominated and blue-collar, especially in manufacturing. In that sector, large employers were often protected by tariffs and limited competition, and union coverage was far higher. Today the economic landscape is vastly different for both employers and employees; over many years the manufacturing sector in Ontario has shrunk significantly, while the service sector has grown significantly.

Pressures Affecting Employers and the Demand for Labour

Globalization

Markets for products and services are increasingly globalized and are often outsourced to foreign firms. Tariff reductions, free-trade agreements and reductions in transportation and communication costs have encouraged this trend. Companies in some sectors, notably manufacturing, previously protected by tariffs, are now subject to intense international competition, especially from imports from low-wage developing countries.

A related pressure is the trend to offshore outsourcing of business services, which is now made possible by the internet, computer technology, and software for global networking. Businesses can send their requests at the end of their business day to another time zone and have the responses the next day. Within business services, the trend has been to outsourcing increasingly sophisticated services.

In addition to global competitive pressures, Canada has experienced a re-orientation from east-west trade within Canada towards north-south trade between Canada and the United States as well as Mexico, largely as a result of free trade agreements. At the present time, the renegotiation of NAFTA is imminent as a result of the change in administrations in the United States. There is also a possibility of border taxes on goods imported into the United States. These pressures have given rise to significant uncertainty. A new trade agreement with Europe may be put in place and even with the apparent demise of the Trans Pacific Partnership, other agreements in Asia are being explored and are likely,

if they come to fruition, to further diminish the importance of internal east-west trade. The reorientation to external trade (much of it north-south) makes it likely that Canadian business will increasingly compete with United States' businesses, which tend to have fewer labour regulations and restrictions.

With the increasing mobility of capital, some firms may have a credible threat to relocate their plants and investments into jurisdictions that have lower regulatory costs. One significant concern is that such competition for investment will lead to a "race to the bottom" or "harmonization to the lowest common denominator" in employment and labour relations law, and that this would discourage any efforts to improve conditions for Ontario workers.

The fear of workers, their communities, and policy makers of losing new investments or having plants relocate out of the province is real. The evidence of what actually influences business on this issue, however, tends to be inconclusive and controversial as shown in the research commissioned for this Review[26]. There is even greater uncertainty on this issue now as the rise of economic nationalism in the United States, "America First" policies, and the renegotiation of NAFTA have the potential to cast a strong political dimension onto investment decisions.

Many businesses in Ontario are not affected by these considerations because they are in non-tradable services. Moreover, many employers will not follow a strategy of relocation or investing in the lowest-wage or least-regulated jurisdiction because there are a host of factors that inform these decisions and make Ontario attractive, positive factors such as its educated, skilled and reliable workforce, its corporate tax structure, the exchange rate for the Canadian dollar, the public funding of its health care system, and many others. However, Ontario must consider the effect of its polices on business costs and competitiveness, especially in light of increased competitive global pressures, the north-south re-orientation and the increased mobility of capital. There is a need for "smart regulation" that can foster not only equity and fairness, but also conditions that support business.

Technological Change

Skill-based technological change and the transformation to the knowledge economy have had profound effects on the kind of workforce that is needed today and have facilitated many other trends, including global networking and trade

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26 Anil Verma, Labour Regulation and Jurisdictional Competitiveness, Investment, and Business Formation: A Review of the Mechanisms and Evidence (Toronto: Ontario Ministry of Labour, 2016), prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review.

and offshore outsourcing (including the outsourcing of business services). These changes associated with the computer and the internet are facilitating changes in manufacturing and distribution such as just-in-time-delivery systems, robotics, 3-D manufacturing, movie streaming, and bar-code scanning systems.

The new so called "sharing economy" or the "GIG economy" manifested by such companies as Uber or Airbnb are becoming increasingly important. They have the capacity to transform some industries and workplaces, as many purport to use independent contractors, and not employees, as the providers of services, making the issue of who is an employee even more important than previously.[27]

The growth of online platforms for the performance of freelance projects, and also for crowd based "clickworkers", have the potential to speed up dramatically the transformation of work and the workplace.[28] According to Policy Horizons Canada, a "foresight" organization within the Government of Canada, the increasing presence of virtual workers in online platforms is a potentially disruptive feature of the digital economy creating a global marketplace for labour and potentially driving down compensation.[29]

One of the more disruptive features of the emerging digital economy is the rise of virtual workers. Online work platforms (e.g. http://freelancer.com) enable individual workers to advertise their skills and find short-term contracts with employers all over the world, creating a global digital marketplace for labour. An estimated 48 million workers were registered on online work platforms globally in 2013.[30] The market is estimated to be growing at 33% annually, with the number of workers expected to reach 112 million and market revenue to hit US$ 4.8 billion in 2015.[31] The advent of virtual work could profoundly reshape the nature of work in Canada, transforming how, when, where and what type of work is done. This, in turn, could challenge the underpinnings of Canadian social policy and programs, such as employment insurance (EI) and the Canada Pension Plan.[32]

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27 A McKinsey & Company survey found that 20-30% of the working age population in Europe and the United States engage in some form of independent work. McKinsey & Company, Independent Work: Choice, Necessity, and the Gig Economy, http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy

28 Working Without A Net, Rethinking Canada's Social Policy in the New Age of Work by Sunil Johal & Jordann Thirgood, Mowat Centre Research #132, November 22, 2016.

29 Canada and the Changing Nature of Work, Policy Horizons Canada, May 2016, available at http://www.horizons.gc.ca/eng/content/canada-and-changing-nature-work, p. 3.

30 Kuek, S. et al. 2015. "The global opportunity in online outsourcing." World Bank Group, June 2015.

31 *Ibid.*

32 Canada and the Changing Nature of Work, *op. cit.*, p.1

The growth of artificial intelligence, the breaking down or unbundling of jobs into constituent tasks, and increased automation and robotization, is expected by many to impact directly on the types and number of jobs, although the pace, extent and consequences are unknown. This can be expected to become a major focus of social policy, as Ontario and Canada seek ways to adjust to these developments.[33]

Changing from Manufacturing to Services

One of the major consequences of these competitive global pressures, along with the industrial restructuring that has taken place in Ontario, is the shift from manufacturing to services. From 1976 to 2015, for example, manufacturing's share of total employment fell from 23.2% to 10.8%, a decrease of 12.4 percentage points. Over that same period, the service sector's share increased from 64.5% to 79.8%, an increase of 15.3 percentage points. The increase in the service sector, however, was polarized, with the largest increases occurring in higher paying professional, scientific, technical and business services combined (from 4.6% to 13.2%) and lower paying accommodation and food services (from 3.9% to 6.4%).[34] Together with other factors, this has had a profound impact on Ontario workplaces.

This shift in the labour market has resulted in a "hollowing out" or "disappearing middle" of the skill and wage distribution, often involving job losses for older workers in relatively well-paid, blue-collar jobs in manufacturing. These displaced workers generally do not have the specific skills to move up to the growing number of higher-end jobs in business, financial and professional services. Their skills are often industry-specific (e.g., steel, auto manufacturing, pulp-and-paper) and not transferable to other industries. Many are middle-aged workers who are often regarded as too old to retrain or relocate, but too young to retire. They often wind up in low-wage, non-union jobs in personal services. The "disappearing middle" of the occupational distribution also means that it is more difficult for persons at the bottom of the distribution to train and move up the occupational ladder since those "middle steps" are now missing. They are often trapped at the bottom with little or no opportunity for upward occupational mobility.

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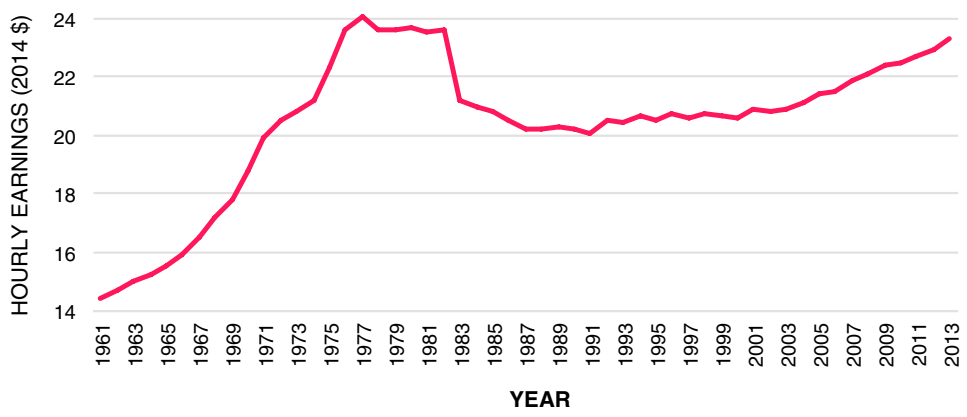
33 *Ibid.*

34 Statistics Canada, CANSIM Table 282-0008 – Labour Force Survey Estimates, by North American Industry Classification System, Sex and Age Group (Ottawa: Statistics Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on data from Statistics Canada's Labour Force Survey.

According to the OECD, the decline in middle-skill employment "went hand in hand with a decrease of standard work contracts, and workers taking on low and high-skill jobs were increasingly likely to be self-employed, part-timers, or temporary workers."[35]

These developments are an obvious source of growing wage and income inequality as well as the stagnation of the growth of real wages as Graph 1 demonstrates.[36] In addition, between 1981 and 2015, wage share of GDP in Canada fell from 48.1% of GDP in 1981 to 44.5% in 2015.[37]

Real Wage Growth (Average Hourly Earnings, Adjusted)



Source: CANSIM Tables 281-0022, 281-0008, 281-0030. Note: the method used by Statistics Canada to categorize employment changed in 1983 and again in 1997. The slight shift upwards after 1997 can partially be attributed to this change in categorization, not substantial wage increases.

Changes in Business Strategy and Organization: Fissured Workplaces

In an effort to explain how, in the last 20-or-so years, workplaces have fundamentally (in his view) worsened, David Weil described the "fissuring" process where lead companies in many industries reduced their own large workforces in favour of a complicated network of smaller employers.[38] New businesses are also

35 OECD (2015), In It Together: Why Less Inequality Benefits All, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264235120-en, pp. 29.
36 Working Without A Net, *op. cit.*, p. 7.
37 Statistics Canada, CANSIM Table 380-0063 - Gross domestic product, income-based (Ottawa: Statistics Canada, 2016).
38 David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It (Cambridge, MA: Harvard University Press, 2014).

being built on this same model. Weil describes the American economy, but the application to many countries around the world has been noted and commented upon in the academic literature. To some extent this trend has contributed to the labour market that we find today in Ontario.

In his book, Weil describes how lead companies, through contracting and outsourcing, reduce costs and place themselves in a position where they are not responsible for the indirect employment they create as they shift liability and cost to others. He describes how this shift to smaller companies that provide lead companies with products and services is a deliberate strategy to create intense competition at the level of employers below the lead company, and causes significant downward pressure on compensation while shifting responsibility for working conditions to third parties. Weil shows how this has created increasingly precarious jobs for employees who perform work for contractors and often for many levels of subcontractors.

Fissuring has occurred, in Weil's view, as a result of operationalizing several distinct business strategies, one focused on revenue, another on costs and a third, which he describes as "the glue" which binds these strategies together. On the revenue side, a lead company will focus on building its brand and creating important new and innovative goods and services, while also coordinating the supply chains that make these possible. On the cost side, lead companies contract out or outsource activities that used to be done internally, creating intense competition among potential suppliers and contractors to provide the lead company with products or services.

The critical factor, which allows the revenue and costs strategies to be integrated and which makes the overall business strategy successful is that the lead company can control the product and services provided by the contractors and subcontractors through new information and communication technology. That technology makes possible the creation of detailed complex standards to which contractors must abide, and also makes it possible for the lead companies to control and enforce all the standards on product quality, delivery, and other services that the contractors and subcontractors provide. Thus, contractors of the lead company, often in fierce competition with other similar companies, must comply with the rigorous supervision of the lead company. Under this strategy, the lead company avoids the legal responsibility that goes with directly employing the employees of the contractors and subcontractors, and any statutory or bargaining responsibility that goes with it. The smaller employers are therefore less stable themselves and often have more uncertain relationships with their own workers.

Franchising in some industries is another example of a business strategy where the lead company, as franchisor, avoids liability for the employees involved in the execution of the strategy and direct selling of the product, which is the core of its brand. The franchisor at the top of the supply chain may or may not be removed from the everyday operation of the business where issues of compliance with employment standards arise. However, most franchisors write and enforce detailed contracts, including legally binding manuals for franchisees that are constantly changing and relate to virtually every aspect of the business. Regulating the contractors and small companies that compete in various industries for the work of the lead companies can be difficult. The business model set up by the franchisor may squeeze profit margins, putting pressure on franchisees not to comply with minimum standards. Moreover, unlike larger companies, these smaller businesses generally do not have a sophisticated human resources department that will ensure compliance with the law.

Clearly, the resources of government to monitor compliance are stretched in any event, and stretched even further by the number of small employers, especially if a meaningful number of small employers do not comply with employment standards. The low risk of complaints from employees, particularly from those with little or no bargaining power, combined with the low risk of inspection and low penalties by the government, makes noncompliance for some small employers simply a part of a business strategy.

In any event, fissuring is a worldwide phenomenon, and jurisdictions everywhere are struggling to find mechanisms by which the law can respond effectively and appropriately. Our jurisdiction is no exception.

Changing Workplaces as a Result of a Changing Workforce

Changing pressures have also arisen from changing demographics and the changing nature of the workforce. The workforce in Ontario has become much more diverse with more women, visible minorities, new immigrants, Aboriginal persons and people with disabilities. Many workers in these groups are likely to be vulnerable and to live in persistent poverty.

Although it has levelled off in recent years, there has been a dramatic increase in the labour force participation of women (and particularly married women, including those with children). The participation of women in the workforce is now close to that of men. The two-earner family is now the norm and not the exception.

There are also many single parents with child-care responsibilities. This has led to very important issues of work-life balance, and has important implications with respect to many workplace issues, including gender inequality in compensation, compensation for part-time work as compared to full-time work, irregular work scheduling, and the right to refuse overtime.

In addition, the workforce in Canada is both ageing and living longer and the trend towards earlier retirement reversed in the later 1990s, especially for males. As larger portions of the workforce will be older, there will be higher age-related costs such as pensions and health-related benefits as well as difficulties in retraining older workers for new jobs if the old jobs become obsolete. Many older workers who retire will later return to the labour force to non-standard jobs. Some will choose do so because they want the flexibility, especially if they already have a pension, but many will do so out of necessity because that is all that is available.

Immigration is especially important to Ontario where the majority of immigrants to Canada settle. Unfortunately, there is difficulty in integrating immigrants into the Canadian labour market in the sense that immigrants are unlikely to catch-up to the earnings of domestic-born workers who otherwise are similarly-situated. The problem is getting more difficult for the more recent cohorts of immigrants who may never expect to fully catch up to the earnings of their comparable Canadian born workers. This has contributed to the increasing poverty rate amongst newly-arrived immigrants.

New immigrants are particularly likely to be vulnerable in the workplace because language barriers may keep them from knowing and exercising their rights. New immigrants may be less likely to complain about employment standards violations because they are economically vulnerable and fear reprisals. They are also less likely to work in unionized industries where the working conditions tend to be better and to be policed.

There continues to be a problem in Canada of students transitioning from school to work. Many students drop out and this often has very negative implications for their employability and earnings. This has been especially true for Aboriginal youth. The problem of youth finding it difficult to successfully transition from school to work is compounded by the fact that the initial negative experience of not being able to get a job when first leaving school can lead to a longer-run legacy of permanent negative “scarring” effects which can lead to lower lifetime earnings. Young people may react negatively to a society and labour market that will not

accommodate them, and employers react negatively to the prospect of hiring young people who have a large gap in employment between their leaving school and their first job.

The Decline of Unions in the Private Sector

Union coverage rates have declined in Ontario from 29.9% in 1997 to 26.8% in 2015 for the public and private sectors combined.[39] The decline in union coverage in the private sector has been particularly pronounced, falling from 19.2% in 1997 to 14.3% in 2015, whereas union coverage in the public sector has remained substantially higher and more stable (69.7% in 1997 and 70.7% in 2015). In Ontario's private sector, the decline in union coverage has occurred primarily for men – it fell from 23.8% in 1997 to 16.0% in 2015; for women, there has been a smaller decline in union coverage, from 13.7% in 1997 to 12.3% in 2015. The decline in union coverage and density in the province is consistent with trends across all provinces. It has also occurred across all developed economies; in fact, the decline in Canada has been small relative to many other developed countries and especially the United States.

Much of the decline in the private sector is attributed to the movement of jobs away from industries and occupations with high union density (e.g., blue-collar work in manufacturing) to ones of low union density such as white-collar work (e.g., professional, technical and administrative) and service jobs. Some of the other alleged causes of the decline were the subject of many of the submissions to us. Some saw the decline as a result of greater employer resistance to unions, some as the result of specific changes to labour legislation that were detrimental to organizing, some as due to the union movement's failure to modernize, adapt, and communicate effectively, while many others, especially in the academic community, point to the current law and the industrial relations system itself, which

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39 Statistics Canada, CANSIM Table 279-0025 – Number of Unionized Workers, Employees and Union Density, by Sex and Province (Ottawa: Statistics Canada, 2016); Statistics Canada, CANSIM Table 282-0078 – Labour Force Survey Estimates, Employees by Union Coverage, North American Industry Classification System, Sex and Age Group (Ottawa: Statistics Canada, 2016); Statistics Canada, CANSIM Table 282-0220 – Labour Force Survey Estimates, Employees by Union Status, Sex and Age Group, Canada and Provinces (Ottawa: Statistics Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on data from Statistics Canada's Labour Force Survey. Union *density* refers to the proportion of employed workers who are union members, whereas union *coverage* includes both employees who are union members and employees who are not members of a union but who are covered by a collective agreement or a union contract. Overall union coverage rates are about two percentage points higher than union density rates.

is based essentially on a "*Wagner Act*" model of bargaining and union organization by workplace. This model is criticized as largely irrelevant to the workplaces of the very large number of small employers which makes organizing, bargaining, and administering a collective agreement at the individual employer unit level not only inefficient but virtually impossible to effect.

In 2015, 87% of workplaces (defined as business establishments with employees) in Ontario had fewer than 20 employees and around 30% of all employees worked in such establishments.[40] To the extent that it is impractical to organize, administer and bargain a collective agreement for so many small units of fewer than 20 employees (union coverage in such establishments in the private sector was only 7.2% in 2015), this means that about 87% of workplaces and almost 30% of the workforce are practically ineligible for unionization (not including construction).[41]

The decline in the number of unionized employees, and in the role of unions in the private sector, makes the employment standards regime even more important for the future, as that is the regime that applies minimum standards today to 86% of workers in the private sector. This is even more the case if in the future there is a lack of practical possibility of union representation for many employees.

Conclusions

Clearly there is a wide array of pressures and trends that are affecting the workplace. These were articulated to us in the various hearings and submissions provided across the province and in the research commissioned for this Review.

In many cases these pressures conflict, as when employer needs for flexibility in work scheduling conflicts with employee needs for some certainty in scheduling to facilitate work-life balance. In other cases, the pressures have the potential to

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40 Statistics Canada, CANSIM Table 282-0076 – Labour Force Survey Estimates, Employees by Establishment Size, North American Industry Classification System, Sex and Age Group (Ottawa: Statistics Canada, 2016); Statistics Canada, CANSIM Table 552-0003 – Canadian Business Counts, Location Counts with Employees, by Employment Size and North American Industry Classification System, Canada and Provinces, December 2015 Semi-Annual (Ottawa: Statistics Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on data from Statistics Canada's Labour Force Survey. Note that the Statistics Canada Business Counts database does not differentiate between public and private workplaces and includes both sectors.

41 Data on union coverage by establishment size was derived from Statistics Canada's Labour Force Survey, upon special request by Ontario Ministry of Labour.

benefit both employers and employees, as when some elements of non-standard employment meet the needs of employers for flexibility and the needs of some workers to balance work and other personal or family commitments.

These various trends and pressures on the workplace highlight the need for reform of employment standards and labour relations legislation and especially to provide protection to vulnerable workers and those in precarious work situations. But they also highlight the complex trade-offs that are involved and the difficulties in navigating them.

04 | Vulnerable Workers in Precarious Jobs

Definitions and Terminology

To fulfill our mandate, we must understand what is meant by "vulnerable workers" and identify those employees who are experiencing precariousness in their employment. Again, our understanding is based on our own reading and on a number of academic papers prepared for us, and especially the two background reports prepared for the Review by Professor Gunderson, from which we have borrowed significantly, but the views expressed are our own.

Precarious Employment

As we use the term here, the concept of precarious employment is broad and means "work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements".[42] For some, "precarious" employment is limited to work that has an element of contingency, and for others it is used synonymously with "non-standard employment" such as part-time and temporary work. However, employees in contingent work include people who are well paid, sometimes precisely because of the uncertainty inherent in their work. We agree with the Law Commission of Ontario ("LCO") that, for our purposes, the term "precarious" should be restricted to include only those whose work is low paid. We agree with the LCO that low wages are a necessary condition for those who are considered precarious for the purposes of needing protection and we agree that we must include employees in standard employment categories.

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42 Leah Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (New York: Oxford University Press, 2010), 2.

Accordingly, although our definition of precarious work includes work that has an element of uncertainty over whether it is continuing, we do not treat it as synonymous with "contingent" or "non-standard" work. Rather, precarious employment transcends the standard/non-standard work distinction, such that forms of employment that are full-time or part-time, permanent or temporary, may be characterized by precariousness. In other words, this definition recognizes that some "non-standard work" is highly paid, secure and not precarious, while some "standard" or full-time permanent work is poorly paid and is precarious because, for example, there may be insecurity because there are no medical benefits or a pension plan. Finally, without equating the concept of non-standard jobs to precarious jobs, our Terms of Reference do recognize a correlation – that is, that the growth of non-standard work has put many workers in more precarious circumstances.

Vulnerable Workers

"Vulnerable workers" describes people, not work or jobs. It is used in many contexts to denote social groups who are defined by their "social location," that is, by their ethnicity, race, sex, ability, age and/or immigration status. In other contexts, however, the term "vulnerable workers" denote groups of workers who have greater exposure to certain risks than other groups, regardless of their social location. In the latter context, the term "vulnerable" describes all those (regardless of the social group(s) to which they belong) whose conditions of employment make it difficult to earn a decent income and thereby puts them at risk in material ways including all the undesirable aspects of life that go hand-in-hand with insecurity, poverty and lower incomes. We believe that our Terms of Reference, in describing the objective of this Review as improving the security and opportunity of vulnerable workers, is intended to have us consider the position of all vulnerable workers in this latter sense. Indeed, we think "vulnerable" is used in our Terms of Reference to include workers, who are, for example, low paid, full-time, without benefits and whose vulnerable status is not at all associated with their social condition. We think the term includes full-time, non-ethnic, non-racialized, male, Canadian-born workers, who have no disability, but who have low wages.

Defining the Group

Conceptually, we understand that our mandate requires us to consider all workers in Ontario whose employment:

- makes it difficult to earn a decent income;

- interferes with their opportunities to enjoy decent working conditions; and/or
- puts them at risk in material ways.

Indeed, we do not think it would make public policy sense to limit our inquiry to only non-standard employment, and not to ask whether, and how, the changing workplace has affected vulnerable employees working in jobs that are considered to be standard employment.

Quantifying the Number of Vulnerable Workers in Precarious Jobs

In order to draw a picture of the number of vulnerable workers in precarious jobs, we have looked at data from the Canadian Income Survey for Ontario for 2014[43]. Based on various measures, we estimate that the number of vulnerable workers in precarious work in Ontario in 2014 was between 30-32%. It may be somewhat higher or lower given the breadth of our definition but this data provides a reasonable approximation.

In keeping with our conceptual definition, we looked at those employees:

- working full-time for low wages, with minimal or no benefits, (such as no pension plan); or
- working for low wages without any or minimal benefits such as without a pension plan; and who:
  - work part-time involuntarily because they want more hours – about 30% of all part-timers;[44] (referred to in the literature as involuntary part-time);
  - work part-time voluntarily, in the sense that they do not want, or cannot avail themselves of, more hours;
  - work for temporary help agencies or on a temporary basis directly for employers;

43 This data was taken from Statistics Canada, Canadian Income Survey 2014. It was analyzed by our Director of Research and some of the academics who supported our review, and was interpreted by us.

44 These are calculations based on data from Statistics Canada's Labour Force Survey (see Interim Report, p. 33)

- work on term or contract;
- are seasonal workers or casual workers;
- are solo self-employed with no employees;
- are multiple jobs holders where the primary job pays less than the median hourly rate.

Working for Low wages is common to these calculations. There are a variety of cut-offs below which individuals could be considered as low-wage. We use two that are common in the literature.

The first is the Low-Income Measure (LIM) which is half of the median income (the median being the number that divides the relevant population in half so that one-half fall below the median and one-half are above the median). It is a common and readily understood measure of low income, used internationally. We use the measure based on *before-tax employment* income for a *single individual* since our focus is on what the labour market yields to an individual independent of their family circumstances, and before taxes and transfers alter their circumstances. The individual before-tax employment income is what reflects labour market vulnerability and that can be affected by employment standards and labour relations regulations, which are the policies under review. In Ontario in 2014, the LIM was $25,038 for a single individual before taxes and transfers, excluding the self-employed who have paid help, and excluding those who made contributions to a private pension plan.

The second measure of low wages that we use is the percent of employees who fall below 150% of the Ontario general minimum wage. This is another common measure used and is often linked to the concept of a “living wage.” Based on the Ontario minimum wage of $11 per hour in 2014 (the year of our LIM data), this yields a low-wage cut-off of $16.50 per hour, excluding all the self-employed and excluding those who made contributions to a private pension plan.

In addition to the criteria requiring the individual to fall below the low-wage cut-off, we also require that the person not have made a contribution to a private registered pension plan; that is, we exclude such persons on the grounds that they are unlikely to be vulnerable if they have made a pension contribution. The database was unable to take into account benefit plan coverage such as health plans. Finally, we exclude the self-employed who have paid help on the grounds that they are an employer or entrepreneur.

All self-employed, including those without paid help, are excluded from the measure involving the minimum wage since they do not have a wage. Also, those with two or more jobs are excluded since it is not clear as to how to apply a minimum wage. Obviously, excluding these various groups may be excluding some who are vulnerable. But judgement calls have to be made, and there are some, based on our criteria, who may be included but who are not vulnerable.

Based on the criteria set out above, our LIM measure implies that 2,097,000 or 31.9 percent of the 6,571,000 workers in Ontario have a before-tax employment income that is less than half of the median individual before-tax employment income, and have made no contribution to a private registered pension plan nor are self-employed with paid help. Of that 31.9 percent who are vulnerable, about half (51.2%) are in standard jobs about equally divided between permanent full-time jobs (26.9%) and voluntary part-time jobs[45] (24.2%). The other half (48.9%) of the 31.9% who are vulnerable are in non-standard jobs with 18.2% in temporary jobs, 5.8% in involuntary part-time jobs, 23.9% in solo self-employment and slightly less than 1% in two or more jobs.

Based on our minimum wage measure, 1,665,000 or 30.4 percent of the 5,481,000 workers in Ontario who are not self-employed or hold two or more jobs fall below 150% of the Ontario minimum wage and had made no contribution to a private pension plan. Of that, 30.4% who are vulnerable, about three quarters (75.8%) are in standard jobs mostly in permanent full-time jobs (48.7%) but also in voluntary part-time jobs (27.1%). The other one quarter (24.7%) of the 30.4% who are vulnerable are in non-standard jobs with 18.9% in temporary jobs and 5.9% in involuntary part-time jobs.

We estimate that 30 to 32 percent of workers in Ontario are vulnerable according to these criteria. The fact that substantial numbers of workers are in standard jobs (e.g. permanent full-time, voluntary part-time and self-employed without paid help) highlights that vulnerability does not apply only to non-standard employment. Many in standard jobs work for very low pay and do not have a private pension. Clearly, there are other concepts in the literature of calculations of vulnerable workers in precarious jobs, although many yield figures that are close to these. In whatever manner it is defined, vulnerability in precarious employment applies to a substantial portion of the workforce, and it is a concept that merits policy attention.

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45 They are “voluntary” in the sense that they do not want more hours of work. They may be in this situation out of choice or because their circumstances, (single parents, students, workers with a disability) do not permit them to work full-time.

Our figures are broadly in keeping with the experience in industrialized countries generally. The OECD has found that between 1995 and 2013 in the OECD countries, 60% of job creation was in non-standard jobs,[46] and that non-standard work accounted for around a third of total employment in OECD countries in 2013.[47]

What Social Groups are Overrepresented Among Vulnerable Workers?

A study for the Law Commission of Ontario (LCO) based on 2008 data identified social groups more likely to be found in precarious jobs in Ontario.[48] It identified the relative proportions of precarious workers in different populations. Although that study used different definitions to determine who was precarious, we find that its results were in keeping with the literature, and more important, the general picture it paints is useful for us for policy purposes in broadly identifying the populations that most concern us.

The populations that are overrepresented in precarious jobs, in descending order, relative to the overall average of 33.1% according to Noack and Vosko's definition of precarious jobs are:

- workers with less than high school diploma (61.4%);
- single parents with children under 25 (51.7%);
- recent immigrants (40.7%);
- women (39.1%);
- visible minorities (34.4%).[49]

Non-standard Employment

Non-standard employment as a category does not take into account aspects of precariousness or labour market insecurity such as low income, control over the labour process, and limited access to regulatory protection. However, there is an obvious correlation between the two, and non-standard employment as a category of employment is what is often written about and measured when

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46 OECD (2015), *In It Together: Why Less Inequality Benefits All*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264235120-en pp 29
47 *Ibid*.
48 Andrea Noack and Leah Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context* (Toronto: Law Commission of Ontario, 2011),
49 *Ibid.*, 28.

precarious jobs are discussed and analysed. It is useful, therefore, to consider the nature and size in Ontario of non-standard employment and its component forms.

Components of non-standard work used in the literature, often in different combinations, include: temporary work (including term/contract, seasonal, and casual/other), solo self-employment (i.e., without paid help), part-time work, and/or multiple jobholding. Sometimes measures of non-standard employment involve a low-wage cut-off (e.g., encompass only those earning less than the median wage). At other times, they include persons at all pay levels. Some commentators include in the definition both those who work in part-time jobs voluntarily and those who involuntarily occupy such jobs because they want more working hours or full-time work. Other commentators exclude voluntary part-timers, often acknowledging that the voluntary/involuntary distinction is murky as when people are constrained by pressures such as family responsibilities for childcare or eldercare.[50]

Some non-standard work is well paid, sometimes to compensate for the uncertainty of the work. Some workers prefer higher cash wages to fringe benefits since they already receive fringe benefits as the children or spouses of other workers. Some non-standard jobs are temporary stepping stones into more permanent jobs.

These differences and different analytical approaches to the definition of non-standard employment make it difficult to determine the exact extent of the phenomenon and the extent to which it has changed over time.

In the literature, the negative aspects of non-standard employment are well-documented. Such employment is generally characterized by low pay and low fringe benefits, little or no job security, limited training, few opportunities for career development and advancement, little control over one's work environment, uncertainty over work scheduling, and little or no protection through unions. It can include large numbers of people who are recently unemployed, women, and members of visible minority groups, immigrants and youth. Also, some secure non-standard forms of employment also have a negative aspect such as, for example, poorly paid permanent part-time work. The OECD indicates that "people are more likely to be poor or in the struggling bottom 40% of society if they have non-standard work".[51]

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50 The distinction between voluntary and involuntary part-time work and whether it is meaningful is important in some contexts because involuntary part-time employment is often counted as part of non-standard work and voluntary part-time employment is often counted as part of standard employment. This distinction is not particularly relevant for us, however, since our conceptual approach to vulnerable workers in precarious jobs transcends that distinction.

51 OECD (2015), *In It Together: Why Less Inequality Benefits All*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264235120-en p.31.

Non-standard employment in Ontario constitutes more than a quarter of Ontario's workforce: 26.6% in 2015.[52] This type of employment comprises temporary employees (including term/contract, seasonal, and casual/other), solo self-employment (i.e., without paid help), involuntary part-time employees (i.e., part-time workers who say that they want full-time work, and/or multiple job-holding (where the main job pays less than the median wage).

Non-standard employment has grown over time, rising from 23.1% in 1997 to 26.6% in 2015.From 1997 to 2015, non-standard employment grew at an average annual rate of 2.3% per year, nearly twice as fast as standard employment (1.2%).

Temporary employment grew at an annual rate of 3.5% from 1997 to 2015 – faster than the other component of non-standard employment.

Compared to workers in standard employment, those with non-standard jobs tend to have lower wages, lower job tenure, higher poverty rates, less education and fewer workplace benefits.

Poverty rates of workers in non-standard employment are two to three times higher than the poverty rates of workers in standard employment.

Real median hourly wages were about $24 for workers in standard employment relationships and $15 for workers in non-standard forms of employment in 2015.

In 2011 most workers in standard employment had medical insurance (74.3%), dental coverage (75.7%), and life or disability insurance (68.1%), or a pension plan (53.8%). In comparison, less than one-quarter of workers in non-standard employment relationships had job benefits such as medical insurance (23.0%) or dental coverage (22.8%), while only 17.5% were covered by life and/or disability insurance or had an employer pension plan (16.6%).

In 2015, the median job tenure in non-standard employment was 32 months, less than half the tenure of standard jobs (79 months). The median length of time in temporary jobs was 13 months in 2014.

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52 These are calculations made by the Ontario Ministry of Finance based on data from Statistics Canada's Labour Force Survey, unless otherwise stated.

The industries with the highest incidence or concentration of workers in non-standard employment, in descending order of the percentage of employment in the industry in non-standard employment (relative to the average incidence of 26.6%) are:

- arts, entertainment and recreation (57.7%);
- agriculture (48.9%);
- real estate and rental and leasing (42.9%);
- business, building and other support services (40.0%);
- social assistance (35.7%);
- construction (33.8%);
- professional, scientific and technical services (32.9%);
- other services (32.6%);
- educational services (31.3%);
- accommodation and food services (30.2%);
- transportation and warehousing (28.6%); and
- retail trade (26.9%).

The distribution or share of non-standard employment by industry in descending order for 2015 is:

- retail trade (11.1%);
- professional, scientific and technical services (10.4%);
- construction (8.9%);
- educational services (8.7%);
- health care (8.4%);
- accommodation and food services (7.3%);
- business, building and other support services (7.2%);

- transportation and warehousing (5.0%);
- arts, entertainment and recreation (5.0%).[53]

We now turn to consider in detail some specific aspects of non-standard employment and their characteristics in Ontario.

Part-time Work

It has long been the case that the standard five-day work week and permanent 35 to 40 hour job is not as common as it once was. For many years, businesses have been expected to be open longer and sometimes around the clock as they have to meet the demand for goods and services. Employers need part-time workers to staff business that have peaks and valleys of demand for goods and services. Part-time work is often sought by those who need to balance work with family responsibilities, or students going to school or older workers who want to remain active labour force participants or may not have enough money to live comfortably in retirement.

Between 1976 and 2015 part-time's share of total employment increased from 13.5% to nearly 20% (19%) with almost all of that increase occurring in the earlier period between 1976 and 1993.[54] A little under a third of these (30% of part-time employees and 5.6% of all employees), referred to as involuntary part-time employees, had to compromise and to accept part-time jobs because they could not find the full-time positions they wanted. Part-time work is highly concentrated in the retail trades and accommodation and food services industries.

There are now many more women in the workplace and work-life balance issues are of great importance especially to those with child and family responsibilities. While this affects many men as well, women comprise two-thirds of the part-time workforce and are therefore disproportionately affected by any negative impacts that arise from part-time work and scheduling issues.[55] In 2015, median hourly rates for part-timers were $12.50, which is only slightly more than half of the

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53 The distribution or share of non-standard employment refers to how non-standard employment is distributed across different industries. It reflects both the incidence of non-standard employment as well as the size of the industry. The arts, entertainment and recreation industry, for example, has the highest incidence of non-standard employment (57.7%) but because it is a small industry, it has a small share of non-standard employment (5%).

54 These are calculations made by the Ontario Ministry of Finance based on data from Statistics Canada's Labour Force Survey.

55 Statistics Canada, CANSIM *Table 282-0008 – Labour Force Survey Estimates, by North American Industry Classification System, Sex and Age Group* (Ottawa: Statistics Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on data from Statistics Canada's Labour Force Survey.

$24.04 for full-timers, although these are not comparisons between workers in the same job and same establishment (we lack the relevant data).[56]

This wage difference does not take into account that health and other benefits (which are mostly non-taxable compensation), that are often not available to part-time employees where they are available to full-time employees in the same establishment.

The dramatic inequality in rates of pay between full-time and part-time employees, especially when they do similar work in the same establishment, together with the lack of benefits available to part-timers have also created policy issues that we have considered in Chapter 7.

Today, employers' need for part-time workers to deal with fluctuating demand dovetails with the preference of many in the workforce for that type of work. However, the employers' need to schedule work according to fluctuations in demand often conflicts with the need of employees for predictability in their work lives. There is tension between the employer need for flexibility and the employee need for predictability, including those having to work on-call or who are subject to last minute changes in work schedules. We have also considered these issues and the need of employees to be able to move more easily from one status to another in Chapter 7.

Temporary, Casual and Seasonal Work

The share of temporary employment in Ontario in 2015 was 10.8%, more than doubling from just under 5% in 1989.[57] Temporary employment, including limited-term contracts, has been the fastest growing component of non-standard employment, expanding at an annual rate of 3.5% between 1997 and 2015.[58]

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56 Statistics Canada, CANSIM *Table 282-0152 – Labour Force Survey Estimates, Wages of Employees by Type of Work, National Occupation Classification, Sex and Age Group* (Ottawa: Statistics Canada, 2016).

57 Statistics Canada, CANSIM Table 282-0080 – *Labour Force Survey Estimates, Employees by Job Permanency, North American Industry Classification System, Sex and Age Group* (Ottawa: Statistics Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on data from Statistics Canada's Labour Force Survey. Additional calculations were made by the Ontario Ministry of Finance based on data from the General Social Survey of 1989.

58 Statistics Canada, CANSIM Table 282-0080 – *Labour Force Survey Estimates, Employees by Job Permanency, North American Industry Classification System, Sex and Age Group* (Ottawa: Statistics Canada, 2016).

Issues have been raised around the insecurity of limited-term contracts. Sometimes there is no issue regarding renewal because the contracts are genuinely for short duration, as in the case of a single project. Often, they are renewed (sometimes automatically or consistently) over many years so that they appear to be almost permanent. Nevertheless, in many situations there is uncertainty and anxiety about whether there will be renewal, and in some professions and disciplines, permanent employment with the salaries, benefits, and security that come with it seems remote and impossible to attain. We discuss this in Chapter 7.

Over the last twenty or more years in Ontario, temporary help agencies which provide staffing services and "assignment workers" to clients have become ubiquitous, giving rise to a host of concerns, among them the phenomenon of "perma-temps," and sometimes even situations where the entire workforce of a particular business is composed of "temporary" assignment workers.[59] There have been concerns identified over the economic incentives for clients to use temporary workers for more dangerous work, and the lack of meaningful requirements to reintegrate those injured workers into the workplace. Indeed, this category of workers is part of an inherently insecure triangular relationship between agencies, clients and the assignment workers where they generally receive lower pay than others performing the same work, face immediate removal from the workplace, and constant uncertainty. Although Ontario made legislative changes in 2009 to regulate temporary help agencies, important issues and problems remain and we have addressed this in Chapter 7.

There has always been a segment of the work force that has provided their services on a casual basis, and issues of pay and scheduling are raised for this group as they are for part-timers. Also, there has always been a part of the workforce that works on a seasonal basis in certain industries such as construction and agriculture where precarious work and vulnerable workers are often found.

Finally, there are also workers holding multiple jobs, often because their main job does not pay sufficient wages. The number of multiple job holders accounts for about 5.3% of the workforce in 2014, up from 2.2% in 1976. Three out of every five multiple job holders (62%) report earnings below the median hourly wage. Women are more likely than men to be in multiple jobs (59.3%) and in jobs with multiple non-standard characteristics (58.4%).[60]

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59 The available data does not enable separating out temporary agency assignment workers from temporary, casual, and seasonal workers in general.

60 These are calculations made by the Ontario Ministry of Finance based on data from Statistics Canada's Labour Force Survey for 2014.

Self-employment

There are two categories of self-employment, one category of workers who have their own paid help and the other category where the person has no paid help. The entire category grew from 10.5% in 1976 to 16.1% in 1997 remaining roughly constant to 15.7% by 2015. Most of the growth was in self-employment without paid help, and that group was 6% of the workforce in 1976, 10.6% in 1997, and 10.9% in 2015. Self-employment with paid help has been fairly constant over the full period, increasing slightly from 4.4% in 1976 to 5.5% in 1997, then declining slightly to 4.8% in 2015.[61]

Solo self-employment is classified as non-standard employment; self-employment with paid help is categorized as standard employment. Some of this growth is genuinely a result of entrepreneurial efforts by persons who start small business and employ others, while many are genuine entrepreneurial efforts by solo consultants and "freelancers." Many workers now work from home or remotely, and/or are deemed by those to whom they provide services to be independent contractors; therefore they do not have access to benefit plans, or statutory benefits like maternity and paternity leave.

Some of the growth in self-employment is tied to the growth in project work, or to a growth in technological expertise by individuals who can provide their specialized services to many businesses. Some of the growth is the result of the fact that many employers do not want to make permanent commitments to employees. Some of the growth is the result of cyclical tough economic times and represents for many of the self-employed a poor second choice reflecting the absence of good employment opportunities. Some of the growth also represents a natural change in practices in some industries where people can now work online at home, and "freelance." Many think this type of "independent" work will continue to grow substantially through the "gig economy" and new and expanding peer-to-peer platforms.[62]

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61 Statistics Canada, CANSIM *Table 282-0012 – Labour Force Survey Estimates, Employment by Class of Worker, North American Industry Classification System and Sex* (Ottawa: Statistics Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on Statistics Canada's Labour Force Survey. The self-employed without paid help category includes unpaid family workers.

62 A McKinsey& Company survey found that 20-30% of the working age population in Europe and the United States engage in some form of independent work Mckinsey & Company, Independent Work: Choice, Necessity, and the Gig Economy, http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy; Canada and the Changing Nature of Work, Policy Horizons Canada, May 2016; Sunil Johal, Jordann Thirgood, Working Without A Net, Mowat Centre, November 2016.

In contrast, some of the growth in self-employment is the result of deliberate misclassification by businesses that do not wish to incur liability for employees and wish to shed liability for mandatory deductions and contributions to public pensions, employment insurance, and workers compensation schemes, together with shedding responsibility for employment standards such as maternity and parental leaves. Also, some of the growth is from a genuine desire by the providers of the service to get tax advantages that might not be available if they operated as employees, despite the fact that the dependency inherent in the relationship makes the providers of the service much closer to being employees than to being really in business for themselves. Some of this growth is highly controversial with changes in industry practice (such as the change from employed taxi drivers to allegedly independent providers who provide services to Uber).

Tenure of Employment in the New Workplace

Expected long tenure with one employer may be high for incumbent older workers, but many new entrants to the workforce cannot expect to have “lifetime” long-tenured jobs and a semblance of job stability with the same, often unionized, employer as did earlier generations. Younger workers can expect to start off in limited-term contracts or in internships (sometimes unpaid), or self-employment, and can expect to change careers often working for different employers.

05 | Enforcement and Administration

5.1 Goals and Objectives

Chapter 2 of this report sets out the Principles informing this review. Some are worth highlighting here as they have particular relevance to our recommendations.

5.1.1 Fostering a Culture of Compliance

It is of utmost importance that there be a respect by all Ontarians for the laws governing the workplace, and that as a society we recognize the importance of compliance with the law. As Ontarians, we need to foster a culture where compliance with minimum terms and conditions of employment is widespread – a culture of compliance. Rules that are easy to understand and administer and that provide workplace parties with compliance tools, together with enforcement that is consistent, are key to achieving these objectives. In a society where there is a culture of compliance, both employers and employees would be reasonably aware of their legal rights and responsibilities, and the law would be easy to access, to understand and to administer. The objective would be to provide employees with the minimum requirements that the law demands and employees would be aware of their rights and would feel safe in asserting them. The failure to provide the ESA's basic rights would not only be legally impermissible but culturally and socially unacceptable. There would be a strong element of deterrence in the system as those who engaged in deliberate flouting of the law would be dealt with by not only having to make restitution, but also being liable for significant administrative monetary penalties.

As stated above, moving towards a culture of compliance requires focus on a number of "included" objectives. These include:

1. **Increased Awareness by Employees and Employers of their Legal Rights and Responsibilities**

   Among other things, this requires education and outreach. Increasing awareness of rights of employees and obligations of employers is a vital part of achieving a culture of compliance. Employees who know their rights will expect their employers to observe them. Employers who understand the rights of their employees and their obligations as employers are more likely to comply with the law.

2. **Increased Protection for Employees who Exercise their Rights**

   In order to achieve a culture of compliance, it is vital to provide protection to employees to allay fears of reprisal and to respond effectively when reprisal or threats of reprisal occur.

3. **Strategic Enforcement**

   If achieving a culture of compliance is a rational objective, new enforcement strategies are required to work towards this outcome. The adoption and implementation of more strategic enforcement initiatives is critical to achieving a culture of compliance. It also requires an assessment of the efficacy of a policy requiring the investigation of all complaints.

4. **Access to Justice**

   Combining a complaint driven process with other strategies for enforcement should not be at the expense of access to justice. Our recommendations recognize and suggest ways to reduce barriers to access to justice.

5. **Consistent Enforcement**

   Consistent enforcement will help ensure a level playing field for business. A level playing field "ensures that all those who are similarly situated should be regulated according to the same rules, and that the law should guarantee equal protection for all its intended beneficiaries." A level playing field "serves to protect not only workers but also the majority of fair-minded employers who wish to meet their legal obligations without the risk of being undercut by

those who do not. Clear laws, effective oversight, consistent interpretation and certainty of enforcement are critical to ensuring observance of the level playing field principle."[63]

6. **Stronger Sanctions and Deterrence**

   Voluntary compliance approaches should be preferred in dealing with non- deliberate non-compliance or where an employer is willing to eliminate non-compliance. Fines and penalties sufficient to deter non-compliance must be an integral part of achieving a culture where the law is respected and compliance is normative.

While our recommendations do not fit into neat categories, we have grouped our recommendations into sections that focus on some specific objectives.

5.2 The Extent of and Reasons for Non-compliance

A report by the Law Commission of Ontario (LCO) confirms the conclusion that "most employers are compliant with the legislation".[64] However, at least a significant minority of employers are not in compliance with some employment standards, and vulnerable workers are most likely to be affected by non- compliance.[65]

In their research paper prepared for the CWR, Vosko, Noack and Tucker advise that the existence of complaints does not always accurately reflect the number or source of violations. However, in our view, complaint patterns and outcomes can nonetheless be helpful in considering compliance issues.

> *Complaints related to the accommodation and food services industry are most likely to have violations, with 78% of assessed complaints resulting in violations (see Appendix B, Table 1.3). Violations are also more likely to be found for complaints filed against small firms. The difference between large and small firms is most noticeable when comparing complaints relating to firms with 1-5 employees, that have a violation rate of 80%, and complaints relating to firms with more than 200 employees, which have a violation rate*

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63 Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau: Human Resources and Skills Development Canada, 2006), 53.

64 Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: Law Commission of Ontario, 2012), 56.

65 Kevin Banks, *Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness* (Toronto: Ontario Ministry of Labour, 2015), 43. Prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review.

> *of only 49% (see Appendix B, Table 1.4). The vast majority of these violations relate to monetary complaints. Among assessed complaints, 69% included monetary violations, and only 1.6% included non-monetary violations. The percentage of assessed complaints that result in a violation declined slightly in the 2014/15 year, though it is too soon to say whether this is part of a trend.*[66]

Simply put, there are too many people in too many workplaces who do not receive their basic rights.

A variety of factors contribute to non-compliance. Ignorance by both employees and employers of their rights and obligations contributes to non-compliance.

Many small employers and employees have no idea what the ESA requires. Educating employers about their responsibilities is as important as educating employees about their rights. The complexity of the law may contribute to a lack of understanding of the rights and obligations in the ESA, thereby exacerbating non-compliance. Some employers have an uncaring attitude towards their obligations and responsibilities and do not regard them as important enough to ensure compliance. Some employers violate the law as part of a deliberate business strategy - including situations where they think that their competitors are not complying. Some employers are confident that because their employees will not complain and the likelihood of government inspection is very low, non-compliance is a risk worth taking, calculating that if they are caught, they can extract themselves from the legal consequences of non-compliance without much difficulty and with trivial costs. The literature is also clear that fear of reprisals reduces the number of complaints that are made by employees. Unfortunately, there is a widespread fear of reprisal among employees if they complain about violation of their ESA rights,[67] and this inhibition contributes to non-compliance. For this reason, the absence of complaints from some sectors of the economy or from some workplaces may be as consistent with non- compliance as it is an indication of substantial compliance.

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66 Leah Vosko, Andrea M. Noack, and Eric Tucker, *Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution under the Employment Standards Act, 2000* (Toronto: Ontario Ministry of Labour, 2016), 29. Prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review.

67 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014). Numerous scholarly and other works have suggested that fear of reprisals is widespread and the research study done for this Review confirms those facts.

5.3 Strategic Enforcement – A Combination of Existing and New Approaches

Strategic enforcement involves a set of policies and practices that have the goal of changing employer conduct so that breaches of the Act do not occur. It is designed to address non-compliance at a systemic level and not only on the basis of complaints. This is a change in emphasis that is required as a result of the changed workplace. As David Weil stated:

> *The changing workplace environment … requires new, more strategic approaches to enforcement. Strategic enforcement policies aim to change employer behavior so that practices that result in underpayment of wages do not occur in the first place. This requires addressing the underlying factors that lead to lost wages and other violations of labor standards. Strategic enforcement also entails changing behavior of employers at the market level, rather than on a case-by-case basis.*[68]

In his research paper for this Review, Professor Kevin Banks described an integrated enforcement strategy with a variety of important elements in the toolkit of the Ministry of Labour including education, proactive auditing, and the effective use of deterrents and remedies:

> *An effective compliance and enforcement strategy will … seek to inform about, strengthen normative commitment to, and detect, deter and where possible address systemic root causes leading to violations of employment standards. Doing this requires a tool kit that combines information dissemination, outreach, persuasion to voluntarily comply, proactive detection of non-compliance, and enforcement of deterrent remedies and sanctions. Deploying these tools effectively to increase compliance requires intelligence gathering and the capacity to evaluate alternative strategies.*[69]

David Weil and others argue that changes in the structure of the economy and in the complexity of employment relationships, together with the decline in unionization have meant that the traditional complaint driven approach to enforcement is less and less effective. Weil put it this way:[70]

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68 David Weil, *Improving Workplace Conditions through Strategic Enforcement, a Report to the Wage and Hour Division.* Boston: Boston University, 2010, 75.
69 Banks, 55.
70 Weil (2014).

> *The employment relationship in many sectors with high concentrations of vulnerable workers has become complicated as major companies have shifted the direct employment of workers to other business entities that often operate under extremely competitive conditions. This "fissuring" or splintering of employment increases the incentives for employers at lower levels of industry structures to violate workplace policies, including the FLSA. Fissuring means that enforcement policies must act on higher levels of industry structures in order to change behavior at lower levels, where violations are most likely to occur.*

Strategic enforcement is increasingly important when the workplace environment is becoming more complex and governments with limited resources are faced with high public expectations. The Ministry must adopt proactive strategic enforcement tools to detect and target systemic violations of the act across the economy and in particular sectors. Responding to individual complaints alone cannot form a primary basis for enforcement and will leave most breaches of the Act undetected.

The Ministry of Labour currently utilizes enforcement strategies in addition to individual complaint investigation. Inspections, targeted and otherwise, have shown the impact of strategic enforcement strategies as a supplement to the investigation of individual complaints and an analysis of current inspection practices illustrates their effectiveness.

5.3.1 Proactive Inspections

A good starting point in the discussion of inspections is Professor Banks:

> *For good reasons, the literature is essentially unanimous in concluding that labour standards compliance and enforcement agencies need to proactively and strategically detect and target non-compliance.*
>
> *As discussed above, the need for proactive detection arises because many workers are unlikely to complain about violations of their employment standards rights during the life of the employment relationship, or at all. Moreover, as Weil points out: "Although most complaints relate to real problems, there is nothing to say that they represent problems of the highest order if compared to the "dog that doesn't bark" - that is, those workplace problems which may exist but which, for one reason or another, are not reported via complaint processes. ... Complaints are often driven by specific problems facing particular workers. They may or may not be related to more*

> *systemic issues. And even if they are, investigations arising from a complaint process may not be perceived as part of a wider systemic problem. This compounds their reactive nature." (Weil, 2008, at 356).*
>
> *… relying on complaints or legal actions to detect violations leaves much if not most non-compliance undetected. Without risk of detection, there can be little deterrence. To the extent that education and information initiatives are not enough to correct non-compliance, as is likely often the case, it will persist without remedy.*[71]

The conduct of inspections should be a continuing and increasingly important focus of enforcement strategies. An effective proactive inspection program should detect and deter non-compliance. To quote Banks:

> *The consensus in favour of increased proactive inspection is essentially based on evidence of significant non-compliance … and the proposition that proactive inspection is the most effective available means of addressing non-compliance not detected through complaints. … Proactive inspection campaigns can, if properly targeted, achieve "wholesale-level" economies of scale that cannot be matched by "retail" interventions in response to particular complaints. Further, the use of targeted campaigns stands to have a deterrent effect as it increases the risk of non-compliance detection.*[72]

There is general agreement among experts and Ministry officials that proactive enforcement is a more effective mechanism for ensuring ESA compliance than relying on individual employees to file claims. It is a laudable goal of the Ministry of Labour to increase the number of proactive inspections it conducts, but the ability of the Ministry to conduct inspections is tempered by dedicating resources to the investigation of individual complaints.

In determining which employers to inspect, the Ministry relies on a variety of factors including: ESO information obtained while investigating a claim; a history of contravening the ESA; information received from employees and third parties; whether the employer is part of a targeted sector; and analysis of data to develop "contravention profiles."

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71 Banks, 59-60.
72 Banks, 60-61.

Vosko, Noack and Tucker, in their CWR research paper, assess the utilization of different types of inspection and their effectiveness. They divide inspections into three categories: expanded investigations, targeted inspections, and regular/ other inspections.

> *Expanded inspections are triggered by an individual complaint and occur when there is an indication that an ESO should assess the workplace more fully by conducting an inspection. Targeted or blitz inspections are determined at the provincial level, and typically take the form of blitzes directed at a particular industry, occupational group or form of employment. In contrast, regular inspections are largely determined either by individual ESO IIs or regional or district offices on the basis of local conditions and are unconnected with blitzes.*[73]

This categorization is not complete as there are other inspections that are initiated by the Ministry. The authors point out that: "the Ministry of Labour tracks several other types of inspections, including re-inspections of previous violators, inspections as a result of participating in a self-assessment (compliance check) and random selections."[74] They conclude that:

> *Expanded investigations detect the highest rates of ES violations; fully 82% of such inspections find infractions… targeted and regular inspections … detect violations 72% and 70% of the time… Expanded investigations also yield the highest levels of monetary violations (overall about 46%), whereas targeted and regular inspections find monetary violations 36% and 38% of the time respectively.*[75]

Vosko, Noack and Tucker also observe that:

> *…there appears to be no particular relationship between the type of inspection and the standards for which violations are found, with the exception that expanded investigations tend to detect violations of overtime pay requirements more frequently. For inspections overall, violation rates are lowest for firms with 50 or more employees (about 68%) and highest for firms with 11 to 19 employees (79%).*[76]

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73 Vosko, Noack, and Tucker, 39-40.
74 *Ibid.*, 40.
75 *Ibid.*, 42.
76 *Ibid*., 42-43.

Professor Banks summarizes the impact of inspections:

> *Proactive inspections provide an effective means of detecting and remedying non- compliance. The LCO notes that in 2011-12, Ministry figures show that 83% of such inspections detected violations (LCO 2012, at 56). Vosko, Noack and Tucker (2016, Appendix B, Table 3.1a) find that the proportion of inspections that detected violations ranged from 75% to 77% in the years between 2011/12 and 2013/14, but dropped to 65% in 2014/15. They also point out that 92 to 99 per cent of confirmed unpaid wages were recovered through proactive processes, much higher than the 60% more typical in complaints investigations, though, as Ministry officials suggest, this difference is likely due in part to a higher proportion of insolvent employers among the population of employers that is the subject of complaints. (Vosko et al. 2011; LCO, at 54) Regular enforcement sweeps also provide low risk opportunities for workers to voice their complaints of alleged non-compliance (Vosko, 2012, at 873).*[77]

With respect to targeted inspections, the evidence is they are of significant importance in detection and deterrence. Professor Banks reports that:

> *… the literature is also unanimous in concluding that proactive inspection and enforcement should be strategically targeted. In this respect recent analyses have been guided by Weil's seminal 2010 report to the United States Department of Labor (Weil 2010). Weil argues that enforcement activity should be targeted at particular industrial sectors and geographic locations according to three priorities: (1) concentration of vulnerable workers; (2) likelihood of complaints in relation to extent of non-compliance, i.e. sectors where workers are particularly unlikely to file complaints and in which non-compliance is likely to be relatively high; and (3) likelihood that enforcement and compliance action can change behavior (Weil, 2010, at 75; LCO 2012, at 64; Howe, Hardy & Cooney 2013, at 136). In recent years the US Department of Labor has explicitly targeted industries with higher concentrations of vulnerable workers (Weil, 2011, at 49).*[78]

Targeted inspections can influence the behaviour of others in the same line of business and beyond. Weil: "But other investigations seem to have much stronger ripple effects that go on to affect the behaviour of other establishments controlled

77 Banks, 60.
78 Banks, 61.

by the firm, or, more interestingly, the behaviour of other companies in the same industry or geographic area."[79]

An efficient and effective use of inspection resources requires an analysis of where risks of non-compliance are greatest, where complaints are least likely to be used, and where remedies are likely to have the greatest sustainable impact in improving compliance. As Professor Banks notes:

> *A strategic approach to targeting enforcement resources requires evidence-based assessment of risks of non-compliance across the regulated economy, and of outcomes of regulatory interventions (Sparrow; Baldwin & Black, 2008, at 65). Each in turn requires data on likelihoods of non-compliance, seriousness of non-compliance and the number of workers affected.*[80]

Targeted inspections need to be maintained over time. They will likely not have sustained effects if they are seen as one-time events rather than part of an ongoing initiative.[81] This means that re-investigations and\or inspections are an important component of an effective enforcement strategy. Not only do they serve as an unofficial quality check on prior past investigations\inspections but also as a check on problem employers – particularly where there is high turnover of employees – and as an assessment of whether there is repetitive non-compliance and whether there is a basis to decide whether further sanctions are warranted.

5.3.2 Other Strategic Initiatives

David Weil and others argue that changes in the structure of the economy and in the complexity of employment relationships together with the decline in unionization have meant that the traditional complaint driven approach to enforcement is less and less effective. Weil put it this way:

> *The employment relationship in many sectors with high concentrations of vulnerable workers has become complicated as major companies have shifted the direct employment of workers to other business entities that often operate under extremely competitive conditions. This "fissuring" or splintering of employment increases the incentives for employers at lower levels of industry structures to violate workplace policies, including the*

79 Weil (2010), 81.
80 Banks, 62-63.
81 David Weil, A Strategic Approach to Labor Inspection Article in International Labour Review 147(4): 349 - 375 · December 2008, 365.

> *FLSA. Fissuring means that enforcement policies must act on higher levels of industry structures in order to change behavior at lower levels, where violations are most likely to occur.*[82]

Weil recommends designing sectoral enforcement strategies, a central purpose of which – as with all enforcement strategies – is to deter violations before they occur. Implementation of a sectoral enforcement strategy requires analysis and understanding the structure of industries to provide insights into why there are higher levels of non-compliance in some industries than in others, and to help inform sector-based enforcement strategies designed to improve compliance. It is his view that an understanding of supply-chain relationships, franchising and other industry structures is an essential first step to the development and implementation of effective enforcement strategies.

Given the similarities between the structural changes in the US economy and those in the Ontario economy, serious consideration of the strategic approach recommended by Dr. Weil and others is a necessity.

The "fissured' workplace requires re-thinking compliance strategies that may engage entities other than the immediate employer. Weil and others have recognized the potential influence of leading firms (such as franchisors, leading brand, or major retailers) within fissured networks of employers on the compliance behaviour of subordinate firms, and of engaging those firms in order to change systemic conditions that create incentives for non-compliance. Professor Banks states:

> *Further, as Weil notes, to pursue strategies that focus at the top of industry structures, on the companies that affect how markets operate and many of the incentives that ultimately affect compliance, inspectorates need to have a clear "map" of how priority industries operate and how that affects employer behaviour. (Weil, 2010, at 78-79) Strategic enforcement also requires information that enables the inspectorate to take into account the likely ripple effects of investigations. As Weil points out, these ripple effects will not only depend on the characteristics of the particular industry or geographical area, but will also be conditional on the relationship between the state inspectorate and key non-state actors. Lead firms, unions, employer associations and other influential community groups can all be critical for magnifying the necessary 'ripple effects' of investigations and prosecutions. (Weil, 2010, at 76-82)*[83]

82 Weil, 1.
83 Banks, 63.

An essential first step in designing and implementing these "top of industry" initiatives is obtaining reliable information on risk factors and industry operations, particularly with respect to new and emerging risks that may require new information collection strategies. (Professor Banks also discusses good practices and the collection of data on employer size and worker characteristics - particularly those associated with labour market vulnerability.[84])

Good practices may also include "obtaining information from individual workers, anonymous sources, unions, community organizations and employer associations" in order to learn about "particular employers that are likely to be non-compliant, how fissured industries are organized, and the extent to which lead firms and employer associations might be engaged to alter systemic conditions fostering non-compliance."[85]

As Professor Banks points out:

> *In Australia, the FWO regularly consults with employer and union organizations with respect to targeting of enforcement campaigns. The organizations provide a key source of information on how industry operates and how to approach compliance and enforcement for maximum effect (Hardy & Howe, 2009, at 129). Hardy also reports that FWO also increasingly uses migrant resource networks, ethnic business groups and community legal centres for whistle-blowing (Hardy, 2011, at 131). Vosko suggests that the Employment Standards Program Advisory Committee might provide a potential means for communicating with worker advocacy groups about improving employment standards enforcement (Vosko 2011). The same might be true with respect to employer organizations.*[86]

Investigators too can collect data about industry structures and practices to bring an increased understanding of numerous matters, including: related employers, management structures, franchising and ownership structures, and how decisions are made about personnel policies.[87]

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84 *Ibid.*, 63-64.
85 *Ibid.*, 64.
86 Banks, 65.
87 Weil (2010), 88-9.

5.3.3 Focusing at the Top

In addition to an expanded use of inspections, Weil and others advise focusing enforcement strategy so that it includes "lead firms" (i.e., firms at the top of the industry structure such as franchisors), as well as the employers directly responsible for labor standards violations. Weil argues that such a strategy requires changes to a variety of investigation protocols. As noted above, it requires sophisticated data collection and a commitment to investigations of multiple sites of a given employer or operating under a lead firm where wide scale violations are believed to be present.

Related to strategies designed to involve the top or lead firm, brand recognition and the need to protect the brand can be important factors in engaging a lead firm. Professor Banks:

> *Weil (2010) points out that addressing non-compliance within fissured networks of firms may require attention to the role of lead firms in setting terms of product market competition and their potential role in altering those terms. For example, to determine whether there are systemic pressures for non-compliance within such networks, investigations into eating and drinking establishments should focus on other establishments owned by the same franchisee, and consider whether there is a pattern of non-compliance within the brand (Weil, 2010, at 78). If such pressures exist, enlisting top-level businesses may be crucial to improving compliance, drawing on their capacity to monitor and regulate conditions of production within the networks of enterprises that they lead. This strategy has the support of the LCO (2012, at 69).*
>
> *However, without reforms to the legal rules of responsibility for terms and conditions of employment such firms may not have any legal obligation or liability for employment standards violations in lower level firms. The lead firms generally will not be the employer of record for the purposes of employment standards legislation. They therefore may have no interest in participating in such agreements. In fact, they may have positive incentives not to get involved in such matters, in order to avoid liability.*
>
> *Nonetheless, lead firms sometimes do have incentives to participate in negotiated agreements to change systemic pressures on labour standards. These incentives can arise out of a desire to protect their brand from*

> *damage to reputation that flow from labour standards violations of suppliers, franchisees, or agencies supplying workers upon whom they rely. Lead firms may also have incentives to reduce the potential liability of franchisees in order to protect the value of franchises.*
>
> *A sustainable compliance strategy might therefore seek to mobilize such incentives. Weil argues that regulatory agencies could potentially make use of information disclosure as a way to promote compliance: "...reputation can be a source of regulatory jujitsu—even without recourse to legal strategies. Workplace regulatory agencies could map relations—whether subcontracting, third-party management, or franchising—of the entities they inspected routinely to the entities that had an overarching role in their activities and report on violations and investigations to that controlling entity. (Weil, 2014, at 235)*[88]

Implementation of such strategies may involve consideration of whether other provinces might be interested in a coordinated strategic approach, given that lead companies often operate in multiple provinces. It would involve data sharing, coordinating the larger investigation strategy and an integrated approach to short-term investigations as well as long-term objectives.

Finally, coordination across cases that are associated with a common business association or an entity that might not traditionally be considered part of coordinated investigation efforts (e.g., independent management operators in the hotel industry) becomes essential.

In order to develop coordinated approaches, consideration should be given to establishing what Weil has described as "vulnerable worker coordinated strike forces in one or two industries employing vulnerable workers."[89] Weil points to "obvious industries" such as eating and drinking, hotel/motel and to other industries with vulnerable workers, such as a major, multi-unit franchisee with a history of violations or a specific management company in the hotel/motel sector.[90]

For such strike forces, a targeted group of firms would be pre-selected and screened and inspections of the targeted employers would start at the same time. These initiatives could be implemented in the hotel, restaurant and other

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88 Banks, 76-77.
89 Weil (2010), 79.
90 *Ibid.*, 87.

sectors where there are a large number of vulnerable and precarious workers. For example, the outlets of a major franchisor could be inspected during a stipulated period in multiple locations. Such a coordinated effort would both create an impetus for establishing agreement with the franchisor to encourage ESA compliance with franchisees, as well as have potential ripple effects on other industry players. (See below for a discussion of what such agreements might look like.) Such a strategy is designed to engage the custodian of the "brand" in voluntary strategic partnerships to create "top-down" pressure to comply.

These "top down" compliance strategies are not based on concepts of joint liability, but rather on the fact that top of industry firms have a stake in protecting the name of the brand and its potential vulnerability if there is well-publicized non-compliance by those down the chain – franchisees for example.

There are similar approaches that have been used in other jurisdictions to engage the "top of industry" in strategic enforcement initiatives. As mentioned above, the Fair Work Ombudsman (FWO) in Australia has established a National Franchise Program that works with franchisors aiming to improve the employment standards compliance performance of their franchisees. The franchisor program is premised on the notion that non-compliance by an employer franchisee can result in serious legal consequences for the franchisee and that these consequences may impact the entire brand. As a result, the franchisor program encourages franchisors to take steps to minimize the risk to their brand by taking practical steps to help franchisees understand and meet their obligations. For example, the FWO encourages franchisors[91] to:

- include in their franchise agreements a specific obligation requiring franchisees to comply with workplace laws;
- make sure that every franchise's business model takes into account the costs of lawfully employing adequate numbers of staff;
- incorporate the Fair Work Handbook into the business' operations manual or as a stand alone document for franchisees;
- develop internal processes to support compliance including making compliance easier for franchisees by providing human resource/industrial relations systems or software to help franchisees achieve consistent and compliant workplace practices;

91 See Australia's Fair Work Ombudsman website at: http://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/franchise-assistance/information-for-franchisors.

- recruit and train franchisees who are committed to compliance on the applicable workplace laws including engaging appropriately qualified human resources / industrial relations staff to train, update and assist franchisees; or arrange corporate memberships with an employer association, or special rates with a professional adviser to help franchisees access reliable and cost effective advice;
- regularly check that franchisees are complying with workplace laws including audits to ensure franchisees are meeting their record-keeping obligations or require franchisees to conduct 'self-audits' and report the results.

The FWO also has entered into various "compliance partnerships" between the FWO and "top of industry" enterprises that may involve reviewing and monitoring supply chain and franchise relationships. These agreements are designed to establish a collaborative relationship between the regulator and businesses that want to publicly demonstrate their commitment to creating compliant and productive workplaces. To quote the office of the FWO: "Through a Compliance Partnership with us, businesses can ensure their systems and processes are working effectively to build a culture of compliance."[92]

Other investigation tools could also be modified to better support a targeted approach to enforcement. Reinvestigations/inspections could be used in a focused effort as part of a wider initiative regarding a problematic brand, as described above. By tying reinvestigations explicitly to brand- or third-party management initiatives, the groundwork could be laid for more comprehensive agreements with the top-level organizations (and potentially increase the deterrence effect of these interventions).

Recommendations:

4. Concurrent with our recommendation for changing the current practice of investigating all complaints, the Ministry of Labour should allocate more resources to proactive enforcement initiatives, including spot checks, audits, and inspections.

92 FWO website.

5. The proactive model of enforcement should do the following:

   a) be strengthened by targeting monetary violations of the type being detected through complaints;

   b) continue to regularly collect and analyze statistical survey data on compliance to determine the likely extent of non-compliance;

   c) continue to regularly collect and analyze data on concentrations of vulnerable workers in various sectors of the economy; and

   d) continue to analyze incoming and processed complaints for data that may help to focus proactive compliance and enforcement initiatives within priority areas.

6. Strategically increase the use of targeted inspections, particularly in sectors and jobs where there are large numbers of vulnerable and precariously-employed employees and with respect to employers in specific sectors and geographic locations.

7. In the course of investigations of individual complaints, employment standards officers should continue to assess whether an expanded investigation or regular inspection should be initiated whenever there is an indication that the problem of non-compliance affects more employees than the complainant alone.

8. Employment standards officers should treat evidence of deliberate non-compliance uncovered in the course of complaint investigation as warranting, prima facie, an extension of the investigation, subject to any overriding priorities related to targeted inspections established as part

9. Further utilize enforcement strategies with a view to focusing on the top of industry structures – the top of the supply chain or franchisor, for example – where decisions are made that influence compliance by those lower in the chain. This will involve the collection of data, during investigations, about industry structures in relation to such matters as common employers, management structures, franchising and ownership structures, and how decisions are made regarding personnel policies.

10. Develop the capacity to link quickly to other sources of government data, including information from other ministries of labour in other provinces, which may help identify areas with a propensity towards non-compliance.

11. The Ministry of Labour should be provided with additional funding sufficient to implement a comprehensive strategic enforcement approach and to hire more officers to increase the capacity for conducting proactive and targeted inspections.

5.3.4 A Law Enforcement Agency

As effective as inspections and other strategic initiatives may be, they are just one element of a cohesive and a comprehensive strategic enforcement approach.

As part of strategic management, the Ministry must move closer to becoming a more traditional law enforcement agency and less an agency involved in customer service that also performs some enforcement activities. We do not mean to suggest that the MOL is not currently interested in and dedicated to enforcement. It is. We do suggest that it needs to consider the implementation of new strategies and also that the Ministry needs more tools and more opportunity to pursue enforcement initiatives. A change in emphasis – to become more of a law enforcement agency – accompanied by legislative change should help create a culture of compliance in Ontario workplaces and help the MOL to carry out its mission more effectively.

Some important enforcement activities - such as proactive inspections - are important and effective components of law enforcement. However, other practices and procedures restrict the effectiveness of the Ministry in its law enforcement role.

5.3.5 Impact of the Current Complaints-driven System on Enforcement Strategies

Currently in Ontario, like most jurisdictions, employee-initiated complaints are the foundation for enforcing employment rights. A central focus of the Ministry's activities is processing complaints. At various times the Ministry devotes extra money and resources to shortening the backlog in its efforts to process all complaints. In this system, the Ministry cannot easily establish priorities and act strategically in the interest of broader workplace compliance. Rather, a large portion of its time and energy is taken up with priorities set by the individual circumstances of those who happen to file complaints and dealing with a backlog. With limited resources, if individual complaints dominate the agenda, the priorities of a law enforcement agency can be secondary instead of dictating the agenda. Just adding personnel to deal with complaints without changing the strategy and the approach will not address the fundamental issue.

If achieving a culture of compliance is a rational objective, new enforcement strategies are required to work towards this outcome. This does not mean to minimize the importance of investigating complaints and recovering wages lost to employees because of non-compliance. That will likely always remain a core function of the Employment Standards Program of the MOL. However, a complaint-driven process - on its own - will not achieve the desired results. As Professor Banks stated:

> *The growth of the vulnerable workforce and the fissuring of workplaces in many networked industries pose very significant and likely insuperable challenges to the effectiveness of any approach to compliance and enforcement that is primarily complaint-driven.*[93]

5.3.6 Systemic Campaigns to Counter Systemic Non-compliance

Adopting an approach more like that of a law enforcement agency would make a difference in that it would be likely to initiate more action on a province-wide or sectoral basis to address systemic problems in the workplace. In the same way as the police in public communications might emphasize the dangerous use of a cell phone or alcohol while driving, a workplace law enforcement agency could highlight the issues of systemic non-compliance such as: “unpaid internships” in situations where the employee is entitled to the protections of the ESA and the misclassification of employees as independent contractors. Both of these practices are illegal and widespread and both constitute a fundamental repudiation of the essential protection of the law, namely, a refusal to recognize that someone is an employee entitled to basic rights. Both issues are poorly understood and should be addressed systemically. A law enforcement agency might broadly publicize when “internships” must be paid, the fact that many unpaid internships and the misclassification of employees as independent contractors are illegal, and publicize a clampdown on illegal practices. It would encourage people to call anonymously and to leave the relevant information on tip lines. If the tips resulted in investigations or inspections, when the investigations were complete and the matters closed, the agency would actively publicize the results with names of offenders and the resulting orders and penalties.

93 Banks, 5.

5.3.7 A Strategic Approach to Litigation

A law enforcement agency would have a more active approach towards litigation and the adjudication of disputes. Currently, the Ministry does not see its role as defending the vast majority of the decisions and policies applied by its Employment Standards Officers (ESO).[94] For example, when an employer seeks a Review of an ESO decision before the OLRB, the Ministry typically does not defend the decision but leaves it to the employee to do so. This often contributes to an uneven playing field where the resources mounted against the decision of the ESO often outweigh the resources of the individual employee to defend it. It may also create situations where strategically important decisions of ESOs are undefended by the Ministry. Occasionally, the MOL will participate in a particular case, but it does so for limited purposes of advocating for the Ministry's interpretation of a provision. In fact, the MOL takes the view that it is neutral in litigation between the employee and the employer. A law enforcement agency would not regard itself as neutral and would not leave the decisions of its officials undefended or leave it to the parties to have the responsibility for defending Ministry policies and decisions.

It is not suggested that the MOL should blindly defend all ESO decisions on Reviews initiated by either party. Some decisions may be indefensible. We do say that consistent interpretation and application of the Act necessitate an active participation in litigation as part of strategic enforcement. It is suggested that the Ministry should, in enforcement of the Act, assume a role analogous to that of the Crown in criminal matters. As the Supreme Court of Canada has stated:

> *It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented, it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings.*[95]

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94 An exception is the Ministry's defence of Notices of Contravention at the OLRB which it has started to use significantly more since the onset of this Review.

95 *R. v. Boucher*, [1955] SCR 16, page 24-25.

In employment matters, the Ministry should actively participate where violations have occurred by ensuring that the evidence and the law are fairly presented to the adjudicator. It should be an advocate for compliance and not restrict its role to being an amicus.

However desirable it would be for the Ministry to appear in all cases, it likely requires too many additional resources. It is not practical. However, the Ministry should be strategic and participate in important cases in sectors where there are high levels of non-compliance and in cases that may have precedential value. In short, a law enforcement agency must have a proactive and policy oriented litigation strategy that will see it be an active advocate for the application of the law in proceedings before the OLRB.

Recommendation:

12. Ministry of Labour counsel or representatives at review hearings before the Ontario Labour Relations Board should actively participate in proceedings to ensure that the best evidence and the law are before the adjudicator.

5.3.8 Current Complaints-based System and the Necessity for Change

The ESA is a complaints-driven model. As Vosko, Noack and Tucker point out in the paper prepared for the CWR:

> *Worker-initiated complaints are the foundation of most regimes for enforcing employment and labour rights. After all, workers are the ones who experience violations directly and have the most direct and immediate interest in obtaining a remedy.*[96]

According to their research:

> *the volume of ESA complaints received by the Ministry of Labour has decreased in recent years. Between 2008/09 and 2012/13, the number of ES complaints submitted annually dropped substantially, but has levelled off at about 15,000 per year since 2012/13. … [I]n 2015/15, there was one complaint submitted for every 285 non-unionized employees.*[97]

96 Vosko, Noack, and Tucker, 11.
97 Vosko, Noack, and Tucker, 6.

The ESA contemplates that the Ministry will investigate all complaints that are filed, as long as the claimant has taken the specified steps to facilitate the investigation. In a world where financial constraints are a constant, budgetary considerations do not permit the hiring of enough ESOs to complete the investigation of all complaints in a timely fashion while also maintaining a significant proactive presence. The result is that there is a backlog of uninvestigated and unresolved complaints.

Quarterly, between 2011-12 and the first two quarters of 2015-16: the average wait time for assignment to a Level 1 ESO ranged from 2 days to 67 days, with an average of 35.4 days. Over the past four quarters in this period the average was 38 days; the average wait time for assignment to a Level 2 ESO for investigation has ranged from 54 days to 189 days, with an average of 119.6 days. Over the past four quarters in this period the average was 89 days.

There have been fundamental changes in the workplace. The number of employees represented by trade unions has declined. There has been a change in how many businesses organize their affairs, as the direct employment of employees has been shifted to other business entities including subcontractors, temporary help agencies and franchisees. There are many vulnerable employees in precarious jobs whose basic employment rights are being denied. This denial of rights and protections occurs for many reasons; however, it is exacerbated by the overwhelming number of complaints and by the lack of resources required to make timely investigation of all complaints.

The problem of limited resources is not unique to Ontario. In the US in 2010, David Weil in his report to the US Department of Labor's Wage and Hour Division, *Improving Workplace Conditions through Strategic Enforcement* described the situation in the US as follows:

> *The challenges facing the major agencies in the US Department of Labor (DOL) that regulate conditions in the workplace are daunting. Public policies on health and safety, discrimination, and basic labor conditions cover millions of workers, and have to be implemented in hundreds of thousands of disparate workplaces in differing geographic settings. Conditions within those workplaces vary enormously – even within a single industry – and employers often face incentives to make those conditions as opaque as possible. Workers in many of the industries with the highest levels of non-compliance are often the most reluctant to trigger investigations through*

> *complaints due to their immigration status, lack of knowledge of rights, or fears about employment security. Even the laws, which set forth the worker protections DOL agencies are charged with enforcing, have limitations in the 21st- century business community. Compounding all of the above, agencies charged with labor inspections have limited budgets and stretched staffing levels, coupled with a very complicated regulatory environment.*
>
> *These challenges, however, reach beyond the number of investigators available to the DOL or to the Wage and Hour Division (WHD) in particular. Profound changes in the workplace, including the splitting up of traditional employment relationships, the decline of labor unions, and the emergence of new forms of workplace risk make the task facing DOL agencies far more complicated. In addition, expectations and demands on all regulatory agencies to demonstrate progress toward achieving outcomes and the resulting impacts on how government agencies are overseen by Congress, accountability agencies, and the public have created intensified pressure and scrutiny.*[98]

A complaints-based system also presents challenges and problems for employees. Often they lack knowledge that their rights have been violated. Fear of reprisals is also a documented reality.

When an employee does initiate a complaint, that employee bears the costs associated with the initiation of the complaint while the benefits of their resolution may spill over to other employees who receive redress as a result of the complaint. Many fear reprisal if they do complain. Professor Banks put it this way:

> *The literature reviewed below suggests that fear of reprisal and the challenges and opportunity costs associated with pursuing a claim can each be a significant barrier to pursuing complaints, and that this is particularly so for workers who are low paid and lack job security. Such workers are disproportionately women and/or members of ethnic or racial minority groups who are more likely to face linguistic and cultural barriers or stereotyping. (Statistics Canada, 2000, at 103; Vosko, 2010, at 634; Thomas, 2009, at 24; Noack et al, 2015, at 89) They are more likely to be persons with disabilities, who often face stereotyping in the labour market and often do not have access to accommodations that they need in order to work with equal*

98 Weil (2010), 1.

> *opportunity (Banks, Chaykowski & Slotsve 2013). Low-wage workers are less likely to be unionized, or to have access to health and disability benefits that improve income security. (Chaykowski 2005, Marshall 2003, Zeytinoglu & Cooke 2004) Workers in a temporary or otherwise insecure residency status, recent immigrants, racialized workers, and people with disabilities are all over-represented in precarious forms of employment (Noack et al, 2015, at 89). While members of racialized groups comprise approximately 13% of the Canadian population, through the late 1990s and into the 21st century they have been disproportionately represented in low-income, low-security occupations such as those of harvesting labourers (40%), sewing, textile and fabric workers (40%), and electronics assemblers (42%) (Thomas, 2009, at 25).*[99]

Consistent with these observations, research suggests that the frequency of individual complaints may not be an accurate indicator of a larger sectoral problem of non-compliance. This is the point made by Vosko, Noack and Tucker who assert that: "the source and type of complaints may not be aligned with the underlying problems in the labour market."[100] Banks makes a similar statement:

> *Claims resolution is an incomplete response to these concerns. It does not address matters never raised as claims. It therefore may not be fully effective, or very effective at all, as a strategy for securing compliance with legal duties and obligations imposed by statute. It may therefore not be sufficient on its own to give effect to the purposes of the Act.*[101]

The changing workplace raises squarely the question of whether the traditional approaches to investigation of complaints and to enforcement are sufficient. As Weil states: "fissuring means that enforcement policies must act on higher levels of industry structures in order to change behavior at lower levels, where violations are most likely to occur."[102] New sector-based enforcement strategies need to be designed to change employer behavior and improve compliance, with priority being given to those sectors where non-compliance is most problematic.

While it is recognized that the investigation and remediation of individual complaints of violation will likely remain an important aspect of the ESA regime, the current policy of investigating all complaints must be reassessed. It is

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99 Banks, 13.
100 Vosko, Noack, and Tucker, 11.
101 Banks, 12.
102 Weil (2010), 1.

expensive and time consuming and sometimes the expense and time involved is disproportionate to the magnitude of the claim as well as not being the most effective means of identification and remediation of larger patterns of non-compliance. The opportunity cost of not changing the system of processing and investigating every complaint is significant. It means that the Ministry is on a constant treadmill trying to clear its backlog and not concentrating on taking important proactive steps to enforce the law, addressing the larger priorities of employees as a whole. The only way in which the Ministry can fulfill its obligation to strategically enforce the statute is by changing the fundamental way it does business with respect to the processing of complaints.

It should also be underscored that recommending a policy of not investigating every claim is not intended to minimize or diminish the importance of a claim, no matter how small, to an individual claimant. It is rather meant to be a recognition that, in an environment of scarce resources, different and more effective strategies related to enforcement must be implemented and resources be shifted to focus, in part, on such strategies.

Simply stated, with limited resources, the most effective strategies to foster a culture of compliance will involve investigating some, but not all individual complaints and implementing other strategies designed to foster compliance. Cases of alleged reprisal and complaints that may lead to an expanded investigation in a workplace should be given priority. This should free up resources for other enforcement strategies like inspections.

Recommendations:

13. The *Employment Standards Act, 2000* should be amended to make it clear that the Employment Standards Program is not required to, and will not, investigate all claims.

14. The claims given priority for investigation should be claims of alleged reprisal and complaints that will likely lead to an expanded investigation in the workplace.

15. The Ministry of Labour should develop on-line assistance for complainants and employers in relation to complaints that are not being investigated, which will provide both parties step-by-step guidance and information regarding the available procedure for processing and filing complaints.

5.3.9 An Accessible Process for Complainants to Have Claims, Not Investigated by the Ministry of Labour, Adjudicated

As discussed, scarcity of resources and the large number of complaints poses too much of a burden on the current enforcement regime. Individual complainants whose complaints are not investigated must be provided access to some simplified expedited dispute resolution process for claims adjudication.

In other jurisdictions, such as the UK, employees are responsible for presenting their own case to an employment tribunal.

Elsewhere in the Report (when dealing with Reviews), we discuss the advantages of increased regional access to the review process to make adjudication more accessible and more efficient for the parties. A similar recommendation is advanced in this section of the report to facilitate hearings of individual complaints where employees have been informed that the Ministry will not be conducting an investigation. This recommendation is intended to make adjudication for individual complainants accessible and cost effective.

The existing tribunal with ESA expertise is the OLRB. It currently hears ESA reviews, some *Occupational Health and Safety Act* (OHSA) matters and is responsible for the administration of the *Labour Relations Act, 1995* (LRA) and for the adjudication of labour cases within its exclusive jurisdiction.

The Ministry of Labour should appoint part-time vice-chairs to deal exclusively with ESA matters in 7 of the 8 judicial districts in Ontario. The judicial districts are: Central East, Central South, Central East, East, Northeast, Northwest, Southwest and Toronto. The OLRB in Toronto could hear cases from the Toronto Region. These part-time vice-chairs will have training and expertise in the ESA and will conduct hearings into complaints (and hear applications for review) on a regional basis thus providing an accessible forum to hear complaints that are not investigated by an ESO. Establishing such a cadre of vice-chairs will make attending and participating in the complaint process more accessible and less expensive for both employees and employers.

The appointment of local ESA vice-chairs of the OLRB is similar to a proposal Professor Arthurs made to the federal government to deal with the special needs of distant communities.[103] There is likely a willing group of knowledgeable local legal

103 Arthurs, 207.

practitioners in each area who would be prepared to sit on a regular basis if necessary to adjudicate employee ESA complaints and hear applications for review. However, being appointed as an adjudicator need not be restricted to lawyers. As Professor Arthurs recommended, adjudicators "should be experienced in conducting hearings and knowledgeable about labour relations and/or labour standards."[104] Adjudicators would be paid on a per diem basis as are current part-time vice-chairs of the OLRB.

The Ministry of Labour or the OLRB should facilitate access by self-represented parties by providing explanatory materials in plain language with respect to both the procedure and the applicable principles of law, including the burden of proof and basic rules of evidence. These sorts of memoranda have proven to be of great assistance to self-represented individuals in other legal proceedings.

The complaint process should be consistent with the requirements of fairness and natural justice and easy to access for self-represented employers and employees.

The real issue on a complaint made directly to the OLRB is whether the ESA has been violated. The burden of proof is on the applicant to show a on a balance of probabilities that a violation has occurred. Since there has been no prior adjudication, this complaint process may necessitate an adversarial proceeding in which evidence is called on some issues, facts are found and a decision is rendered. Access to justice for both employers and employees requires a process that is user-friendly without sacrificing the quality or fairness of outcomes.

In order to accomplish this, vice-chairs of the OLRB who hear complaints in the first instance should be given, by statute, the power to consult with the parties as part of the decision-making process. Consultation is less formal and less costly and more efficient than an adversarial process and should result in a better understanding and definition of the issues in dispute and as a forum to decide whether it is necessary to hear evidence in the case. The OLRB has successfully used such a consultative process for some cases under the LRA. The adjudicator, the vice-chair, plays an active role in a consultation. The goal of the consultation is to expeditiously focus on the issues in dispute and to determine whether any statutory rights have been violated. The OLRB describes the consultation process as being designed to: "draw out the facts and arguments necessary to decide whether there has been a violation of a statute."[105] In doing so, the vice-chair may: (1) question the parties and their representatives; (2) express views;

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104 *Ibid.*, 207.
105 http://www.olrb.gov.on.ca/english/hearing.htm

(3) define or re-define the issues; and (4) make determinations as to what matters are agreed to or in dispute. If it is necessary to hear evidence, for example where matters of credibility must be resolved, the giving of evidence under oath and the cross-examination of witnesses is restricted to matters defined by the vice-chair.

In sum, the vice-chair in a consultation process decides procedural issues if required and helps the parties define the issues and determine whether evidence is required on particular matters. The vice-chair then decides the case.

Special procedures, like pre-review meetings with the parties could be scheduled in advance with LROs to ensure narrowing of the issues, agreement on facts and perhaps settle cases, much like pre-trials in civil cases.

A number of cases could be scheduled and heard on the same day.

Employers who elect to contest a complaint should be required to bring to the hearing copies of all documents and business records relevant to the complaint and to its response.

The recommendations below are not intended to restrict the power of the Director of Employment Standards under s. 96.1 of the ESA to require among other things that "the complainant shall give the Director such evidence and other information in writing as the Director considers appropriate for assigning the complaint to an employment standards officer for investigation." It will be the Director who assigns a complaint for investigation or advises the complainant that the complaint should be filed as a complaint directly with the OLRB.

Recommendations:

16. The Ontario Labour Relations Board should be the forum for the adjudication of individual complaints not investigated by the Ministry of Labour, provided the Director of Employment Standards approves such complaints as ones to be filed and processed by the complainant.

17. The Director of Employment Standards should determine whether a complaint is to be investigated or processed by a complainant to the Ontario Labour Relations Board and, in making such a determination, the Director should have the authority not to approve a complaint to be heard by the Ontario Labour Relations Board, just as the Director is permitted, in certain circumstances, to decline to assign the complaint to an employment standards officer for investigation under the *Employment Standards Act, 2000*.

18. The Ministry of Labour should appoint part-time vice-chairs in each of the seven judicial districts in the Province of Ontario outside Toronto to hear complaints that are not investigated by an employment standards officer.
19. Vice-chairs who hear complaints in the first instance should have all the powers of an employment standards officer and the requisite authority to adjudicate complaints and make orders necessary to compel remediation of the violations found to have occurred. In addition, without restricting the generality of the foregoing, the vice-chair should have the right to award wages, fees and compensation, interest on wages owed and the right to order the posting of notices in conspicuous places at the place of employment of the complainant or in other places deemed appropriate.
20. Vice-chairs of the Ontario Labour Relations Board who hear complaints in the first instance should have the power to consult with the parties as part of the decision-making process.
21. Employers who elect to contest an employee complaint (where there has been no investigation) should be required to produce copies at the hearing of all documents and business records relevant to the complaint and to the employer's response.
22. The Ontario Labour Relations Board, or the Ministry of Labour in consultation with the Board, should create explanatory materials for unrepresented parties regarding both the complaint procedure and the applicable principles of law, including the burden of proof and basic rules of evidence.

5.4 Education of Employees and Employers – Increasing Awareness of Rights and Obligations

Providing… information to employees is a crucial step in ensuring that they have access to the enforcement of their rights. Providing information to employers responds directly to the needs of many. The literature treats this as a cost-effective means of increasing compliance, though it contains no systematic demonstration that this is the case. Nonetheless, there are reasonable grounds to suppose that it is. … [T]he motivations of many employers will dispose them to comply if they know what is required of them. Once produced, informational materials can be reproduced and distributed at relatively low cost. (Banks, p. 57)[106]

106 Banks, 57.

5.4.1 The Proposed Workplace Rights Act

We recommended in the introduction, that the critical components of workplace rights be packaged together under a common umbrella, to be communicated and marketed together as a comprehensive Workplace Rights Act in order to underscore and communicate to all Ontarians that employment carries with it rights that need to be respected and enforced. The repeated reference, over many years, in workplaces and elsewhere, to a Workplace Rights Act that sets out workplace rights is a simple but effective measure to increase awareness among both employees and employers.

5.4.2 Education and Outreach

The Ministry currently engages in several educational and outreach initiatives that are designed to help employees and employers understand the rights and obligations that are set out in the ESA. These include: the provision of videos and explanatory materials on the Ministry website; a call centre to provide general information about the ESA in multiple languages; and the delivery of seminars to employee and employer groups.

Employment Standards Officers, who are charged with enforcing the Act, are required to follow the Director's policies. The Employment Standards Act, 2000 Policy and Interpretation Manual, which is written by Ministry of Labour staff, sets out in detail the policies and interpretations of the Director of Employment Standards. Until recently, the Manual was published by a legal publishing firm and was available for purchase by external stakeholders such as clinics, law firms, unions, employers and human resource professionals. The Manual is no longer available for purchase. The Ministry will provide an electronic version of the Manual on a USB key to individuals on request. Individuals must periodically makes requests to the ES Program for new USB keys to ensure they have the most recent version of the Manual.

The Act requires employers to post and provide employees with a statutory ESA poster that provides a brief description of the Act and provides the Ministry's web address and a phone number if employees or employers wish to obtain more information.

It is a self-evident truth that knowledge and understanding of rights and obligations will assist in achieving higher levels of compliance. As Professor Banks stated in his CWR Report:

> *There is broad consensus in the literature that agencies responsible for compliance and enforcement should make information on what compliance requires readily available, and should actively disseminate it to targeted groups of employers and employees who may need it the most… Providing this information to employees is a crucial step in ensuring that they have access to the enforcement of their rights. Providing information to employers responds directly to the needs of many. The literature treats this as a cost-effective means of increasing compliance, though it contains no systematic demonstration that this is the case. Nonetheless, there are reasonable grounds to suppose that it is. As discussed above, the motivations of many employers will dispose them to comply if they know what is required of them. Once produced, informational materials can be reproduced and distributed at relatively low cost.*[107]

And:

> *First, for many employers an effective compliance strategy simply entails dissemination of clear information on what compliance requires. These employers will probably tend to be those that provide terms and conditions well above minimum standards in order to pursue a competitive strategy based on retaining and rewarding employees with marketable skills and abilities. These employers have few if any incentives not to comply.*[108]

There are groups of employers and employees in sectors where non-compliance is a greater problem than in other sectors. Targeted information on rights and obligations may alleviate this problem.

In our view, complaint patterns and outcomes can be of assistance in identifying sectors for educational outreach. For instance:

> *Complaints related to the accommodation and food services industry are most likely to have violations, with 78% of assessed complaints resulting in violations … Violations are also more likely to be found for complaints filed against small firms.*[109]

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107 Banks, 56.
108 Banks, 54.
109 Vosko, Noack, and Tucker, 29.

The Ministry should also actively collaborate with employers, unions and worker advocacy groups to identify targets for pro-active strategic and targeted communications to employees and employers in sectors where there are many vulnerable employees and high incidents of non-compliance. Professor Banks stated:

> *Case study literature also points to the value of partnerships with employer, worker and other organizations in disseminating compliance information, drawing on the access and trust that they enjoy with their constituencies (Hardy, 2011, at 130-1; LCO 2012, at 69).*[110]

The Ministry should be aware of and consider the efficacy and cost-effectiveness of implementing educational and outreach strategies used in other jurisdictions. Professor Banks noted the following as worthy of evaluation:

> *Free Tailored Education: Australia Fair Work Ombudsman (FWO) has established a National Employer Program that delivers free tailored education to employers with more than 1000 employees to help them understand and apply Australia's employment standards laws. FWO has targeted industries in which illegal unpaid work arrangements are more prevalent, and industries with high levels of procurement in an effort to increase compliance among subcontractors (Vosko et al., 2014, citing FWO 2012 and 2013). FWO also has a National Franchisees Program that works with franchisors aiming to improve the employment standards compliance performance of their franchisees. Participating employers have demonstrated satisfaction with the program. This is a purely voluntary program, as firms derive no legal advantage in the form of reduced inspection. While is [sic] has been pointed out that both programs may be targeting resources towards compliance where it is most easily achieved (Vosko, Grundy & Thomas 2014), this may be an efficient means of raising compliance if the costs of the program are low. There is no costing of these programs in the literature.*
>
> *Saunders and Dutil (2005) endorse the suggestion of Quebec enforcement officials that labour ministries target accountants, who often provide book-keeping services to small firms and therefore are in a good position to ensure their clients' compliance. Ontario officials inform me that in their experience many accountants and bookkeepers are unfamiliar with the requirements of the ESA.*[111]

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110 Banks, 57.
111 Banks, 57-58.

In a complaint-based system, employee knowledge of rights is important, but so is their willingness to use them. All efforts to encourage reporting of violations must be accompanied by efforts to communicate information on the anti-reprisal provisions of the ESA to employees and to employers, as well as by rigorous enforcement of those provisions. Education and awareness of rights and obligations and of anti-reprisal provisions could be increased by giving publicity to cases of reprisal.

In this regard, David Weil stated that:

> *A concerted and well-publicized effort to prohibit the intimidation of employees who complain would encourage greater use of rights as well as discourage illegal employer behavior.*[112]

The publication of investigations may have deterrent ripple effects on other employers in the same sector. In canvassing the benefits of transparency, Weil states:

> *In general, the WHD should make its investigation activities in a geographic area more transparent. WHD District Offices publicize directed investigations in a variety of ways (press releases, letters to employer organizations, outreach to worker advocates). These should be evaluated to assess their comparative impact. New methods of conveying information about WHD activities, drawing on the web and social networks, should also be explored.*[113]

The *Stronger Workplaces for a Stronger Economy Act, 2014*[114] included amendments to the ESA that allow an ESO, by giving written notice, to require an employer to conduct an examination of the employer's records, practices or both to determine whether the employer is in compliance with one or more provisions of this Act or the regulations. If an employer is required to conduct an examination under subsection 91.1(1), the employer is required to report the results of the examination to the ESO in accordance with the notice and the requirements of this section. This legislation has the potential to aid in both in education of employers and in compliance. It remains to be seen if it is utilized effectively.

As outlined in the Interim Report, employee advocacy groups, unions and employers all stressed the value of education. Employee advocacy groups and unions recommended that the government ensure that educational materials

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112 Weil (2010), 87.
113 *Ibid.*, 83.
114 S.O. 2014, c. 10.

are easy to understand and are provided in multiple languages, and supported launching extensive public awareness campaigns about the ESA. Employers suggested, among other things, that the employer community would benefit from: the use of simple, clear language in all communications that explain the ESA; public ESA information campaigns in multiple languages; working more with community agencies to maximize outreach; providing easy access to the Ministry's Policy and Interpretation Manual; and providing links in the online ESA to clear and concise interpretations of the provisions.

ESA instruction is not a mandatory part of the provincial high school curriculum, whereas occupational health and safety education has been part of the provincial high school curriculum since 1999. Basic instruction on the rights and entitlements of employees under the ESA would be a useful addition to the high school curriculum.

Industry and professional human resource associations could be more effectively utilized to educate employers.

The education of employees and employers will involve multiple communications, educational and outreach strategies.

Recommendations:

Education and outreach are essential tools in creating a culture of compliance. We therefore recommend:

23. The government should consider including basic instruction on the rights and entitlements of employees under the *Employment Standards Act, 2000* in the high school curriculum.
24. The Ministry of Labour should make its Policy and Interpretation Manual available on-line to be accessible by everyone.
25. The Ministry of Labour should continue to actively collaborate with employers, unions, worker advocacy groups, and employer associations to identify candidates for pro-active, strategic and targeted communications aimed at employees and employers in sectors where there are many vulnerable employees and high incidents of non-compliance.
26. The Ministry of Labour should target employers for self-audits pursuant to section 91.1 of the *Employment Standards Act, 2000*, particularly in

sectors where there are many vulnerable employees and high incidents of non-compliance. In addition, the Ministry of Labour should assess the impact of the self-audit provisions on compliance and awareness.

27. The Ministry of Labour should continue to explore, be aware of and consider the efficacy and cost-effectiveness of implementing educational and outreach strategies, including those suggested by stakeholders and those used in other jurisdictions.

5.4.3 Internal Responsibility

Related to education and awareness, the Interim Report advanced as an option that consideration be given to the implementation of an internal responsibility system (IRS) that is intended to formalize a focus by employers and employees on both the substance of the law and on compliance.

The purpose of an internal responsibility system is to give voice to employees in the workplace, to heighten awareness of rights and obligations and to increase compliance with the ESA. Internal responsibility does not assume that the Government's role in administration and enforcement will be reduced or that responsibility for compliance will be off-loaded or made subordinate to any system of internal responsibility. Quite the contrary, to be effective, a system of internal responsibility must be accompanied by strong and robust enforcement strategies. An IRS should supplement and not replace inspections, investigations of individual complaints and other strategic initiatives designed to achieve compliance.

As stated in the Interim Report, the impetus for this approach comes largely from the IRS established by the OHSA that some argue has been effective in making Ontario's workplaces safer and healthier. Under OHSA, both employers and employees have responsibility for health and safety in the workplace and both play a role in endeavoring to achieve compliance with the Act. In this regard, joint health and safety committees or, in smaller workplaces, health and safety representatives, have contributed to a strengthening of a health and safety culture than would otherwise be the case. Committees and representatives have raised employee and employer awareness of health and safety issues and, in many workplaces, have contributed to the identification and elimination of hazardous conditions and to a safer workplace.

The IRS under OHSA is not without its critics. While agreeing that worker involvement has and can have a positive role in making workplaces safer, some critics (for example, the Labour OHCOW Academic Research Collaboration) have expressed concern that the precariously employed are less likely to be able to exert an influence in the workplace than those with more secure employment. In a paper written in 2010, the authors state:

> *The key concern is that the increased precariousness of employment resulting from extensive economic restructuring is undermining the capacity of workers to exercise their responsibilities and rights under the law. … The common theme is that employment is much more insecure, an insecurity that is further aggravated by reductions in social assistance with lower employment insurance (EI) and welfare payments, stricter qualification requirements, and pension shortfalls. Increased levels of stress, declining union and worker solidarity and associated health and social problems are all commonly observed consequences of these developments (Siegrist and Marmot, 2004).*[115]

The authors conclude:

> *As the above evidence indicates, this increased vulnerability to management resistance, pressure and intimidation also means that precarious workers are less likely to report injuries. This clearly has significant implications for the reliability of injury compensation data in as much as it suggests that precariousness may be leading to more under-reporting (Hall et al., 2010; Lewchuk, Clark and de Wolff, 2009). This problem may be greatly enhanced when management is motivated to conceal or repress complaints or injury reporting. … Rather than making the changes that are needed, workers are cajoled, persuaded or threatened to conceal their injuries and/or conceal their seriousness (Eakin et al., 2003; Thomason and Burton, 2000).*[116]

If precariously employed workers in a non-union environment are less likely to report injuries, it is reasonable to conclude they may also be less likely to report or act on ESA violations. On the other hand, where there is no intentional violation of the ESA by an employer, employee and employer representatives with a formal information gathering and monitoring role could lead to improved education, awareness and compliance.

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115 Labour OHCOW Academic Research Collaboration, *Internal Responsibility: The Challenge and the Crisis*, 10.
116 *Ibid*, 14-15.

Before discussing a potential IRS in more detail, it is perhaps useful to mention once again the provisions of s. 91.1 of the ESA that permit the ordering of a self-audit by employers. This provision enables an ESO to require an employer to conduct an examination of the employer's records, practices or both to determine whether the employer is in compliance with one or more provisions of this Act or the regulations and report the results to the ESO by a specified date. The ESO can specify the methodology to be used, the format to be followed and the information to be included in the self-audit. The employer can also be required to identify if employees are owed wages and the details of any payments made to remedy the non-compliance. If the employer's report includes an assessment that the employer has not complied with this Act or the regulations but no employees are owed wages as a result of the failure to comply, the employer is required to include in the report a description of the measures that the employer has taken or will take to ensure that this Act or the regulations will be complied with. The ESO may also order wages to employees based on the audit. In sum, the MOL already has the authority under the ESA to require simplified audits relating to compliance with all or portions of the ESA. To require employers to conduct simplified compliance audits should result in an increased awareness by some employers of their obligations and of employee rights and in increased compliance.

Employer audits could be an essential tool in making an IRS effective. Employers could be required by the Ministry to audit compliance with selected standard(s) identified by the Ministry. The requirement of the employer audit with respect to selected standard(s) could be announced to employers and employees in advance with targeted communications and education. A compliance audit on standard(s) could easily provide a basis for an agenda for employee and employer representatives to meet and discuss compliance and issues related thereto.

In the EU, Consultation Committees are mandated in workplaces with more than 50 employees. The EU directive for informing and consulting with employees requires information to be given and advice sought with respect to a number of subjects including the economic situation of the business and decisions likely to lead to organizational change. Australia has similar legislation. The federal Canada Labour Code contains provisions for the establishing of joint committees to deal with the consequences of mass redundancy.

We endorse, in a general sense, establishing consultation committees to give employees both information and a voice in the workplace. However, we have concluded that Consultation Committees or other Internal Responsibility Systems for employment standards should be encouraged but not mandated by law.

If a Consultation Committee were to be established by an employer, its mandate could be much broader than ESA compliance. Employee committees could receive information and be consulted on a number of subjects and decisions related to the enterprise that might be of interest to or have significant impact on employees like potential major changes in production, organization, or technology. Information about employee rights and compliance with the ESA is only one of many subjects that might be the business of Consultation Committees.

With respect to ESA matters, such a Committee might be given authority to:

- receive information from employees related to alleged non-compliance;
- ask for and receive information with respect to specific issues of alleged non-compliance;
- receive copies of compliance audits and simplified audits from the employer;
- share the results of such audits with all employees to assist in promoting accountability and awareness;
- discuss measures that the employer has taken or will take to ensure that the Act or the regulations will be complied with; and
- generally to educate employees in the workplace to increase awareness of their rights and of employer obligations under the ESA.

The employer might agree to:

- meet with the Committee on a regular basis;
- provide relevant information with respect to ESA compliance to the Committee when requested;
- share the results of compliance audits and simplified audits in a timely fashion;
- meet with the committee to review audits;
- discuss the measures that the employer has taken or will take to ensure that the Act or the regulations will be complied with; and
- generally to educate employees in the workplace to increase awareness of their rights and of employer obligations under the ESA.

There is no obvious need for an IRS for unionized employees as the union already has the responsibility to collectively bargain for bargaining unit employees, and to deal with ESA issues on behalf of bargaining unit employees, including non-compliance. However, for non-union employees in the same enterprise, an IRS could be a useful way of heightening both awareness and compliance.

An additional benefit of an IRS might be that employees are more willing to report alleged violations to other employees where there is an IRS rather than to complain directly to the Ministry. Inquiries by Committee members regarding specific issues of potential non-compliance may not require identification of specific employees, but rather may initiate general monitoring of compliance with an employment standard by the Committee with their managerial counterparts. Establishing an IRS may result in the Ministry ordering an audit with respect to compliance with a certain standard or standards. It may result in employers who are not in compliance because of lack of knowledge or mistaken understanding of their legal obligations voluntarily remedying non-compliance without the ministry's involvement. An IRS should be consistent with encouraging voluntary compliance initiatives by employers who are motivated to comply with the ESA.

It must be clear that the anti-reprisal protections of the ESA apply to Committee members. The success of any IRS system depends on employees being confident that they have meaningful protection in fulfilling their monitoring and educating role.

Recommendations:

28. The Ministry of Labour should encourage the establishment of internal responsibility systems by employers.
29. The Ministry of Labour should provide assistance and advice to employers who wish to establish such systems.

5.5 Increased Protection for Employees Who Seek to Enforce Their Rights

5.5.1 Greater Protection for Employees from Reprisals

Background

The current ESA provides broad protection to employees against reprisal.

The Act prohibits employers, and anyone acting on their behalf, from intimidating, dismissing or otherwise penalizing an employee or threatening to do so because the employee attempted to exercise, or did exercise, his or her rights under the ESA. More particularly, an employer is prohibited from reprising against an employee because the employee:

- asks the employer to comply with this Act and the regulations;
- inquires about his or her rights under this Act;
- files a complaint with the Ministry under this Act;
- exercises or attempts to exercise a right under this Act;
- gives information to an ESO;
- testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act; or
- participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act;

Employers are also prohibited from penalizing an employee in any way because the employee;

- is or will become eligible to take a leave;
- intends to take a leave or takes a leave under Part XIV of the ESA; or
- because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to the employee.

The burden of proof that an employer did not engage in a reprisal against an employee is on the employer.

In sum, the anti-reprisal provisions (s. 74) in Ontario's ESA prohibit employers from intimidating, dismissing, otherwise penalizing or threatening employees because they ask about their rights, ask the employer to comply with the Act, file a claim or participate in any investigations. This protection covers whistleblowers. The anti-reprisal protections of the ESA also cover assignment workers placed in a business by a temporary help agency (THA) and protect them from reprisal by both the THA and by the client employer to whom they are assigned to perform work.

If an employer is motivated in whole or in part by an unlawful motive, its conduct is unlawful. An employer who takes into account the exercise by an employee of rights under the ESA in dismissing or otherwise penalizing an employee is acting unlawfully.

Employees who believe they have been subject to reprisal may file a claim with the Ministry, which will investigate.

If an ESO determines that a reprisal occurred, the officer may order that the employee be compensated for any loss incurred as a result of the contravention or that the employee be reinstated, or may order both compensation and reinstatement.

Reprisal claims are currently not given priority by the Ministry. It takes approximately 90 days before claims are assigned to a Level 2 ESO for investigation, and on average it takes approximately 51 days to conclude an investigation.

In recent years, approximately 12% of claims[117] contained an allegation of reprisal (or leave of absence, which almost invariably entails a reprisal allegation). The majority of these involve a termination. Approximately 20% of cases result in a finding of a contravention;[118] however, the percentage of contraventions may be higher given that a substantial number of them are settled or withdrawn.

In the Ministry's experience, most employees who have been terminated do not seek reinstatement. In our view, this is understandable given the long delays in the current process, but the hope is that this may change under an expedited procedure.

The Reality of the Workplace for Many Employees in Ontario.

There are many employers who are interested in and committed to compliance, and where contraventions occur, if at all, it is likely as a result of inadvertence or lack of knowledge and not because of intentional violation of the ESA. In this kind of corporate environment, it is likely that reporting alleged non-compliance by an employee would be dealt with responsibly without risk of reprisal to the employee. Unfortunately, this is not always the case.

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117 Vosko, Noack, and Tucker, 24.
118 *Ibid.*, 30.

Many sources contend that fear of reprisal presents a major barrier to filing employment standards complaints.[119] This conclusion is sometimes based on a number of propositions or suppositions about the behavior of workers in light of the economic and social context in which they find themselves; for example: where a worker perceives a significant risk of dismissal, he or she is likely to decide not to pursue a claim worth less than the potential future income stream provided by continued employment.[120]

Professor Banks, while acknowledging that there is relatively little statistical research on the influence of fear of reprisal on willingness to report concludes:

> *What evidence is available does however indicate that fear of job loss and other forms of employer reprisal most likely does undermine the willingness of many workers to complain about employment standards violations in Ontario.*[121]

In his review of the literature, Professor Banks also states:

> *Other suppositions are about how workers actually perceive the risk of reprisal and the accuracy of those perceptions: that many workers perceive that there is a significant risk of dismissal or other forms of reprisal if they file an employment standards claim against their employer; and that workers may perceive that the risk of dismissal will be greater where their employment is already precarious, such as in relatively low paid positions with high turnover (Procyk, 2014 at 1).*
>
> *…*
>
> *The consequential risks associated with job loss will often be higher for workers with low incomes or short job tenures. Low-income workers are more likely to have little or no savings upon which to draw to meet basic needs during a period of unemployment (Weil, 2012, at 3). Many workers with short job tenure are not eligible for employment insurance benefits, which in Ontario cover only 41 per cent of unemployed workers, and in any event replace only 55% of wages (Vosko, 2011, at 33). Migrant workers face additional risks associated with dismissal. Workers engaged under*

119 Vosko 2011; WAC 2015; Weil 2010; Weil & Pyles 2007.
120 Weil (2012), 3.
121 Banks, 16.

temporary work permits are most often tied to a single employer such that dismissal may result in their repatriation. (LCO 2012) Undocumented workers face the risk that their status may be reported to immigration authorities, resulting in deportation (Noack et al, 2015, at 92; Vosko, 2011, at 33).

Berhhardt et al's survey [of] low-wage workers in New York, Chicago and Los Angeles about violations of their rights under employment standards laws found that 20 per cent of their sample did not file a complaint during the prior year despite having experienced serious problems such as dangerous working conditions, discrimination, or not being paid a minimum wage. (Bernhardt et al, 2009, at 24). The most common reason, cited by 51% of those who chose not to complain, was fear of job loss (Weil, 2012, at 6).

The Federal Labour Standards Review Commission also noted that the number of complaints is small in relation to the likely prevalence of labour standards violations (FLRSC, at 192). Similarly, a study by Weil and Pyles examining complaint rates under the US Fair Labor Standards Act for the period 2000-2004 found that there were about 25 complaints for every 100,000 workers, and that it took on average about 130 violations of the overtime provisions of the Act to elicit a single complaint. (Weil & Pyles, 2006) While other factors such as the low value of some complaints or difficulties in accessing claims procedures probably play a role in these low complaint rates, it is quite likely in light of the other evidence and considerations reviewed here that fear of retaliation plays a very important role in these trends.[122]

Vosko, Noak and Tucker state:

The real and/or perceived risks of reprisal for making an ES complaint either directly to one's employer or to state officials, or for suing one's employer are well-documented in the scholarly literature (Ruckelshaus 2008; Alexander 2013; Griffith 2015), suggesting that employees often choose to remain silent and not complain.[123]

122 Banks, 15-17.
123 Vosko, Noack, and Tucker, 22.

There can be little doubt based on common sense, academic research and scholarly articles of the accuracy of the assertion by one researcher referred to in the Report by Professor Banks that:

> *many workers perceive that there is a significant risk of dismissal or other forms of reprisal if they file an employment standards claim against their employer; and that workers may perceive that the risk of dismissal will be greater where their employment is already precarious, such as in relatively low paid positions with high turnover (Procyk, 2014 at 1).*[124]

There is statistical support for this conclusion.

Over 90% of the approximately 15,000 complaints made every year are by people who have left their jobs voluntarily or after they have been terminated.[125] When the Ministry investigates those complaints, of the claims that are not settled or withdrawn, they conclude about 70% of the complaints are valid. In addition, when the Ministry proactively carries out inspections of workplaces, they commonly find violations of the Act. In the three years between 2011-12 to 2013-14, the Ministry found violations 75-77% of the time. Where an inspection of the employer was carried out after a complaint was made, violations were found over 80% of the time.[126]

> *The Ontario Auditor General found in 2004 that 9 out of 10 workers who file claims for unpaid wages and entitlements in Ontario do so after they have left the job. (Vosko, 2011, at 34). Similarly, the Federal Labour Standards Review Commission found that 92% per cent of complaints filed under Part III of the Canada Labour Code by persons no longer employed in the same workplace. (FLSRC at 192). While these studies do not identify the reasons of workers for waiting until after they have left the job, it is reasonable to infer that fear of reprisal is an important reason, since most complaints concern fundamental issues such as non-payment of wages, benefits or overtime that arise during the employment relationship (FLSRC, at 192-3).*[127]

The fact that so many complaints are filed by employees after they have left the employ of the contravening employer is strong circumstantial evidence supporting the conclusion that fear of reprisal is a factor that dissuades many employees from reporting a violation of the ESA.

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124 Banks, 15.
125 Vosko, Noack, and Tucker.
126 *Ibid*., 5.
127 Banks, 16-17.

Economically vulnerable workers, even if aware of the anti-reprisal provisions, may reasonably regard them as insufficient protection of their interest in continued employment. Such workers may be unwilling to risk a period of unemployment while a claim under section 74 is decided. Even the prospect of reinstatement with back pay may not be enough to offset the risk of a lengthy period of unemployment. Studies of reinstatement in non-union environments cast some doubt on potential effectiveness of this remedy (England).[128] Nonetheless, timely remediation of reprisal complaints, including an order to reinstate and the prospect of significant sanctions may deter reprisals by employers thus improving the effectiveness of the reprisal protections and remedies (including reinstatement) already provided for under the ESA. Where a reprisal has been found to result in dismissal, quickly obtained orders to reinstate may increase the number of successful employee reinstatements.

Delay in investigating and remedying a valid complaint of reprisal, as a matter of common sense, is a factor that likely acts as a disincentive to reporting contraventions, particularly for the most vulnerable employees. If the delay in investigation and remedy were reduced, particularly in cases where dismissal has resulted, the reporting of non-compliance by employees may increase.

Creating an expedited process for reprisal investigations may also prevent compounding contraventions and minimize the chilling effect of the reprisal on other employees. One result might also be an alleviation of sub-standard conditions for other employees who may feel more confident that reprisals based on the exercise of rights under the ESA will be taken seriously by law enforcement.

An expedited process for the investigation and determination of reprisal complaints would have the effect of emphasizing to employers the importance of the ESA's anti-reprisal provisions, particularly if combined with the imposition of appropriate sanctions designed to deter such conduct.

Education and awareness of rights and obligations and of anti-reprisal provisions generally could be increased by giving publicity to reprisal cases, with the added benefit of deterring other employers from engaging in similar conduct.

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128 Banks, 18.

In addition, we have recommended that an office of Director of Enforcement be created which could seek significant administrative penalties of up to $100,000 per infraction against an employer where, after investigation, it appears that there are reasonable and probable grounds to believe a serious reprisal has occurred. This would provide an important element of deterrence to dissuade employers from engaging in such practices and reflect the public policy importance of the issue.

As noted above, reprisal claims are currently not given priority by the Ministry. It takes approximately 90 days before claims are assigned to a Level 2 ESO for investigation, and on average it takes approximately 51 days to conclude an investigation. This is unacceptable in cases where an employee has been terminated. Most employees are simply not prepared to suffer potential unemployment while waiting 6 months for the possibility of being awarded the remedy of reinstatement and back pay, particularly if the delay in reinstatement is less likely to be meaningful or effective after that length of time.

Reprisal complaints alleging termination of employment should be given priority and not just put in a queue to be dealt with by investigators as soon as is practicable. In this regard, the Ministry should not only announce to the public that reprisal complaints alleging termination of employment will be given priority, but it should also develop tight timelines in to deal with complaints. These complaints should be investigated and completed within a matter of days.

Timely and effective investigation of reprisal complaints and timely and effective remediation of claims found to be established go hand in hand with effective law enforcement. Fear of reprisal must be combatted by a rigorous, timely and effective response, by those responsible for enforcement of the ESA, to cases of alleged reprisal and by the availability and imposition (in appropriate cases) of meaningful sanctions to deter such conduct by employers.

Recommendations:

30. The Employment Standards Program should develop, implement and publicize a policy for the speedy investigation of complaints by employees, including whistleblowers, alleging termination of employment based on the exercise of rights under the *Employment Standards Act, 2000*.

31. The policy should emphasize that reprisals, where termination of employment has occurred, will be given priority by the Ministry of Labour and that investigations will normally be commenced within five days of receipt of the complaint.

32. Complaints of termination of employment warranting speedy investigation should include cases where an employer has refused to allow an employee to return to work after a leave of absence, pursuant to the *Employment Standards Act, 2000*.

33. The Ministry of Labour should publish the policy and, in doing so, take steps to clearly communicate the purpose and substance of the anti-reprisal protections of the *Employment Standards Act, 2000*.

5.5.2 Temporary Foreign Workers

Both the Law Commission of Ontario[129] (at 73) and the Federal Labour Standards Review Commission[130] (at 244) have recommended that expeditious and fair processes be put in place for dealing with alleged reprisals against Temporary Foreign Workers, and for hearing cases that could result in repatriation, since the risk of repatriation is a significant deterrent to filing a complaint, and repatriation can have the effect of denying a worker any effective remedy.

In the case of temporary foreign workers, no termination of employment – whether for reprisal or for other alleged reasons – should be effective unless and until a neutral adjudicator makes an order permitting such termination. Given the federal and provincial jurisdictional issues involved, the Ministry should work with the federal government to establish an adjudication process that will protect TFWs against repatriation in cases of dismissal and prior to the expiry of a work permit. This may mean co-ordination and agreement with Immigration, Refugees and Citizenship Canada, Employment and Social Development Canada and the Canada Border Services Agency to ensure that there is an effective and efficient adjudication process recognized by both governments.

Recommendation:

34. The Ministry of Labour should work with the appropriate federal agencies and ministries to develop and implement an expeditious and accessible procedure, which is available to address cases of alleged reprisals that result in termination or unjust dismissal for temporary foreign workers prior to repatriation under the terms of their work permit.

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129 LCO (2012), 73.
130 Arthurs, 244.

5.6 Access to Justice

5.6.1 Improving the Complaint and Review Process – Assistance to Employee Complainants

Both in the existing claims system and in the new model we have proposed for employees to have carriage of claims where the Ministry does not investigate, employees may need assistance and advice in preparing and presenting claims, including in a review.

The Ministry makes available a toll-free telephone information service. Employees can phone the Employment Standards Information Centre (ESIC). Ministry officials advise that the ESIC will not assist claimants in how to fill out the form per se, but it will help claimants to identify the issue, and tell them where they can find the claim form and other documents that can assist them in filling it out. The ESIC handles about 200,000-300,000 calls per year from employers and employees.

The Ministry also makes available a "before you start" kit and a worksheet to calculate amounts that may be owed. Online resources are available in many languages. Self-help documents and the claim form itself have been recently updated in an effort to make them more user-friendly. Once a claim is filed it is sent to a Claims Centre for review. If a claim is lacking required information a Provincial Claim Centre representative will contact the claimant seeking that information. However, since around 2006, claimants have not had access to person-to-person assistance prior to filing a claim, or to face-to-face assistance in order to complete an incomplete claim. Those kinds of support ended when the Ministry closed down its intake offices and moved intake into select Service Ontario offices.[131]

Professor Banks states: "Given the growing importance of employment standards to an increasing share of the Ontario workforce, the question of whether services equivalent to those offered to occupational safety and health, workers' compensation and discrimination claims should be addressed."[132] He concludes that: "While the literature convincingly raises this issue, it does not provide enough information on alternative service delivery or funding models to assess, cost or recommend options."[133]

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131 Banks, 25.
132 Banks, 40.
133 *Ibid*., 40.

This is a subject addressed in the Interim Report where it was suggested that the Ministry consider the possibility of engaging the Office of the Worker Advisor (OWA) to assist employees in various aspects of the claims process. OWA is an independent agency of the Ministry of Labour. The OWA mandates are set out in the *Workplace Safety and Insurance Act, 1997* (WSIA) and the OHSA. Its costs are currently paid by the Workplace Safety and Insurance Board (WSIB).

The OWA currently provides free and confidential services to non-unionized workers (advice, education, and representation) in workplace safety insurance matters (formerly called workers' compensation) and on occupational health and safety reprisal issues. The OWA delivers all of its services in English and French. In addition to representing workers at the WSIB, and the Workplace Safety and Insurance Appeals Tribunal (WSIAT), it also represents workers in proceedings before the OLRB in health and safety reprisal cases. It provides self-help information for workers to handle their own claims where appropriate. The OWA develops community partnerships with other groups that assist injured workers or who promote health and safety in the workplace. The OWA also provides educational services in local communities on topics related to its mandates. The OWA has offices in Toronto, Scarborough, Ottawa, Downsview, Hamilton, Mississauga, St. Catharines, London, Sarnia, Waterloo, Windsor, Sault Ste. Marie, Sudbury, Thunder Bay, Timmins and Elliot Lake.

The OWA could be given an enhanced jurisdiction and a new funding model developed to help employees handle their own claims under the ESA and perhaps to represent such employees on reviews. An expanded mandate would be consistent with their current mandate to assist workers with workplace issues. If the mandate of the OWA were expanded, the result would be legal or paralegal support for employees and some employees would be able to obtain assistance in filing claims as well as other help, for example, in reprisal cases, in representation of employees in meetings with ESOs, in presenting complaints and at review proceedings before the OLRB.

Lists of lawyers willing to provide pro bono legal assistance should be developed and published on the MOL website. There are many lawyers in Ontario who deal with employment matters who may be prepared to help employees and employers prepare claims or respond to claims as part of their commitment to public service. Similarly, there should be publication of the names of worker advocacy groups, trade unions, legal clinics and others who are willing to assist employees.

Recommendations:

35. Increase the resources and expand the mandate of the Office of the Worker Advisor with a new funding model developed to help employees with claims under the *Employment Standards Act, 2000*.

36. The Ministry of Labour should, in all judicial districts in Ontario, develop and publish on its website a list of lawyers in those districts who are prepared to provide pro bono assistance to employees and employers.

37. The Ministry of Labour should develop and publish a list of worker advocacy groups, trade unions, legal clinics and others in Ontario who are prepared to provide assistance to employees.

5.6.2 Removing a Barrier to Claimants

Employees not covered by a collective agreement can file a claim with the Ministry of Labour if they believe their employer (or former employer) has not complied with the ESA. Unionized employees must generally enforce their ESA rights under the grievance and arbitration provisions of the collective agreement.

In 2010 the Act was amended so that the Director of Employment Standards could require that a complainant employee first contact his or her employer about the employment standards issue before a claim will be assigned to an ESO for investigation. There are template letters and other supporting material on the Ministry's website that employees can use. This has been referred to as the "self-help" requirement contained in s.96.1 of the ESA.

As a matter of Ministry policy, there are exceptions to the general rule that employees first contact their employer. These exceptions are identified on the claim form and in Ministry material explaining the claims process and include situations where an employee is afraid to do so because of fear of reprisal. As a practical matter, we are advised that claims are not rejected by the Director because the employee has not contacted his or her employer first, although the claims processor typically asks for the reason the employer was not contacted.

The research study commissioned for this Review suggested that there has been a significant decline in the number of claims filed over a period of years and that some of this decline may be associated with the introduction of the self-help requirement. Indeed the authors of the study concluded that: "the balance of

evidence suggests that the decline in complaints corresponds to the introduction of the OBA [the self-help provision] the requirements of which may be dissuading workers from pursuing their rights."[134]

The ESA currently provides broad protection for employees against reprisal by an employer for exercising his/her rights under the ESA, including filing a claim.

Unions and employee advocates assert that fear of reprisal can significantly deter employees from making timely complaints and that a requirement to inform the employer before filing a complaint exacerbates the problem of accessing ESA entitlements. They point to the large number of complaints that are made by employees after they have left the employ of the employer as evidence supporting a conclusion that the obligation to inform their employer is a barrier to accessing justice.[135] Professor Banks concludes that: "the workers most likely to suffer from deliberate non-compliance are also those who are most likely to be vulnerable in the event of employer reprisal. To the extent that employees have well-founded fears of reprisal, a requirement to first approach the employer is likely to constitute a significant barrier to access."[136]

The fact that the majority of ESA claims are filed by former employees after they have quit or their employment has been terminated[137] is compelling circumstantial evidence that fear of reprisal, coupled with the obligation to first raise the matter with the employer, reduces the willingness of employees to initiate complaints while employed by the employer who is alleged to have violated the Act.

In our view, concerns about the potential adverse impact of the self-help provision are well founded.

The Act should be amended by removing the authority of the Director to require that the complainant inform the employer of the basis for his or her view that this Act has been or is being contravened and, if he or she is of the view that wages are owed, the amount of the wages. This is not intended to be a criticism of the Director. Even if the Director were never to impose this requirement (which is not the case), its inclusion in the Act is likely a deterrent for potential claimants who may be discouraged from reporting violations because of concerns that they may be required to disclose first to their employer.

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134 Vosko, Noack, and Tucker, 19.
135 Vosko, Noack, and Tucker.
136 Banks, 22.
137 Vosko, Noack, and Tucker.

In sum, the requirement that an employee report alleged violations first to his employer has a negative impact on reporting and on compliance and amounts to a barrier in accessing justice to the most vulnerable employees.

In making this recommendation, we would be remiss not to mention that we are aware that there are many employers who are interested in and committed to compliance and where contraventions occur, if at all, as a result of inadvertence or lack of knowledge and not because of intentional violation of the ESA and where good faith internal reporting of alleged non-compliance by an employee would be dealt with responsibly without risk to the employee and often without the necessity for any external involvement. We are also aware that there are respected labour law experts and jurists who support internal reporting as a preferred first step in dealing with a complaint of alleged violation of employment standards legislation. For a succinct overview of this perspective, we refer to the opinion of Justice Binnie in: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771.*[138]

Recommendation:

38. The Employment Standards Act, 2000 should be amended to remove the Director of Employment Standards' ability to require that an employee who is of the view that the Act has been or is being contravened inform the employer of the basis of his or her view.

5.6.3 Anonymous, Third Party, Whistleblower and Individual Complaints and Confidentiality of Identity of the Complainant

5.6.3.1 The Current Provisions of the ESA

Section 96(1) of the Act provides that:

> *A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director.*

The ESA does not specifically refer to complaints made by anonymous or third party complainants, but the section as currently drafted permits such complaints to be filed.

138 2005 SCC 70.

5.6.3.2 Anonymous Complaints

As a matter of Ministry practice, all information provided anonymously to the Employment Standards Information Centre about possible violations is passed to the appropriate Ministry staff for review and for possible proactive activity. In other words, anonymous information may lead to an inspection under the Ministry's proactive enforcement program, but it does not serve as the basis for a complaint that may be sent for investigation. This seems a reasonable way to deal with complaints in circumstances where the identity of the complainant is not known to the Ministry staff who, in cases of an anonymous complaint, are not in a position to ask questions of the complainant in order to obtain additional relevant information, to assess the validity of or motive behind such a complaint, including whether the complaint is vexatious. Ministry staff will have to make a judgment call on whether to initiate an inspection based on a number of factors including, but not limited to, the specificity of the factual allegations and the sector. This seems to be a reasonable approach.

There is not, at present, a "Hotline" or "Tip's line" where callers can report alleged violations of the ESA on an anonymous basis. The use of a hotline could assist the Ministry in deciding where a targeted inspection might be warranted and to help identify specific sectors that may warrant proactive enforcement measures. In order to combat insurance fraud, the Financial Services Commission has such a Hotline on their website providing a telephone number and a form to file an on-line complaint. It is a useful precedent.

Vosko, Noack and Tucker also support initiatives to expand options for the filing of anonymous complaints: "Due to the clear evidence of fear, particularly among employed complainants, consideration could also be given to expanding options for third-party and anonymous complaints where employees remain on the job."[139]

Recommendation:

39. The Ministry of Labour should make available, and widely publicize on its website and elsewhere, an Employment Standards Act, 2000 Hotline for the receipt of tips by telephone or online.

139 Vosko, Noack, and Tucker, 24.

5.6.3.3 Confidentiality

Whistleblower Complaints

Whistleblowing in the ESA context occurs when employees reveal real or perceived employer wrongdoing to the ESB. The purpose of the whistleblower protection in the employment standards context is "to encourage employee cooperation with government officials in labour matters..." See: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*.[140]

Subsection 74 (1) of the ESA contains whistleblower protection. It provides in part that:

> No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,
>
> (a) because the employee,
>
> (i) asks the employer to comply with this Act and the regulations,
> …
>
> (iii) files a complaint with the Ministry under this Act,
> …
>
> (v) gives information to an employment standards officer,
>
> (vi) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,
> …

In cases of whistleblowers, there are invariably going to be circumstances where fear of reprisal is a significant factor in discouraging any reporting of violations of the ESA, either internally or externally. To be sure, there will be other cases where employees may feel completely comfortable in reporting their concerns directly to management. For example, some companies have codes of ethics stating a commitment to complying with all applicable laws, and have developed internal policies and procedures to protect any employee who in good faith comes forward with concerns about corporate non-compliance with any applicable law. However, we are concerned with employees who wish to report directly to the law

140 *Op. cit.*, para 30.

enforcement authorities that violations of the ESA are occurring in their workplace. This is the activity that is encouraged by the whistleblower protection in the legislation. This is the activity that must be protected.

The protection of whistleblowers from reprisal by the employer in the ESA reflects the legislature's awareness that whistleblowers are vulnerable to demotion, dismissal or other negative treatment from their employer after disclosure – either internally to those responsible for managing the company or directly to the authorities. Statutory protection of whistleblowers is not enough. Vigorous law enforcement is required. The Ministry must be seen as the protector of the rights of whistleblowers and should respond quickly and effectively in cases where reprisal is alleged.

As a matter of probability, there is little doubt that fear of disclosure of identity and an accompanying fear of reprisal discourages reporting of violations by potential whistleblowers. Professor Banks says:

> *There is also an extensive literature on internal and external whistleblowing in the United States with respect to corporate wrongdoing. In the US there are dozens of federal health, safety, and environmental statutes that contain provisions that prohibit retaliation by private employers against employees for engaging in whistleblowing activity (Berkowitz et al, 2011, at 17). Researchers have observed that organizations with strong threats of retaliation and those without support mechanisms for employees disincentivized whistleblowing (Yeoh, 2014, at 465), and that lack of anonymity was among the main factors discouraging reporting of wrongdoing (Yeoh, 2014, at 464; see also ERC/ KPMG 2011).*[141]

The real issue to be investigated in a complaint initiated by a whistleblower is whether there is non-compliance. The identity of the whistleblower complainant is – in virtually all cases – going to be irrelevant to the determination and resolution of the issue(s) related to allegations of non-compliance. As discussed below in the section dealing with individual employee complaints, in any case involving allegations of non-compliance the facts of any alleged violation, including the names of employees whose rights allegedly have been violated and/or who may be entitled to a remedy, must be disclosed to the employer in order to permit an informed response to the complaint and to enable the employer to take steps in

141 Banks, 17.

order to comply in the future - if any are required. The disclosure of the particulars of the alleged violations to the employer does not require the disclosure of the identity of the whistleblower.

There is no policy or legal reason why the identity of the whistleblower ever needs to be made known to the employer by the ES Program in the course of an investigation where the whistleblower complainant wishes to have his/her identity kept confidential. As stated above, the real issue is whether there is non-compliance – not the identity of the whistleblower. The identity of the whistleblower in virtually all cases is going to be irrelevant and completely unnecessary to the determination and resolution of the issue(s) related to allegations of non-compliance by the employer.

Furthermore, there is no reason why the name of the whistleblower complainant needs to be disclosed by the Director to an ESO assigned to investigate the complaint. Neither is there any obvious need to disclose the identity of a whistleblower complainant in any documents given to the ESO. Developing and implementing such an internal policy would help ensure that whistleblower identity is not revealed during the course of an investigation by inadvertence or innocent mistake.

If a whistleblower is identified because the trier of fact in a court or tribunal believes such disclosure is relevant, then the identity of the whistleblower may have to be made known. Having said that, however, it is not obvious when the identification of a whistleblower would ever be relevant, even where testimony is given in a legal proceeding. If required to give testimony, to be given any weight by the court or tribunal, evidence given will usually have to be evidence based on personal knowledge relating to the alleged violation(s) (not hearsay) and the credibility of such evidence would not usually depend on a person's status as a whistleblower, which would not be a factor to be taken into account in assessing credibility. Tribunals and courts will also be sensitive to the risks and implications of requiring any person to disclose whether that person is a whistleblower and are unlikely to make such an order unless convinced that the identity must be revealed in order to provide a fair hearing to the employer.

As with anonymous complaints, the Ministry should consider whether the nature and the specificity of the complaint, the nature and extent of violations alleged, together with other factors warrant a targeted inspection. It is within the Ministry's authority to act without any complaint or information being made by any person.

Third Party Complaints

Third party complaints are those filed by non-employee persons who may make claims on behalf of an individual employee or group of employees and who may or may not represent employees in any subsequent internal investigation or ESA proceeding resulting from the complaint. A third party is entitled to file a complaint because the third party is a "person" within the meaning of subsection 96(1) of the Act, which provides that "a person alleging that this Act has been or is being contravened" may file a complaint.

As with whistleblowers, the real issue to be investigated in a complaint initiated by a third party is whether there is non-compliance, and the identity of the third party complainant is irrelevant to the determination and resolution of the issue(s) related to allegations of non-compliance. As discussed below, in any case involving allegations of non-compliance the facts of any alleged violation, including the names of employees whose rights allegedly have been violated and/or who may be entitled to a remedy, must be disclosed to the employer in order to permit an informed response to the complaint and to enable the employer to take steps in order to comply in the future - if any are required. The disclosure of the particulars of the alleged violations to the employer does not require the disclosure of the identity of the third party.

Although third party complainants may not have reason to fear workplace related reprisals like whistleblowers, they may wish to keep their identity confidential for a number of reasons. Some may think their effectiveness in a particular sector and/or in a particular community of vulnerable employees will be compromised if the employer and the employer community become aware of their identity. Others may wish to have their identity known so others may come to them for help if their names are disseminated. The Ministry is in no position to question the reasons why a third party wants to preserve confidentiality of identity. It should try to accommodate that request when made.

As with anonymous complaints, the Ministry should consider whether the nature and the specificity of the complaint, the nature and extent of violations alleged, together with other factors, warrant a targeted inspection. It is within the Ministry's authority to act without any complaint being made by any person.

Employee Claimants

The current practice of the ESP is that claimants who file an ES claim must provide their name, which is shared with the employer during the claims process.

At one time, the Ministry permitted employees to file a claim confidentially (i.e., where the employee's name was known to the Ministry, but not disclosed to the employer). This practice was changed in response to an OLRB ruling that employees would have to identify themselves to enable the employer to know the case it had to meet.[142] A careful reading of the OLRB case (*Cineplex Odeon Corporation v Ministry of Labour*) indicates that it does not stand for the proposition that the name of the employee complainant must always be disclosed to the employer. In that case, an order to pay was issued with respect to complainants who wished to remain anonymous and the order to pay did not disclose the names of the employees in respect of whom order was made. The essential point of the OLRB ruling is that as a matter of basic fairness and natural justice, employers should know the case they have to meet in order to make a reasoned response and/or to rectify the problem if is established. Knowing the case to be met of necessity involves the disclosure of the names of employees with respect to whom violations are alleged and subsequently, those who are entitled to relief. That is what the OLRB held – not that the name(s) of the complainant(s) had to be disclosed to the employer.

We have no hesitation in agreeing that the facts of an alleged violation(s), including the name(s) of employee(s) allegedly adversely affected, should be made known to the employer regardless of how the complaint is initiated. This information should be provided to the employer before any order is made. If, as a result of an investigation, the ESO decides to make an order, it should disclose the names of those employees whose rights have been found to have been violated, the names of all employees who are found to be entitled to relief and the nature and quantum of relief ordered for each employee.

Whether the name of the employee complainant must be provided to the employer is a separate issue. We see no reason why the identity of the employee complainant needs to be disclosed to an employer as long as the employer is in a position to respond to the complaint.

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142 *Cineplex Odeon Corporation v. Ministry of Labour*, (1999) CanLII 20171, ON LRB.

As in any case involving alleged non-compliance, the real issue is whether there is non-compliance – not the identity of the complainant. The identity of the employee complainant in some cases will be irrelevant to the determination and resolution of the issue(s) related to allegations: for example, where the facts resulting in a finding of contravention are agreed by the employer it would not be necessary to disclose the name of the employee complainant.

There are, however, other circumstances where the identity of the employee complainant will be disclosed in fact or by necessary implication. As a practical matter, particularly where there is only one complaint being investigated, the disclosure to the employer of the facts of the alleged violation(s), including the name of the employee allegedly adversely affected, may amount to a disclosure of the name of the complainant. It may be reasonable in some circumstances for the identity of the complainant to be disclosed by the investigating officer as part of the investigation. Where a complainant provides a version of the facts that are disputed by the employer, identification of the complainant is likely necessary not only as a matter of fairness to the employer, but also such disclosure may facilitate agreement on the facts and the resolution of the complaint. There are other occasions where the identity of the complainant will be obvious even if not disclosed. In endeavoring to find the facts, pursuant to the authority in s. 102 (1) of the ESA, an officer is empowered to convene a meeting that gives an officer the authority to require the attendance of both an employee and the employer. While convening such a meeting may not require the identification of the employee as the complainant, in many circumstances, it will be apparent to the employer that the employee and the complainant are the same.

The identity of the complaint may also become known because of being required to give testimony in a legal proceeding before the OLRB or a court (in contempt proceedings, for example) or because the trier of fact believes such disclosure to be relevant.

In many circumstances, the confidentiality of the individual employee complainant seeking a remedy cannot be protected in a meaningful way while at the same time being fair to an employer in disclosure of the case to be met. It would be potentially misleading to an employee when a complaint is filed to give any such assurances.

In conclusion, there are many circumstances where identity of the employee complainant may become known to the employer in the course of an investigation

and/or in legal proceedings and an ESO cannot and should not give assurances that the identity of the complainant will not be disclosed to the employer during the investigation or during legal proceedings that might result.

This is another reason to focus attention on reprisal protection for employees and a reason why targeted and proactive measures must be given high priority.

Recommendations:

40. In relation to education, awareness programs and initiatives by the Ministry of Labour, it should be emphasized that good faith whistleblower reportings of violations are encouraged and protected under the *Employment Standards Act, 2000*.

41. The stated policy of the Employment Standards Program should be to protect against the disclosure to the employer of the identity of a whistleblower complainant who wishes to keep that information confidential, with the qualification that the whistleblower's identity may be disclosed by order of a court or tribunal resulting from the investigation of the complaint.

42. Complaints from a whistleblower of alleged reprisal by an employer should be given priority by the Employment Standards Program, as should cases of reprisal brought by employees as discussed in 5.5.1 above.

43. The stated policy of the Employment Standards Program should be to protect against the disclosure to the employer of the identity of a third-party complainant who wishes to keep that information confidential, with the qualification that the third party's identity may be disclosed by order of a court or tribunal resulting from the investigation of the complaint.

44. The Ministry of Labour should implement a policy to not disclose (in documentation or otherwise) the identity of the whistleblower or third-party complainant to the employment standards officer assigned to investigate the complaint, to ensure that confidentiality is not inadvertently breached.

45. In cases of a complaint by an employee, whistleblower or third party, the Ministry of Labour should consider whether a targeted inspection or other strategic initiative is warranted instead of, or in addition to, conducting an investigation of a complaint.

5.6.4 Applications for Review

Employers, corporate directors and employees who wish to challenge an order issued by an ESO or the refusal to issue an order are, in most cases, entitled to apply for a review of the order by the OLRB.

The ESOs, in fulfilling their roles to investigate alleged ESA violations, do not hear evidence in the traditional sense of hearing testimony under oath and receiving into evidence documents filed by the parties in accordance with rules of evidence. The ESOs investigate a complaint by interviewing the complainant and employer, and sometimes other employees and others who may have relevant information. They will also gather and evaluate the relevant employer and employee records and other relevant evidence. If, based on the investigation, the ESO concludes there has been a violation, the employer is typically given an opportunity to pay the amount owing without an order being issued. If payment is not made, the necessary order issues. The fact that an enforceable order has been made (or not made) may give rise to an application for review by the party against whom the order has been made or by the person denied relief that he/she believes is warranted.

The ESA provides that applications for review may be made where: 1) an ESO makes an order to pay wages, compensation, fees, to reinstate and/or to comply; 2) an ESO refuses to make an Order; and, 3) where a Notice of Contravention is issued.

The application for review must be made in writing to the OLRB within 30 days after the day on which the order, Notice of Contravention, or notice of the refusal to issue an order was served on the party wishing to apply for review. The OLRB has jurisdiction to extend the time for applying for review if it considers it appropriate to do so. In the case of an order directed against an employer, the employer must first pay the amount owing as determined by the ESO, plus the administrative fee, to the Director of Employment Standards in trust.[143] This requirement ensures that the ordered amount will be available to be paid to the employee if the appeal fails. This does not apply to a Notice of Contravention.

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143 Exception: the amount that has to be paid into trust to appeal a compensation order is limited to $10,000.

The OLRB applies a "self-delivery" model to ESA appeals. Under this model, applicants are required to deliver a copy of the application and supporting documents to the responding parties, including the Director of Employment Standards before filing them with the OLRB. If the case is scheduled for a hearing the parties are required – no later than 10 days before the hearing – to deliver to the other parties and file with the OLRB copies of all documents they will be relying on in the hearing.

Currently, the ESA review process is a de novo process meaning that the parties can call evidence and what occurred at the ESO stage does not strictly matter. This distinguishes an ESA review from a pure appeal where, save in very unusual circumstances, an appellate tribunal does not hear evidence but decides an appeal on the basis of the written record which often includes a record of the evidence heard by the court or tribunal whose order is being appealed. The OLRB is required to give the parties full opportunity to present their evidence and make submissions. As a result, either party may put evidence before the OLRB either by oral testimony or by filing documentary evidence. In essence, the review hearing before the OLRB is like a trial. This means that if a party wants the OLRB to consider any documentary or other information (including information that he or she gave to the ESO), the party will have to adduce evidence before the OLRB. The OLRB makes its determination based on the evidence and argument presented by the parties. The OLRB on a review of an order, may amend, rescind or affirm the order or issue a new order; on a review of a refusal to issue an order, the Board may issue an order or affirm the refusal. Parties to the review may retain a legal advisor. In practice, we are advised that most parties are self-represented.

For reviews of orders (or failures to issue an order), the ESA provides that the OLRB shall determine its own practice and procedure (s. 116(9)) and authorizes the OLRB to make rules governing those practices and procedures (s. 118)). One of the OLRB's rules allows it to summarily dismiss an application without a hearing because it does not make out an arguable case. According to Vosko, Noack and Tucker, approximately "one-fifth of all applications for review are dismissed summarily, that is without a hearing. … Employer and director applications are summarily dismissed about 24% of the time, while employee applications are summarily dismissed about 13% of the time."[144]

144 Vosko, Noack, and Tucker, 60.

The Ministry's Director of Employment Standards is a party to the review and the Director's representative participates in some but not all hearings. The Director's representative does not directly support either workplace party but advocates for an application of the ESA that is consistent with the Director's interpretation of the relevant section(s). As a result, the current regime is essentially a two-party process with a complainant employee and a respondent employer being the principal parties to the dispute with responsibility for the litigation at the review stage before the OLRB. With some exceptions, the parties are therefore in a position to resolve their own litigation. The OLRB assigns a LRO to work with the parties to attempt to settle the case. If the parties do not settle, it will be referred to a hearing. Recently, hearing dates have been set approximately 4 months after the settlement meeting.

Approximately 80% of ESA review applications are settled. Of those cases that do not settle and a determination on the merits is made, almost twice as many applications were dismissed than were granted.

In recent years, approximately 735 review applications have been filed annually (representing a review rate of approximately 6.5% of claims in which an officer made a decision). A majority of review applications are by employers and directors of companies.

The OLRB generally processes ESA reviews in the order that they are received.

The OLRB does hear some cases in regional centers in Ontario but there are few, if any, vice-chairs resident in these communities. The cost of travel including the time consumed in travel by vice-chairs from Toronto makes these hearings outside Toronto expensive and impractical for the volume of cases where the vice-chairs always have to travel. For employees and employers living outside Toronto and far from locations where the OLRB holds ESA review hearings, attending such hearings is a very expensive and time-consuming process.

The record currently before the OLRB on a review consists of the ESO's order and the reasons for the order that may refer to relevant employer records.

As a de novo proceeding, the applicant for review is, in essence, asking for a trial on the merits of the case. Under the current system, the employer applicant is saying to the complainant whose complaint has been allowed in whole or in part by an ESO: I do not accept the result, so prove your case before another neutral

adjudicator. And an employee applicant whose complaint has been dismissed by an ESO is saying: I do not accept the result. I want the chance to prove my case before another adjudicator.

A Simpler Process for Employee Complainants

On an application for review, the process should be simplified and easy to access for self-represented employers and employees.

On a review of an ESO order, there is currently no rebuttable presumption that the ESO order is issued in accordance with the applicable law.

The real issue on a review of an order should be whether the ESO order is based on sustainable findings of fact and on a correct application of the law. The burden should be on the applicant for review to show, on a balance of probabilities, that the ESO order is wrong as a matter of fact and/or law.

This may still necessitate a trial-like adversarial proceeding in which evidence is called on some issues, facts are found and a decision is rendered. However, the process can be made more user-friendly than it currently is for those who appear before the OLRB on applications for review.

Vice-Chairs of the OLRB who hear reviews should have the power to consult with the parties as part of the decision-making process. As explained above, consultation is less formal and less costly and more efficient than an adversarial process, and should result in a better understanding and definition of the issues in dispute and as a forum to decide whether it is necessary to hear evidence in the case. The goal of a consultation is to expeditiously focus on the issues in dispute and to determine whether any statutory rights have been violated. The vice-chair in a consultation process decides procedural issues if required and helps the parties define the issues and determine whether evidence is required on particular matters. The vice-chair then decides the case.

Special procedures, like pre-review meetings with the parties could still be scheduled with LROs in advance to ensure narrowing of the issues, agreement on facts and perhaps settle cases, much like pre-trials in civil cases.

Regional Hearings

Increased regional access to the review process will facilitate access to justice. If our recommendations with respect to complaints and a complaints process accessible to employees is implemented, the Ministry of Labour will appoint part-time vice-chairs of the OLRB in various cities around the province (in 7 of the 8 judicial districts in Ontario) who have training and expertise in the ESA and who will conduct reviews on a regional basis. The judicial districts are: Central East, Central South, Central East, East, Northeast, Northwest, Southwest and Toronto. The OLRB in Toronto would hear cases from the Toronto Region. Appointing vice-chairs in these 7 judicial districts outside the Toronto District would make attending and participating in the review process more accessible and less expensive for both employees and employers.

Explanatory Materials

The OLRB or the Ministry of Labour, in consultation with the OLRB, should be asked to create explanatory materials for unrepresented parties. There will always likely be a significant number of unrepresented parties at the OLRB. One straightforward way to assist is by ensuring that memoranda in plain language are prepared to assist self-represented individuals, both employees and employers, with respect to both the procedure and the applicable principles of law, including the burden of proof and basic rules of evidence. These sorts of memoranda have proven to be of great assistance to self-represented individuals in other legal proceedings, including in criminal prosecutions where an understanding of the burden of proof, the applicable law, the rights of the accused and some basic rules of evidence in a criminal prosecution are of fundamental importance.

Documentary Record

ESOs should be required to include copies of all of the documents that they relied upon when reaching their decision (e.g., payroll records, disciplinary notices, medical certificates) when they issue the reasons for their decision. This will help to ensure that the OLRB has a complete record before it of the documents relied on by the ESO in making an order or in denying a complaint. Such a mandatory process should lead to a more consistent quality of decision-making by ESOs and would help explain the decision to the affected parties and to the OLRB, as well as providing a more complete record to the OLRB sitting in review. For an employee who seeks a review of a decision, this procedure would also alleviate – at least to some extent – any obligation to produce some, or all, of the documentary evidence relevant to a review. This would not preclude the parties from adducing other documentary evidence relevant to the disposition of the case.

If our recommendations are accepted, not every case of alleged violation of the ESA will be investigated. This means that some employee complainants will have to bring their complaints directly to the OLRB without being investigated. In such cases, where the burden is on the complainant to show a violation of the ESA, we also recommend the less formal consultation process described above.

Recommendations:

46. Employment standards officers, when they issue the reasons for their decision, should be required to include copies of all of the documents that they relied upon when reaching their decision (e.g., payroll records, disciplinary notices, medical certificates).

47. The *Employment Standards Act*, 2000 should be amended to provide that, on an application for review, the burden of proof is on the applicant party to prove, on a balance of probabilities, that the decision made by the employment standards officer is wrong as a matter of fact and/or law and should be overturned, modified or amended.

48. Increase regional access by appointing part-time vice chairs of the Ontario Labour Relations Board to sit and hear review applications and employee complaints in each of the seven judicial districts in Ontario outside Toronto.

49. Vice-chairs of the Ontario Labour Relations Board who hear applications for review should have the power to consult with the parties as part of the decision-making process.

50. The Ontario Labour Relations Board, or the Ministry of Labour in consultation with the Board, should create explanatory materials for unrepresented parties regarding both the review procedure and the applicable principles of law, including the burden of proof and basic rules of evidence.

51. In all judicial districts in Ontario, the Ministry of Labour should develop and publish on its website lists of lawyers and legal clinics in those districts willing to provide pro bono legal assistance to parties with respect to applications for review.

5.6.5 Settlements

The Act permits parties to settle their ESA issues in a number of different circumstances. Settlements can be facilitated by ESOs, or parties can settle the matter themselves and inform the ESO. If the employee and employer comply with the terms of the settlement, the settlement is binding, any complaint filed is deemed to have been withdrawn and any order made by an ESO in respect of the contravention or alleged contravention is void (except a compliance order).

Settlements are void if the employee (or in the case of a settlement facilitated by an ESO, the employer) demonstrates that it was entered into as a result of fraud or coercion.

Even where a settlement occurs, the Ministry may still choose to continue prosecution proceedings against the employer if a violation was found.

ESOs may introduce the idea of a settlement in exercising their discretion under ESA s.101.1. If either party introduces the idea of a settlement, an ESO may relay offers and may describe the case of a party to the other party. ESOs who are charged with the responsibility of issuing orders should be careful about weighing in on the merits of cases when the facilitation occurs prior to an order being made. They are in a practical sense not only the face of law enforcement but also the first adjudicator of the complaint and must try to preserve, and be seen to preserve, their neutrality in that role. Consistent with this role, ESOs often do not comment on the strength of a case, but do have discretion to offer, where they consider it appropriate, an evaluation of the strengths and weaknesses of the case to either both or one of the parties. Importantly, however, ESOs are directed not to participate in settlement discussions once they have made a determination, or to delay an investigation pending settlement discussions. Ministry officials report that most settled cases are more complex matters where there are issues of credibility that are difficult to resolve, the facts are unclear, the application of the law is uncertain, or the parties' positions are equally strong or weak. Banks concludes: "This approach appears to offer appropriate safeguards, provided of course that the role of the ESO is clearly communicated at the outset to both parties."[145]
As of April 1, 2017, facilitated settlements, pursuant to s. 101.1 will be restricted to claims where a s. 104 order can be issued (compensation and/or reinstatement) – this would include reprisals, leaves of absence, retails business establishments, and lie detectors.

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145 Banks, 20.

Approximately 15% of claims were settled with the assistance of an ESO or by the parties themselves in the 2014/15 year.

The OLRB has a cadre of professional mediators – Labour Relations Officers (LROs) – who are assigned to assist the parties to help resolve matters in advance of the tribunal hearing applications for review of an officer's decision. Approximately 80% of ESA reviews are settled.

The Ministry of Finance (MOF), as the designated collector of unpaid orders and notices, is authorized to enter into a settlement with the debtor, but only with the agreement of the employee. If the settlement would provide the employee less than 75% of the amount he or she is entitled to, the approval of the Director of Employment Standards must be obtained.

In Ontario, the settlement of cases is almost always encouraged by adjudicative tribunals and courts charged with the duty of final adjudication. There are many reasons for this. Judicial resources are strained and could not handle the volume of cases initiated without settlements. Without settlements, too many cases would go on for too long and there would be an excessive burden on already strained adjudicative resources. Settlements virtually always save time and money for the litigants because the costs (including the costs of time off work) of proceedings before the court or administrative tribunal can be onerous. The stress of an adversarial proceeding on an individual can be burdensome. In cases where there is an on-going relationship a settlement can facilitate restoration of a "normal" relationship. Where a specific outcome at trial or before the tribunal administrative proceeding is not predictable, settlement may be a very rational way to manage risk.

Without the possibility of settlements, any legal process becomes more time consuming and more expensive for the parties and for society as a whole.

The facilitation of settlements by an experienced mediator is beneficial. Most tribunals and courts do not have skilled mediators available to facilitate dispute resolution. This is an important service to provide to the parties.

Recommendation:

52. No changes are recommended.

5.7 Remedies and Penalties

Enforcement mechanisms that encourage compliance, deter non-compliance and provide appropriate and expeditious restitution to employees whose ESA rights have been violated are an essential part of an effective compliance strategy.[146]

Thousands of complaints are filed with the Ministry of Labour for ESA violations every year. Approximately 70% of assessed complaints lead to confirmed violations of the ESA.[147]

5.7.1 The Current Law

Employees may choose to pursue their ESA rights through the civil courts rather than the ES Program. Employees who are covered by a collective agreement work through their union to enforce their ESA rights.

Ministry ESOs investigate claims filed by employees who believe their current or former employer has contravened the ESA, and proactively inspect workplaces to check compliance. ESOs are empowered, among other things, to:

- enter and inspect any place (except for a personal dwelling, which requires a warrant or consent);
- interview/question any person on matters that may be relevant;
- demand the production of records and to examine those records and remove them for review and/or copying; and
- require parties to attend meetings with the ESO for purposes of advancing the investigation of a claim or an inspection.

If an ESO determines that there was a monetary contravention, the employer (or other entity who has been found liable under the ESA) is often given the opportunity to pay the amount owing without an order being issued (this is referred to as voluntary compliance). If the employer does not voluntarily comply, the ESO has the authority to issue an order requiring payment. An administrative fee of 10% of the amount owing (or $100, whichever is greater) is added on to the amount of the order. Orders to Pay Wages are the most frequently issued sanction when employers do not voluntarily comply.[148]

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146 Interim Report, 288.
147 Vosko, Noack, and Tucker, 5.
148 Vosko, Noack, and Tucker, 6.

Employees can generally recover money owing under the Act through an Order as long as a claim is filed within 2 years of the contravention. In an inspection, ESOs can issue an Order to recover money owing up to 2 years before the date that the inspection was commenced. There is no statutory limit on the amount of money that can be recovered for employees.[149]

Directors of corporations that fail to pay its employees can be held liable under the ESA for some of the unpaid wages (up to 6 months' wages and 12 months' vacation pay, but not termination or severance pay). The ESA's director liability provisions generally mirror those in the *Ontario Business Corporations Act* but provide for enforcement through the ES Program rather than through court proceedings that are typically more protracted and expensive.

ESOs may also issue compliance orders ordering that a person cease contravening the Act, directing what action (other than the payment of money) the person shall take or not take to comply with the Act, and specifying a date by which the person must do so.

Compliance orders may be enforced by injunction obtained in the Superior Court of Justice, although MOL has never used this process. Compliance orders are the primary tool used in response to violations found in workplace inspections.[150]

In some circumstances, for example in cases of reprisal, the ESO can issue an order to compensate and – if the reprisal took the form of a termination – reinstate an employee. The types of damages that can be included in a compensation order include amounts representing the wages that the employee would have earned had there been no reprisal, damages for emotional pain and suffering and other reasonable and foreseeable damages.[151]

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149 The time limits on recovery through an order and the limit on the amount that can be the subject of an order were amended effective February 20, 2015: the $10,000 cap on an Order to pay wages for a single employee was removed, and the provision that limited Orders to covering only those wages that became due in the 6 months prior to the date the claim was filed (or 12 months in the case of vacation pay and repeat contraventions) was changed to two years. The previous limitations apply only with respect to wages that became due prior to February 20, 2015.

150 Vosko, Noack, and Tucker, 6.

151 For example, damages representing the loss of an employee's reasonable expectation of continued employment with the former employer, expenses incurred in seeking new employment, and damages representing lost benefit plan entitlements that an employee was wrongfully deprived of.

ESOs are empowered to issue a Notice of Contravention (NOC), which involves the imposition of an administrative monetary penalty, where the ESO finds a contravention of the Act. The penalty is payable to the Ministry of Finance (MOF) and becomes part of the province's general revenues. The amount of the NOC for failing to post or provide the Ministry's ESA poster, or to keep proper payroll records or make them readily available for an ESO are: $250 for a first contravention; $500 for a second contravention in a 3-year period; and $1000 for a third or subsequent contravention in a 3-year period. For contraventions of other provisions of the ESA, the penalties are: $250 for the first contravention multiplied by the number of employees affected; $500 for a second contravention in a 3-year period multiplied by the number of employees affected; and $1000 for a third or subsequent contravention in a 3-year period multiplied by the number of employees affected.

ESOs may initiate a prosecution under Part I ("tickets") of the *Provincial Offences Act* (POA).

The ESO may recommend a prosecution under Part III of the POA but the final decision to prosecute under that Part rests with the Ministry of the Attorney General (MAG). In general, deterrence tools such as NOCs and POA prosecutions are used less frequently than other measures to bring employers into compliance.[152]

Whether or not a contravention is found, ESOs can require an employer to post in its workplace any notice the ESO considers appropriate or any report concerning the results of an investigation or inspection. In practice, ESOs order employers to post documents only in the inspection context, not in the claim investigation context.

The Ministry publishes the name of anyone convicted under the POA of contravening the ESA on its website.

Despite the high rate of confirmed ESA violations, relatively few penalties are issued.

On some occasions, employers provide the statutorily required payments to an employee after a claim is filed and the employee withdraws the claim and, as a result, the Ministry closes the claim without an investigation and without making a finding that the employer contravened the Act. Similarly, if the parties enter into a binding settlement, the claim is deemed to be withdrawn and any order made in

152 Vosko, Noack, and Tucker, 6.

respect of the contravention or alleged contravention is void. Approximately 15% of claims were settled in the 2014-15 year. Settlements do not terminate prosecutions.

In addition to the above, the ESA provides that the Director of Employment Standards may, with the approval of the Minister of Labour, determine a rate of interest and manner of calculating interest for the purpose of the Act[153] and sets out circumstances in which interest may be payable pursuant to those determinations: when an ESO issues a Director Order to Pay, when the OLRB makes, amends or affirms an Order, and where money is paid from the Ministry's trust fund.[154] To date, the Director has not made these determinations. The effect of this is that no interest is payable pursuant to the ESA in any of the circumstances in which the Act mentions interest.

Part III prosecutions are relatively rare. When Part III prosecutions do occur, they are usually for failure to comply with an order to pay.

5.7.2 Voluntary Compliance Measures

Voluntary compliance approaches should be preferred in dealing with non-deliberate non-compliance, particularly where an employer is willing to commit to meaningful measures to eliminate current and future non-compliance. As Professor Banks states:

> *This approach can be efficient because it reserves more costly punitive actions for cases in which less costly compliance approaches have proven ineffective. It can enhance effectiveness by enlisting, sometimes under the implicit threat of sanction, the cooperation of regulated enterprises through less adversarial interactions. In employment standards regulation a willingness to take a less adversarial stance may also enhance the perception of the legitimacy of employment standards within the population of employers who are contingently disposed to comply…*[155]

Appropriate sanctions must be available and used in cases of intentional violation and for repeat offenders.

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153 See Section 88(5).
154 See Sections 81(8), 119(12), 88(7), 117(3) and 117(4).
155 Banks, 67-68.

5.7.3 Enforceable Undertakings

Consistent with the objective of achieving voluntary compliance, the ES Program has compliance orders as a tool in its enforcement toolkit. A compliance order requires an employer to take steps to achieve compliance. It does not include orders to pay wages owing as a result of non-compliance.

Some jurisdictions have provision for enforceable undertakings as a compliance tool. Professor Banks describes such undertakings as: "a statutory agreement between a regulator and an alleged wrongdoer which sets out a number of promises or commitments intended to rectify past contraventions and encourage future compliance"[156] and further comments on their successful utilization in Australia. In Australia, such an undertaking is a legally binding and enforceable agreement. The Fair Work Ombudsman describes an enforceable undertaking as an agreement between the regulator designed to "fix a problem and make sure it doesn't happen again" after an investigation or inspection has shown non-compliance and where the employer agrees to voluntary remediation. In such agreements, the employer also agrees to preventative actions for the future.

Such agreements commonly include:

a) identification of the employer managers who have responsibility for managing operations including compliance with the law;

b) an outline of the non-compliance and an acknowledgement by the employer that the law has not been followed;

c) an outline of wages owed and whether payment has been made;

d) an agreement by the employer to do certain actions to fix the breach (eg. remedying an underpayment, apologizing, printing a public notice)

e) an agreement to have a compliance audit or a series of audits;

f) to provide training (by an approved trainer) related to compliance for persons who have managerial responsibility for human resources, recruitment or payroll functions;

g) a commitment by the employer to future compliance measures (e.g., regular internal audits, future reporting to the Fair Work Ombudsman);

156 Banks, 72.

h) a provision that the FWO can rely on the admissions made in any subsequent case involving future non-compliance, including enforcement proceedings related to alleged non-compliance with the undertaking.

If the FWO decides that an enforceable undertaking is appropriate, the Office of the FWO prepares a draft agreement. The employer can provide input and seek independent legal advice before signing the agreement.

The use of enforceable undertakings is designed to engage employer commitment to compliance on a co-operative basis without the imposition of sanctions in a way that avoids legal proceedings. Such undertakings can combine the virtues of a voluntary compliance approach - avoiding the potential costs of legal proceedings associated with sanctions - and opportunities to enlist employer cooperation in future compliance initiatives.

According to the research material provided, the Australian experience is that enforceable undertakings are a "valuable and effective tool at the disposal of the regulator." The research indicates that enforceable undertakings, in addition to being non-punitive, have several advantages where they have been implemented. First, as mentioned, they engage employer commitment to on-going and sustained compliance on a co-operative basis. They are designed to create cultural change. Additionally, enforceable undertakings are tailored and responsive to individual businesses and industry. Banks cites a study[157] that concludes: "In sum, enforceable undertakings offer a number of distinct advantages over prosecution: they are generally quicker, less costly and more certain. Further, these benefits do not necessarily come at the expense of deterrent, rehabilitative or restorative outcomes."[158]

However, for intentional and repetitive non-compliance, more serious sanctions are required.

Recommendation:

53. The *Employment Standards Act, 2000* should be amended to provide for enforceable undertakings to be entered into on a voluntary basis between the Ministry of Labour and an employer.

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157 Hardy, Tess & John Howe. "Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman", *Federal Law Review*. 41.1 (2013): p. 1-33, at 7.

158 Banks, 73.

54. Enforceable undertakings should be enforced by the Ontario Labour Relations Board.

5.7.4 The Current Approach to Sanctions and Proposed Changes

The currently most-favoured Ministry response to violations where sanctions are imposed is the issuance of a ticket resulting on conviction in the imposition of a fine in the aggregate amount of $360.00 ($295.00 plus a surcharge and a fee for court costs). The current practice of issuing tickets has been summarized by Professor Banks as follows:

> *Where sanctions are imposed, Ministry policy apparently favours the imposition of tickets over Notices of Contravention, which carry potentially greater monetary consequences. The penalty [through a Notice of Contravention] for a first contravention (other than of provisions dealing with posters and records) is $250 multiplied by the number of employees affected. It is possible that the cost to the employer of paying compensation plus a ticket, when that cost is weighted by the risk of detection, will often be less than the money saved through non-compliance. If so, while tickets may serve a reminder function in dealing with employers disposed to voluntarily comply, it is difficult to see how they could deter employers who are not so disposed because of such cost considerations. The evidence reviewed above suggests the likelihood that many if not most instances of deliberate non-compliance will result from an employer facing incentives that dispose it not to comply.*[159]

In sum, like other critics, Banks suggests that, for some employers, the magnitude of the fine is simply viewed as a cost of doing business and is insufficient to deter future non-compliance. The question is whether the current system – as a practical matter – contains sufficient disincentive to discourage intentional and repetitive non-compliance. In addition, since "tickets" under Part 1 of the POA will still be issued, there is a question whether the amount of the fine currently established by the Schedule to the POA for ESA violations is sufficient. In our view, the minimum amount payable on a plea or a conviction under Part 1 should be increased both to underscore the importance of compliance and to make the sum payable more than just another cost of doing business.

159 Banks, 71.

Until recently, Notices of Contravention have been used sparingly but the Ministry has begun to use them more often. As stated above, the amount of the penalty varies with the number of employees affected per violation, and doubles and redoubles if the contravention is a first, second or third contravention within a three-year period. Thus the amount of the penalty can be more significant if there are many employees and multiple contraventions. The penalties have not increased since 2001, whereas the rate of inflation since that time has increased by approximately 35%.

We are of the view that while Part III prosecutions (which are rarely utilized) are available to the Ministry, they are not the best way to deal with intentional or repeat offenders. Tickets issued pursuant to Part I of the *Provincial Offences Act* are in most cases likely insufficient to have any deterrent effect on the employer charged or on other employers who might otherwise be motivated to change their views on the importance of compliance.

In the Interim Report, there was a discussion of whether the OLRB should be given jurisdiction to impose, where appropriate, administrative monetary penalties on non-compliant employers in addition to other remedial authority, for example, the authority to make orders to compensate employees where violations are shown to have occurred and to issue prospective compliance orders.

Other tribunals have statutory authority to impose administrative monetary penalties. The Ontario Securities Commission, if in its opinion it is in the public interest to do so, may make an order requiring a person or company to pay an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law (section 127(1)9 of the *Securities Act*). The Securities Commission also has jurisdiction in appropriate cases, after conducting a hearing, to order a respondent to pay the cost of the investigation and the cost of the hearing incurred by the Commission. Additionally, the Securities Act provides that revenue generated from the exercise of a power conferred or a duty imposed on the Commission does not form part of the Consolidated Revenue Fund but can be used for various purposes including: for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets.

In *Rowan v. Ontario Securities Commission*,[160] the Ontario Court of Appeal stated:

> *Penalties at the level of $1 million almost certainly have a deterrent purpose, but that does not make them penal in nature. As the Supreme Court of Canada held in Re Cartaway Resources Corp., 2004 SCC 26, [2004] 1 S.C.R. 672, in carrying out their regulatory and preventative mandate provincial securities commissions may legitimately consider deterrence when imposing a monetary penalty. Writing for the court, Le Bel J. stated, at para. 60, that "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".*[161]

In *Rowan*, the OCA approved the following statement of the Securities Commission:

> *In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than "the cost of doing business". In the current securities regulation and today's capital markets context, a $1,000,000 administrative penalty is not prima facie penal.*[162]

It is a legitimate regulatory goal to have administrative deterrent sanctions that are not penal. The Ministry of Labour is charged with the responsibility of endeavoring to create a workplace environment for all working Ontarians in which compliance is the norm and non-compliance is the exception. Unfortunately, as concluded elsewhere in this Report, non-compliance with the ESA currently affects thousands of Ontarians and is a significant societal as well as a workplace problem.

The OLRB is an expert tribunal with expertise in the interpretation, application and administration of the ESA. It is a Tribunal with an on-going interest in and commitment to ESA compliance and enforcement. If the OLRB were given a broader jurisdiction to impose significant monetary penalties, the imposition of such penalties in appropriate cases will act as a significant deterrent to other employers as well as providing a penalty for non-compliance to a particular employer. The OLRB would also develop a broader employment standards jurisprudence that would have

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160 2012 ONCA 208
161 *Ibid.*, para. 51.
162 *Ibid,* para. 52.

an educative as well as jurisprudential value. Giving the OLRB jurisdiction to impose monetary penalties may not only have the desired deterrent effect but also, as the Securities Commission stated, be an "appropriate legislative recognition of the need to impose sanctions that are more than the cost of doing business."

In our view, the imposition of an administrative monetary penalty should be the result of state action in the public interest and be initiated directly by the Ministry of Labour or by the Ministry of the Attorney General against a named respondent or respondents. For this purpose, it will be necessary to have a designated officer of the Crown act as a Director of Enforcement – a person with specific responsibility to determine when to initiate proceedings in which an administrative monetary penalty is sought and to take carriage as the applicant in the proceedings. If a Director of Enforcement is given the authority to take cases directly to the OLRB, the Director could elect to initiate proceedings when, after receiving advice from the Director of Employment Standards, it is determined that there is a public policy interest in achieving an outcome that would better reflect the seriousness of the violation(s) alleged, for example – where after an investigation:

- it appears that there are reasonable and probable grounds to believe a serious reprisal has occurred; or
- in cases where there are multiple violations disclosed either by an ESO investigation or by an inspection or an audit; or
- where the employer has been found to have violated the ESA on previous occasions; or
- in cases of intentional violation.

In cases where the Director of Enforcement initiates or takes carriage of proceedings seeking the imposition of an administrative monetary penalty over and above a remedy for the claimant(s) or other employees whose rights have been violated, the respondent must be advised not only of the details of the alleged violations, but also of the amount of the administrative monetary penalty that is being sought by the Director. At any hearing, the burden of proof would be on the Ministry.

The current complaints driven process is essentially a two-party process with the complainant and a respondent employer/corporate director being the parties. With some exceptions, the parties are therefore in a position to resolve their own litigation. A settlement with respect to one or more employees should not bar the Director from assuming carriage of a case and taking it to the OLRB to seek an

administrative monetary penalty and/or compensation for employees with whom there is no settlement and for whom no complaint has been made – for example, compensation for others if violations are uncovered during an inspection or during the investigation of an individual claim. In a proceeding before the OLRB where the Director of Enforcement decides to take carriage of a complaint or to initiate a complaint and seek a monetary penalty, the employee claimant(s) will not be responsible for preparing the case or for taking the matter to a hearing before the OLRB.

A complaint initiated by the Director of Enforcement should not preclude a settlement agreement between the Director and the employer on the question of remedy for adversely affected individuals and on the question of the administrative penalty – the latter being subject to the approval of the OLRB. The Director will be in the best position to assess the strengths and weaknesses of the case, to assess how best to serve the public interest and to take into account the views and the rights of adversely affected employees, all of which would – of necessity – be taken into account by the Director of Enforcement in deciding whether and on what terms to settle. One would assume that – as a matter of policy – counsel acting on behalf of the Director of Enforcement would ensure that the employees receive any monies owed based on the proper application and interpretation of the ESA.

Giving the OLRB jurisdiction to impose monetary sanctions for violation of employment standards law will not only underscore the important public policy objectives of compliance, but would also act as a deterrent to respondents and others from engaging in future conduct that violates the ESA.

Recommendations:

55. Schedule 4.2 of O. Reg 950 under the *Provincial Offences Act* currently sets fines for violations of the *Employment Standards Act, 2000* at $295. Schedule 4.2 should be amended to set the fine for a Part 1 prosecution under the *Provincial Offences Act* in the amount of $1000 for the specified violations of the *Employment Standards Act, 2000*.

56. The penalties for notices of contravention should be raised from $250/$500/$1000 to $350/$700/$1500, respectively.

57. The Ontario Labour Relations Board should be given an expanded jurisdiction to impose administrative monetary penalties of up to $100,000 per infraction and the jurisdiction to order an unsuccessful respondent to pay the costs of the investigation.

58. The Ontario Labour Relations Board should be given the same remedial authority as an employment standards officer to make orders to compensate employees where violations have been shown to have occurred and to issue prospective compliance orders.

59. The Ministry of the Attorney General or the Ministry of Labour should appoint a designated officer of the Crown to act as a Director of Enforcement – a person with specific responsibility to determine when to initiate proceedings in which an administrative monetary penalty of up to $100,000 per infraction is sought against a named respondent(s) and to take carriage of the case as the applicant in the proceedings.

    Note: This recommendation to give the Ontario Labour Relations Board jurisdiction to impose administrative monetary penalties is intended to replace the Part III *Provincial Offences Act* prosecution process.

60. Either the Director of Employment Standards should set interest rates pursuant to section 88 (5) of the *Employment Standards Act, 2000*;

    or

    The *Employment Standards Act, 2000* should be amended to provide that when orders are made by an officer or by the Ontario Labour Relations Board, complainants are to be awarded pre-order and post-order interest, calculated in accordance with the *Courts of Justice Act*.

5.8 Security for Employee Remuneration[163]

5.8.1 The Concern

The concern we deal with here is that the ESA does not have an effective mechanism that grants priority to debts owed to employees for vacation pay, wages, severance and termination pay, and lags behind other provinces.

163 We are grateful to E. Patrick Shea, LSM., CS, for his guidance and advice in this area.

In the case of vacation pay, the ESA creates a lien or charge on the employer's assets,[164] but there is nothing in the ESA, nor in the *Personal Property Security Act*[165] (the PPSA) which gives the charge relative priority over other creditors. Accordingly, its priority is based on the chronological order in which it arose compared to others.[166] There is no equivalent provision to secure wages, severance and termination pay.

The ESA also creates a deemed trust for vacation pay[167] but there is no equivalent provision to secure wages, severance and termination pay. In contrast to the statutory charge, the PPSA does provide for the relative priority of the deemed trust that arises under the ESA *vis-a-vis* other secured creditors providing that it ranks in priority to most security interests in inventory and accounts.[168] However, the statutory deemed trusts have not been effective mechanism in protecting amounts owed employees.[169] The *Bankruptcy and Insolvency Act* (BIA) contains provisions that limit the effectiveness of deemed trusts in favour of the Crown[170] and the courts have found that deemed trusts are not effective to exclude the property deemed to be held in trust from the property of the bankrupt.[171] A central problem with the deemed trust concept has been the lack of an effective procedure to "enforce" the trust. The legal principles applicable to common law trusts are not easily adapted to the traditional debtor-creditor relationship and the legislation that creates the trusts typically does not provide enforcement mechanisms.

5.8.2 Other Provinces

Other provinces have employment standards legislation that provides broader protection for employees than the ESA/PPSA regime.[172]

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164 ESA, s. 40(2).
165 R.S.O. 1990, c. P.10.
166 *Textron Financial Canada Limited v. Beta Brands, 2007* CanLII 43908 (ON SC).
167 See ESA ss. 40(1).
168 PPSA, s. 30(7). See also *Textron Financial Canada Limited v. Beta Brands*, 2007 CanLII 43908 (ON SC).
169 ESA, s. 40(2).
170 BIA, s. 67(2) and (3).
171 See, for example, *British Columbia v. Henfry Samson Belair Ltd.*, 1898 CanLII 43 (SCC), *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue)*, 1995, CanLII 69 (SCC) and *IBL Industries Ltd. (Re)*, 1991 CanLII 7223 (ON SC).
172 It should be noted that most provinces include the protection in a single piece of legislation.

British Columbia

The *Employment Standards Act*[173] (the "BCESA") provides for a priority lien and charge in favour of the Director against all of an employer's property to secure unpaid employee remuneration[174] and for the seizure of assets by the Director to satisfy amounts owing.[175] The Act also provides for the issuance of requirements to pay to re-direct to the Director funds that are otherwise to be paid to the employer.[176]

Alberta

The *Employment Standards Code*[177] (the "AESC") creates a statutory deemed trust for all employee remuneration and a priority charge to secure up to $7,500 of employee remuneration.[178]

Manitoba

The *Employment Standards Code*[179] (the "MESC") creates a statutory deemed trust and a priority charge to secure up to $2,500 of employee remuneration.[180]

Saskatchewan

The *Saskatchewan Employment Act*[181] (the "SEA") creates a deemed trust and a priority charge to secure employee remuneration claims.[182] The Saskatchewan *Enforcement of Money Judgments Act*[183] (the "EMJA") also provides employees who obtain judgments against their employers with an enhanced ability to recover amounts owing as compared to Ontario. The EMJA provides employee (and other) judgment creditors with a security interest over assets to secure a judgment and provides for the appointment of a receiver to recover amounts owing under a judgment.[184]

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173 R.S.B.C. 1996, c. 113. See *CIBC v. Wildflower Productions Inc.*, 2000 BCSC 193 (CanLII) and *Vancouver City Savings Credit Union v. Avicenna Group Holdings (Chilliwack) Ltd.*, 2015 BCSC 31 (CanLII).
174 BCESA, s. 87.
175 BCESA, ss. 92 – 94.
176 BCESA, s. 89.
177 R.S.A. 2000, c. E-9.
178 AESC, s. 109.
179 C.C.S.M. c. E110.
180 MESC, s. 100 - 107.
181 S.S. 2013, c. S-15.1.
182 SEA, ss. 2-64 – 2-67.
183 S.S. 2010, c. E-9.22.
184 It should be noted, however, that the EMJA has yet to be "tested" in an insolvency proceeding to determine whether the security interest created by the EMJA will "survive" a bankruptcy.

Nova Scotia

The *Labour Standards Code* provides for a statutory lien to secure orders made by the Board.[185]

5.8.3 Practical Impact of Bankruptcy

It is important to understand that because of the supremacy of federal bankruptcy legislation, in the Canadian context, statutory charges created by provincial legislation to secure employee remuneration "drop away" in a formal insolvency proceeding. However, the *Bankruptcy and Insolvency Act*[186] (the "BIA"), and *Companies' Creditors Arrangement Act*[187] (the "CCAA") provide for the payment of employee remuneration claims to a cap.[188] The interaction between provincial employment standards legislation and the Federal insolvency legislation often results in the initiation of "strategic" bankruptcies. An employer or secured creditor impacted by the operation of the priority charge in favour of employees under provincial employment standards legislation can, for example, commence bankruptcy proceedings and the result is that the priority charge created by provincial legislation "drops away" and is replaced by the charge in favour of employees created by the BIA. Whether or not formal insolvency proceedings are commenced is determined on a case-by-case basis, based largely on the economics of the situation. There are cases where there will be no formal insolvency proceedings commenced and employees will be able to exercise whatever remedies are provided by the ESA.[189]

5.8.4 Federal Protection for Employee Remuneration Claims

Federal insolvency legislation provides some protection for employee remuneration claims in formal proceedings under the BIA and the CCAA. The *Wage Earner Protection Program Act*[190] (the "WEPPA") provides for the payment of certain amounts to employees where their employment is terminated immediately prior to or as a result of certain insolvency proceedings. The WEPPA covers wages,

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185 R.N.S. 1898, c. 246, ss. 85 and 88. See also *Ross Estate v. Police Association of Nova Scotia*, 2014 NSSC 42 (CanLII).
186 R.S.C. 1985, c. B-3.
187 R.S.C. 1985, c. C-36.
188 See, for example, *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue)*, (1995), CanLII 69 (SCC).
189 See, for example, *CIBC v. British Columbia (Director of Employment Standards)*, (2001) BCCA 159 CanLII.
190 S.C. 2005, c. 47, s. 1.

vacation pay, and severance and termination pay, but there is a cap on the maximum amount that an employee may recover.

5.8.5 Analysis

The intention of the current legislation is to protect vacation pay owing as against other creditors but it is ineffective because the deemed trust provision does not work appropriately to provide that protection. Similarly, the statutory charge that is created is not given priority under the PPSA and accordingly its priority depends on when it arose as compared to other creditors. This situation generally compares unfavourably to the situation in the western provinces where all employee remuneration is given priority protection, not just vacation pay, and where statutory charges are created which can be more effective in granting priority to employee claims over other creditors.

A statutory priority is intended to have the same effect as a deemed trust – to provide a right to recourse against property to secure payment of an obligation. It will be no more effective in Bankruptcy proceedings than other statutory charges but it will give better and recognized protection for claims than deemed trusts.

In our view, it should be the policy of the law in Ontario to protect employee remuneration over other creditors to the extent it is reasonable, that is to say with a cap per employee. There is no policy reason to protect only vacation pay and not other remuneration owing including termination and severance pay. Since the deemed trust provision is ineffective, it should be replaced by a statutory charge and there should be an effective enforcement mechanism for that charge.

As to an enforcement mechanism, the government should provide for a statutory charge against real property in favour of Her Majesty to secure claims. This is used in the BIA and CCA to secure claims relating to environmental matters.[191]
In any event, provisions could be added to the PPSA and/or the ESA with respect to the enforcement of the security provided to secure employee remuneration claims. The remedies should be available to the Director, the employees or a representative of the employees.

Further, Ontario should consider the Saskatchewan mechanism allowing judgment creditors a security interest over assets to secure a judgment and provides for the appointment of a receiver to recover amounts owing under a judgment.

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191 BIA, ss. 14.06(1.1) and (7), and CCAA s. 11.8(8).

Recommendation:

61. Ontario should repeal the deemed trust and statutory lien provisions in the *Employment Standards Act, 2000* and *Personal Property Security Act* and replace them with legislative provisions that:

    a) create a priority statutory charge in favour of the Director of Employment Standards against all of an employer's property to secure unpaid employee remuneration, up to $10,000 per employee, similar to the priority charge arising under section 23 of the *Retail Sales Tax Act*, including provisions with respect to the enforcement of that charge in the same manner as a contractual security interest enforced under the personal property security legislation.

    b) enable the Director of Employment Standards to take security for the payment of employee remuneration, give the Director direct rights of action to recover employee remuneration, and give the Director the ability to take security for the payment of employee remuneration, similar to the rights afforded under subsections 37 (1) and (2) of the *Retail Sales Tax Act*.

    c) provide that the remedies should be available to the Director of Employment Standards, or to employees or a representative of the employees where the Director does not act.

    d) eliminate the requirement to file a certificate in a court of competent jurisdiction (except for reciprocal orders) and, instead, make an order valid and binding upon issuance, similar to section 18 of the *Retail Sales Tax Act*. However, it may be preferable to state in the legislation that the order of the Director of Employment Standards is enforceable like a judgment and no certificate is required, as a provision similar to section 18 of the Retail Sales Tax Act may not be effective in making the order a judgment. The intent would be to allow for immediate enforcement, similar to a judgement of the Court.

    e) provide for the ability to cancel and reissue an order for the purpose of making corrections without having to cancel the original order, for example, where a director named in an order turns out not to have been a director at the time the money became payable.

    f) provide the Ministry of Finance with the authority to demand information and to share information for the purposes of the administration and the enforcement of the *Employment Standards Act, 2000*.

5.8.6 Director Liability for Employee Remuneration[192]

The Concern

The issue here is that the ESA and the *Business Corporations Act*[193] (the "OBCA") are ineffective in advancing employee claims against directors for unpaid wages and vacation pay.

Director Liability

Both the ESA and the OBCA impose personal liability on the directors of business corporations for unpaid wages and vacation pay,[194] but not severance or termination pay.[195] The ESA and the OBCA each contain conditions that must be satisfied in order for director liability to arise. In addition to creating a direct claim against directors, the ESA includes an administrative enforcement mechanism. Unlike directors, corporate officers are not personally liable for employee remuneration under the ESA or OBCA. The ESA does not provide a "due diligence" defence to directors.[196] Directors are personally liable for unpaid employee remuneration despite any steps they took to ensure that employees were paid. The liability imposed under the ESA can be enforced directly by an employee in an action against directors seeking a judgment or through the ESA's enforcement mechanism. They cannot do both.[197]

Shareholder Liability

The OBCA contemplates that shareholders may remove the directors' obligation to manage or supervise the management of the corporation's business and affairs in a unanimous shareholder agreement.[198] In these circumstances, both the ESA and the OBCA provide that the shareholders of the corporation are personally liable for employee wages and vacation pay.[199] The OBCA also contemplates that where all of the directors of a corporation have been removed or resigned, shareholders that step in to manage or supervise the management of the business and affairs

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192 We are grateful to E. Patrick Shea, LSM., CS, for his guidance and advice in this area.
193 R.S.O. 1990, c. B.16.
194 ESA, Part XX and OBCA, s. 131.
195 ESA, s. 81(3). Under the OBCA, liability is for amounts owing for services performed and this has been found to not include severance and termination: See *Barrette v. Crabtree Estates*, 1993 CanLII 127 (SCC) (applying parallel provisions of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 119).
196 Note that the *Canada Business Corporations Act* provides a due diligence defence: see *Canada Business Corporations Act*. R.S.C. 1985, c. C-44, s. 123(4).
197 ESA, ss. 97 and 98.
198 OBCA, s. 115(1).
199 ESA, ss. 79 and 80, and OBCA, s. 108. Note that s. 80 of the ESA does not reflect the possibility that corporations incorporated otherwise than the OBCA and the CBCA are operating in Ontario: see *Extra-Provincial Corporations Act*, R.S.O., 1990, c. E.27.

of a corporation will be subject to liability as directors.[200] The procedural and substantive provisions of the ESA and the OBCA with respect to director liability for remuneration apply to shareholders when they are subject to personal liability.

A. *Employment Standards Act, 2000*

i Relevant provisions

Under the ESA, a director is liable for up to six (6) months wages for work performed for the corporation and up to twelve (12) months of accrued vacation pay[201] where:

(a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;

(b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;

(c) an employment standards officer has made an order that a director is liable for wages, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or

(d) the Board has issued, amended or affirmed an order under section 119, the order, as issued, amended or affirmed, requires the employer or the directors to pay wages and the amount set out in the order has not been paid.[202]

An order to pay made under the ESA has the same effect as a judgment obtained by an employee against a director.[203] In either case, the director's assets can be seized to satisfy the order and amounts owing to the directors can be garnished to satisfy the order. However, practically, it is difficult to enforce a monetary judgment in Ontario as compared to Saskatchewan, for example, where new legislation has significantly enhanced the rights of judgment creditors, and to have a security interest in the amount of the judgement, and to be able to appoint a receiver.[204] Neither of these is available in Ontario.[205]

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200 OBCA, s. 115(4). This provision applies to anyone other than officers and professional that step in and take over managing or supervising the management of the corporation's business and affairs.
201 ESA, s. 81.
202 ESA, ss. 81(1).
203 ESA, s. 126.
204 See *Enforcement of Money Judgments Act*, S.S. 2010, c. E-9.22.
205 *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 60.

ii Barriers to effectiveness

The administrative remedy in the ESA with respect to directors contemplates a relatively streamlined process that results in a judgment against the directors without the need for a civil action to be commenced under the Rules of Civil Procedure.[206] The effectiveness of this procedure, however, depends on the Ministry allocating sufficient resources to the process. There is a perception in the legal community that the Ministry does not allocate sufficient resources to pursuing remedies against directors, although the policy of the Ministry is to pursue directors in every case.

The barriers to the effectiveness of the ESA as a direct remedy for employees against directors are:

(a) the requirement that there be formal court-based insolvency proceedings commenced in respect of the employer before the employees may pursue the directors;

(b) the requirement that the employee file a proof of claim and wait to determine if there will be a distribution in the insolvency before the employees may pursue the directors; and

(c) there is no ability for one employee to act as a representative of all employees in an action against directors for unpaid remuneration.

The requirement that the employer be bankrupt or be subject to a court-appointed receivership before employees are permitted to pursue claims against directors for unpaid remuneration effectively requires that employees initiate bankruptcy, or wait until the employer or some other creditor(s) commence bankruptcy proceedings.

The requirement that an employee file a proof of claim in a bankruptcy or receivership is, in and of itself, not a significant barrier. However, while there is a statutory claims process in bankruptcy proceedings, there is no statutory requirement that a receiver appointed under the *Courts of Justice Act* or the *Bankruptcy and Insolvency Act* (the "BIA") conduct a claims process, and therefore an employee may not be able to file a proof of claim in a receivership.

206 ESA, Parts XXI and XXII.

The requirement that the employee's claim in the bankruptcy or receivership be unpaid limits the effectiveness of the remedy against the directors. Even where there is a claims procedure, it can often be months, or even years, before it is determined whether there will be a distribution to unsecured creditors.

In addition, the scope of the insolvency proceedings referenced in the ESA is not complete in that it contemplates only bankruptcy and the appointment of a receiver by the court. The ESA does not contemplate a secured creditor taking steps to appoint a receiver under a security agreement over all or substantially all of an employer's assets. The ESA also fails to contemplate the possibility that reorganization proceedings may be commenced under the BIA or the **CCAA** in which employee claims for remuneration pay may not be fully satisfied and in respect of which payment to employees may be significantly delayed. The BIA and the CCAA both provide protection to employees,[207] but the relevant provisions may not provide coverage for the full amount owing and employee recovery in reorganization proceedings may take a considerable period of time.

The ESA contemplates the possibility of a person representing the interests of parties with the same or similar interest before the OLRB,[208] but not a single employee representing the interests of all employees in pursing directors for unpaid remuneration.

B. *Business Corporations Act*

i Relevant provisions

Under the OBCA corporate directors are jointly and severally liable for up to six (6) months of wages and twelve (12) months of vacation pay owing to employees for services performed for the corporation while they were directors where.[209]

(a) the corporation has been sued for the debt and the judgment cannot be satisfied from the assets of the corporation; or

(b) the corporation is subject to winding-up, liquidation or bankruptcy proceedings and a claim for the debt owing has been proven.

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207 The BIA, for example, requires that certain employee claims be paid: see *Bankruptcy and Insolvency Act*, R.S.C. 1985, B-3, s. 60(1.3).
208 ESA, s. 119(2).
209 OBCA, s. 131.

The OBCA does not provide a "due diligence" defence to directors. Directors are personally liable for unpaid employee remuneration despite any steps they took to ensure that employees were paid.

The OBCA does not include an administrative procedure for enforcing directors' liability. An employee who wishes to pursue a director for unpaid remuneration must commence a proceeding under the *Rules of Civil Procedure*. Where a proceeding is commenced against the directors under the *Rules of Civil Procedure* administrative enforcement proceedings under the ESA are prohibited.[210]

ii Barriers to effectiveness

The barriers to the effectiveness of the OBCA as a direct remedy for employees against directors are:

(a) the requirement that, in the absence of formal liquidation proceedings, a judgment be obtained against the corporate employer as a pre-condition to the directors being personally liable;

(b) there is no ability for one employee to act as a representative of all employees in an action against directors for unpaid remuneration; and

(c) the list of insolvency proceedings that will "trigger" director liability is incomplete.

Unlike the ESA, the OBCA requires only that a proof of claim is filed by the employees where formal liquidation proceedings are commenced in respect of an employer. This does not create an unreasonable barrier or undue delay. However, the OBCA does not contemplate the possibility that a receiver may be appointed over an employer's assets by the court or a security agreement and, as is the case with the ESA, there is a "gap" in the OBCA in that it does not contemplate reorganization proceedings under the BIA or the CCAA. As noted above, while the BIA and the CCAA provide protection to employees in reorganization proceedings, the possibility exists that employees will have an unsecured claim in a re-organization.

Analysis

The reason personal liability is imposed on directors is to ensure that employees are paid. There ought to be effective remedies to ensure prompt payment of what

210 See ESA, ss. 97 and 98.

is owed. The existing procedures and requirements place unnecessary, time consuming and expensive barriers in the way of employees receiving the wages and vacation pay they are owed. Where liability is based on the fact that the employer is insolvent and unable to pay (and there are other circumstances where liability arises without a formal insolvency), there should be no need for formal proceedings to be commenced before the employee can take direct action. The fact that employee remuneration has not been paid, in and of itself, ought to provide the basis for employees to take proceedings against the directors of a corporate employer. Changes that do not expand the liability of directors beyond what it is today but provides an effective means to obtain payment should be the objective.

When the directors pay the remuneration owing they would be subrogated to (or stand in the shoes of) the employees' claims against the corporation, including any claims the employees might have in a bankruptcy or receivership.[211] The ESA provides that there is no requirement that remedies as against the corporation be exhausted before pursuing the directors for unpaid remuneration.[212]

There is no sound policy reason why the employees' ability to pursue directors under the OBCA, for unpaid remuneration ought to be limited to those cases where the employee has first obtained judgment against the employer. In fact, this barrier is unjustifiable given the very high cost of litigation and the fact that the OBCA does not contemplate representative proceedings on behalf of all employees. This criticism does not apply to the ESA.

Requiring that employees obtain a judgment against the corporation before pursuing directors makes the directors "true" guarantors. The law as it stands is not consistent with modern commercial practice where most guarantees are structured as "primary obligor" guarantees, where there is typically recourse against the guarantor without requiring the debtor to first pursue the primary obligor.[213]

As is the case with enforcing judgment against an employer in Ontario it should be easier to enforce a judgment against directors. It should be possible to obtain a security interest in the amount of the judgment and to be able to appoint a receiver.

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211 The ESA contains to express subrogation provisions, but the doctrine of equitable subrogation would apply to put the director into the shoes of the employees *vis-a-vis* the corporation.

212 ESA, s. 81(2).

213 It should be noted that even in the case of "true" guarantees the law provides procedures that permit a debtor to obtain relief directly as against a guarantor without first pursuing the primary obligor.

There is inconsistency between the ESA and the OBCA in terms of the availability of a remedy against directors. For example:

(a) in the case of a bankrupt employer, the ESA requires that a proof of claim be filed and there be no distribution to employees, but the OBCA requires only that a proof of claim be filed;

(b) the ESA provides relief to employees where a receiver is appointed by the court over the employer's assets, but the OBCA does not.

Harmonization of the ESA and the OBCA would make it easier for employees to understand their remedies *vis-a-vis* directors and for the directors to understand their potential liabilities *vis-a-vis* employees.

Adopting this approach, the effectiveness of the personal liability remedies provided by the ESA and the OBCA would be enhanced without altering the scope or extent of the liability to which directors (and shareholders) are exposed. The changes would be more efficient and effective for employees without exposing directors (or shareholders) to new or increased liabilities. Given the difficulties inherent in enforcing judgment against corporations, it is very important that the existing liability of directors be made effective. Our recommendations in this regard simply takes the existing purpose of the law and seeks to make important changes that will make it effective. It will be important, however, for the Ministry to devote adequate resources to pursue directors in order to recover the amounts owing.

Recommendations:

62. The existing provisions of the *Employment Standards Act, 2000* and the Ontario *Business Corporations Act* should be amended to provide that up to six months' wages and up to 12 months' accrued vacation pay are the responsibility of the directors of a corporation and that the only condition that must be met in order for an employee to receive these amounts is that the employee has not been paid these sums by the corporation.[214]

63. The provisions of the *Employment Standards Act, 2000* and the Ontario *Business Corporations Act* should be consistent.

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214 Note that the ability of an Employment Standards Officer to make an order under sections 81 (1) and 106 where insolvency proceedings have been commenced will have to be adjusted once the insolvency requirement is removed.

64. An employee representative should be able to take proceedings or make a claim against directors on behalf of all employees.

65. The Ministry of Labour should ensure that adequate resources are allocated, or continue to be allocated, and utilized for the recovery from directors of unpaid amounts owing by a corporation to an employee.

06 | Sectoral Regulation and Exemptions

Exemptions and sector specific regulations raise fundamental philosophical and practical questions about approaches to the uniform nature of statutory minima across the province, the need and appropriateness of individualized treatment for certain sectors of the economy, and the process to determine and review exemptions and sector specific regulation.

As collective bargaining in the private sector is relied on less and less to regulate working conditions, sector specific regulation under the ESA is likely to become more necessary and important to ensure that working conditions meet the test of decency, and that certain issues contributing to vulnerability and precariousness are addressed.

Our recommended sector specific approach (outlined below) is designed to provide a consultation process with representatives of employers, employees and government when exemptions are reviewed or requested or where sector specific regulation is being considered. The process is designed to allow all stakeholders an opportunity to advance and protect their legitimate interests, to provide advice and solutions and to seek consensus on outcomes that address the legitimate concerns and interests of all participants.

Many people assume that basic terms and conditions of employment either are or ought to be universal in Ontario and apply to all workers, thus setting a common floor of uniformity and equality. The legitimate concern regarding exemptions from minimum standards is that many employees, particularly vulnerable workers in precarious jobs, may be denied the protections under the ESA that are essential for them to be treated with minimum fairness and decency. This indeed is a major concern of ours.

As the reports of the LCO[215] and the research of Vosko, Noack and Thomas,[216] establish, Ontario has a troubling patchwork of exemptions by industry (such as agriculture, construction), by occupation, by job classification (e.g.., liquor servers), and by employment status (such as temporary agency employees). In research done for the CWR, it is estimated that the result of the current 85 exemptions and special rules is that only a minority of Ontario workers are fully covered by the statute.[217] Overall, the existing exemptions do not fit into a consistent policy framework.

The major concern over the structure of Ontario's current "patchwork of exemptions" is that the lack of universality disproportionately affects the disadvantaged - such as recent immigrants and the young - and that it contributes to the precariousness of work and the presence of vulnerable groups of workers in our society.[218] Part-time employees are more likely to be affected by exemptions and special rules than are full-time employees, temporary workers more than permanent employees, and low-wage employees are more likely to be affected than higher wage earners.[219] Particularly worrisome is that only a small minority of minimum wage earners, 23%, are fully covered by the ESA.[220] As well, it is estimated that only 29% of low income employees are fully covered by overtime provisions as opposed to approximately 70% of middle and higher income employees.[221]

This patchwork of exemptions, with a disproportionate impact on the disadvantaged, does not lead us to conclude that sector specific regulations or exemptions are per se "bad" or unnecessary. To the contrary, Ontario has a broad and diverse economy and one size does not always fit all. Sometimes it is neither practical nor appropriate to insist on a single standard for all employers and employees. Sometimes a unique and focussed approach to regulation and/or exemption from the generally applicable standard is reasonable. Also, there may be unintended and unanticipated adverse consequences as a result of the imposition of a standard of general application that warrant an exemption or differential treatment.

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215 Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: Law Commission of Ontario, 2012). Available online: http://www.lco-cdo.org/vulnerable-workers-final-report.pdf.

216 Vosko, Noack, and Thomas, *How Far Does the Employment Standards Act, 2000 Extend and What Are the Gaps in Coverage*. (Toronto: Ontario Ministry of Labour, 2015). Prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review.

217 *Ibid.*, 4.

218 *Ibid.*, 5.

219 *Ibid.*, 5.

220 *Ibid.*, 5.

221 *Ibid.*

While sector specific regulation often results in derogations from the statutory norms, it also means that the standard for employees in a sector could be better than elsewhere. A sector may require a regulation that is designed to reflect the special needs of employees in that sector but which would be problematic if applied across the board. This is evident, for example, in O. Reg. 291/01 under the ESA, which sets higher terms and conditions of employment than the statute in the women's garment industry.

Simply put, for those who long for a simple world of uniformity and strict equality, such a world has not existed for some time, if ever, and does not reflect the reality of the complexity of the modern economy. In our view, 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.

The recommended consultative process is to be used in circumstances where existing exemptions are being reviewed and where new exemptions or sector specific regulations are being requested and/or considered. The process recommended is designed to ensure that the interests and solutions proposed by employers and employees are heard by each other and by government, and to provide an opportunity to achieve outcomes based on consensus. Government needs a window on various sectors to better understand the legitimate needs and interests of employers and employees in those sectors. Moreover, areas of potential sector specific regulation, such as scheduling, require a process in which the directly affected interests have a voice if the resulting regulations are to be fair, balanced and workable.

Moreover, in our fast-changing world and workplaces, employers and employees need to be in dialogue with one another and with government to ensure that established exemptions remain relevant and justified and also to deal with new developments, concerns and requirements. Exemptions, once established, should not exist in perpetuity regardless of changed circumstances. Currently, there is no mechanism for ongoing review of regulations that take away or modify basic entitlements. This is not acceptable.

Accepting the advisability/necessity of sector specific regulation in appropriate circumstances is not unique and was endorsed by Harry Arthurs in his report on Federal employment standards in 2006:

> *As noted earlier, the introduction of flexibility at a sectoral level may have important advantages. Compared with a statute or regulation of general application to all employers and workers in the federal domain, sectoral adjustments can take account of the unique structural and other characteristics that give rise to regulatory difficulties types of employment and business conditions. Compared with workplace-level adjustment, the sectoral approach can engage a wider range of participants, address a broader spectrum of concerns, bring more extensive expert resources to bear on the issues, and better maintain a level playing field among competing enterprises. And finally, sectoral procedures have the beneficial side effect of contributing to more positive relation among significant actors in a part of the economy…*
>
> *The possibility of providing flexibility at the sectoral level is already implicit in Part III, {of the Canada Labour Code} which authorizes the Minister to make orders that "apply generally or in particular cases or…to classes of employees or industrial establishments." Moreover, ministerial regulations introducing elements of flexibility into the control of working time may be made with regard to "classes of employees."*
>
> *As noted, this authority has already produced sector-specific regulations concerning working time in several sectors. The Minister is also authorized to establish "consultative or advisory committees to advise…on any matters arising in relation to the administration of [Part III]" and has done so on many occasions. And finally, the Minister is already required to "cause an inquiry to be made" and to consider the resulting report before making certain kinds of regulations respecting working time.*[222]

Similarly, the ESA already differentiates between sectors to a significant degree, and the legislation currently allows the Minister to appoint committees to provide advice.

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222 Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau: Human Resources and Skills Development Canada, 2006), 125-126. Available online: http://www.labour.gc.ca/eng/standards_equity/st/pubs_st/fls/pdf/final_report.pdf.

In conclusion, in our view, the lack of any process for conducting reviews of existing exemptions, or for the consideration of new regulations and exemptions, has resulted in a structural and procedural vacuum where there is no transparency. And while we do not recommend that there must be a binding process for reviewing and evaluating exemptions and proposed regulations in every case, we do believe that there should be a transparent process that government ought to follow, unless there are good reasons not to use the process, in which case government should be accountable and be able to explain those decisions when they occur.

6.1 Review of Existing Exemptions

Given our views on the type of process which is required to review existing exemptions, as well as new proposed regulations, we concluded that a review process like the CWR is not the right mechanism. There could not have been the kind of in-depth and concentrated consultation on the issues with the necessary participants in a process like the CWR. Also, practically, it would have been impossible for us in this review to examine the large number of existing exemptions in depth, and had we done so, we would have done little else.

We are able to say, conclusively, however, that we have reviewed the existing exemptions sufficiently that we can say that it is imperative that they be reviewed expeditiously. We have found that many of the exemptions raise, at least at first blush, difficult questions about their purpose, origin, breadth, and ongoing justification. Many workers, especially vulnerable ones in precarious work, are being denied either minimum wages, or overtime or hours of work protection or all of the above, without reasons that are apparent.

The current patchwork mechanism and exemptions that are broadly drawn, reflects poorly on the past processes, not necessarily of the current government in recent years, but rather over a long period under many different governments. It appears that exemptions have been granted too easily, too broadly, with little or no rationale, little transparency and too little consultation with employees. In addition, in recent years the Ministry adopted a policy framework for the consideration of new requests for exemptions, but it has not applied that framework to pre-existing exemptions. In any event, given the LCO Report,[223] the work in this Review of

223 Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: Law Commission of Ontario, 2012). Available online: http://www.lco-cdo.org/vulnerable-workers-final-report.pdf.

Vosko, Noack, and Thomas,[224] which studied the exemptions, their consequences and costs, we recommend that the review of existing exemptions be given priority and that reviews be conducted in accordance with our recommended process where it is appropriate to do so.

Given our recommendation that the review of existing exemptions should be a top priority, we want to underscore that the process by which this is done is very important. The preference of some in the civil service may be to consult with interested parties separately. Clearly, responsibility for decision-making lies with the government. However, we know from our experience in the world of employment and labour relations that involvement of the stakeholders often results in better understanding of positions and in compromise. All parties can learn from each other and there is often a lot of practical wisdom that they bring to the table. The government's understanding of the needs and interests of employers and employees, and the quality of its decision-making, will be enhanced if representatives of those most involved have an opportunity to be fully engaged in the problem-solving exercise, with government as an interested participant prepared to listen to and consider advice from those most affected.

The discussions in this process should take place with a framework to guide them. The Ministry of Labour currently has an internal policy framework for considering new exemptions and special rules which was developed after most of the existing exemptions were made. It has never been applied to most of the existing exemptions. These criteria for exemptions, or core conditions,[225] are not binding, but they do provide a framework for assessment and discussion. The policy framework should be reviewed and updated as necessary by the Ministry in advance of the new process to review the existing exemptions.

Recommendations:

66. The government should establish a committee process that may be utilized when existing exemptions are being reviewed, when new exemptions are being considered, and when sector-specific regulations are contemplated.

67. Committees should be composed of representatives of employers and employees for the purposes of providing advice to government.

68. The government should make the review of existing exemptions a priority.

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224 Vosko, Noack, and Thomas.
225 These are contained in the Interim Report at pp 157-158.

69. In accordance with the recommendation in Chapter 7, the government should adopt a sector-specific approach to the regulation of scheduling. The government should include scheduling in the scope of the review of existing exemptions on hours of work, overtime, and related matters, where warranted and practicable. As a priority, there should be a committee established to consider a sector-specific scheduling regulation in the retail and fast food sectors.

70. The committee process should be set out in the statute; however, it should not be mandatory and should provide for flexibility in the process, as required. The Minister of Labour should be able to initiate the committee process for the review of existing exemptions or the development of new terms and conditions of employment in a sector or subsector, or parties may request the Minister of Labour to invoke the process.

71. Sectoral and subsectoral committees should be established as necessary. If there are no exemption issues in the sector, then a committee should be established to set up a permanent process for the discussion of:

    a) the application of the provisions of the Employment Standards Act, 2000 to the sector; and,

    b) enforcement issues and proactive enforcement in the sector.

72. The policy framework within which the committees operate should include the following:

    a) the *Employment Standards Act, 2000* should apply to as many employees as possible;

    b) departures from, or modifications to, the norm should be limited and justifiable; and,

    c) proponents of maintaining an exemption should bear the onus of persuasion that the exemption is still required;

73. The government should provide committees with costing information on the cost to employees and savings to employers of any exemptions from employment standards.

74. Although the government has responsibility for all regulations promulgated and must remain the ultimate decision-maker, committees should provide the government with assistance and advice with respect to exemptions.

75. The organization and work of the committees is to be supported by the government.

6.2 Sectoral Committees:

Recommendations:

76. The government would appoint the members with respect to the sectoral committees, recommended to be established, above. The committees would be composed of:

    a) a neutral chair, whose role as facilitator is to ensure the views of employers and employees are heard and to explore the possibility of consensus. (If consensus is achieved, the chair will communicate the consensus and recommendations to the Minister of Labour in writing. If consensus is not achieved the chair may make a recommendation to the government, if necessary. Chairs of sectoral committees could include, but would not necessarily be limited to, vice-chairs of the Ontario Labour Relations Board, either full-time or part-time. Resulting reports of the chair would be made public);

    b) representatives of both large and small employers, put forward wherever possible by employer organizations in the sector, including representatives of employers who have adopted “best practices”;

    c) employee representatives, whom the government will appoint from among the following:

        i. employees, as suggested by community organizations, who are independent from any employer working in the sector and who have experience in the area, or who are otherwise selected;

        ii. representatives from community organizations, such as legal aid clinics, workers’ groups, and other community organizations;

        iii. following consultations with other trade unions, unions with experience or interest in the sector, even in sectors where there are few unionized operations, as unions have experience in representing employee interests;

        iv. professional associations in the sector that represent employee interests; and

        v. other persons experienced in representing the interests of employees.

d) representative(s) of government who can provide advice or information and who function in a supportive role to the committee; and,

e) at the discretion of the government and upon the recommendation of the facilitator, an expert with specialized knowledge to advise and support the committee on issues, e.g., potentially, a scheduling expert or an industry expert.

77. Committees should be small to ensure they are workable.

78. Service on sectoral committees should be unpaid except for the chair and any experts whose advice is sought.

6.3 Recommendations on Specific Exemptions

6.3.1 Information Technology Professionals, Pharmacists, Residential Building Superintendents, Janitors, and Caretakers

In our Interim Report, we asked for submissions with respect to several existing exemptions indicating that we would consider recommending their elimination without further review. Included in this list were Information Technology Professionals, Pharmacists, and Residential Building Superintendent, Janitors, and Caretakers.

6.3.1.1 Information Technology Professionals and Pharmacists

We received some submissions with respect to IT professionals and pharmacists that did not persuade us that the existing exemptions are justifiable. The rationale remains unclear and the exemptions seem overbroad. However, the submissions did persuade us that the regulations present sufficient complications that they ought to be reviewed more carefully in the process set out above before any final decisions are made.

Recommendation:

79. The current regulations with respect to information technology professionals and pharmacists present sufficient complications, warranting a more careful review through the process set out, above, before any final decisions are made with respect to these groups.

6.3.1.2 Residential Building Superintendents, Janitors, and Caretakers

We received no submissions from residential property employers with respect to residential building superintendents, janitors, and caretakers. As we indicated in our Interim Report, letters received from employees earlier raised concerns about the long hours and the little, if any, free time available for individuals working in these jobs.

Rather than eliminate the exemption on the basis that no submissions were received from the employers, we recommend an early review of the regulation applying to this group of employees because of its breadth and the resulting anomalous treatment compared to others similarly situated in the rest of the country.

Recommendation:

80. An early review of the regulation applying to residential building superintendents, janitors, and caretakers is recommended because of the breadth of this group and the resulting anomalous treatment of these employees compared to other similarly-situated employees in the rest of the country.

6.3.2 Student Minimum Wage for Those Under 18

There is a separate minimum wage for students under 18 who work no more than 28 hours per week when school is in session, or work during a school break or summer holidays. For such employees, the minimum wage is $10.70 per hour instead of $11.40.[226] In the research done for this Review, 59% of affected students report earning less than the general minimum wage, suggesting that

226 The student minimum wage is scheduled to increase to $10.90 on October 1, 2017.

employers are using this provision.[227] It has been estimated that the individual cost of this special rule is a median of $8 per week per employee, and the weekly cost to all student employees in Ontario is approximately $482,000.[228] This is over $25,000,000 per year. Ontario is the only province in Canada with a lower minimum wage for students and those that previously had a lower rate eliminated them years ago. Importantly in our view, the exemption does not apply to youth below age 18 but only to students below age 18. Thus, the regulation actually promotes the hiring of students as opposed to those who drop out of school, providing an incentive to employers not to hire the latter. This seems counter-intuitive and counter-productive as the people who drop out may actually need the income more than the students.

The Ministry states that the rationale for the student minimum wage is "to facilitate the employment of younger persons, recognizing their competitive disadvantage in the job market relative to older students who generally have more work experience and may be perceived by employers as more productive".[229] Proponents of the lower rate believe it is necessary to give employers an incentive to hire younger workers and that youth employment would decline if the special rate was not there. The Tourism Industry Association of Ontario has opposed withdrawing the lower rate because it claims these students incur training costs and need a high level of supervision, both of which, they submit, justify the lower rate.

The association representing the restaurant industry asserts that the industry employs more than 200,000 young people between the ages of 15 and 24, representing one in five youth jobs in Ontario. There was no data presented as to the number of students below age 18.

The restaurant industry strongly opposes the elimination of the lower rate, stressing the importance of a first-time job to younger students. In its view, the work opportunities provided to young people are extremely important to their future career development,[230] and the overt or implied suggestion is that these will be reduced as there will be fewer jobs if the lower minimum wage is eliminated.

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227 Vosko, Noack, and Thomas, 20.
228 *Ibid.*, 20.
229 *Employment Standards Act, 2000 Policy & Interpretation Manual* (Ministry of Labour).
230 We do not question this assertion, but we merely point out that the key determinant of future success is staying in school. Based on an extensive review of much of the literature, Hankivsky (2008, p. 10) concludes: "Research has documented the numerous consequences associated with dropping out, including reduced lifetime earnings, poor health, increased unemployment, delinquency, crime, substance abuse, early childbearing, economic dependency, and reduced quality of life, and an increased incidence of marital instability." Hankivsky, Olena. *Cost Estimates of Dropping Out of High School in Canada*. Ottawa: Canadian Council on Learning, 2008.

Based on the evidence of a variety of studies, we have concluded that a rise in the student minimum wage of 6.5% could cause a reduction in younger student employment in a range of 2-4%,[231] although there is an argument it could be zero.[232]

Data from the Labour Force Survey indicates that, in November 2016, the employment rate for students aged 15-19 (students under age 18 are not separated out in the public data) is 33.7% for all Canada and 29.5% for Ontario.[233] Since the rest of the country does not have a lower student minimum wage, one possible conclusion is that the student minimum wage does not appear to accomplish its purpose, which is to encourage greater employment of younger teenagers in Ontario.

The restaurant industry claims that providing these opportunities come with a cost to employers because younger workers, by their inexperience, are less productive and have a higher turnover rate than other, more experienced workers:

> *Student wage differentials have historically been in place to help employers offset the additional costs in training and lost productivity while giving students valuable work experience and the opportunity to earn and save.*[234]

No evidence was provided to indicate to what extent turnover of younger students is greater than older students, and to what extent training costs are higher, and productivity is less.

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231 Baker, M; Benjamin D; Stanger, S. "The Highs and Lows of the Minimum Wage Effect: A Time-Series Cross-Section Study of the Canadian Law," *Journal of Labor Economics*, April 1999, 17, 318-350. Campolieti, M; Fang, T; Gunderson, M. "Minimum Wage Impacts on Employment Transitions of Youths: 1993-99," *Canadian Journal of Economics*. 38 (February 2005a) 81-104. Campolieti, M; Fang T; Gunderson, M. "How Minimum Wages Affect Schooling-Employment Outcomes in Canada," *Journal of Labor Research*. 26 (Summer 2005b) 533-45. Campolieti, M; Gunderson, M; Riddell, C. "Minimum Wage Impacts from a Pre-Specified Research Design: Canada 1981-97," *Industrial Relations*. 45 (April 2006) 195-216. Yuen, T. "The Effect of Minimum Wages on Youth Employment in Canada: A Panel Study" Journal of Human Resources. 38 (Summer 2003) 647-672.

232 Campolieti M; Gunderson M.; and Lee B, "Minimum Wage Responses from Permanent vs. Temporary Minimum Wage Jobs," *Contemporary Economic Policy*, Vol. 32, No. 3 (July 2014) 578-591. This study found that increases in minimum wage had no adverse effect on persons in temporary minimum wage jobs (defined as having a pre-determined end date). It is not clear which group (temporary or permanent jobs) the students would fit into although likely disproportionately in the temporary jobs.

233 Statistics Canada, CANSIM *Table 282-0005 – Labour Force Survey Estimates*, by full- and part-time students during school months, sex and age group, unadjusted for seasonality, monthly (Ottawa: Statistics Canada, 2016).

234 Restaurants Canada, *Response to Changing Workplaces Review Interim Report*, October 14, 2016, 12.

The Ministry of Labour has advised us that this minimum wage rule complicates enforcement and administration of the Act because some employers continue to pay the student minimum wage even after the employee has turned 18, or where a student under 18 works more than 28 hours/week while school is in session, both of which are violations of the current section. Additionally, some employers pay all students the student minimum wage, regardless of their age.

In our view, this provision, although well intentioned, is out of step with current values across Canada. The purpose of the provision is to encourage employers to hire younger students; it is presumably supposed that if the wage cost of younger students is the same as those 18 and over, the employer will hire the older students because they are more productive, and have lower training costs and turnover rates than younger students.

In our view, the impact of the provision is discriminatory and although the Human Rights Code effectively permits discrimination of those under 18, the *Charter of Rights and Freedoms* does not. Although we do not opine on whether the provision offends the Charter, the fact that other Canadian provinces do not have similar laws suggests that the government might have some difficulty in justifying the treatment under section 1 of the *Charter*.

Although there may be other reasons to explain the evidence, it is at least worth nothing that the employment of younger students is not more prevalent in Ontario than elsewhere in Canada. Nor was there evidence, beyond assertion, that training, productivity and turnover of 16 and 17-year-old students is markedly greater than 18 and 19-year-old students. That said, we are prepared to accept that there is some truth behind the assertion, but without some indication of the extent and reality of the supposed justification for the lower rate, it is difficult to conclude that it really is warranted, especially in light of the experience in other provinces.

It seems apparent that employers do use the provision and, presumably, if the younger students were truly not up to the employment tasks, or made the businesses so much less productive, they would not be employing them at all.

The real issue is an economic one and approximately $25,000,000 per annum in lost income to young students is in issue. It will either continue to be absorbed by the students, or, if the lower rate is eliminated, it will be absorbed by consumers or by the employers. There may well also be some impact on the employment of teenagers, at least in the short run, if the lower rate is eliminated. As we indicated above, however, the studies indicate this will be relatively small and if the change is

phased in, it may be even smaller. It is also possible that a higher rate will lead to a higher participation rate.

We do not think that the law is justifiable in the modern world where student debt is mounting and teenagers make important efforts to join the workforce. The fact that employers make such use of the provision makes it unlikely that the training costs for younger teenagers is so markedly different than for older teenagers, or that there is a significantly greater degree of supervision that makes the lower rate justifiable. Purely and simply the justification for the provision is the encouragement of more employment among this group of young people, and while this is a reasonable objective, the discriminatory treatment which is the consequence has either not been followed in other provinces or has been discontinued.

We think, on balance, that younger teenagers should be fully recognized for the work they do and be as valued as others. The fundamental message should be that our youngest workers are not worth less than others, and laws like this which may undermine the self-worth of young people are not constructive. Finally, the simplification of the law with one minimum wage will assist in administration and enforcement of the Act.

We do believe that the economic impact on employers, which may be passed on to the public in the form of higher prices, should be mitigated by eliminating the lower rate over time. The increase in wages in respect of those students is 6.5%, a small proportion of the overall wage cost, but we would nonetheless recommend that the student rate be gradually eliminated over a three-year time frame.

Recommendation:

81. The minimum wage rate for students under age 18 should be eliminated over a three-year time frame.

6.3.3 Student Exemption from the "Three-hour Rule"

All students are exempt from the requirement that employees be paid a minimum amount if they report to work and are then sent home. The Act includes what is referred to as the "three-hour rule", which provides that, when an employee who regularly works more than three hours a day is required to report to work, but works less than three hours, s/he must be paid whichever of the following amounts is the highest: i) three hours at the minimum wage; or ii) the employee's regular wage for the time worked.

All students regardless of their age do not have the protection of the "three-hour rule".

Unlike the student minimum wage differential, there does not appear to be a policy reason for treating students differently than other employees when it comes to the "three-hour rule". Being sent home early will have the same negative impact on students as it does on everyone else in the form of lost wages, or a lost opportunity to work elsewhere. Also, unlike the student minimum wage differential, this exemption treats all students the same regardless of their age.

Once again, this rule seems to be an outdated vestige of the past as only Saskatchewan and Alberta have different rules that apply to certain high-school students. In addition, the provision may be discriminatory as indirectly affecting the young and the *Charter of Rights of Freedoms* could be arrayed against the provision as well as the Human Rights Code in respect of students 18 and over.

One case that was made for preserving the rule was from the tourism industry based on its seasonal structure. It is unclear to us why the seasonal nature of work would have any material impact on the three-hour rule, and in any event this was not explained. Even if it did have an impact, we cannot see a justification that is sufficiently important to warrant treating the time of all students in a way that effectively says their time and commitment to working does not matter as they can be sent home without any minimum pay, whereas other employees cannot be treated in that way.

We recommend the deletion of the exemption.

Recommendation:

82. The student exemption from the "three-hour rule" should be eliminated.

6.3.4 Liquor Servers' Minimum Wage

The ESA contains a lower minimum wage for liquor servers than for other employees. It applies to employees who serve liquor directly to customers or guests in licensed premises as a regular part of their work. The liquor servers' minimum wage is currently $9.90 per hour,[235] roughly 87 percent of the general minimum wage or a difference of $1.50 per hour.

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235 The liquor servers' minimum wage is scheduled to increase to $10.10 on October 1, 2017.

There are only three provinces, including Ontario, with lower minimum wage rates for liquor servers. British Columbia and Quebec are the other two, although Quebec's lower rate is for all tipped employees. Alberta eliminated its liquor servers' minimum wage on October 1, 2016, four years after it was introduced. The differential of $1.00 per hour was eliminated over two years, but at the same time as other significant minimum wage increases were being implemented.

Women comprise almost three-quarters of liquor servers.[236]

We note that the Ontario Legislature recently passed the *Protecting Employees' Tips Act, 2015*, which prohibits employers from taking any portion of an employee's tips or other gratuities, except in limited circumstances. The Act came into force on June 10, 2016. The impact this Act may have on liquor servers' incomes remains to be seen.

The policy rationale for a lower liquor servers' minimum wage is that they earn enough in tips to meet or exceed the general minimum wage so that a lower rate is justified. This conclusion is somewhat challenged by the conclusion of commissioned research that 20% of liquor servers earn less than the general minimum wage after tips.[237] This research has estimated that, across all liquor servers (approximately 45,900), the cost of the special rule is approximately $258,900 in lost wages each week, or approximately $13,500,000 per annum, that are not adequately compensated for by tips; individually, the cost was calculated at a median of $21.00 per week per employee.[238]

In our view, it is likely the case that some servers do not report all their tips, and if that were the case, the 20% figure would be less to some degree, and the cost to servers would likely be less than $13.5 million.

Restaurants Canada, an industry association, challenged the research findings that 20% of servers earned less than the minimum wage with tips. It submitted a survey it conducted from PEI which purported to show that tips per hour ranged from $9.21 to $22.74; however, there was no information on the methodology, or the survey size that would justify our relying on this.

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236 Vosko, Noack, and Thomas, Table 4a.
237 *Ibid.*, 20.
238 *Ibid.*, 20.

In any event, we are prepared to accept, as did Vosko, Noack and Thomas, that most liquor servers make more than the minimum wage with tips, but there surely are some situations, whether it is 20% or 2%, where that is not the case.

There has in recent years been some movement to eliminate tipping in some locations in favour of higher prices. In any event, a policy of tipping or no tipping is one that is in the discretion of the employer and is not guaranteed to the employee.

In our view, the decision to recommend the abolition or retention of the lower rate falls to be determined on the values inherent in the current structure of wages in the sector, and on the impact the decision could have on employers and servers. In other words, the decision does not turn on precisely how many servers in fact earn less than the general minimum wage when one includes tips.

Based on research on the economic effects of minimum wage increases generally, it can be expected that eliminating the liquor servers' minimum wage would have some effect on employment levels. More importantly, however, are the costs to the employer community.

From the research that was performed for us there were approximately 46,000 servers working in Ontario.[239] While the loss to the employees of the difference between the two minimum wages was estimated by the researchers at $13.5 million annually, we calculate that eliminating the lower rate could potentially cost employers up to $1.50 per hour for every server, or a percentage increase of 15.15%. This assumes that all liquor servers are currently paid the liquor servers' minimum wage rate of $9.90, but the cost to the employer will be less if liquor servers are currently paid a rate above $9.90 per hour. Still, an increase of this magnitude would have an impact on employers and consumers, if increased costs were passed on to them. Insofar as liquor servers tend to work in smaller firms,[240] eliminating the lower rate may have a disproportionate impact on smaller employers.

Interestingly, Restaurants Canada did not make the argument that the cost of removing this lower rate is problematic, but we raise the issue of its impact on our own. We think that an increase in the wage cost of servers that is not phased in may put too much pressure on employer salary costs all at once and affect potentially other restaurant salary costs indirectly.

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239 *Ibid.*, 20.
240 *Ibid.*, 41.

One argument raised by employers against removing the exemption was that the differential allows restaurants to compensate other staff that do not share in the gratuities. While there was no evidence to support this assertion, i.e., evidence that salaries to other staff were higher than they otherwise would be, we do not doubt that a significant increase in liquor server rates could cause some strain on the industry.

The chief objection to the existing lower rate is that it institutionalizes dependence on tips for servers, to make even the minimum wage. Particularly when the cohort of employees is made up largely of women, this raises significant policy concerns.

Most importantly, the policy puts pressure on servers to provide not only good service to attract tips, but may put servers in a position where they may feel pressure to tolerate sexual harassment or other harassment from customers. However, the fact is that this will be the reality in any industry where servers rely on tips for a large portion of their income and will not be completely or even substantially ameliorated by increasing their minimum wage to the same level as anyone else. Tips will still form a very significant portion of their income.

A further consideration is that tipping is discretionary and earning at least the general minimum wage is not guaranteed. As we have already indicated, there is some movement towards no tipping as a policy and, in any event, the entire matter of permitting or limiting tipping is one within the discretion of the employer, including potentially eliminating the practice.

A final consideration is that eliminating the liquor servers' minimum wage could make the minimum wage rules simpler, and easier to understand and administer. The MOL has advised us that employees and employers are sometimes confused about whether the liquor servers' minimum wage applies to an employee or not, and some employers take advantage of that uncertainty by paying the lower rate to employees who may not actually be subject to it (e.g., bus persons).

On balance our view is that this exemption is an anachronism. The fact that only two other provinces also have it and that one province, Alberta, recently eliminated it, is evidence that the entire idea is increasingly out of keeping with the ideas of decency of many Canadians. It is just wrong in our view to pay a group of workers, especially when so many of them are women, a lesser minimum wage than everyone else, including others who earn tips, or who serve customers in a liquor-free environment. The law is creating an institutional dependence on

customers being prepared to tip, something which they currently do, but not always, and which is not mandatory. This is particularly true when the server group is disproportionately female and so there is an unintended discriminatory impact. One is left uneasy about the demographics of the sector and we question whether this anomalous treatment of liquor servers would have survived this long if most of the servers were male.

Recommendation:

83. The liquor servers' minimum wage should be phased out over three years.

6.3.5 Managers and Supervisors

The issue here is not whether there ought to be an exemption from the hours of work, overtime and related provisions of the Act, but how the exemption should be defined. In other words, the issue is which employees should not have the protection of the Act because they are genuinely aligned with management to such an extent that they do not need protection or warrant protection, as they are expected as part of their higher remuneration to work longer and harder, as part of the arrangement wherein management is paid more generously.

The managerial exclusion in the ESA has a different purpose than in the LRA. In the LRA, managers are excluded because union representation would be a conflict of interest with the duty of loyalty owed to the employer because their duties could bring them into conflict with the union and unionized employees. In the ESA, there is no such conflict of interest issue, but there is a heightened concern that if the managerial exclusion is drawn too liberally, many employees will lose hours of work protection and overtime entitlements unnecessarily.

The exemption is an important one which is estimated to have a "cost" to employees who are classified as managerial of $196 million per year in Ontario.[241]

Employees who are classified as managerial or supervisory are exempt from overtime pay and from the rules which govern maximum daily and weekly hours of work, daily and weekly/bi-weekly rest periods, and time off between shifts.

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241 Mark Thomas, Leah Vosko et al., "The Employment Standards Enforcement Gap and the Overtime Pay Exemption in Ontario," prepared for the ILO 4th Conference of the Regulating for Decent Work Network, Geneva, July 2015, 19.

Managerial and supervisory employees are defined as those whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an "irregular or exceptional basis." This means that the supervisor/manager exemption can apply even if the employee is not exclusively performing supervisory or managerial work.[242]

The concern with the present definition is threefold:

1. It may be including many people as supervisors and managers who are not really functioning in that role, or who even if they are, are paid too little to warrant the exclusion;
2. It is unclear who is and who is not managerial as the tests are not well described or understood;
3. The current test treats some real managers and supervisors as not being exempt, only because they perform some of the same work of the people they supervise on a regular basis.

In our view, this is not the kind of exemption which requires more consultation than we have had in this process. It is not really a sectoral issue but one of general application that cuts across most sectors. While we do not preclude that some sectors may need a special rule or a different test than the one we are recommending, in our view, we are as well positioned as anyone to recommend a generalized solution to this issue.

The Current Test

The test focuses in part on the regularity and exceptionality with which the person performs the same work as those they supervise to determine whether they are managerial or not. Litigation has focused on that issue.

The focus of the current test, means in practice, for example, that store managers in retail who will regularly help or serve customers when the store is busy, or kitchen managers in restaurants who are supervising employees but who will pitch in and help when the kitchen is busy, may not be considered to be managerial and must be paid overtime and be subject to hours of work restrictions.

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242 *Employment Standards Act, 2000 Policy & Interpretation Manual* (Ministry of Labour).

This test has been criticized by the Retail Council of Canada, for example, as concentrating on the wrong factors. It argues that the exemption should look at the primary function of such persons by looking at their compensation levels and training and not consider whether part of their work includes doing the work of non-managerial or non-supervisory employees. It is arguing that managers' and supervisors' serving customers as part of the team should not convert them into regular employees entitled to overtime.

We agree in general with that approach and with the criticism of the current definition and test. The test equates the performance, on a regular or non-exceptional basis, of work of those being supervised as not managerial regardless of the duties and responsibilities or pay level. However, in our view the test does not address the real policy issue the statute should be concerned with which is who should be included and who should be exempt.

In our view, concentrating on whether the persons perform the duties of the people they supervise and how often is not an appropriate indicator as to whether they should be protected under the Act. If they genuinely perform managerial functions and if they are paid appropriately, the law should have no concern as to how much work they are doing of those they are supervising. Accordingly, we recommend that the existing test be eliminated.

What Should the Test Be?

First, in our view, the duties which will make employees managerial should be defined in detail, much in the same way as it is in the American federal sphere under the *Fair Labor Standards Act* (FLSA). Unlike the *Labour Relations Act, 1995* (LRA), where the definition is restricted to the OLRB defining who in its opinion is managerial, and therefore the term is extensively defined in jurisprudence,[243] under the ESA there is clear need among employees and employers to be able to know with clarity if the employee is managerial or not. So, for example, we would endorse the detailed American approach we set out in the Interim Report and

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243 The LRA provides that an employee does not include someone who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labor relations. (s. 1(3)(b)) This approach is not appropriate for the ESA because the purpose of the exclusion as set out above is to prevent conflict of interest between the bargaining unit members and representatives of management by having the person in the bargaining unit. If the persons earn little but have real management responsibilities, the law excludes them anyways because of the conflict. These considerations do not arise under the ESA.

which is set out again below.[244] These efforts at greater specificity and clarity can help to educate and contribute to a simplified and broader understanding of what is required in terms of duties in order to be managerial.[245]

Second, the person should be excluded if they have genuine management responsibilities, but if they are paid very little, it is unreasonable and exploitive to deny them the protection of limits on working hours and entitlement to overtime and rest protections. Giving someone management responsibilities, without adequate income, is not a license in our view to insist that they work without limits. Having only a duties component but not a salary component to the test exposes too many people to exploitation. In short, in our view an adequate income is essential for the exemption together with the actual duties. Accordingly, we agree with those who argue that the test should have two components: first, a requirement for genuine management functions, but second, also a salary test that

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244 **Executives:** Exempt if the following conditions are met: The employee must be compensated on a salary basis at a rate not less than $455 per week. [This equals $23,660 per year for a full-year worker.] The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent. *AND* The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other changew of status of other employees must be given particular weight.

Administrative Employees: Exempt if the following conditions are met: The employee must be compensated on a salary or fee basis at a rate not less than $455 per week. [This equals $23,660 per year for a full-year worker.] The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. *AND* The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Highly Compensated Employees: Employees who perform office or non-manual work and are paid total annual compensation of $100,000 or more are exempt if they customarily and regularly perform at least one of the duties of an exempt executive or administrative employee identified above.

The Department of Labor (DOL) updated the salary threshold for the exemptions. Under the new rule, which was scheduled to come into effect on December 1, 2016, the standard salary level was to be set at the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage census region (currently the South); this would have been $913 per week ($47,476 annually for a full-year worker). The high income exemption was to be set at the 90th percentile of earnings for full-time salaried workers nationally, which would have been $134,004. These salary figures would be automatically updated every three years, beginning on January 1, 2020.

The DOL estimated that, in the first year, 4.2 million currently exempt workers could be entitled to overtime. Similarly, it estimated that 65,000 workers currently exempt under the "highly compensated employees" category may become covered.

A federal court enjoined the revision as the legality of the provision was challenged. It is also unknown if the new salary figures will survive the change in the American Administration.

245 Here we focus on the term managerial and not supervisory which we think is unnecessary and confusing. There should be a set of duties that comprise the term managerial and if a person with a different title, such as supervisor, performs them, they will be exempt and if not they will be covered by the act regardless of titles.

is sufficiently high so that such persons are compensated for the statutory rights they are giving up. This "duties plus salary" approach is precisely the American approach and we endorse it.

Where Should the Salary Threshold Be Set?

The purpose of the salary threshold is to ensure that persons are earning enough so that being exempt from hours of work maximums, rest periods, and overtime entitlements is effectively included in the weekly or annualized salary, and is sufficient to giving up statutory rights and protections. On the other hand, setting the rate too high may cause difficulty for some sectors, where genuine managerial employees are not well paid because of the overall level of wages in the sector. This potential variation and "one size not fitting all" could be dealt with on a sectoral basis if the salary level that is chosen is demonstrably too high for a specific sector. We are not suggesting a wide variability in the threshold but point out that a threshold can be set and modified appropriately if necessary.

Since this is the first time a salary test will be included, we have decided to be conservative in recommending where it should be set. The current American figure of $455 per week, which equals $23,660 per year for a full-year worker, was set in 2004 and was proposed to move to $913 per week (or $47,476 annually for a full-year worker) at the end of 2016. The high income exemption which essentially creates a more liberal duties test for high income employees was scheduled to go from $100,000 to $134,004. The implementation of the new regulation has been enjoined and it is unclear whether it will ever proceed.[246]

Our view is that a multiple of the minimum wage is an appropriate basis on which to put the salary test for purposes of the managerial exclusion. It seems to us that assuming a person is genuinely assigned managerial responsibilities, they ought to be compensated at least 50% above the general minimum wage on a weekly basis in order to deprive them of rights to hours of work and overtime protection.

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246 State of Nevada ET AL v. United States Department of Labor ET AL No: 4:16-CV-00731 (November 22, 2016) www.txed.uscourts.gov/d/26042

Based on the research done for our review,[247] about 30% of Ontario employees in 2014 were below 150% of the minimum wage. Since the proposed new US figure was set at the 40th percentile of the lowest wage region in that country, a 30% percentile is more conservative. However, converting to a 44 hour work week, which is the number above which overtime is payable in Ontario, would increase the number by 10% and take it on a weekly basis to $750 (based on the existing minimum wage of $11.40) and on an annualized basis to $39,000. Also, tying the number to the minimum wage means it will automatically index as that number increases by CPI from year to year. We do not believe that a special rule is required for high income earners and do not recommend one.

Recommendation:

84. We recommend that the current test for managers be changed to a "salaries plus duties" test where, in order to be exempt from hours of work and overtime protection, a manager would have to perform defined duties, which would generally follow the U.S. tests for executive and administrative employees (these are, in broad strokes, compatible with the Ontario Labour Relations Board criteria). We recommend that the salary figure be 150% of the general minimum wage (currently $11.40), converted to a weekly salary of $750 per week, on the basis of a 44-hour work week, which is the threshold for the payment of overtime.

247 Data drawn from the Canadian Income Survey for Ontario shows that, in 2014, 30.4% of the 5,481,000 employees in Ontario who are not self-employed or hold two or more jobs, fell below 150% of the Ontario minimum wage (of $11.00) and had made no contribution to a private pension plan. This data was analyzed by our Director of Research and some of the academics who supported our review, and was interpreted by us.

07 | Changes to Basic Standards

7.1 Part-time, Casual, Temporary, Seasonal and Contract Employees

7.1.1 Part-time Employees

Part-time employment serves important needs of many employees for income and flexibility. Students, many seniors and others including a disproportionate number of women (two-thirds of part-timers are female) value and depend on the opportunity to earn income through part-time employment.

Employers rely on part-time employees for many valid reasons: to deal with fluctuations in customer demand for goods and services and to replace employees who are away because of illness, unplanned absences and vacations. Employer utilization of part-time workers dovetails with the preference of many in the workforce for part time work. We agree with Professor Gunderson[248] and the Keep Ontario Working Coalition that part-time employment is of value to both employees and employers.[249]

Overall, there is little dispute that Ontario would benefit from the creation of more full-time jobs. An estimated 5.6 % of the workforce would prefer full-time work to the number of part-time hours they currently have[250], and an estimated 5.3% of the workforce hold multiple jobs where the primary job pays less than the median

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248 Gunderson, Morley. 2015. Changing Pressures Affecting the Workplace and Implications for Employment Standards and Labour Relations Legislation. https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Gunderson-3-Changing%20Pressures%20Trends.pdf.

249 Keep Ontario Working: A Call for Evidence-Based Workplace Law Modernization in Ontario, p. 18 . http://www.occ.ca/wp-content/uploads/2013/05/Keep-Ontario-Working-Changing-Workplaces-Submission-Oct-13.pdf

250 Changing Workplaces Review Interim Report, July 2016. p. 38.

wage[251]. However, the creation of better more full-time employment is not likely going to occur as a result of legislative change but by employers who operate in a competitive labour market.

While part-time work is desirable for many employees, a significant portion of part-time work is low wage, without benefits, and has scheduling uncertainty which creates stress. There are some inequities that need to be addressed and our recommendations are designed to improve some basic terms and conditions of employment for part-time employees.

Historical attitudes towards part-time employment

It is useful to understand the development of part-time work historically and to reflect in this context on what accounts for the attitudes towards part-time employees that has countenanced distinctions in pay and benefits based on the number of hours worked.

The negative attitude towards part-time work appears to have been deeply ingrained in our society. The Report of the Special Commission on Part Time work in 1983 recorded that at least until that time, all parts of society had treated part-time workers unfairly:

> *The Commission found conclusive evidence to support the view that part-time workers in the Canadian labour force are treated unfairly compared to full-time workers. It also found that every group in the work place – employers, governments, unions, and even individual full-time workers – have been guilty of treating part-time workers unfairly.*
>
> *Many employers, including governments, are paying part-time workers lower hourly rates than full-time workers, denying them access to pension and fringe benefits plans, and keeping them in low skilled jobs with little opportunity for promotion.*
>
> *Governments, in their employment standards legislation, have ignored the existence of part-time workers or actively worked to prevent or reduce their participation in the workforce. Although the union attitude appears to be changing, unions, until the past few years, have deliberately ignored the existence of part-time workers or actively worked to prevent or reduce their*

251 Changing Workplaces Review Interim Report, July 2016. p. 41.

> *participation in the work force. Some unions still curtail the job opportunities open to part-timers, their pay rates and their access to seniority lists. The result is that part-time workers, no matter how long their service to a company, are the first to be laid off. Even full-time workers in some work places treat part-timers as second class citizens.*[252]

While there have been some improvements for both unionized and non-union part- time employees in efforts to reduce or eliminate differential treatment of part-time employees, inequality of treatment in pay and benefits remains lawful despite repeated recommendations to change the status quo.[253] Meanwhile concerns have increased in recent years over the insecurity created for part-time employees when the employer need for scheduling flexibility is not sufficiently accommodating of the employee need for predictability.

Between 1976 and 2015 part-time's share of total employment increased from 13.5% to nearly 20% (19%) with almost all of that increase occurring in the earlier period between 1976 and 1993.[254] A little under a third of these (30% of part-time employees and 5.6% of all employees), referred to as involuntary part-time employees, had to compromise and to accept part-time jobs because they could not find the full-time positions they wanted.

This was a profound change in the composition and nature of the workforce. Some have suggested that since part-time work has not grown in proportion to the total workforce since the late 1990s and has remained stable or is a little lower than 25 years ago, it undermines claims of precariousness.[255]

The fact that the proportion of part-time employment has not grown in the past two decades after a period of significant growth is not material to an assessment of measures that need to be taken now to deal with some of the inequities faced by part- time employees. A substantial number of part-time employees are women, immigrants, youth, and older workers. It is relevant and timely to ask if there is justification for differential treatment. The fact that part-time employees may be paid lower wages than full-time employees doing the same work –

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252 *Part-Time Work in Canada: Report of the Commission of Inquiry into Part-Time Work* (Ottawa: Labour Canada, 1983), p 21.

253 See Wallace Commission of Inquiry, Abella Report, Harry Arthurs, "Fairness at Work: Federal Labour Standards for the 21st Century" (Gatineau: Human Resources and Skills Development Canada, 2006).

254 These are calculations made by the Ontario Ministry of Finance based on data from Statistics Canada's Labour Force Survey.

255 Keep Ontario Working Coalition, submission at pp.5. http://www.occ.ca/wp-content/uploads/2013/05/Keep-Ontario-Working-Changing-Workplaces-Submission-Oct-13.pdf

ignoring calls for law reform over the years – provides support for a conclusion that this issue should not be ignored any longer.

There are several factors that may account for some historically entrenched attitudes towards part-time work. In the face of relatively quick growth, workers feared that the increase in part-time work would crowd out full-time jobs. Certainly, the Commission in 1983 recorded the historic opposition of unions to part-time employment while noting that the opposition was just beginning to moderate. This opposition may have resulted in unions deciding not to encourage the further growth of part-time work by agreeing to differential treatment.

In addition, the value of part-time work was seen as worth less than that of full-time employees because of the large percentage of young people, students and women who were performing it. In other words, the work was devalued because of discriminatory attitudes towards those who were largely performing it. There was an unfounded perception as well that part-timer employees were less committed to their jobs - partially a function of the fact that young people were performing a lot of the work, and there was also a perception that prime working age women were only working for "pin money" or to provide "luxuries".[256] All of this was part and parcel of the discriminatory attitudes towards the work women perform which has resulted in lower wages for women and a factor contributing to the gender wage gap.

Symptomatic and reflective of the treatment of part-timers generally was the treatment of these workers by Labour Boards. When we began practicing law in the 1970s, it had already been the rule for a long time that part-timers were considered to have a lesser commitment than full-timers to the workplace and that part-time employees did not share a community of interest with full-time employees. The Labour Board facilitated both union and employers bargaining separately for these groups of employees by accepting the request of either side to separate full-time from part-time bargaining units on the basis that their interests did not coincide.[257] This was accepted practice apparently with little understanding or concern that, over time, it would contribute to inequitable treatment for part-time employees. Most acknowledge that part-time employees may have different interests necessitating different terms and conditions of employment, that does not justify unfair and\or discriminatory treatment.

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256 Part-Time Work in Canada: Report of the Commission of Inquiry into Part-Time Work (Ottawa: Labour Canada, 1983), p 22.
257 Leon's Furniture LTD, [1976] OLRB Rep. 282.

The fact that the OLRB typically put students employed for the school vacation period in the same bargaining as part time employees[258] facilitated the negotiation of unwarranted inferior conditions for part-time employees. Students employed for the school vacation period were, and still are, viewed as having a limited commitment to the workplace and were often subject to terms and conditions of employment inferior to those of full-time employees. The standard bargaining unit configuration of part-time employees and students employed during the school vacation period also underscored the perception that part time employment was more transitory than that of full time employees – a perception that further served to justify differential treatment.

The generally negative consequence for part-timers resulting from government policies including the OLRB policy on separate bargaining units was noted and criticized in the Wallace Commission Report in 1983.[259]

The OLRB policy of separate certification for part-time and full-time units ceased in 1993 when the amendments[260] to the Labour Relations Act overruled such an approach and created a presumption in favour of combined full-time/part-time units.[261] Although this provision was quickly repealed in 1995, the policy of the Board towards appropriate bargaining units had changed by then and the Board moved away from focusing on questions of community of interest to focus instead on whether "the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer". The Board began to recognize that in many cases the old paradigm of part-time workers not having a long term attachment to the workplace and there not being a community of interest between full-time and part-time employees was no longer appropriate.[262]

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258 Post Printing Co. Ltd, [1966] OLRB Rep.Mar. 930; Inter-City Bandag,[1980] OLRB Rep.Mar. 324.

259 *Part-Time Work in Canada: Report of the Commission of Inquiry into Part-Time Work* (Ottawa: Labour Canada, 1983). The negative treatment of part-time workers by the law generally along with other "atypical" workers was noted in Geoffrey England, Part-time, Casual and other Atypical Workers: A Legal View, 1987, Queens University, Industrial Relations Center Press, Research and Current Issues Series, No. 48.

260 Under Bill 40, the *Labour Relations and Employment Statute Law Amendment Act, 1992* (proclaimed into effect on Jan. 1, 1993), the LRA was amended to direct the OLRB to certify part-time and full-time employees in the same unit where the union had more than 55% membership support overall.

261 In 1995, Bill 7 repealed the Bill 40 amendments. Nevertheless, the Board continued to adopt in practice the Bill 40 practice of preferring combined over separate units in respect of full and part-time employees.

262 See Caressant Care Nursing Home of Canada, Limited, 97 CLLC para. 220-014.

7.1.2 Equal Pay with Comparable Full-time Employees

Many employers and unions treat their part time employees equitably by paying the same wage as to full time employees who perform the same or similar work. Many also provide employee benefits on a pro rata basis, by allowing a more liberal access to benefits if employees meet a threshold of income or hours to qualify for benefits, or with pay-in-lieu of benefits. However, differentiation in pay between part-time employees and comparable full-time employees in the same establishment persists.

An important question that needs to be addressed is whether the law should require that part-timers be paid the same as comparable full-timer workers. One of the options in the Interim Report was that part-time employees should be paid the same as full-time employees unless there were objective factors which justified the difference, such as qualifications, skills, seniority, or experience.

The option is responsive to the assertions of many employers that paying part -timers less is justified in circumstances where they are less skilled or less experienced. The option calls for equality unless objective factors justify a differential in pay.

In our view, this is one of the more important areas where changes in the law should occur, albeit with important limitations. There are several reasons why differential pay treatment of part-timers should no longer apply.

First, the principle that those who perform the same or similar work should be paid the same is a powerful equitable argument that accords with fairness and decency as it is grounded in equality of treatment. Absent objective factors that justify differential treatment, a differential is both arbitrary and discriminatory. When two people who are full-time perform work that is the same or similar and one person is male and the other person is female, the differential treatment is unlawful unless justified on objective factors.[263] The same is true where the basis for the differential treatment is race, or ethnicity, religion, age or other grounds of discrimination under the Human Rights Code. When the differential pay, treatment is based on part time status, it is neither fair nor reasonable. Rather, it is an arbitrary and unjustified distinction affecting up to one in five employees in Ontario, and if one includes temporary, casual and contract and seasonal employees, the potential percentage of people affected is even higher.

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263 See Part XII (Equal Pay for Equal Work) of the *Employment Standards Act, 2000*.

Not all groups in society are impacted equally by the differential treatment. Rather, it affects some groups more than others and likely amounts to adverse impact discrimination. The demographic composition of part-timers is different than the demographic composition of full-timers. Two-thirds of part-time employees were women in 2015[264] and 36% are youth ages 15-24. Increasing numbers of part-timers are over age 55. A disproportionate number of recent immigrants are part-time employees (16% as of 2008 when recent immigrants comprised 10% of the total employees.[265] Accordingly, the policy of different treatment is leading to adverse impact discrimination among women, youth, and increasingly, older workers and racial and ethnic minorities.

Another reason to end the differential treatment is that it impacts vulnerable workers in precarious work. Part-time workers are often low wage earners and are highly concentrated in the retail trades, accommodation and food services industries which have a high concentration of vulnerable workers in precarious work. In 2015, median hourly rates for part-timers were $12.50, which is only slightly more than half of the $24.04 for full-timers, although these are not comparisons between workers in the same job and same establishment (we lack the relevant data).[266] The C.D. Howe Institute recently reported that the differential in pay between full-time and part-time jobs has been rising in recent years, reaching a gap of $9.40 per hour in 2015, increasing from 31% to 35%.[267] Also a disproportionate number of part-time employees, 21.8%, earned minimum wage as compared to only 3.4% of full-time workers in 2013.[268] Finally, among full time employees, 56.2% of people who are permanent have an employer-sponsored pension-plan, compared to only 26% of those who are temporary, and among part-time employees, 25% of people who are permanent have an employer-sponsored pension plan, compared to only 11.5% of those who are temporary.[269]

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264 Statistics Canada, CANSIM Table 282-0008 – Labour Force Survey Estimates, by North American Industry Classification System, Sex and Age Group (Ottawa: Statistics Canada, 2016).

265 Andrea M. Noack and Leah F. Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context* (Toronto: Law Commission of Ontario, 2011). Available online:. http://www.lco-cdo.org/wp-content/uploads/2012/01/vulnerable-workers-call-for-papers-noack-vosko.pdf

266 Statistics Canada, CANSIM Table 282-0152 – Labour Force Survey Estimates, Wages of Employees by Type of Work, National Occupation Classification, Sex, and Age Group (Ottawa: Statistics Canada, 2016).

267 "Precarious Positions: Policy Options to Mitigate Risks in Non-standard Employment", CD Howe Institute, p. 6.

268 Diane Galarneau and Eric Fecteau, "The Ups and Downs of Minimum Wage," Statistics Canada, http://www.statcan.gc.ca/pub/75-006-x/2014001/article/14035-eng.htm.

269 *Law Commission of Ontario*, at pp 19.

It is the public interest to encourage growth in the workforce. The Ministry of Finance has pointed out[270] that Ontario, like the rest of Canada and other countries, faces the problem of a diminishing workforce as baby boomers age and leave active employment. It has pointed out that the adverse economic impact of a diminishing workforce could be mitigated by increased participation by baby boomers and by others. Policies that encourage greater workforce participation in part-time work, like paying part-time younger workers, female workers and older workers fairly and not discriminating against them based on the amount of time they work, could encourage labour force participation in line with the needs of the economy and serve the public interest.

Our recommendation is not new. A similar recommendation has been made by other commissions: in 1983 by the Wallace Commission on Part-time Work;[271] in 1984 by Rosalie Abella (now Justice Abella) in the Royal Commission on Equality Report;[272] and in 2006 by Harry Arthurs in his Report to the Federal Government on Federal Labour Standards[273]. Furthermore, it has been partially adopted by two provinces[274], in Australia and has been in place in Europe for 20 years[275].

Thirty-three years after this recommendation was first made in Canada, it is long past time for its adoption in Ontario and indeed it is unconscionable to ignore it any longer.

7.1.3 Casual, Temporary[276], Seasonal and Contract Employees

There is no reason to exclude casual, temporary and contract employees from the new rule we are recommending for part-time employees. Unless there are objective grounds such as seniority, experience, skill or qualifications which justify

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270 "Ontario's Long-Term Report on the Economy" Ontario Ministry of Finance, 2014. http://www.fin.gov.on.ca/en/economy/ltr/2014/ltr2014.pdf

271 *Op cit.*; "the Canada Labour Code, Part III (Labour Standards), be amended to ensure that part-time workers receive the same protection, rights, and benefits (on a prorated basis) as those now guaranteed to full-time workers. " p. 145.

272 "If they work part-time, they should not bear the unfair financial brunt of a perception that part-time work is not serious work. They should be remunerated and receive benefits on a prorated basis with workers employed full-time".

273 Arthurs, Harry. "Fairness at Work: Federal Labour Standards for the 21st Century", 2006.

274 Ministry of Labour, *Changing Workplaces Review Interim Report*, 2016, pg. 224 see information on Saskatchewan and Quebec.

275 Ministry of Labour, Changing Workplaces Review Interim Report, 2016, pg. 224 - 226.

276 In this section, we are not discussing persons referred by a temporary help agency to a client.

a difference in pay, temporary, casual, seasonal, and contract[277] employees should be treated in the same way as part-time employee's vis a vis comparable full-time employees and have the same protection.

There is no principled reason to exempt these employees from the application of the rule. Employers can use part-time, casual, temporary, contract and seasonal employees interchangeably and to exempt some employees from the application of the rule would create loopholes and\or classification issues. These employees are also component parts of non-standard employment where there has been substantial growth and are just as deserving of equitable treatment as part time employees.

7.1.4 Casual and Seasonal Employees

There has always been a segment of the workforce that has provided their services on a casual or seasonal basis and issues of pay are the same as for part-timers. Also, there has always been a part of the workforce that works on a seasonal basis in certain industries such as construction and agriculture where precarious work and vulnerable workers are often found. Casual workers are generally included in EU countries with the same rules that apply to part-time employees applying to them.

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277 Groups that made extensive submissions to us on behalf of contract employees included almost every Faculty Association in the province. The essential thrust of their submissions was that contract faculty are in a very difficult and adverse situation as compared to full-time faculty because they do not have tenure, are not part of the tenure stream system, and are paid much less than full-time faculty. Their position is said to be very precarious because they can remain interminably having to be reappointed year to year, or their reappointment can always be in doubt, either of which are difficult situations to be in. We are very sympathetic to the concerns of contract faculty. However, this problem is one that seems to us to be related to the funding of universities, the educational structure of teaching in universities, and how to compensate and provide for all the functions that faculty carry out including research and service to the university, as well as teaching. This complex problem is not one that seems to us to be susceptible to an ESA solution based on alleged differential treatment between full-time and contract faculty; there are simply too many objective criteria involved in the different treatment, including different duties and responsibilities, qualifications and merit, any of which could justify differential treatment. Rather, this is an important issue that needs to be addressed at the highest levels regarding the funding of universities, and/or in contract negotiations between faculty associations and administrations. Indeed, the consolidation of university bargaining units to allow for the representation of all faculty in a single bargaining unit to make sure the interests of contract faculty are heard, was one of the potential issues we had in mind in making our recommendations on consolidation of bargaining units.

7.1.5 Temporary and Contract Workers

Temporary employment, including limited-term contracts, has been the fastest growing component of non-standard employment, expanding at an annual rate of 3.5% between 1997 and 2015.[278] The share of temporary employment in Ontario in 2015 was 10.8%, more than doubling from just under 5% in 1989.[279]

Employees with temporary work arrangements generally experience lower wages as in 2015, median hourly rates for temporary employees were $15.00 in 2015, while permanent employees earned $23.00 per hour across the province.[280] These gaps may reflect differences in the types of jobs done by temporary and full-time/permanent workers, but they also reflect pay differences that exist when the jobs are the same or similar.

In 2012, 30% of minimum wage earners were employed in a temporary status, a figure that well exceeded the share of temporary status workers in the workforce at that time (12.9%). Thus, minimum wage workers were two-and-a-half times more likely to be employed in a temporary job category such as seasonal, contract and casual.[281] Similarly to part-time employees, typically they do not receive employee benefits available to full time employees on a pro rata or other basis and do to not receive compensation in lieu. Between 2000 and 2015, cumulative growth in temporary employment has outpaced that of permanent job growth (at 45% and 15%, respectively). As of 2015, there were 747,600 temporary employees in Ontario, comprising approximately 13% of total employees (temporary and permanent).[282]

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278 Statistics Canada, CANSIM *Table 282-0080 – Labour Force Survey Estimates, Employees by Job Permanency, North American Industry Classification System, Sex and Age Group* (Ottawa: Statistics Canada, 2016).

279 Statistics Canada, CANSIM *Table 282-0080 – Labour Force Survey Estimates, Employees by Job Permanency, North American Industry Classification System, Sex and Age Group* (Ottawa: Statistics Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on data from Statistics Canada's Labour Force Survey. Additional calculations were made by the Ontario Ministry of Finance based on data from the General Social Survey of 1989.

280 Statistics Canada, CANSIM *Table 282-0074*.

281 Computed by the Ontario Ministry of Finance based on data from Statistics Canada's Labour Force Survey. This was a special tabulation made for the Ontario Minimum Wage Advisory Panel.

282 Statistics Canada, CANSIM *Table 282-0074 – Labour Force Survey Estimates, Wages of Employees by Job Permanence, Union Coverage, Sex and Age Group* (Ottawa: Statistics Canada, 2016).

Recommendation:

85. We recommend the *Employment Standards Act, 2000* be amended to provide that no employee shall be paid a rate lower than a comparable full-time employee of the same employer. The rule would not apply when there is a difference in treatment between employees on the basis of: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) another factor justifying the difference on objective grounds. Section 42 (1) of the Act should be amended to reflect this same approach.

The informing principle is that a part-time, casual, contract, temporary, or seasonal employee has a right not be treated less favourably than the employer treats comparable full-time workers, unless the less favourable treatment is justified on objective grounds.

7.1.6 Benefit and Pension Plan Coverage

For practical reasons and because of our concern that there could be significant unintended impacts on full-time employees, we are unable to recommend that the government require equal treatment in the provision of benefits and pensions for part-time, temporary, contract, casual and seasonal employees. Instead, we recommend that government prioritize finding mechanisms to make basic insured health benefits such as drug[283], dental, vision, and mental health services available not only to part-time, contract, and temporary workers, but to the many full-time employees who do not have benefits, the self-employed and small employers who also do not have access to cost effective health benefit coverage.

To be clear, we do not consider the lack of coverage for essential health care benefits to be decent or fair. The lack of access to benefit plans for drugs, dental, vision, hearing, and mental health services, and all other kinds of healthcare, is a significant problem because the absence of such benefits contributes materially to the ill health, vulnerability and precariousness of many employees and their families. Part-time employees are not the only employees without benefit coverage, as many full-time employees, independent contractors and small employers also do not have it. The provision of these kind of benefits mostly through the

283 Some support is available through the Trillium Drug Program for those who spend approximately 3 to 4% or more of their after-tax household income on prescription-drug costs. https://www.ontario.ca/page/get-help-high-prescription-drug-costs#section-4.

workplace shows the limits of this approach as when many employers can't afford or don't provide access to benefits, there is an significant vacuum which needs to be filled through some other kind of mechanism such as a basic public or combined public/private mechanism.

It is highly material that collective vehicles to deliver benefits are more efficient and less costly than individual benefit arrangements. Most health benefits are provided tax free when provided through a health benefit plan at the workplace. The denial of benefit coverage to large numbers of employees is one of the more obvious and inequities as it forces employees and their families either to go without the care, or, to pay for these benefits out of after tax dollars, when other employees covered by benefit plans get the value of the benefits on a tax-free basis. This has more impact on vulnerable workers in precarious work because it forces these employees either to go without necessary care for themselves and their families, or, if they can afford care at all, they are paying too much for their benefits when they are the least able to afford it.

Of course, some employees without benefit coverage will be covered by a family member who has family benefit coverage, and many youth will be covered by the same family plans. In addition, many employers in both non -unionized and unionized settings, including many unionized multi-employer benefit plans, provide benefits to part-time employees with certain restrictions such as thresholds for required hours worked or pro-rata entitlements. In Saskatchewan, an employer with 10 or more full-time equivalent employees must provide benefits to eligible part-time employees (i.e., part-time employees who work between 15 and 30 hours a week receive 50% of the benefits provided to comparable full-time employees, and those working 30 or more hours in a week receive 100% of the benefits provided to comparable full-time employees). It is certainly not an impossible task to provide part-time employment benefits through an employer benefit program.

That said, employers face many practical and financial issues in order to provide benefits to part-time employees. Providing benefits to any group of employees can be expensive, which is why many employers do not provide benefits to full-time employees, and drug plan costs, in particular, have been a significant cost issue for employers for some time. Pro-rating of benefits can be very difficult in benefit plans. It is unclear how one would pro-rate a fixed drug or dental claim and therefore employers usually create a different plan for part-time employees than for full-time employees. That practical requirement for a different plan pushes

up the cost of establishing and administering a second benefit plan for part-time employees. In addition, in order to make the plan for part-timer employees financially affordable, there is often a requirement for mandatory participation of all part-time employees including those who already have benefit coverage through a family member. That can make the negotiation or provision of such benefits unattractive to those part-time employees who already have coverage through a family member leaving those without such coverage exposed.

We are unable to recommend that benefits must be provided by employers to part-time, contract, seasonal, casual and temporary employees because we are concerned about the cost and the impact on employers, particularly small ones. As we indicated above, benefit plans can be expensive and the costs of a drug plan in particular, can present challenges especially to small employers. We consulted with a variety of expert benefit plan consultants with extensive experience in the industry, including experience with the provision of benefits plans which included part-time employees. The thrust of the advice we received was that the mandatory coverage of part-time employees in benefit plans could well drive many employers out of providing benefits altogether. Faced with potentially having to set up another plan or substantially rethinking the application of the existing one to part-time and other employees, and the added costs, we are concerned they could just cease to sponsor a benefit plan at all. In short, faced with a choice between covering part-time employees and others, or not covering anyone, some employers could choose the latter as there is nothing which requires employers to provide full-time employees with benefit coverage. Without further careful study and analysis we are not prepared to make such a recommendation either.

Our conclusion leaves a vacuum in the provision of health care benefit coverage in our society especially for vulnerable workers in precarious work. Drug[284], dental, vision, paramedical, mental health coverage, counselling and others benefits are obviously crucial to many working Ontarians. Some employees are vulnerable in precarious jobs precisely because their employment does not provide them with access to those essential non- taxable health benefits for themselves and their families. Our conclusion shows the limitations of relying on the workplace to be the source of benefit coverage. Senior Ontarians, and those on social assistance, and others depending on income through the Trillium Drug Program, have government support in obtaining some of these benefits. While group coverage is available in

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284 *Ibid.* Some support is available through the Trillium Drug Program for those who spend approximately 3 to 4% or more of their after-tax household income on prescription-drug costs. https://www.ontario.ca/page/get-help-high-prescription-drug-costs#section-4.

the private market, low income workers without benefit plans from their employer will find it difficult to obtain group coverage that is affordable, if only because there is no employer contribution to the cost of the plan and it is not tax effective. Such coverage may also be unaffordable for many of those who the new economy and the new workplace is driving to be self-employed, including small employers.

Recently the C.D. Howe Institute[285] focused on precisely this problem and pointed out that some provinces, notably Quebec, British Columbia and Alberta, have innovated with various programs to partially fill some of this gap. That study argues that this is a significant problem in our society and concludes that are "many options available to governments for establishing better basic coverage in a fiscally responsible way", especially since it regards federal action in this area as "highly unlikely".

Accordingly, we recommend that the government make it a priority to initiate a study as to how, at least a minimum standard of benefits, can be provided across all workplaces, especially to those full-time and part-time employees without coverage, the self-employed and including small employers. We must find a made in Ontario solution to address this issue. Unions in industries like construction and others with a large number of small employers have found effective ways to do this. These can provide models as to how this can be accomplished across workplaces either through a public or mixed public/private plan or through other means.

With respect to pension plans, a recommendation on eligibility for part-time and other similar employees is unnecessary because the existing situation is that part-time employees cannot be excluded now from coverage simply because they are part-time.[286] However, participation is not mandatory and for part-time and other non-full-time employees, participation is elective.

A pension plan may not require more than, the lower of, either 700 hours of employment or 35% of the Yearly Maximum Pensionable Earnings (YMPE) over 2 consecutive calendar years in order to qualify for membership. Then, as noted above, it is typical for non -full time employees to be offered elective membership. Unlike benefit plans, both defined benefit and defined contribution plans are relatively simple to pro-rate for non-full-time employees. The real issue appears to be for low income earners including many non-full-time employees.

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285 Colin Busby, Ramya Muthukumaran, Precarious Positions: Policy Options to Mititgate Risk in Non-Standard Employment, C.D. Howe Institute, Commentary No. 462.
286 Financial Services Commission of Ontario Policy M100-300.

It is hard for them to have the funds to contribute when they qualify, and then their pension benefits result in a reduction of the guaranteed income supplement (GIS) they would otherwise receive in retirement from the Government of Canada. Our recommendation here is that the Provincial Government urge the Federal Government to review the working of the private pension system with public programs such as the GIS in respect of how they affect low earning Ontarians.

The recent agreement to broaden the Canada Pension Plan may also assist low earning employees.

Recommendations:

86. We recommend that the government initiate an urgent study on how to provide at least a minimum standard of insured health benefits across workplaces, especially to those full-time and part-time employees currently without coverage, and to the self-employed, including small employers.

87. We recommend that the provincial government urge the federal government to review the operation of the private pension system, in conjunction with public programs, such as the Guaranteed Income Supplement, with respect to how they affect low earning Ontarians.

7.1.7 Contract Employees – Renewable Contracts

Contract employment is much more commonplace than it was and is an important factor in the growth of temporary work in Ontario. Issues were raised with us and in the Interim Report related to the renewal of limited contracts[287] and how fixed term contract employment is reducing the amount of full-time employment. Project work and work for limited periods serve important purposes. The main concern related to situations where there are multiple renewals of fixed term contracts which has the effect of denying people security and permanency. The EU requires member states to introduce one or more of the following measures: objective reasons justifying the renewal of such contracts or relationships; the maximum total duration of successive fixed-term employment contracts; and the maximum number of successive renewals. We have considered provisions like those in the EU but we are not prepared to recommend their adoption without further monitoring and further study.

287 Refer to the Interim Report, Section 5.3.7.

The most popular measure suggested for preventing abuse of fixed-term contracts is to impose a cap on the total duration of such contracts. We are not recommending a cap on duration because the impact is unforeseeable and the continuing employment of people on contract may be adversely affected. The CD Howe Institute recently reported on what it found to be the failure in the Netherlands of policies to restrict the renewal of contracts which it claimed led to greater precariousness and unemployment for contract workers.[288]

Our recommendation to government is to continue to monitor the use of fixed term contracts in Ontario and to assess the impact of legislation in other jurisdictions before legislative intervention.

Recommendation:

88. The government should continue to monitor the use of fixed-term contracts in Ontario and to assess the impact of relevant legislation in other jurisdictions before engaging in legislative intervention.

7.2 Scheduling, Right to Request, and "Three-hour Rule"

7.2.1 Scheduling

The ESA does not include provisions regulating scheduling of work by employers. There is currently no provision in the ESA requiring an employer to provide advance notice of shift schedules or of last minute changes to existing schedules.

There is a "three-hour rule" providing that, when an employee who regularly works more than 3 hours a day is required to report to work but works less than 3 hours, he/she must be paid the higher of: 3 hours at the minimum wage, or the employee's regular wage for the time worked.[289]

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288 "The Dutch *Work and Security Act*, which was introduced as a response to increasing precariousness and employment insecurity, strengthened the status of employees on fixed-term contracts in the Netherlands by aiming to helping them transition into open-ended employment contracts. The new laws, however, did not promote more permanent employment as intended. The government restricted the maximum periods for successive temporary employment from three to two years to curb the use of such contracts, but this led to more use of temporary contracts, with lower standards of pay, thus exacerbating the situation for precarious workers. The Dutch experience led them to recognize the unintended consequences of dictating a limit to the length of temporary contracts. Job creation suffered, and more importantly these reforms resulted in many workers without employment when their temporary contracts expired, as employers would simply hire new people once a contract ended rather than establish an employment relationship with an incumbent."

289 The rule does not apply in some cases where the cause of the employee not being able to work at least 3 hours was beyond the employer's control (e.g., fire, power failure).

Despite the numerous and varied responsibilities of many in today's workforce, there are workers who often have very little ability to make changes to their work schedules when those changes are needed to accommodate family and other responsibilities.

Many low-wage workers not only have very little or no control over the timing of the hours they are scheduled to work, but also receive their schedules with very little advance notice and they have hours of work that vary significantly. Uncertainty can also include: last-minute call-in where no schedule is maintained and, where there is a schedule, last-minute notice to employees of changes in work hours, and "on-call" shifts where employees are expected to be available for work on short notice (i.e., less than 24 hours' notice).

Such practices make it difficult for employees to plan for child-care, undertake further training and education, maintain or search for a second job, make commuting arrangements, and plan other important activities. Consequently, uncertainty in scheduling practices may contribute to making work precarious.

In a paper published in the US by the Economic Policy Institute in April 2015, the author, Lonnie Golden[290], stated:

> *The plight of employees with unstable or unpredictable work schedules has become increasingly well-documented in the media and in the academic literature. There are drawbacks of erratic and uncontrollable work schedules for any employee, particularly those on nonstandard work times. They can be particularly acute among hourly paid workers, especially with lower incomes. Work times are most irregular for those hourly workers on part-time employment arrangements. Moreover, it is becoming recognized that when work hours and schedules generally are variable, it undermines elements of well-being, such as sleep time.*
>
> *Work schedules or shifts that are irregular are consistently found to be associated with assorted adverse outcomes for workers. One such study examined the extent to which work demands, including irregular work schedules, are related to work-family conflict as well as life and job satisfaction among nurses. Irregular work schedules (along with work overload) are the predictors of work-family conflict, and that work-family*

290 Economic Policy Institute Briefing Paper, April 9, 2015. http://www.epi.org/files/pdf/82524.pdf

> *conflict is in turn associated with lower job and life satisfaction. Generally, having to be constantly available for work, not just long hours per se, creates a daily struggle for workers to reconcile competing caregiving and workplace demands.*

Golden concluded; "Employees who work irregular shift times, in contrast with those with more standard, regular shift times, experience greater work-family conflict, and sometimes experience greater work stress.

Other Jurisdictions in Canada

Like Ontario, most Canadian and American jurisdictions have some reporting pay requirement that requires employers to compensate employees for a minimum number of hours when they report for work, but are sent home before the end of the scheduled shift. The amount of reporting pay required in such circumstances differs among jurisdictions, but generally ranges from 2 to 4 hours.[291]

There are examples in Canada of schedule posting requirements. In Alberta, every employer must notify the employee of the time at which work starts and ends by posting notices where that can be seen by the employee, or by any other reasonable method. An employer must not require an employee to change from one shift to another without at least 24 hours' written notice and 8 hours of rest between shifts. In Saskatchewan, employers must give employees notice of the work schedule at least 1 week in advance and must provide employees written notice of a schedule change 1 week in advance.

United States (US)

Scheduling has been the subject of much discussion across the US, in response to the issues raised here. Recent developments have included: predictable scheduling laws (i.e., advance notice provisions); enhanced employee flexibility laws (i.e., right to request provisions); and non-legislative approaches (e.g., retailers re-evaluating and updating existing practices in response to external pressures).

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291 The majority of provinces require employers to provide a minimum of 3 hours compensation to employees for on-call or regularly scheduled cancelled shifts. In British Columbia, for example, an employee scheduled for 8 hours or less must be paid for a minimum of 2 hours even if work less than 2 hours. An employee scheduled for more than 8 hours, must be paid for a minimum of 4 hours even if works less than 4 hours. Must be paid for if they report to work as scheduled, regardless of whether or not they start work. In addition to these reporting pay requirements, some American jurisdictions require that employees be scheduled for minimum shift lengths (i.e., a shift cannot be scheduled for less than 3 hours).

In 2014, San Francisco became the first US jurisdiction to pass legislation[292] penalizing the use on-call shifts. The San Francisco Retail Workers Bill of Rights is intended to give hourly retail staffers more predictable schedules and priority access to extra hours of available work. It applies to retail chains with 20 or more locations nationally or worldwide and that have at least 20 employees in San Francisco under one management system. It is estimated that this law affects about 5% of the city's workforce. The ordinances require businesses to post workers' schedules at least 2 weeks in advance. Workers receive compensation for last-minute schedule changes, "on- call" hours, and instances in which they are sent home before completing their assigned shifts. Specifically, workers receive 1 hour of pay at their regular rate of pay for schedule changes made with less than a week's notice and 2 to 4 hours of pay for schedule changes made with less than 24 hours' notice.

The Retail Workers Bill of Rights in San Francisco has generated a larger discussion in the US about the need for predictable and stable schedules for part-time employees.

A number of state legislatures have introduced or enacted similar measures including Michigan in 2014, and Connecticut, California, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New York, Oregon, and Indiana in 2015.[293]

Retailers are addressing scheduling issues on their own, with many publically speaking about existing or proposed changes. For example, Abercrombie & Fitch, Victoria's Secret, and Gap Inc. and others pledged to make specific changes to their scheduling practices following inquiries by the New York Attorney General requesting information about their on-call scheduling practices questioning whether such practices were legal. Other large retailers in the US have voluntarily implemented predictable and stable scheduling regimes for part-time employees. In a unionized environment, Macy's sets schedules for its employees as far as six months in advance for some of the shifts at its unionized stores in and around

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292 It comprises two separate pieces of legislation – the "Hours and Retention Protections for Formula Retail Employees" and the "Fair Scheduling and Treatment of Formula Retail Employees". Together, the ordinances contain five major provisions to curb abusive scheduling practices at corporate retailers.

293 "Fact Sheet: Recent Introduced and Enacted State and Local Fair Scheduling Legislation," National Women's Law Center, http://www.nwlc.org/sites/default/files/pdfs/recent_introduced_and_enacted_state_and_local_fair_scheduling_legislation_apr_2015.pdf.

New York City.[294] Some companies have instructed their local store managers to consider requests for making schedules more stable or consistent week-to-week, such as Starbucks and Ikea, which provide up to 3 weeks' advance notice of upcoming schedules.[295]

On December 20, 2016 the Toronto Star reported:

> *An estimated 50,000 workers nationwide for Disney, Aeropostale and four other U.S. retailers are expected to get an early holiday present from their employers — new agreements to end on-call work shift scheduling.*

The agreements followed an April letter sent to retailers by the attorneys general of California, Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, Minnesota, New York and Rhode Island, all Democrats.

Workers assigned to shifts by call-in scheduling "encounter obstacles in pursuing an education, and in general experience higher incidences of adverse health effects, overall stress and strain on family life than workers who enjoy the stability of knowing their schedules reasonably in advance," the letter said.

At least 10 per cent of the U.S. workforce has on-call or irregular work schedules and an additional 7 per cent work split or rotating shifts, according to a 2015 report by the Economic Policy Institute, a non-profit, non-partisan think tank focused on including the needs of low- middle-income workers. The lowest-income U.S. workers have the most irregular job schedules, the study found.

State and local officials in roughly a dozen jurisdictions across the nation have focused on the issue by introducing regulations that would restrict on-call shift scheduling, according to the National Retail Federation, the world's largest retail trade organization.

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294 The collective bargaining agreement with Macy's negotiated by Local 1-S RWDSU enables workers to choose shifts 3 weeks in advance and select permanent shifts of up to 6 months ahead of time. Available online: http://retailactionproject.org/wp-content/uploads/2014/09/ShortShifted_report_FINAL.pdf

295 "Irregular Work Scheduling and Its Consequences," Economic Policy Institute, http://s2.epi.org/files/pdf/82524.pdf.

Australia

In Australia, there are 122 industry and occupation awards (including retail and hospitality sectors) that cover most workers. Australia addresses scheduling practices (i.e., rostering) on a sectoral basis. For example, notice of schedule changes must be provided by advance written notice to part-time retail workers.[296]

Conclusion

Our experience and the approach taken in other jurisdictions reflect the fact that scheduling cannot be the same for all employees employed in all businesses. Scheduling can be a very complex and difficult subject. Trade unions and employers in collective bargaining often spend very significant amounts of time negotiating workable and fair scheduling arrangements. In sum, one size does not fit all.

7.2.1.1 Sectoral Regulation of Scheduling

However, there are sectors employing many part-time employees where some scheduling regulation is required. The fast food and restaurant sector is likely one sector requiring a scheduling regulation. The retail sector may be another. These sectors employ many part-time employees without any scheduling regulations and without the kind of voluntary scheduling implementation which we have seen from leading retailers in the United States.

Our consultations and representations from various unions and employee advocates have led us to conclude that lack of scheduling for part-time employees in particular often results in unwarranted hardship for employees who deserve some advance notice of their employer's expectations with respect hours of work.

Recommendations:

89. The *Employment Standards Act, 2000* should give the Ministry of Labour the authority to regulate the scheduling of employees by employers.
90. Recognizing the need for predictable schedules for employees in certain sectors and the variability of scheduling requirements, the government should adopt a sector-specific approach to the regulation of scheduling.

296 Under the General Retail Industry Award 2010.

91. Scheduling regulation in some sectors, such as fast food and retail, should be a priority.
92. To the extent reasonably practicable, the Ministry of Labour should gather data and statistics related to other sectors to identify those sectors most in need of regulation and to determine priorities.
93. In accordance with recommendations made, herein, in relation to Sectoral Regulation and Exemptions, the Ministry of Labour will appoint sectoral committees to develop sector-specific scheduling regulations.
94. The Ministry of Labour should consider developing a policy framework for scheduling discussions by sector, describing issues, options and best practices.
95. In constituting sectoral committees for advising on sector-specific scheduling regulations, the Ministry of Labour should consider making available to the committees, experts on scheduling and/or others – for example, academics with the relevant employment standards expertise – who may help facilitate an educated discussion on the scheduling issues being considered.

7.2.2 Right to Request

Providing a "right to request" means providing employees the right to ask for such things as changes in work hours' schedules, or location, with protection from retaliation by the employer. Right to request legislation recognizes that employees have home care, family, and other duties and responsibilities, but at the same time wish continuation of their employment and access to more flexible working arrangements.

The federal government has made a commitment that employees will be given the right to request flexible hours (in addition to an increased parental leave). For example, employees will have the legal right to ask their employers for flexibility in their start and finish times, as well as the ability to work from home.[297]

Other jurisdictions both in Europe and in North America have implemented right to request legislation.

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297 "Minister of Employment, Workforce Development and Labour Mandate Letter," Office of the Prime Minister, http://pm.gc.ca/eng/minister-employment-workforce-development-and-labour-mandate-letter.

An EU directive on part-time work includes provisions facilitating movement from full-time to part-time status and vice versa, where employers are required to give consideration to requests from workers to transfer from one status to another.[298]

Some European countries allow requests for transfers for all employees, but in many cases these are limited to those with caregiving responsibilities. A wide entitlement to request a change in status is often accompanied by the right to refuse for any reason although there may be a requirement that the employer meet employees to discuss the matter and provide a rationale in writing within a fixed period of time if the request is rejected. Reprisals cannot be taken against workers for making the request. While employers have a broad right to refuse requests, there is evidence that employers are more likely to permit adjustments between full and part-time work when a statutory right to request the change is in place.

The Netherlands passed the Part-Time Employment Act, which gives workers the right to periodically request a change in their weekly work hours (either requesting more or fewer hours). In July 2014, the UK extended the legal right to request flexible work arrangements for those with caregiving responsibilities to all employees.[299]

In the U.K., there is legal right to request allowing all employees to request flexible work arrangements, if they have been with a company for at least half a year. An employer can deny a request if it has a good business reason for doing so.

There are right to request provisions in numerous other jurisdictions including France, Germany and Poland. The legislation of some European countries, like the German legislation, contain "reversibility" provisions enabling employees to be able to request moving back from part-time to full-time hours after having moved from full-time to part-time.

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298 Clause 5 of the Part-time Directive states that as far as possible, employers should give consideration to:
a) requests by workers to transfer from full-time to part-time work that becomes available in the establishment;
b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise;
c) the provision of timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfers from full-time to part-time or vice versa;
d) measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions, and where appropriate, to facilitate access by part-time workers to vocational training to enhance career opportunities and occupational mobility; and
e) the provision of appropriate information to existing bodies representing workers about part-time working in the enterprise.

299 If the employee has been with a company for at least half a year. An employer can still deny a request if it has a good business reason for doing so.

One example of "right to request" legislation referred to by Golden in his EPI paper referred to above is in Vermont. Golden describes the Vermont legislation as follows:

> *A law that took effect in January 2014 in the state of Vermont provides employees with a "right to request". Versions of this right exist now in two other states—Montana protects an employee request for job sharing and Oregon protects a request for teleworking. The Vermont law establishes a process whereby an employee can request "a flexible work arrangement" for any reason (not just parenting duties), at least twice per calendar year, and the employer is required to discuss and consider such requests "in good faith." Like the proposed federal legislation, it protects employees who request or use flexible work arrangements from retaliation or discrimination, a key component to prevent such arrangements from becoming a gender segregating practice (see Powell 2013). The law is also like the federal legislation in that there are at least eight factors for which the employer may deny the request, either completely or partially, as long as the denial of the request is put in writing. It may be denied as "inconsistent with business operations or its legal or contractual obligations." It includes factors such as the burden of additional costs on business quality, performance, or restructuring; the effect on aggregate employee morale; an inability to meet consumer demand, recruit new staff, or reorganize work among existing staff; or an insufficiency of work during periods employee proposes to work instead. To date, there are no research studies documenting the experience of employees and/or employers regarding exercise of the right to request or its processes. In countries that have such a 'right to request,' the vast majority of requests are granted and the process appears to be without flaws.*

San Francisco's *Retail Workers Bill of Rights* contains a provision to promote what it terms, "Full-Time Work and Access to Hours". The essence of that provision requires retailers with additional hours of work to offer to offer those hours of work first to existing (qualified) part-time employees before hiring additional part-time employees or before hiring through a temporary services agency, staffing agency, or any similar contractor.

Proposed legislation in Minnesota is described as the "most far-reaching and promising among the states where legislation like San Francisco's has been introduced (these states include Maryland, Massachusetts, and Connecticut). Each of the bills builds on and extends the provisions in the groundbreaking right to request law San Francisco enacted and is now enforcing." The Minnesota bill

allows employees the right to request scheduling accommodation and to request a flexible working arrangement at any time, not just at the start of the employment relationship, and the employer must promptly evaluate and respond to the request, rather than just rejecting it. The Bill requires employers to grant such a request if the request is due to a serious health condition, caregiving obligations, educational pursuits, or requirements of a second job. The Bill also directs employers to offer hours to existing (not just part-time) employees before hiring new staff or temporary workers. Finally, protection against retaliation is stronger, placing the burden on employers to show that an adverse action against an employee who exercised his or her rights or assisted others to assert their rights, was not retaliatory in nature. Enforcement would include an individual right to pursue civil penalties, in addition to actions by an office of labor standards.[300]

In 2015, President Obama directed the federal Office of Personal Management (OPM) to initiate more flexible work and workplace options for the approximately 2 million federal employees. The directive includes a section with a "Right to Request Work Schedule Flexibilities." The directive requires the employer to make federal employees aware, on a periodic basis, that they have the right to request work schedule flexibilities available to them under law, pursuant to an applicable collective bargaining agreement, or under agency policy, without fear of retaliation or adverse employment action as a consequence of making such a request. The agencies must facilitate conversations about work schedule flexibilities, including telework, part-time employment, or job sharing arrangements.

Conclusion

Right to request legislation can facilitate many objectives including the transition of workers from full-time to part-time and vice versa. It can facilitate scheduling of individual employees to help them with their outside obligations or transfer to another location. As we have seen from the above discussion, it can also obligate employers to provide work opportunities to part-timers or other employees prior to hiring more part-time employees or using agency employees.

Professor Harry Arthurs in his Report to the Federal government recommended that after 1 year of service, employees should have a right to request, in writing, that their employer decrease or increase their hours of work, give them a more flexible schedule or alter the location of their work. The employer would be required to give the employee an opportunity to discuss the issue and provide

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300 Economic Policy Institute Briefing Paper, April 9, 2015. http://www.epi.org/files/pdf/82524.pdf

reasons in writing if the request is refused in whole or in part. There would be no appeal of an employer's decision on the merits. The employer's obligation to respond to an employee's request would be limited to one request per calendar year, per employee.[301]

Since Professor Arthurs made his recommendation, there have been more jurisdictions that have legislated and implemented right to request legislation. There is more experience therefore relating to workability, impact and employee utilization of such provisions. The trend to right to request legislation reflects a recognition that the flexibility created can be beneficial to employees and employers and to the health and welfare of both. However, the scope of rights and the restrictions on employees and employers in right to request law is varied reflecting the time of passage, the assessment of what is reasonable and perhaps, the nature of the community affected.

We agree with Professor Arthurs and the substance of his recommendation to the federal Government.

Recommendations:

96. The Employment Standards Act, 2000 should be amended to provide that, after one year of service, an employee has a right to request, in writing, that the employer decrease or increase his or her hours of work, give him or her a more flexible schedule or alter the location of his or her work. The employer should be required to give the employee an opportunity to discuss the issue and provide reasons, in writing, if the request is refused in whole or in part. There should be no appeal of an employer's decision on the merits. The employer's obligation to respond to an employee's request should be limited to one request per calendar year, per employee.

97. Any "right to request" legislation must include protection from reprisal or retaliation for an employee who exercised the right.

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301 Harry Arthurs, Fairness at Work: Federal Labour Standards for the 21st Century (Gatineau: Human Resources and Skills Development Canada, 2006). Available online: http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1166&context=reports

7.2.3 "Three-hour Rule"

The ESA does not include provisions regulating scheduling of work by employers. There is currently no provision in the ESA requiring an employer to provide advance notice of shift schedules or of last minute changes to existing schedules.

There is a "three-hour rule" providing that, when an employee who regularly works more than 3 hours a day is required to report to work but works less than 3 hours, he/she must be paid the higher of: 3 hours at the minimum wage, or the employee's regular wage for the time worked.[302]

We agree with some employer submissions that the existing provision of the ESA should be changed to increase the minimum hours of reporting pay from the current 3 hours at minimum wage to 3 hours at the employee's regular wage. This change will result in a clearer, fairer and easier to understand minimum entitlement.

Recommendation:

98. The *Employment Standards Act, 2000* should be amended to provide that, when an employee who regularly works more than 3 hours a day is required to report to work but works less than three hours, he or she must be paid three hours at the employee's regular wage.

7.3 Temporary Help Agencies

7.3.1 Triangular Relationship

The temporary help industry provides a broad spectrum of services to clients ranging from executive search and recruitment, assignment of professionals and skilled workers to the assignment of less skilled and lower paid workers. In this review, we are primarily concerned with this latter group of staffing agencies and with the clients who use their services and benefit from the labour of these workers.

The triangular nature of the relationship between the employee, the agency and the client, and the temporary nature of the employment, results in some temporary help agency employees being among the most vulnerable and precariously employed of all workers.

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302 The rule does not apply in some cases where the cause of the employee not being able to work at least 3 hours was beyond the employer's control (e.g., fire, power failure).

The agency decides whether the worker will be sent to a client. The work with the client is temporary and the duration of an assignment often unknown and unpredictable. Employees can be removed without notice from their work at the instance of the client or the agency. The agency pays the employee his or her wages but the source of the funds is the client. The remuneration of assignment employees, at least in low skilled jobs, is generally below what the client pays its own workers doing the same job. The client generally directs and controls the work. The agency controls whether the worker will be sent to an assignment with subsequent clients. While work with a particular client is usually temporary, sometimes "temporary" lasts for a long period and the status of the employee more resembles that of a "perma-temp".

Employment-related legislation allocates employer obligations, responsibilities and liability for non-compliance to one or both of agency and the client. For the purposes of the ESA, the worker is an employee of the agency which imposes primary obligations on the agency for payment of wages, vacation, and holiday pay while the client is jointly and severally liable for some - but not all - obligations. The status of being an employee of record of the agency, for the purposes of the ESA, makes sense because the agency assigns the worker to various clients and the agency is the paymaster. This is different from the approach taken under the *Labour Relations Act, 1995* (LRA). For the purposes of the LRA, the OLRB has often found that the client is the temporary worker's true employer, in the context of an application for union certification at the client workplace. The fact that there are different considerations under each act demonstrates that the allocation of employer obligations, responsibility and liability may differ depending on the issue. (See the discussion in Chapter 12 on Who is the Employer Under the *Labour Relations Act, 1995*.)

Background

We set out the background facts in the Interim Report but it is worthwhile to summarize some of them here in the context of our recommendations.

THAs recruit and assign people to perform work on a temporary basis for clients of the agency. The duration of the assignment can vary from one day to years. Such persons are termed "assignment workers." Clients comprise diverse sectors and professions (e.g., manufacturing, administrative, support services, information and information technology), and as such require assignment workers with varying degrees of skill and education.

Businesses use THAs in a variety of ways. Some use temporary help to manage peaks and valleys in demand, to replace absences, and for short term projects, while others use assignment workers as an integral part of their regular staffing, using it as a device to vet workers in lieu of a probationary period, or because it is easier to terminate the assignment of an assignment worker than it is a regular employee of the client. Some use assignment workers because they can't find enough permanent workers to work in their industry. Some businesses may use temporary assignment workers because it is more economical, having regard to lower *Workplace Safety and Insurance Act* (WSIA) premiums for agencies as compared to the client, particularly if dangerous work is involved. It is also said that economic uncertainty and volatility constrains new job creation and the use of THAs allows for "leaner staffing."[303]

At the end of 2015, there were 962 temporary help services establishments in Ontario which comprised 47.3% of all temporary help service establishments in Canada.[304] These agencies are ubiquitous in many communities and constitute the major or sole entry point to employment into certain industries in some Ontario communities. Data suggests the employment services sector is growing quickly,[305] and especially in the US, while trends in Canada often follow somewhat later.

THA Business Model

The basic structure of the industry is that the agency recruits, refers and pays the assignment worker who performs his or her duties at the client's place of business, subject to the direction of the client and for the benefit of the client's business. The assignment worker can be removed from the client's workplace at the discretion of the client with no requirement of any notice. After the assignment is terminated, the assignment worker then is commonly placed back on the referral list of the agency and may or may not be assigned to work for another client of the agency.

Assignment workers may comprise a large or small percentage of the client's workforce and may work there for short or very long periods of time as circumstances vary from client to client, agency to agency, and worker to worker.

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303 Steven Berchem, "Navigating the 1% Economy," *Staffing Success*, September 2013, 32.Available online: http://altstaffing.org/wp-content/uploads/2014/03/American-Staffing-2013_Navigating-the-1-Percent-Economy.pdf.

304 "Temporary Help Services Establishments," Businesses – Canadian Industry Statistics. Statistics Canada. https://www.ic.gc.ca/app/scr/app/cis/businesses-entreprises/56132

305 Interim Report, Section 5.3.9, p. 236.

While the agency provides workers' compensation insurance coverage for assignment workers, generally in client/agency contracts, the client agrees to provide all assignment workers with a safe worksite as well as safety information, training and equipment as required. Because the client controls the facilities in which workers work, the client and agency generally agree that the client is primarily responsible for compliance with all applicable occupational, health and safety laws.

Assignment Worker Profile

There are limited data on assignment workers in Canada although there tends to be more on the industry in the US. In Canada, according to 2004 statistics,[306] assignment workers are:

- most likely to work in processing, manufacturing and utilities jobs (43%) and in the management, administrative and other support industry (48%);
- far less likely to be unionized than direct-hire, permanent employees (recent estimates of union coverage rates among agency workers are as low as 3.4%);
- less likely than other workers to have completed high school or have a university degree; and
- are older than other types of temporary workers[307] (e.g., seasonal, contract or casual workers), with 32% being 45 years of age or older.

Although some assignment workers seek agency work because they desire flexible employment conditions, studies have found that many engage in this work for involuntary reasons – that is, they have been unable to find more stable employment.[308]

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306 S. Fuller and L. F. Vosko, "Temporary Employment and Social Inequality in Canada: Exploring Intersections of Gender, Race and Immigration Status," *Social Indicators Research 88*, no. 1 (2008).

307 In Canada, definitions of temporary employment in standard statistical sources are not entirely consistent but normally include contract or term, agency, seasonal and casual (on-call) employment.

308 European Foundation for the Improvement of Living and Working Conditions, *European Working Conditions Survey* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2007); N. Galais and K. Moser, "Organizational Commitment and the Well-Being of Temporary Agency Workers: A Longitudinal Study," *Human Relations* 62, no. 4 (2009).

Other Jurisdictions

Canada

Ontario, together with Manitoba, is in the minority of jurisdictions that specifically addresses THA employment.[309]

United States (US)

The ubiquity of temporary help workers in the US has led to significant criticism of the industry, much greater regulation by the US federal government, and new legislation in some states where THAs are very prevalent. Critics[310] argue that the greater use of temporary agency work is part of the decline of the middle class. The National Employment Law Project in the US (NELP) also argues that competition between staffing agencies causes significant downward pressure on wages. As noted in the Interim Report in the context of the joint employer liability doctrine under the *Fair Labour Standards Act* (FLSA)[311] and in the context of the joint employer doctrine recently applied by the National Labor Relations Board (NLRB) as set out in the case of Browning-Ferris,[312] the THA industry attracted the strong attention of regulators in the US in the last Administration. The thrust of this attention was, in effect, to make clients and THAs joint employers. Illinois, Massachusetts and California have all passed such laws in the last decade.[313]

European Union (EU)[314]

While there was strong antipathy to the industry in the early and mid-1900s in Europe, there was a change in attitude in the last part of the century. This change

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309 In addition to requiring a licence to operate, Manitoba's *Worker Recruitment and Protection Act* has provisions regulating the operation of the THA sector (e.g., agencies are prohibited from charging assignment workers any fees and from preventing a client from hiring an assignment worker) which are largely similar to regulations in Ontario.

310 Typified by Erin Hatton *The Temp Economy: From Kelly Girls to Permatemps in Postwar America*, and the National Employment Law Project (NELP).

311 See section 5.2.2 of the Interim Report at pp. 148.

312 *Browning-Ferris Industries of California, Inc.*, (2015) 362 NLRB 186.

313 Illinois requires that third-party clients that contract with day and temporary service agencies for the services of day labourers share all legal responsibility and liability for the payment of wages under state wage payment and minimum wage legislation. Based on the Illinois model, new legislation in California makes clients (with some exceptions) share legal responsibility and civil liability with labour contractors for payment of wages. California, Illinois and Massachusetts require employees to be provided with a notice of details of the assignment by the time of dispatch. Illinois and Massachusetts both require THAs to be licensed. They have also required that a poster summarizing temporary workers' rights be displayed at agency locations, and deductions from wages be limited.

314 Katherine Gilchrist, *Temporary Help Agencies* (Toronto: Ontario Ministry of Labour, 2016). The material in this section on the EU was taken from a paper prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review.

occurred in the context of a growing movement within the EU towards promoting flexible forms of work (including part-time and temporary work) as a strategy for better meeting the needs of employers and of employees.

This new attitude to temporary work through agencies was made possible by the adoption of the concept of "flexicurity" whereby flexible forms of work are promoted but in a context of the protection of, and the provision of, security for temporary help workers. Flexicurity is seen by the European Commission as an integrated strategy which promotes flexibility and security in the labour market concurrently. This includes policies which promote lifelong learning and training, adjustments to period of unemployment and transition, and comprehensive social security systems.[315]

The Directive on Temporary Agency Workers (2008/104/EC) legitimized agency work, defined private employment agencies as the employer[316] and provided equal treatment for assignment workers as that of workers directly hired by clients. One of the main objectives of the Directive was to correct the negative working conditions for temporary workers who suffered a pay gap with those hired directly by the employers, together with the gap in training and in working conditions, as well as greater exposure to physical risks, intensity of work and accidents at work.[317]

In most EU member states, the principle of equal treatment means that for the purposes of basic working conditions, the legislation, collective agreements,

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315 European Commission, Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security (Brussels: European Commission, 2007).
The components of flexicurity are:
- Flexible and reliable contractual arrangements (from the perspective of the employer and the employee, of ''insiders" and ''outsiders") through modern labour laws, collective agreements and work organisation;
- Comprehensive lifelong learning (LLL) strategies to ensure the continual adaptability and employability of workers, particularly the most vulnerable;
- Effective active labour market policies (ALMP) that help people cope with rapid change, reduce unemployment spells and ease transitions to new jobs;
- Modern social security systems that provide adequate income support, encourage employment and facilitate labour market mobility. This includes broad coverage of social protection provisions (unemployment benefits, pensions and healthcare) that help people combine work with private and family responsibilities such as childcare.

316 Apart from the UK, in all EU Member States the assignment worker is generally defined as an employee of the agency working under the managerial authority of the user company (i.e., client). In Czech legislation, both the agency and the client are employers.

317 The two other objectives were 1. to better develop flexible forms of work to promote job creation and higher levels of employment through reducing restrictions placed on temporary agencies (the perceived positive role of temporary agency work in bringing people into work and reducing unemployment as well as supporting labour market access of specific target groups was an important rationale, and 2. the perceived need for the EU to set common minimum standards for temporary agency work in order to prevent "unfair competition" between member states.

or other binding agreements (general company pay scales are included, as are company guidelines) applying to the sector of the user company or to the user company will apply to temporary agency employees. In a few member states, including in the UK, the working conditions that apply to the temporary agency employee are those that apply to a comparable employee at the same company.[318]

Exceptions, called "derogations," from the equal treatment principle, are permitted but a country which opts for an exception must take measures to prevent misuse. One derogation is a qualifying period before equal treatment becomes effective. In the UK, agency workers are entitled to full equal treatment once they have completed a 12-week qualifying period.

The Directive also requires appropriate measures to prevent misuse in the application of any exception such as the qualifying period and in particular, successive assignments designed to circumvent the Directive. The risk of circumvention is particularly high in the case of a qualifying period, as it creates an incentive for the client to enter into successive short contracts with the agency to reset the qualifying period and therefore never face the obligation to pay equal wages.

The UK has adopted detailed measures to avoid circumvention of the law by providing that, in case of a break of less than 6 weeks by an agency worker on assignment at a user undertaking, the qualifying "clock" is not reset to zero. In Ireland, a gap must be at least 3 months.

Australia

In Australia, assignment workers must receive at least the minimum entitlements in the governing terms and conditions of employment for a sector or where the agency has its own enterprise agreement relating to wages and working conditions, that agreement.

Policy Objectives

As difficult and vulnerable as the triangular relationship is for those who have to work in it, it has become increasingly commonplace. Industry makes use of it for many purposes, such as spikes in demand, seasonal fluctuations, and as a device for vetting a permanent workforce. In some extreme situations, the

318 The comparability standard has been seen as potentially problematic or subject to abuse by the company, as it may in fact be a lesser standard where a "dummy comparator" is hired at the company, with considerably lower working conditions than other employees in order to use as the comparator for temporary agency workers.

entire workforce is "temporary". While as a society we might strongly prefer that employers made less use of temporary help agencies, it is not practical for Ontario to regulate it out of existence, nor to overregulate the industry. Given the use which clients make of this device, and its growing usage globally, as a society we must decide which aspects of it are incompatible with decency and to be clear about the objectives and purposes we are attempting to meet through regulation.

What are the policy objectives that should drive regulation in this area?

7.3.2 Compensation Equality and Job Permanency

The first principle, that should be accepted, and the first objective, is that as a general proposition these workers should be paid the same as others performing the same work in the same establishment. In the section above regarding compensating part-time, casual, temporary and contract workers, we noted that the principle that those who perform substantially the same work should be paid the same is a powerful equitable argument that appeals to a fundamental sense of fairness and decency grounded in equality of treatment. Having recommended the application of that principle for those employees, it would be inconsistent to recommend something different here. At the same time, other jurisdictions have exceptions to the principle which should be considered as well.

One of the most criticized aspects of how assignment workers are treated by some clients is that they are kept in these positions for long periods of time, becoming in effect, "perma-temps", where they are treated in an inferior, and, many believe, discriminatory fashion compared to someone directly hired by the client. We agree that the practice of permitting "perma-temps" is inconsistent with decency and the fundamental demands of equality of treatment. One primary objective then is ending the plight of "perma-temps" by requiring equality of treatment after a fixed period of time.

In this regard, the Europeans who accept the fundamental principle that assignment workers should be paid the same as the client's direct employees also have a number of exceptions, one of which, as in the UK, is a "qualifying period" during which the assignment employee does not need to be paid equally. In the UK, the qualifying period is three months. We are attracted to the concept of a qualifying period, because it is an accepted practice in a jurisdiction which accepts the principle of equality, and because it broadly accords with notions of a starter or a probationary rate, which is quite common in workplaces generally.

We are not recommending a limit on the duration of the triangular relationship itself but we do seek to protect the employee from being unfairly compensated.[319]

There is a material difference between the part-time, casual or temporary worker hired by the client directly and assignment workers sent to the client by a temporary help agency. That difference is that the client using a temporary help agency must pay the agency for the service of finding the assignment worker, plus a profit margin for the agency on the labour of the worker, and pay for the labour of the worker.

In principle, we agree the assignment worker should be paid the same as the employees of the client who perform the same job. In fact, assignment workers typically receive compensation that is significantly less[320] than the client's direct hires.

One of the major justifications given for the use of temporary help agency workers is that it is a gateway for some vulnerable workers in precarious work into permanent employment. How successful this is in practice is unclear and the data is conflicting.[321] Anecdotally, we do know that clients finding a good worker will be reluctant to let that worker go if they require a permanent employee, and will take steps to make those workers permanent. From a policy point of view, one major goal in regulating this work is to encourage and make possible the achievement

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319 There may be many reasons why all concerned may want to continue the triangular relationship from the existence of restrictions on direct hiring to the extension of specific projects. There is no need to regulate this but only the compensation payable beyond the qualifying period.

320 Our comments here are directed at staffing agencies paying generally low wages to employees and not to the placement of skilled personnel to better paid positions.

321 The American Staffing Association claims that "one-third of temporary and contract employees were offered permanent positions by clients where they worked on assignments—two-thirds of those accepted the offers of employment.": https://americanstaffing.net/staffing-industry/workforce-solutions/; A 2008 Canadian study (Fang, Tony, and Fiona MacPhail. "Transitions from Temporary to Permanent Work in Canada: Who Makes the Transition and Why?" *Social Indicators Research* 88, no. 1 (August 2008): 51–74, suggests the number of employees transitioning from temporary to permanent work may be as high as one-half over the period of a year. In a literature review done for this Report, Katherine Gilchrist, Temporary help Agencies, 2016 Queens Printer noted that "Surveys from around the EU (discussed subsequently) show that while temporary agency worker may be a stepping stone for some to full-time, permanent employment outside of the temporary agency worker, it varies considerably from country to country and in the types of work the temporary agency worker is engaged in through the agency." One American study from 2006 Autor and Houseman (2006) indicates that agency work may be particularly effective for disadvantaged workers as a route out of poverty because employers may be reluctant to hire such workers directly but more willing to accept them as temporary help and then asses them. A recent study published in 2015 of a single large agency in the US over a lengthy period, showed that permanent hiring was much less common than the studies referred to above, amounting to only 6.6% overall and approximately double that in some unskilled areas: 2015 Temporary Help Employment in Recession and Recovery Susan N. Houseman, Carolyn J. Heinrich, Upjohn Institute working paper; 15-227.

of permanent employment for vulnerable workers in precarious work, even if this is for a relatively small group in the overall workforce. It is also the case, however, that some workers doing this kind of work do not want permanent employment, at least not with some particular clients.

If clients rely on a third party to refer people from whom they can potentially choose for a regular workforce, they will presumably accept workers they might not otherwise accept, and give people a chance to prove themselves who might otherwise have a more difficult time being hired. The potential to be considered and accepted for permanent employment by the client will be important for some agency employees.

If providing opportunities for permanent employment is a worthwhile goal, then that militates in favour of a longer qualifying period so that the client has a longer opportunity to assess the worker and can feel comfortable in making a decision to offer him\her employment. It is also important that during the qualifying period assignment workers be made aware of permanent openings and be able to apply. It should also be a requirement that prior to terminating the relationship at the end of the qualifying period, the client must consider offering the assignment worker an available position with the client which is compensated on the same basis as the client paying its own direct hires.[322]

One factor influencing the length of the qualifying period is the fee payable to the agency by the client when the client hires the assignment worker on its own payroll. Such fees are obstacles to the client hiring the worker into its own workforce. In order not to discourage the client from offering the assignment worker a permanent position, Ontario law now permits such a fee to be charged only for the first six months after the assignment worker is assigned to the client.[323] The temporary help industry argued forcefully and persuaded the government in 2009 that it requires a six-month period because otherwise it would not recoup its recruitment costs. We are uncertain whether this argument applies in the case of lower paid workers or whether it really only applies to higher paying jobs. In any event, a longer qualifying period is more likely to give more assignment workers a better opportunity to be permanently placed than would a shorter qualifying period. Clearly, if the qualifying period ended prior to six months, the fee would

322 It goes without saying that this compensation should be the genuine compensation paid to the client's own employees and not an artificial construct done for the purpose of avoiding the purpose of the legislation.

323 See Section 74.8.2 of ESA.

be payable and there would be an incentive for clients not to hire the assignment worker. Accordingly, the qualifying period should end just at or after the time the fee is no longer payable. In practical terms this should mean the client will at the end of the six month period turn its mind to offering the assignment worker a job directly with the client and will not have to pay the agency a fee if the assignment worker is hired. This should incentivize the hiring of assignment workers into permanent jobs at the end of the qualifying period.

A six month period corresponds to a reasonable probationary period for unskilled work and provides the client a reasonable opportunity to consider a permanent hiring.

A six month qualifying period means the long term placement of people in positions with the client who are paid on an inferior basis as “perma-temps” will become illegal. As stated above, the triangular relationship can continue past the qualifying period but the inferior treatment with the clients own employees would not be permitted.

A concern with our recommended approach is that it could unnecessarily restrict professional and skilled employees on longer assignments and projects, and the clients who use the services of such persons. Our mandate is generally to protect vulnerable workers in precarious work; there are higher paid workers who do not need the protection of the Act or for the agencies and clients who employ them, the regulation would be unnecessary and invasive. We think this concern can be met by placing an income cap on the operation of this recommendation such that it does not apply to higher earners. We recommend that the provision not apply to persons at or above a cap of 2.5 x the minimum wage (converted to a weekly or annualized salary based on a 40 hour week). This would be an annualized salary of $59,280.

The EU has pointed out that exceptions to such a qualifying period can be abused and what is required is a mechanism that prevents the client from simply stopping the relationship one day and starting anew the next, such that the requirement for equal treatment is never operational. In our view this requires a reasonable lengthy break before an assignment worker can be brought back without the protection of equality of treatment. The client should have to assume that the worker will be unavailable at a later period, and if they want the worker to remain, they would be well served by offering them permanent employment. We recommend a compulsory break of not less than three months.

Recommendations:

99. Assignment workers shall not receive less compensation than a comparable employee of the client performing similar work.

    This provision does not apply during the first six months that an assignment worker performs work for a client. Only a break in the assignment of longer than three months will negate the obligation to compensate the assignment worker equally to a comparable employee of the client performing similar work.

100. A client shall make best efforts to ensure assignment workers are aware of all available openings for jobs with the client and should consider, in good faith, any assignment worker who applies for a position.

101. Prior to terminating the employment relationship with an assignment worker, the client shall consider, in good faith, whether the assignment worker is suitable for an available position with the client.

    These recommendations do not apply to persons at or above a cap of 2.5 times the minimum wage (converted to a weekly or annualized salary, based on a 40-hour week).

7.3.3 Termination Pay

Under the ESA, the agency is deemed to be the employer of record. Once there is an employment relationship between an agency and an assignment worker, the relationship continues whether or not the employee is working with a client of the agency on a temporary basis. The fact that an assignment ends does not mean that the employment relationship with the agency ends.

Rights to notice on termination operate differently for an assignment worker working for a client, and an employee hired directly by the client working at that same workplace. If both employees do the same work at the client's business for 4 months and both are "let go" without notice and without cause, the client would be required to pay its direct employee termination pay in lieu of notice of 1 week, but would have no payment obligations[324] to the assignment worker.

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324 Termination pay calculation is different for assignment workers than regular employees under the ESA (see section 74.11.7).

The agency also does not have such an immediate obligation to the assignment worker because the loss of work (i.e., assignment) is not technically the end of the employment relationship. The act currently treats this situation as though it is a temporary layoff, and no termination pay is payable by the agency to the assignment worker if the worker is referred to another client by the agency within 13 weeks (in any period of 20 consecutive weeks).[325]

The termination pay provisions of the ESA for assignment workers are very complex and it is very doubtful if many assignment employees understand if they are entitled to termination pay, when, and how much.

Assignment workers are treated as if being told to leave the client workplace at the direction of either the client or the agency is a temporary layoff. In a temporary layoff, an ordinary employee is laid off for what might turn out to be a temporary period and there is not necessarily the intention to lay off permanently. The relationship between that worker and the employer is a direct one and employees are likely to have worked for that employer for varying periods of time, including some employees who will have worked for the employer for years. The reason for the 13 week period in a period of 20 weeks is presumably because that is the period without recall to work after which it makes sense to consider the employment at an end, and make termination pay payable.

In the case of assignment workers, there is likely no possibility of that client having the assignment worker back to work. The removal of the employee from work is not intended as a temporary layoff by the client but as the end of the relationship with the client. The question is not if there is a possibility that there will be more work with the client, but whether the agency will refer the worker to another client. Projecting that forward to 13 weeks in the next 20 is taking an existing rule not intended for this situation and applying it to a situation where it frankly makes little sense and has no real application. If a further referral is going to happen, it should occur within a reasonably short period of time after the assignment worker is no longer working for the client. The existing time period using the temporary layoff rules make no rational sense in the context of the likelihood of a future referral.

The purpose of notice and termination pay is to give workers a period of time to adjust and find other work. The ordinary rule for regular employees is an

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325 Or more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks of layoff in any period of 52 consecutive weeks under specific circumstances (for complete list see section 56(2) of ESA).

entitlement to one weeks' notice after three months or more of employment, two weeks' notice after one year and up to a maximum of 8 weeks' notice or pay after 8 years of service.

The current state of the law permits the relationship with the client to end without any obligation by the client for notice or pay, and equally no obligation by the agency for notice or pay for the end of an individual assignment with the client (the agency is, however, responsible for providing notice or pay in lieu of notice if they end *their* employment relationship with the assignment worker). This makes the precarity and vulnerability of assignment workers all the greater.

In the triangular relationship between the agency, the client, and the assignment worker, who is called the employer is not as important as is the allocation of responsibility to be determined from a policy point of view by the statute. The point is not to determine rights based on the fiction that the employee remains employed, but to determine what rights ought to apply for notice or pay in these circumstances based on what makes sense and is fair and decent in the circumstances. It does not make any sense, and is not fair or decent given the precarity and contingency in the entire scheme for assignment workers to get virtually no notice and no pay because of the possibility of future assignments. The situation of an assignment worker is not equivalent to a temporary layoff in form or substance.

In our view, employees should receive the notice that the law requires of one week after three months of work in an assignment and otherwise as required by the ESA. If the client or the agency wants to terminate the assignment, the assignment worker should receive notice. If the agency is required to give the notice, it will likely, in turn, as a practical matter, require the client to provide the notice to it, in its contract with the client. There is no cost to the agency or the client if notice is given.

If notice is not given, pay in lieu of notice should be forthcoming unless the agency refers the assignment worker to other clients for the number of day's equivalent to the period of the notice, within three months of the end of the assignment. In other words, if the assignment worker is not given notice of the end of the assignment, and is owed five days' pay, the assignment worker should be paid, unless s/he is provided five days of work in the next three months with other clients and any days worked would lower the amount owing. Of course, if the assignment worker unreasonably refuses an assignment, the assignment worker will be deemed to have worked the assignment for purposes of calculating the amount owed.

These recommendations are not intended to affect the amount of notice or pay owing to an assignment worker if the agency terminates the employment of the assignment worker except if the end of the assignment and the end of employment by the agency coincide, there is only one payment owing, (the larger), not two.

Recommendation:

102. The existing rules with respect to notice of termination and termination pay for assignment workers, which rely on the temporary layoff provisions of the *Employment Standards Act, 2000* in relation to payment of termination pay, should be revoked and the following changes made:

    The agency should provide to the assignment worker notice with respect to the end of the assignment with a client, whether the termination was caused by the agency or the client, in an amount equivalent to the amount of notice currently required under the *Employment Standards Act, 2000*. If notice is not given, unless the employee is referred to work for other clients of the agency, termination pay is payable by the agency for the number of days equal to the amount of the notice, which amount must be paid within a period of 13 weeks following the end of the assignment. Each day of work reduces the amount of termination pay owing.

    This recommendation is not intended to have any impact on the amount of notice or termination pay owing by the agency if it terminates the employment of the assignment worker except that, if the end of the assignment and the end of employment by the agency coincide, only one payment is owing, the larger of the two payments.

7.3.4 Workplace Safety for Assignment Workers

There appears to be little doubt that temporary workers are at a significantly increased risk of injury at work as opposed to the regular workers of the client. The United States Depart of Labour, Occupational Safety and Health Administration (OSHA) website states[326]:

> *As detailed in the documents posted on our website (www.osha.gov/temp_workers), temporary workers are at increased risk of work-related injury and illness. In recent months, OSHA has received and investigated*

326 https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html.

> *many reports of temporary workers suffering serious or fatal injuries, some in their first days on the job. Numerous studies have shown that new workers are at greatly increased risk for work-related injury, and most temporary workers will be "new" workers multiple times a year.*[327]

In 2014, the Director of OSHA[328], said:

> *We've seen over and over again temporary workers killed or seriously injured on their first day at work. When we investigate, we see that most employers don't treat temporary workers the way they treat their permanent employees — they don't provide them with the training that is necessary.*

In Ontario, research by the Institute for Work and Health over a 10 year time frame found that new workers face a higher injury rate than permanent workers and since temporary workers are by definition new workers, they have a much greater risk of injury. Risk is very high especially in the first month on the job.[329]

The issue here is whether the insurance system under the Workers Safety and Insurance Act (WSIA) is allocating risk and costs inappropriately such that it is in the economic interest of clients to assign more dangerous work to assignment workers. This is work for which assignment workers are the least suited because they are generally new to the workplace and therefore more susceptible to injury.

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327 For studies in this area see, for example, Smith CK[1], Silverstein BA, Bonauto DK, Adams D, Fan ZJ, Temporary workers in Washington state, Am J Ind Med. 2010 Feb; 53(2):135-45 which found that assignment workers had higher injury rates for all types of injuries and double that of employees of clients in construction and manufacturing jobs. Pro Publica's study of claims in five states showed that assignment workers had a significantly greater risk of injury than permanent employees: "In California and Florida, two of the largest states, temps had about 50 percent greater risk of being injured on the job than non-temps. That risk was 36 percent higher in Massachusetts, 66 percent in Oregon and 72 percent in Minnesota": https://www.propublica.org/nerds/item/how-we-calculated-injury-rates-for-temp-and-non-temp-workershttps

328 The Director (United States Occupational Safety and Health Administration) as quoted in the New York Times, August 31, 2014 Available online: http:// www.nytimes.com/2014/09/01/upshot/the-changing-face-of-temporary-employment.html

329 Sara Morassaei, F Curtis Breslin, Min Shen, Peter M Smith, Examining job tenure and lost-time claim rates in Ontario, Canada, over a 10-year period, 1999–2008; Occupational and Environmental Medicine Mar 2013, 70 (3) 171-178.

Background

The agency is deemed to be employer of record for purposes of the WSIA, including paying Workplace Safety and Insurance Board (WSIB) premiums, WSIB experience rating, and return to work obligations. The agency pays WSIB premiums for assignment workers as they move through assignments (i.e., clients do not pay anything to WSIB). These premiums presumably are charged back to the client directly or indirectly through fees (e.g., as part of the markup).

WSIB experience rating programs are meant to encourage employers to reduce injuries by providing refunds to safe employers and surcharges to employers with high injury rates. WSIA premium-based refunds or surcharges are based on an employer's accident record. In the THA sector, experience rating costs and benefits currently are applied to the agency supplying and paying the worker, not to the client to whom the worker is supplied and is based on the THA industry rate, not on the particular client industry rate. This is the case even though injuries occur at the client workplace, which is controlled by the client who decides what work the assignment workers perform.

The WSIA premiums paid by agencies currently are often significantly less than those paid by the clients for direct hired staff doing the same work. This provides an incentive for the client to use assignment workers to perform more dangerous work. A client can save money by assigning work that is more likely to give rise to an accident or injury to assignment workers rather than to its direct hires. This is potentially a selling point for the temporary help industry to convince some clients to use their services as it can lead to significant savings to the client.

In Ontario, The Institute for Work and Health has set out its findings that temporary workers are at greater risk of injury, in part because of the financial incentives and disincentives in the WSIA, the vulnerability of temporary workers to management by temporary help agencies of workplace accidents, and the limitations on the responsibility for integration back into the workplace placed on clients.

> *Because temp agencies are the employers under Ontario's Workplace Safety and Insurance Act, they are the ones subject to experience rating surcharges when worker injuries occur – not client employers who actually control the worksite.*

Temp agencies, by and large, prefer to maintain responsibility for claims and costs because it increases business. And they can generally manage accident costs and consequences, as follows:

- *some agencies (involved in this research) discourage injury reports by requiring extensive written accounts of the accident and/or questioning the injury's legitimacy;*
- *agency workers are mostly short-term and rarely subject to the duty to rehire after a workplace injury, and, in any case, rehiring only means putting workers back on the roster, not into jobs with clients;*
- *because temp agencies can operate with very little physical infrastructure – "you can run one with a Blackberry," noted one workers' compensation regulator – smaller agencies can close and reopen in the face of very high fines or experience rating surcharges, thus avoiding these costs if company directors have no identifiable assets; and*
- *because their workers' comp premiums are sometimes lower than those of their client employers, temp agencies can build these premiums into their contract prices.*[330]

The *Stronger Workplaces for a Stronger Economy Act, 2014*, provided the government with a regulation-making authority to require that the WSIB, under its experience rating programs, ascribe injuries and accident costs to the clients of the THAs where injuries to agency workers actually occur rather than to the agencies themselves.

On December 1, 2016, the government made regulation 470/16, which amended O. Reg 175/98. The amendments related to THAs do not come into effect until January 1, 2019.

Under the amended regulation, THAs will be classified for premium rate calculations falling under the class of industry of the client to which they supply workers. This would ensure that a THA's premiums reflect the business activity and risk of the industries to which it supplies workers. For example, if an employment agency supplies office workers to a plant that is part of the auto sector, the agency would have to pay the same manufacturing premium rate that the auto sector manufacturer pays for its own workers.

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330 http://www.iwh.on.ca/at-work/69/temp-agency-workers-falling-through-cracks-in-ohs-system

Under the new structure a THA will have a premium rate for each industry to which they supply labour, i.e. if they supply labour to clients in several industry classes, they would have a rate established based on that THA's own experience in each particular industry class, as opposed to the current THA industry rate which is lower.

However, notwithstanding this change in the regulation, the premium rates would still be based on the claims experience of the individual THA that supplies labour to each respective client in that industry. For example, the particular manufacturing rate for a THA would be based on their own risk profile (not that of their client), and that cost would be a function of the THA claim costs in manufacturing. Therefore, it will be possible for the THA's premium rate to be more expensive or cheaper than the client's premium rate. As the THA is considered the employer of record under section 72 of the WSIA, their rate would be adjusted based on their own risk profile in each particular sector to which they supply labour, and not that of their clients. The only change from the status quo will be that the premium structure will be based on the industry of the client and not the lower THA industry rate.

Analysis

It is important that the risk of higher injury be properly allocated. There should be financial incentives and disincentives to discourage workplace practices that cause higher rates of injury. Businesses with workplaces that carry a high risk of injury ought to pay premiums and surcharges in accordance with that higher risk. At present, because WSIA treats agencies as the employers of assignment workers, the risk of injury to assignment workers is being allocated to agencies and not to clients and based on the THA industry rate not the client industry rate.

Risk should not be allocated on the basis that assignment workers are the employees of the agency. The provision in a statute that the agency or the client is the employer is simply a means of allocating liability, responsibility and risk, and is not a conclusion of status for all purposes. In fact, the allocation of liability and responsibility will vary according to the context. Accordingly, under the ESA, while the agency is the employer of record, clients have joint and several liability for many rights of assignment workers. In contrast, for the purposes of a union certification application under the LRA, the client is often found to be the true employer when determining whether temporary workers should be included in a bargaining unit at the client workplace. (See the discussion in Chapter 12 on Who is the Employer Under the LRA.)

In the WSIA context, the reality is that it is the business of the client that creates the higher risk and that workplace is controlled and work directed in most cases by the client. In the interests of safety and workplace responsibility, the client should be responsible for injuries sustained by its own staff and by assignment workers.

The government was obviously aware of the importance of this issue when it passed the *Stronger Workplaces for a Stronger Economy Act, 2014*. It explicitly provided a regulation-making authority to allow the WSIB, under its experience rating programs, to ascribe injuries and accident costs to the clients of the THAs where injuries to agency workers actually occur rather than to the agencies themselves. A new system will be implemented in 2019. It is unfortunate that this is delayed but it is preferable for the premium structure to be based on the industry to which workers are supplied and not the THA industry itself. The concern that we have, is that in the new system, it will still be possible for the THA rate to be more expensive or cheaper than the client rate, depending on the accident experience of the THA as compared to the client. This provides an incentive for clients to switch agencies from one with an expensive existing poor safety record to a new agency with a better accident record, perhaps because it has yet to supply many workers to that industry.

Entry of new agencies into the THA industry is easy, low cost with few barriers to entry and a new THA could offer clients cheaper rates than an incumbent THA with more expensive premiums. This may lead to a decision by the client to hire the new agency and reduce its costs, but at the expense of exposing workers referred by that agency to greater risk.

The key principle is that the cost of injuries occurring to assignment workers in the workplace should be borne by the client using their services and directing them in the workplace. Otherwise adequate steps may not be taken to protect such workers from injury. THA liability and accident experience independent of the client is a fiction. Using assignment workers should not permit a deviation from the principle of the client being fully liable and responsible for the risks it creates and manages and for the injuries that occur in its workplace.

Recommendation:

103. With respect to the allocation of risk and liability, the government should accept the principle that the client, not the agency, is responsible for injuries incurred in a workplace by an assignment worker.

7.4. Hours of Work and Overtime

The major focus of those making submissions to us in this review regarding hours of work was not directly on the existing hours of work provisions of the Act but more on what was alleged to be missing in the Act, such as provisions relating to scheduling. The other major concern was with exemptions to the Act, many of which relate to hours of work and overtime. We deal with exemptions in Chapter 6 and with scheduling, above.

On the remaining hours of work and overtime issues, no one issue surfaced that affects vulnerable employees and precarious work in a major way, except the averaging of overtime to which we have proposed some changes.

In terms of the impact on employers, overall, we found in our review that Ontario's existing approach to hours of work is complex, somewhat unconventional, and some provisions could theoretically pose difficult issues for employers. However, we heard no serious complaints from the employer community that overall the existing system posed significant problems for their operations or flexibility. At a practical level, the existing system seems to work effectively. However, some small changes to the system are advisable to help employers better adjust to the marketplace. If in the future the provisions as currently structured prove difficult in practice, the government will have to look carefully at reform, likely adapting them on a sectoral basis.

7.4.1 Employee Consent

Ontario's uniqueness lies in its system of requiring written employee consent for various deviations from statutory requirements. For example, if the employer wants employees to work beyond 8 hours in a day or beyond regular workday hours, or beyond 48 hours in a week, individual written consent is required. While employers are not particularly happy with the time and steps necessary to obtain these consents, there was no widespread drive to repeal the requirement. However, many employers seemed unaware that obtaining consent electronically was permissible, and so we would recommend that this be set out in the legislation or regulations and not just be maintained as an MOL practice.

The threshold at which employers must ask for employee consent if they want them to work overtime in Ontario is the lowest in the country (along with Manitoba), but we can only assume that obtaining consent is not a significant issue because most employees provide it.[331]

While we did not hear from many employers that employee refusal to work overtime was causing problems. Those that did raise the issue were in sectors with a just-in-time manufacturing model or other businesses where there was an urgency to the work being performed. In some cases, we heard that that the consistent refusal of a minority of employees to work overtime caused problems especially where employees worked closely together as members of a team and the absence of a team member could cause difficulty with work being performed effectively.

This employer concern is not an issue in unionized workplaces where unions often grant consent on behalf of the workforce to work overtime and individualized consents are not required. Of course, individual employees will have family and other human rights considerations that would not permit them to work overtime and these obviously have to be respected and accommodated. However, this model in unionized workplaces demonstrates that we do not now rely on individual employee consent in all workplaces.

Accordingly, in our view, it may be appropriate in a non-unionized environment to also have an option where the majority of employees in a secret ballot vote process could determine the issue binding individual employees, except where human rights considerations apply or in the circumstances referred to in the Arthurs Report.[332] These votes could be supervised through the Ministry or the OLRB which has extensive experience in conducting workplace votes, and the results could be in place for a period of time after which there could be reconsideration by the group.

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331 Many employers obtain the consent at the point of hiring. These can be revoked with relatively little notice. Likely many employees provide consent or do not withdraw it because they feel they have little choice. Employee advocates worry about this reality but would certainly oppose withdrawing the necessity for consent. The alternative is to impose absolute rules on employers and employees that cannot be varied by consent, but this would impose rigidities in the system that would likely be unacceptable to the vast majority of employees and employers. Ontario has only one hours of work rule that cannot be altered by consent, and that is the compulsory 11 hours of daily rest.

332 He recommended that there should be an absolute right to refuse where: the employee has unavoidable and significant family-related commitments; scheduled educational commitments or a scheduling conflict with other employment (part-time workers only). Harry Arthurs, Fairness at Work: Federal Labour Standards for the 21st Century (PDF) (Gatineau: Human Resources and Skills Development Canada, 2006), p. 146. Available online: www.labour.gc.ca

In our view, because this option reduces individual choice, it should not be an automatic option in every non-unionized workplace. Rather it should be an option that may be available, in non-unionized settings, on a sectoral basis. What we intend is that if individualized consents are posing problems for employers in a sector, this is a matter that should be raised in the sectoral committee (our proposal for sector committees is in Chapter 6) and an attempt made to achieve consensus on the need for an option for group consents at individual workplaces in that sector. In other words, it would be something that sectoral committees could discuss and recommend to the Minister, and some individual employers in a sector could then consider it as an option.

Recommendations:

104. The Ministry of Labour's practice of permitting employee consent agreements to be obtained electronically should be set out in the *Employment Standards Act, 2000*.

105. An option for obtaining group consent to work overtime, or to other hours of work rules, should be made available through a secret ballot vote on a sectoral basis, if it is appropriate for that sector.

7.4.2 Requirement for Ministry of Labour Consent to Work Longer Than 48 Hours a Week

From 2001 to 2005, employees and employers could agree in writing to a work week of up to 60 hours and no approval was required by the Ministry of Labour. Ministry approval was needed for agreements to work beyond 60 hours in a week.

Changes were subsequently made in 2005 to require the Director of Employment Standards to approve all agreements between employers and employees to work more than 48 hours in a week – not just those above 60 hours a week.

The return to the need for Ministry approval was in part a response to criticism that without the requirement for Ministry approval the law was effectively making possible the 60-hour work week. Presumably, the policy rationale for the requirement of Ministry approval on top of employee consent is that the employee consents cannot be relied upon without monitoring by the Ministry.

If the intent of the change in legislation was to achieve active Ministry oversight on the length of the work week, this has not occurred. Our understanding is that Ministry approvals to work 48-60 hours a week are given routinely. There is little scrutiny applied to these applications. In general, it appears that the Ministry currently does not exercise any substantial or meaningful policy judgement or framework within which these applications are evaluated. Applications for hours beyond 60 are scrutinized.

Is there any purpose served by maintaining the requirement? Some would argue it is worth maintaining just to discourage employers from applying. We disagree. If every employer who applies generally obtains Ministry approval, there is no reason for the unsophisticated employer who does not know that the application will be routinely approved to be disadvantaged by its lack of knowledge as to how the system works. Moreover, Ministry approval conveys the false impression to the employees and to the world that the government has turned its mind to the issue of the longer hours in that workplace and approved them, when in fact it has done no such thing.

Nor are we convinced that the Ministry should apply its mind to those kinds of decisions. If for 10 years the Ministry has just approved virtually all the applications and we have heard no outcry that there has become a standard, or prevalent or even contentious pattern of 60-hour work weeks, then there is no basis for maintaining the requirement.

It appears to be wasteful, unnecessary and misleading to continue this requirement for Ministry approval of work weeks between 48-60 hours and just creates unnecessary paperwork and regulation. The requirement that the Director of Employment Standards approve all agreements between employers and employees to work more than 48 hours in a week should be removed.

Ministry approval for permission to work more than 60 hours a week should be maintained.

Recommendation:

106. The requirement for obtaining Ministry of Labour consent to work 48 – 60 hours a week should be repealed.

7.4.3 11-hour Rule

The maximum number of hours employees can be required to work in a day without written employee consent to work longer is 8 hours or the number of hours in an established regular workday; however, there must be an 11-hour daily rest period. Taking into account the 11-hour daily rest requirement, the maximum regular workday that an employer can establish is 12 hours per day (because there are two 30-minute meal periods in that time frame) which cannot be exceeded, either by employee consent or Ministry approval. For example, if the regular established work day is 9 hours per day, written agreement would be required for the employee to work beyond 9 hours per day, up to 12 (plus two thirty-minute meal breaks) but no more.

Ontario is the only province to require 11 consecutive hours off each day. Ontario is the only Canadian jurisdictions to have daily rest rules mandating that the longest an employee can be required to work in a day is 12 hours and where no variations or extensions can be made. This is a hard cap on daily hours.

We heard from a few employers that this rule poses some problems for them but we were given no details and no specifics. The rule has been in place since 2001 and clearly most employers have either adapted to it or the MOL does not enforce it. We considered loosening the rule to permit employee consent as in some other provinces or requiring Ministry approval. We rejected the latter option because it just adds yet another layer of regulation and we rejected the former because we are inclined to think that an absolute protection on the total number of hours of work in a day is a reasonable protection as a health and safety matter.

While we have decided to recommend maintenance of the status quo, if there are industries and\or areas of the economy where longer daily hours are required, that issue can be raised on a sectoral basis in the committee process we have recommended, where a discussion can take place as to whether a lower minimum period of daily rest is appropriate and necessary in the particular circumstances of that sector.

Recommendation:

107. Maintenance of the status quo. The Ministry of Labour should be open to considering varying the 11-hour rule on a sectoral basis, if appropriate.

7.4.4 Overtime and Overtime Averaging

7.4.4.1 Overtime

We were urged by almost all the organizations advocating for employees and by the unions to move the trigger for overtime work from 44 hours to 40. Although the trigger for overtime in Ontario is higher than in Quebec, British Columbia, Manitoba, Saskatchewan, Newfoundland/Labrador and the Federal jurisdiction, we have been cautious recommending increased across-the-board minimum entitlements for all employees. Instead we have generally (but not always) emphasized targeted changes aimed at improving the security and circumstances of vulnerable workers in precarious jobs consistent with our mandate.

We have also listened to the employer community. We agree that the current uncertain state of the economy, the future of trade with the US which is our largest trading partner, our history of slow productivity growth, improvements to the CPP and the effects of cap and trade, the potential impacts of some of our recommendations on some employers, (e.g., eliminating the student and liquor server minimum wage provisions, the new part-time rule, and others) are such that we should be cautious in recommending broad changes which might directly affect the bottom line of those same employers. The trigger for overtime should remain at 44 hours per week.

Recommendation:

108. The trigger for overtime should remain at 44 hours per week.

7.4.4.2 Overtime Averaging

The Act currently provides that agreement in writing is required between the employer and employees to average hours of work in order to determine an employee's entitlement to overtime pay. In addition, Ministry of Labour approval is required for all such agreements. We understand that employer applications to permit overtime averaging over a period of 4 weeks or less are routinely approved by the Director of Employment Standards. Applications to permit overtime averaging over a period of more than 4 weeks are scrutinized.

There is no limit in Ontario on the number of weeks over which overtime can be averaged. This contrasts, for example, to the U.S. where the limit is two weeks. In Canada, only Nova Scotia, Saskatchewan, and British Columbia allow hours to be averaged.

In general, it appears that the Director of Employment Standards will approve up to 4 weeks averaging for non-unionized employers and 6 weeks averaging for unionized employers. The Ministry will consider such factors as whether the averaging provides employees with increased flexibility, whether the threshold for overtime is lower than the Act, (e.g., whether it is lower than 44), whether there are guaranteed hours of pay, and whether employees are paid more for working weekends or unscheduled hours. Generally, however, our understanding is that the denial of approval is rare and, as indicated above, applications for averaging over a four-week period are routinely approved. From the criteria applied on the applications for averaging above four weeks, it is difficult to understand how the Ministry balances the employee interest in being compensated for the long hours worked with whatever employer interest is driving the request for averaging.

In our view, averaging overtime is a necessary and valuable tool for increasing employee flexibility in hours of work while not increasing employer costs. Compressed work weeks and similar arrangements may also serve employer interests in that they may be necessary to enable continuous service or production. What all such arrangements typically have in common is that the total number of hours worked does not extend beyond the overtime threshold over the period of averaging. The scheduling requirements or desire for flexibility is accommodated without adding hours of work beyond the threshold and without added overtime cost.

Where averaging overtime is unnecessary to accommodate employee interests, or where an employer requiring additional longer hours of work at certain times will offset this with fewer hours of work at other times, the case for averaging is less compelling. To the extent it is allowed, it undermines the right to be paid overtime pay for working inconvenient hours. The reason for overtime pay is because working longer than normative hours in a day, or week, or on the weekend is considered an intrusion on what are normally non-working hours. Accordingly, the law requires an additional premium once a certain threshold of hours is reached. If the number of hours that attract the premium can be averaged over a number of weeks, the protection of the law and the premium for working inconvenient hours is lessened and undermined. For example, if an employee works a regular 40-hour week for two weeks and is required to work 50 hours the next two weeks, with averaging over four weeks the employee works 12 hours of overtime in the four week period but is only paid for four hours at overtime rates. It is not clear that there is any justification for this practice. If there is a justification, it should be addressed on a sectoral basis.

We were not provided with any data as to how much the averaging provision costs employees or saves employers.

In conclusion, our view is that as a general matter of principle, there is no reason to undermine the requirement to pay overtime by permitting averaging except: where the purpose is to accommodate employees with flexible work schedules; or, where an employer desires a similar accommodation for business purposes (while not requiring a total number of hours that exceeds the 44 hour threshold over the averaging period); and where the employees are agreeable to this arrangement. If there are business reasons why certain sectors of the economy require more liberal rules on overtime, including averaging, then that is a matter that should be addressed in sectoral committees where it can be understood, justified and provided for in respect of a sector.

Recommendation:

109. Overtime averaging should only be permitted where it would allow for a compressed work week, continental shift or other flexibilities in employee scheduling desired by employees, or to provide for employer scheduling requirements where the total number of hours worked does not exceed the threshold for overtime over the averaging period. Overtime averaging should not be permitted for other purposes, unless a specific case can be made by an industry or sector for averaging on a sectoral basis.

7.4.4.3 Blended Overtime Rate

Ontario is apparently the only jurisdiction in Canada to require that overtime be paid at a blended rate when an employee has two different positions and rates of pay. In other jurisdictions, the employee is entitled to overtime pay based on the rate of pay for the work done in the overtime period. The Canadian Payroll Association asked that this be changed and we agree that the blended rate concept is needlessly complex and overtime should be paid based on the rate for the work performed.

Recommendation:

110. Overtime should be based on the rate in force for the work performed, not on a blended rate if an employee has more than one position.

7.5 Leaves of Absence

The *Employment Standards Act, 2000* currently provides ten unpaid, job-protected leaves of absence. Ontario typically mirrors leaves for which the federal government has provided income support, while the *Employment Standards Act, 2000* provides the corresponding job-protection.

7.5.1 Personal Emergency Leave

The Current Legislation

Personal Emergency Leave is an unpaid, job-protected leave of up to 10 days per calendar year for the purposes of personal illness, injury, or medical emergency, as well as to attend to the death, illness, injury, medical emergency of, or urgent matter concerning, specified relatives. Personal Emergency Leave is intended to assist employees in dealing with personal illness or family emergencies without fear of job loss.

Currently, only employees who work for employers that regularly employ 50 or more employees are eligible for Personal Emergency Leave. Entitled employees have access to Personal Emergency Leave regardless of their length of service.

Section 50 of the *Employment Standards Act, 2000* provides that an employee may use these days for: a personal illness, injury or medical emergency or for the death, illness, injury or medical emergency or urgent matter concerning:

- the employee's spouse;
- a parent, step-parent or foster parent of the employee or the employee's spouse;
- a child, step-child or foster child of the employee or the employee's spouse;
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse;
- the spouse of a child of the employee;
- the employee's brother or sister;
- a relative of the employee who is dependent on the employee for care or assistance.

The Current Environment

In addition to pregnancy and parental leaves, the *Employment Standards Act, 2000*, also provides for other unpaid leaves of absence that are job protected in the following areas:

- Family caregiver leave of 8 weeks per calendar year per specific family member to an employee whose family member who has a serious medical condition that requires care or support.
- Family medical leave of 8 weeks in a 26 week period to provide care or support to a family member who faces a significant risk of death.
- Leave for events such as organ donor, declared emergency, critically-ill child, crime related death or disappearance of a child.
- Reservist leave for the Armed Forces.

In last year's Fall Economic Statement, the government asked us to consider the Personal Emergency Leave provisions of the *Employment Standards Act, 2000* on an expedited basis and to provide a recommendation to address business concerns.

The Threshold

The terms of reference stated that the objective of the Changing Workplaces Review is to improve security and opportunity for those in precarious work and who are made vulnerable by the structural economic pressures and changes being experienced by Ontarians. Many of those employed in workplaces where there are fewer than 50 employees are vulnerable workers in precarious jobs. The focus on vulnerable workers in precarious jobs requires us to address whether the current legal framework effectively protects the rights of such workers. We are also mindful that there are certain groups that are overrepresented in precarious jobs, including: workers with less than a high school diploma, single parents with children under 25, recent immigrants, women and visible minorities.[333]

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333 Noack and Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context* (Toronto: Law Commission of Ontario, 2011).

Ontario is the only Canadian jurisdiction with a scheme of entitlements for leaves that has a threshold exemption for small employers. The impact is to exclude approximately 29% of employees in Ontario from coverage (29% is estimated as being over 1.7 million employees in Ontario).[334] The current legal framework in Ontario grants no protection to over 1.7 million workers who may require time off work for the personal illness or family emergencies covered by section 50.

The Importance of Personal Emergency Leave to All Employees

The rights granted to employees under the *Employment Standards Act, 2000* for Personal Emergency Leave are very important in a modern workplace. Employees are sometimes required to be away from the workplace in the case of illness, injury or medical emergency. This has long been recognized by the *Employment Standards Act, 2000*. Indeed, the health of others may depend on employees who are ill remaining away from the workplace. The prevalence of families where both parents work, of single parent families and an aging population increase the need to recognize a minimum entitlement to time off work to deal with family illness and urgent matters related to families. The granting of bereavement leave in the case of a death in the family is a manifestation of respect, of sympathy and of ordinary human decency.

This right to leave is as important to employees in firms that regularly employ 50 or less employees as it is to employees who work in larger companies.

We were advised in the submissions from an organization representing a large number of small employers[335] that 85% of employers below the threshold already accommodate personal issues even though they are not legally required to do so. If this is an accurate statistic, it reflects recognition by smaller employers of the common sense of accommodating absence for illness, injury or urgent matters regarding family and the practical advantages of establishing good relations with their employees.

We conclude that the current version of the Personal Emergency Leave provisions of the *Employment Standards Act, 2000* do not effectively protect the rights of employees in workplaces that regularly employ less than 50 employees.

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334 Statistics Canada. Table 281-0042 - Survey of Employment, Payrolls and Hours (SEPH), employment for all employees, by enterprise size and North American Industry Classification System (NAICS), annual (persons), CANSIM (database).

335 Submission by Canadian Federation of Independent Business to Special Advisors August 29, 2016.

Recommendation:

111. We recommend the elimination of the 50 employee threshold and that the Personal Emergency Leave provisions of the *Employment Standards Act, 2000* be made available to all employees in Ontario.

7.5.2 Personal Emergency Leave Entitlement

In 2014, the Ministry of Finance released its Long- Term Report on the Economy in which it stated:

> *Productivity growth is a key driver of an economy's prosperity and living standards. Labour productivity growth for Ontario's business sector, including key subsectors, has slowed significantly over the past decade. In addition, Ontario's productivity gap with the United States, its key trading partner, has continued to widen.*[336]

While this productivity gap is explained by many different factors, certainly absenteeism is a factor that impacts on productivity. The literature we have been referred to supports a conclusion that absenteeism contributes to lost productivity and revenue for Canadian organizations. These results were similar to findings for the United States and many European countries.

Statistics Canada's Labour Force Survey provides measures of time lost from work because of personal reasons - specifically illness or disability, and personal or family responsibilities. In Ontario, the average days lost per worker in a year, for illness or disability, was 6.3 days in both 2014 and 2015. For personal or family responsibility (excluding maternity leave), the days lost during same years was 1.4 and 1.5 days respectively[337]. This resulted in 7.8 total days lost per worker in 2014 and 7.7 total days lost per worker in 2015.

Personal Emergency Leave is not easily compared to leave provisions in other jurisdictions because it essentially combines three separate leaves (sick, bereavement, and family responsibility leaves into one with an employer size threshold (50+). A review of Canadian jurisdictions indicated that there is a

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336 Ministry of Finance (2014) *Ontario's Long-Term Report on the Economy*.
337 Statistics Canada. Table 279-0029 - Work absence statistics of full-time employees by province, census metropolitan area (CMA) and sex, annual (percent unless otherwise noted), CANSIM (database).

variety of entitlements and conditions for job-protected leaves. Three Canadian jurisdictions combined personal illness and family responsibility leave into one, however, bereavement leave is always a separate job-protected leave. Alberta is an outlier in Canadian jurisdictions as it does not provide sick, family responsibility or bereavement leave provisions in its legislation.

The Canadian leave provisions are summarized in the following chart outlining statutory entitlements to personal illness leave and family responsibility leave:

Jurisdiction	Personal Illness	Family Responsibility
Quebec	Not more than 26 weeks	10 days
British Columbia	N/A	5 days
Nova Scotia	3 days (Days may be used for medical or similar appointments)	
Manitoba	3 days	
Saskatchewan	12 days	N/A
Alberta	No sick or family responsibility leave provisions under code	
New Brunswick	5 days	3 days
Newfoundland and Labrador	7 days	
Prince Edward Island	3 days (includes 1 paid day after 5 years of continuous service)	3 days
Federal	17 weeks	N/A

In the United States, it is far more common to have no leave protections for these purposes. Some states (e.g., California and Massachusetts) do provide sick leave that is broad in nature. As well, the United States does have the federal *Family and Medical Leave Act* (FMLA) that requires employers with 50 or more employees to provide job-protected, unpaid leave for qualified medical and family reasons. Eligible employees are entitled to 12 work-weeks of leave in a 12 month period for various purposes such as the care for a newborn or adopted child; the care of the employee's spouse, child, or parent who has a serious health condition; a personal serious health condition; any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or twenty-six work-weeks of leave in a 12-month period

to care for a covered service member with a serious injury or illness. While there are similarities in eligibility between the *Family and Medical Leave Act* and Personal Emergency Leave, employees in Ontario are also entitled to a number of leaves that cover similar criteria as the *Family and Medical Leave Act* (e.g., pregnancy and parental leave, family caregiver leave, family medical leave).

The Impact of Personal Emergency Leave on Employers

In most studies, employer groups perceived unplanned/unscheduled absences to be the greatest productivity loss when compared with planned and extended absences. This is because unscheduled absences were found to be the most disruptive to businesses and resulted in greater costs. One study investigating absenteeism in Canada conducted by the Morneau Sheppell's research group reported that the majority of employers surveyed viewed absenteeism as costly and having a negative impact on productivity in their organization and half of the employers indicated that absenteeism was a serious issue in their workplace[338]. The Conference Board of Canada found that, based on 2011-2012 absenteeism rates, organizations estimated that the direct cost of absenteeism[339] is about 2.4% of a firm's gross annual payroll.[340]

It is often recognized that unplanned employee absences are more disruptive to businesses than other types of absences. Several studies have highlighted the greater direct and indirect costs for employers of unplanned absences[341]. Even when employee absences are unpaid, employers often incur significant costs such as replacement workers, overtime costs, administrative expenses for managing absenteeism, and a general loss of productivity in some cases.[342]

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338 Allen, P., & Bourgeois, L. (2015). *The True Picture of Workplace Absenteeism*. Toronto: Morneau Shepell.

339 The direct cost of absenteeism is the salary cost associated with the number of workdays lost. This does not consider any of the indirect costs of absenteeism.

340 Stewart, Nicole. *Missing in Action: Absenteeism Trends in Canadian Organizations*. Ottawa: The Conference Board of Canada, 2013.

341 Allen, P., & Bourgeois, L. (2015). The True Picture of Workplace Absenteeism. Toronto: Morneau Shepell.
Bureau of Labor Statistics, U.S. Department of Labor (2008) Current Population Survey, Annual Averages, Household Data, Table 46, http://www.bls.gov/cps/tables.htm.
Kronos, The Total Financial Impact of Employee Absences, 2010.
Nicholson, S., Pauly, M. V., Polsky, D., Sharda, C., Szrek, H. and Berger, M. L. (2006), Measuring the effects of work loss on productivity with team production. Health Econ., 15: 111–123. doi: 10.1002/hec.1052
Stewart, Nicole. *Addressing Employee Absences: A Look at Absence Management in Canadian Organizations*. Ottawa: The Conference Board of Canada, 2016.

342 Stewart, Nicole. Addressing Employee Absences: A Look at Absence Management in Canadian Organizations. Ottawa: The Conference Board of Canada, 2016.
Stewart, Nicole. Missing in Action: Absenteeism Trends in Canadian Organizations. Ottawa: The Conference Board of Canada, 2013.

In the literature, some reasons to explain the impact of worker absenteeism on productivity were stated as:

- In some instances, the absent employee is simply not replaced and as a result, there is no productivity during the absence.
- Replacement workers are sometimes assigned to cover roles and are often perceived to be less productive than regular employees. For example, one study found that replacement workers were perceived to be 31% less productive when covering for unplanned absences.
- In some workplaces, co-workers are used to fill in for absent employees and are generally less productive because of the increased workload.
- Absences also impact the productivity of supervisors as supervisors must spend time adjusting workflow and arranging cover off.[343]

Some employers who represent major investment in this province and whose presence affects the well-being of many other corporations and their employees have reported to us that they are required to maintain additional staff on their payroll to deal with the problems of unplanned absenteeism which has been exacerbated since the introduction of Personal Emergency Leave days in 2001. In their opinion, the additional costs associated with such staffing could be a factor when making decisions to invest in the province.

Some employers have articulated concerns over how the present Personal Emergency Leave provisions operate and their impact. These concerns are made in the context of a continuous effort by many in the employer community to manage absenteeism that, as noted above, is seen as a major problem. For example, some employers with existing generous leave provisions argue that the fact that existing statutory leave entitlement provides a variety of reasons for absence results in employees getting not just the benefit of the employer's leave policies, but, in addition, the benefit of the *Employment Standards Act, 2000* provisions. A related problem for some employers is that it is very difficult to determine when the employer provides a greater right or benefit such that the employer policies prevail and the Personal Emergency Leave provisions of the *Employment Standards Act, 2000* do not apply. These employers assert that MOL's policies to determine if the employer's policies provide a greater right or benefit are complex and require an individualized assessment. Because of the

343 Kronos, *The Total Financial Impact of Employee Absences*, 2010.

perceived complexity of the issue of greater right or benefit, some employers do not feel that they receive credit for the days the employee takes off when there is a right to the entitlement under both company policy and the statute. In addition, the Ministry's view of what constitutes a greater right or benefit is not binding on the OLRB or arbitrators or courts, and those decision-making processes and the expense involved just adds to the uncertainty and the complexity. There was a strong view that we heard from the employer community that we ought to recommend provisions that bring greater clarity to the interaction of the greater right or benefit section of the *Employment Standards Act, 2000* with the Personal Emergency Leave provisions, and employer policies.

In addition, some employers state that from their standpoint, not all of the time off is legitimately in line with the intention of the Act and that while the Employment Standards Act, 2000 is intended to provide time off for legitimate reasons for personal emergencies, they argue that the current provisions contribute to growing unwarranted absenteeism and abuse. These employers point out that that a disproportionate number of Personal Emergency Leave days tend to get taken on Mondays and Fridays, on days prior to or just after scheduled vacations, on the Monday following the Super Bowl, during hunting season, or when an employee has already been denied permission to take a day off. These employers would agree with Professor Gunderson who has opined that: "…personal leaves may be more likely to be abused by employees because there is generally not a well-documented event like pregnancy that justifies their leave, and they may increasingly regard them as a "right" rather than a privilege, especially if co-workers commonly take the leaves."[344]

The Challenge: Find a Reasonable Balance of Interests

Finding a reasonable way to bridge the conflicting needs and interests of employees and employers in this area is the essence of the public policy goal and the challenge we face.

We believe most employers and employees understand the needs and interests of the other. After all, almost all employers – including those below the threshold of 50 employees – do recognize the need to accommodate the reasonable needs of their employees.

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344 Gunderson, M. *Expected and Actual Impact of Employment Standards*. Toronto: Ontario Ministry of Labour 2015.

Similarly, most employees understand that there are limits on the extent to which employers can be asked to accommodate absences. Equally important, most employees recognize that the absences the law protects are bona fide personal emergencies, and not the desire to take a day off, to take a longer vacation or to avoid working overtime. The vast majority of employees understand that the statutory benefit is intended to be used to justify absences specified in the section and does not give employees a blank cheque to take time off as they desire.

As in any cross-section of the population, however, there are certainly employers and employees who do not wish to take into account the legitimate needs of the other.

Analysis, Findings and Recommendations

Our first finding is that the concern of a few but important segments of the employer community over the Personal Emergency Leave provisions have gone beyond the point of mere concern, to the point where investment decisions in Ontario are put in issue in some cases. Given that the Government of Ontario committed to supporting economic growth, which includes new investments and expensive renewal and upgrades of existing plants and operations, we do believe that Ontario would be prudent to endeavor to correct deficiencies in the current Personal Emergency Leave provisions, if it can do so reasonably without fundamentally sacrificing the legitimate needs of employees.

Second, we accept that in some areas, at least, abuse of the provisions has become a problem. Whether this is as a result of lax employer management of absenteeism and a reluctance to question employees' use of the provisions or as a result of the spread of misconceptions amongst employees about the extent of the rights the statute provides is unclear.

Some employers, however, have told us that in their workplaces taking this time off has come to be regarded as a right, regardless of the circumstances, together with a perception that employers are not entitled to inquire as to the circumstances or to ask for evidence that is reasonable in the circumstances. That cultural development in those workplaces is an unfortunate outcome of legislation designed to protect employees and gives them rights to be away from work in legitimate circumstances. And the cultural perception is not accurate. The legislation is designed for personal illness, family illness, and urgent matters related to family. The onus is on the employee, if asked, to provide reasonable evidence in the circumstances that the leave was legitimate.

The section requires the employee to give the employer notice of the intention to take the leave and where that is not possible, to do so as soon as possible thereafter.

We are of the view, however, that the existence of abuse in some places is not itself a sufficient reason to change legislation intended to meet the bona fide needs of employees. As stated above, the employer can require the employee "to provide evidence reasonable in the circumstances that the employee is entitled to the leave". Many employers can do better in terms of absentee management. As recommended by the Conference Board, organizations looking to address absenteeism should:

- understand organizational drivers and predictors of absences;
- track absences;
- have a formal absence management process;
- focus on prevention; and
- intervene early.[345]

Structure and Operation of the Section

The structure and operation of the section is awkward. It combines two (and some would argue three) generically different kinds of leaves, namely bereavement, personal illness and family emergencies having an overall limit of 10 unpaid days in any calendar year.

7.5.3 Bereavement Leave

The inclusion of bereavement leave in this section is problematic. Since the current Personal Emergency Leave provisions limit the number of absences to 10 in any calendar year, the occurrence of a death reduces the availability of days for a personal illness, injury or medical emergency or for illness, injury or medical emergency or urgent matter concerning family members. Conversely the use of the provisions for other purposes can reduce or eliminate the right to take bereavement leave.

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345 Stewart, Nicole. *Missing in Action: Absenteeism Trends in Canadian Organizations*. Ottawa: The Conference Board of Canada, 2013.

In our view, when death of a family member does occur, the right to bereavement leave should not be tied to the number of days already taken that calendar year because of the illness of the employee or of a family member. It should be a standalone right unaffected by the absence of an employee for other reasons. This is the standard in other provinces. To deny bereavement leave to an employee who wishes to mourn and to attend the funeral and surrounding events following the death of a family member fails the test of decency. The same considerations apply to the impact of multiple deaths in the family in the same calendar year. If there are two deaths, two parents, for example, and the bereavement leave was three days for each, (we believe, a minimum acceptable standard for death of an immediate family member) that would leave the employee with only four other days to cover off all personal illnesses and family emergencies in that year. This is irrational and avoidable by providing a separate entitlement for bereavement leave.

The most common bereavement leave provision in Canadian jurisdictions is three days of leave for the death of an immediate family member (the exception is Alberta which has no statutory provisions for bereavement leave). Quebec, Saskatchewan and New Brunswick each provide for five days for immediate family members (with Quebec including one paid day), however, the category of family members is narrower than Ontario's Personal Emergency Leave provisions. In no other province is the entitlement to bereavement leave made contingent on whether a bank of days has been used for other reasons. No other jurisdiction limits the number of bereavement leaves for members of the employee's immediate family in a calendar year.

We conclude that the entitlement of an employee to bereavement leave should stand on its own, independent of other absences, and should only depend for its trigger on the death of a person covered by the section. We recommend that a specific provision be enacted providing for unpaid bereavement leave for three days in case of the death of any of the family members covered by the existing Personal Emergency Leave provisions.

7.5.4 Personal Illness and Family Emergencies

We have recommended a free standing statutory right to bereavement leave of three unpaid days for the death of all family members currently covered by the *Employment Standards Act, 2000*. Does this mean that the remaining number of days should be reduced? And should there be separate leaves for personal illness and family emergencies? We think these questions should be examined

considering, among other relevant factors, how these entitlements are structured across the country.

Only three other provinces have combined entitlements for personal illness and family responsibility; Nova Scotia and Manitoba have three combined days, and Newfoundland has seven combined days.

Alberta is an outlier with no entitlements for either personal illness or family responsibility. The federal jurisdiction and Saskatchewan do provide entitlement days for personal illness or injury but do not provide family responsibility leave.

British Columbia has five days for family responsibility and none for personal illness.

Of those provinces that have separate personal illness and family responsibility provisions, New Brunswick has five personal illness and three family responsibility days; PEI has three personal illness days (with one paid day after five years of continuous service), and three family responsibility days. Quebec is an outlier with the largest by far entitlement for personal illness at 26 weeks, and 10 family responsibility days.

These provisions are complex and somewhat difficult to compare but seven days combined entitlement for Ontario would be in approximately the middle of the range.

The number of days of employee absenteeism in Ontario annually has some relevance to the determination of the number of days. As previously mentioned, Statistics Canada reported that Ontario's total days lost per worker was 7.7 days in 2015.

The value of removing bereavement leave from the Personal Emergency Leave entitlement, and therefore from the 10 days, is probably something less than three days because – on average – utilization of bereavement leaves is likely less frequent than once per year.

A very important additional factor is that we are recommending the elimination of the 50 employee threshold and therefore the new restructured provisions will apply to small employers. In our view, many smaller employers are likely to have a more difficult time than larger employers in finding staff to cover the absences and paying for the added costs. Also, the impact of unscheduled absences on small employers may be greater because of the smaller scale of the enterprise. Accordingly, we think it would be unfair to require small employers to meet the

10-day current entitlement, as those employers will also have to provide bereavement leave now under our recommendations, as well as personal illness and family emergency leave.

A uniform minimum entitlement for all employees across Ontario is a desirable and equitable outcome. For this reason, a reduction in the total amount of days for personal illness and family emergencies, while making bereavement leave a new and separate leave, is a fair way to obtain universality in the application of the entitlement, and we recommend that the combined leave be set at seven days.

While this will have some impact on employee flexibility, it is likely that the number of employees who take the full entitlement of 10 days now without utilizing any bereavement leave is far less than the majority of employees. In other words, the vast majority of employees should find this entitlement to be adequate, although we grant it is certainly not perfect. For some employees, obviously, even 10 days would be inadequate, as would any other minimum standard. Whatever the standard, some employees will require additional leave and we encourage employers to act reasonably in the circumstances and grant further leave where circumstances dictate.

For employers who do not act reasonably in these circumstances, there are other employee protections. The Human Rights Code requires that employers accommodate disability and family status, unless there is undue hardship. So in those cases where the employer disciplines or terminates, employees are entitled to the protection of the Human Rights Code. Employment standards are probably never the benefits we would most desire for ourselves or our families. They are not designed to reflect average entitlements. They must be decent but they are minimum standards.

Should there be one group of leaves for personal illness and family emergencies or two separate leaves?

We have already recommended the creation of a new independent right to bereavement leave of three days and determined that a combined entitlement of seven days is around the midpoint of Canadian entitlements. But should the seven days be further broken down into two particular entitlements, of, for example, four days for personal illness and three days for family emergencies?

The difference in allocating the seven days into one group, or into two, is significant. The many employers who do not provide for family emergency leave but do provide for personal illness would strongly favour two groups because it would mean that instead of a possible maximum usage for family emergencies, the entitlement to family emergency leave would be reduced. However, if they remain together as a single group, employees would have flexibility to use the seven days as they needed them.

If the Personal Emergency Leave provisions were originally introduced in 2001 as three separate leaves totaling 10 days, one for bereavement, as the case in almost every other jurisdiction, a second one for the employees own illness and a third covering family emergencies, the adaptation to the provisions by employees and employers and the usage would likely have been different. It might well be clearer now if one of the leave amounts was inadequate and why. As practices have evolved over the past 15 years, however, the existing combination has provided elements of flexibility that have become important to employees in the usage of time off.

Under the existing system, in any one year, some employees may require no time off, but in another year they may need seven days off to care for young children who are ill, and in other years they may require more time to care for aging parents, or as a result of the employee's own illness. For that reason, many employees are reluctant to give up that flexibility and many employee advocates and unions have urged us not to break the entitlements down into separate groups, whereas many, but not all employer groups, have favoured a breakdown. Again the effect of a breakdown into categories would be a diminution of flexibility and would amount to the setting of smaller limits for each use than currently exist. The effect, therefore, would be to limit usage in areas where many employers have no policy, which is leave to attend to family emergencies.

Flexibility in the modern world is necessary and valuable to employees. We have heard from many employers in this process about their desire for flexibility in many policy areas. Here employees want to maintain their flexibility to minimum entitlement for leaves of absence based on personal or family emergencies.

The modern world is increasingly complex and having greater flexibility to deal with the some of the urgent reasons that arise and that require the employee not to be at work is valuable and a decent right to legislate. The future needs of any single employee in any year are unknowable and a single grouping of seven days provides

important elements of flexibility to meet changing needs while the maintenance of two smaller categories provides artificial limits without regard to those needs. When the policy of the law is to permit these leaves, it should not matter to the employer whether the employee is away for reasons of illness or family emergency, but it may matter deeply to the employee if the law artificially and arbitrarily restricts her/his ability to respond effectively to family emergencies or to personal illness. In this case, the employee need far outweighs the employer concerns.

From a practical point of view, creating separate groupings for personal and family emergencies would limit the ability of employees to take time off for family emergencies, since many employers provide some form of leave for personal illness greater than four days, but not as commonly for family emergencies.

In our view, cutting back further on the right to take leave to deal with family emergencies is contrary to the current purpose of the *Employment Standards Act, 2000* and contrary to good public policy. It is the very need of the modern employee to respond to family emergencies as well as to personal illness that led to the creation of the Personal Emergency Leave entitlements in the first place.

Policies that enhance the ability of employees to respond to family emergencies are to be favored over policies which restrict that flexibility. For instance, women commonly bear a disproportionate burden for the care of children and the elderly, and take more time off work than males.[346] [347] Whether or not an employee has children was found to have very little impact on overall absenteeism rates, but did affect the reasons for which employees report being absent. Employees with children under the age of five take over twice as many days for personal or family responsibilities compared with those with no children. However, they were also off work less due to their own illness or injury compared with other groups.[348]

As a society we require policies that enable employees to respond to the needs of their families. Simply put, the breaking down of the right to be absent into separate categories of personal illness and family emergency after having a combined entitlement since 2001, would be a retrograde step that would negatively impact

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346 Marshall, K. (2011). Generational change in paid and unpaid work. *Canadian social trends, 92*, 13-24.

347 Pedulla, D. S., & S. Thébaud. (2015). Can we finish the revolution? Gender, work-family ideals, and institutional constraint. *American Sociological Review*, 80(1), 116-139.

348 Stewart, Nicole. *Addressing Employee Absences: A Look at Absence Management in Canadian Organizations*. Ottawa: The Conference Board of Canada, 2016.

employees and is contrary to the interests and needs of the modern family. Helping families through the rigors of modern living is an important value in contributing to a decent workplace.

Another reason to favour a combined group of entitlements is that we have had a history of 10 days and in moving to seven we are already limiting flexibility. Breaking it down further means that for those with particular needs, say for family emergencies, the reduction would be more dramatic and have a greater adverse impact. This would be too drastic and we find it unsupportable.

Yet another reason for favouring a combined entitlement is that the reality in many workplaces today is that where employers have generous personal illness policies but not family emergency leaves, they permit personal sick days to be used in the case of the illness of a child or parent or other similar circumstances. This common sense and practical approach by employers is to be strongly encouraged and should be formalized in employer policies. The statute should not encourage a rigid separation of entitlements.

Another contributing factor to our favouring a single remaining group of seven days is that we believe it will be less administratively burdensome, particularly for small employers to keep two separate banks of days and to keep track of the reasons for absence by category. Having said that, the administrative convenience/burden argument is a small factor compared to the overall policy of allowing employees added flexibility by keeping the entitlements combined.

Recommendations:

112. We recommend that bereavement leave be removed from the *Employment Standards Act, 2000*'s personal emergency leave provisions and be made an independent entitlement of up to three unpaid days for each of the family members covered by the existing personal emergency leave provisions. It should not be limited by an annual restriction and it should be applicable to all employers.

113. We recommend that the personal emergency leave provisions be amended to provide an annual entitlement of seven days for all the reasons currently covered in the provisions, except bereavement.

7.5.5 Domestic Violence

Since the interim report was issued, we have become aware that the issue of domestic violence leave was a serious omission in the scope of the review. We are more aware of the prevalence of domestic violence and the importance of providing leave for victims.

A number of states in the US have legislation providing for such leaves. These include: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Maine, New Jersey, New Mexico, North Carolina, Oregon, Virginia, Washington, and the District of Columbia. The activities covered by such leaves are differently expressed but all are designed to assist victims of domestic violence.

In Canada, Manitoba has enacted legislation providing paid and unpaid leave from work for domestic violence victims, guaranteeing them job security while they secure shelter, healthcare and legal counsel. Under the Domestic Violence and Stalking Act in Manitoba, domestic violence is defined as: an intentional, reckless or threatened act or omission that causes bodily harm or property damage; an intentional, reckless or threatened act or omission that causes a reasonable fear of bodily harm or property damage; conduct that reasonably, in all the circumstances, constitutes psychological or emotional abuse; forced confinement and sexual abuse. The Manitoba legislation describes situations of domestic violence as instances of violence that occur by one person against another person who: lives or has lived with him or her in a spousal, conjugal or intimate relationship; has or had a family relationship with him or her, in which they have lived together; has, or previously had, a family relationship with him or her, in which they have not lived together; has or had a dating relationship with him or her, whether or not they have ever lived together; or is the other biological or adoptive parent of his or her child, regardless of their marital status or whether they have ever lived together.

An employee who is a victim of domestic violence and has worked for the same employer for at least 90 days is entitled to the leave. Employees can use domestic violence leave to: seek medical attention for themselves or their minor child for a physical or psychological injury or disability caused by the domestic violence; obtain services from a victim services' organization; obtain psychological or other professional counseling; temporarily or permanently relocate to a safe place; or to seek legal help or law enforcement assistance, including participating in any civil or legal proceeding related to the domestic violence.

We have concluded that the omission of a consideration of a right to domestic violence leave in the scope of the *Employment Standards Act, 2000* review is problematic.

It is recommended that domestic violence should be added to the category of reasons that may be used by employees for taking Personal Emergency Leave pursuant to s. 50 of the Act. The Personal Emergency Leave provisions will, if our recommendation is implemented, be available to all employees and not restricted to employees whose employers employ 50 or more. This is a substantial extension of the Personal Emergency Leave provisions of the Act and if our recommendation that domestic violence be added as a reason for absence is accepted, it will be available to all Ontario employees regardless of employer size.

Recommendations:

114. Section 50 of the *Employment Standards Act, 2000* should be amended to provide that an employee can use Personal Emergency Leave days if the employee is a victim or their minor children are of domestic violence.

115. We also recommend that, in implementing domestic violence leave entitlement as part of section 50 of the *Employment Standards Act, 2000*, the Ministry of Labour consider the definitions of domestic violence and situations of domestic violence referred to in the Manitoba legislation as initial guidelines and should stipulate in the *Employment Standards Act, 2000* that domestic violence leave can be utilized for the purposes set out in the Manitoba legislation.

116. Finally, we recommend that the *Employment Standards Act, 2000* provide that all information related to and given by an employee to support the taking of domestic violence leave must be kept confidential with restricted access to no more than two managerial or human resources personnel and must also be kept separate and apart from any personnel file otherwise maintained by the employer.

7.5.6 Sick Days

Currently, Personal Emergency Leave provides an unpaid, job-protection entitlement to be absent for a certain number of days (unpaid) for urgent matters as well as personal illness, injury or medical emergency.

While most provinces in Canada have some protection for employees to be away from work due to illness, requiring payment for sick days is not common. In Canada, Prince Edward Island is the only province to provide 1 paid sick day per year. This leave is only available to employees with 5 or more years of service.

In the US, only California and Massachusetts have paid sick leave legislation. In California, the leave is available to all employees and accrues at 1 hour of paid leave for every 30 hours worked. Employers are allowed to limit the amount of paid sick leave per year to 24 hours or 3 days per year. In Massachusetts, paid sick leave is available to employees who work for employers with 11 or more employees and accrues at one hour of earned sick time for every 30 hours worked up to a cap of 40 hours per year. Employers with fewer than 11 employees are expected to offer the same leave, but unpaid. In the US, it is uncommon for there to be statutory leave entitlement for personal emergency leave which includes personal illness.

In September 2015, US President Obama signed an executive order requiring federal contractors to offer their employees up to 7 days of paid sick leave per year. The executive order was estimated to assist approximately 300,000 people at the time of signing. In addition, President Obama has urged Congress to pass legislation that would provide paid sick day protections for workers.

Globally, a 2010 report for the World Health Organization[349] suggests that as many as 145 countries have some form of leave and wage replacement with respect to employee illness. However, there are variations in how long these leaves may be and how wages are replaced (for example, wages may be replaced only partially). A recent study of combined employer and state paid sick pay schemes in the EU demonstrates a very wide degree of variability in paid indemnification for illness.[350]

There is a very strong view expressed by health care professionals and others that the lack of paid sick days causes unnecessary costs to patients, other workers who become infected by colleagues who are ill, and the health-care system generally.

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349 Xenia Scheil-Adlung and Lydia Sandner, *The Case for Paid Sick Leave: World Health Organization Report*, (PDF) (Geneva: World Health Organization, 2010). Available online: www.who.int.)

350 Sick Pay and Sickness Benefit Schemes in the EU, October 2016; ec.europa.eu/social/BlobServlet?docId=16969&langId=en

Employee advocacy groups asserted that the lack of legislated entitlements to paid sick days has left many precarious workers unable to stay home when sick due to fear of lost wages and/or termination. It was commonly recommended that the *Employment Standards Act, 2000* should be amended to repeal the exemption of 49 or fewer workers from providing Personal Emergency Leave, that all employees should accrue paid sick time [for example, a minimum of 1 hour of paid sick time for every 35 hours worked (approximately 7 paid sick days per year)], and that employers should be prohibited from requiring evidence for such absences. In January 2014, the OMA issued a news release encouraging people who are sick to stay home. It also encouraged employers to not require sick notes as doing so only encourages the spread of germs in the doctor's office waiting room. The then-president of the OMA said: "I can't stress it enough: going to work while sick is bad for you and potentially worse for your colleagues. Staying home to rest will help you to manage your illness and prevent others from getting infected." Others have questioned the utility of medical notes that are costly, very often result from a telephone consultation and repeat what the physician is told by the patient, and which are of very little value to the employer.

While the introduction of paid sick leave would be beneficial, the more important first step is the expansion of Personal Emergency Leave to all employers so that all employees have a basic right to time off in the case of personal illness. Therefore our recommendation is in the context of, and related to, our recommendation on changes to the current Personal Emergency Leave provisions of the *Employment Standards Act, 2000*.

Recommendation:

117. An employer should be obligated to pay for a doctor's note if the employer requires one.

7.5.7 Interaction between Company Policies and the Personal Emergency Leave provisions of the ESA

Section 5 (1) prohibits the contracting out of employment standards. Section 5 (2) which is referred to as the "greater right or benefit" provision provides as follows:

> *If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard*

> *provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.*

The purpose of this section is clear. It is to permit and encourage policies and contractual arrangements that exceed the minimum standards set out in the legislation.

The interaction between the Personal Emergency Leave provisions of the *Employment Standards Act, 2000* and employer policies that provide for leaves of absence and s. 5 (2) of the Act has been the subject of discussion during the CWR consultations. It is apparent that there is confusion and\or misunderstanding with respect to the proper application and interpretation of section 5 (2) - particularly where it is asserted that employers' policies regarding leaves of absence provide a "greater right or benefit" than the Personal Emergency Leave provisions of the *Employment Standards Act, 2000*. In this regard, our respectful opinion is that the interpretation manual of the Ministry of Labour and the decisions of courts and tribunals may have contributed to lack of clarity and confusion.

Some employers currently have leave of absence policies that in some cases do not provide for all leaves of absence mandated by the *Employment Standards Act, 2000* but in other areas provide more generous leaves than the Act requires. For example, an employer may have a policy providing for leaves of absence for personal illness, injury, or medical emergency of the employee ("personal illness"), bereavement leave and educational leave but that does not provide for leaves of absence for illness, injury or medical emergency or urgent matter concerning a family member ("family emergency"). Some employer representatives have suggested that in order to determine whether the employer provides a "greater right or benefit", the Ministry should be required to assess the total leave provisions provided by the employer to determine whether, in aggregate, employer leave policies provide a greater right or benefit to employees than is required by the *Employment Standards Act, 2000*. In the example given, this would require the Ministry to determine whether the existing leave policies of the employer, even though they do not provide for family emergency leave, provide greater rights or benefits to the employee.

We do not agree that this approach should be permitted. There is no acceptable and established methodology to make comparisons of the value to employees of one type of absence compared to another. Such an approach would lead to

endless disputes as to whether an employer's leave policies provide "greater right or benefit" and to uncertainty with respect to the rights of employees and the obligations of employers. Furthermore, in the example given, where the employer policy does not provide for leave of absence for family emergency leave, the policy does not comply with the Personal Emergency Leave provisions of the *Employment Standards Act, 2000*. As a matter of public policy, it has long been established that employees should have a limited right to leave for absence for family emergencies. To permit non-legislated leave provisions to be a "greater right or benefit" than the legislated minimum Personal Emergency Leave standards would permit employers to opt out of the Personal Emergency Leave section of the Act thereby undermining the purpose of the section which is the right to time off work without penalty for the reasons set out in the section. That right should be applicable to every employee and every employer without ambiguity.

In summation, where a company policy does not provide for employees to be absent for the reasons set out in the *Employment Standards Act, 2000*'s Personal Emergency Leave provisions, notwithstanding the policy of the company, the employee is entitled to additional leaves of absence in accordance with the Personal Emergency Leave provisions of the *Employment Standards Act, 2000*.

Provided they comply with the minimum requirements of the *Employment Standards Act, 2000*, employers are in a position to implement more generous leaves of absence policies. Any additional or superior entitlements over and above the statutory minimum standards that are provided by employers as a matter of company policy or agreement are permissible and welcome.

Recommendation:

118. We recommend that section 50 of the *Employment Standards Act, 2000* be amended to provide that employers must comply with all of its minimum requirements, but employers can decide to add to the entitlements provided under that section.

7.5.8 Summary of Personal Emergency Leave Recommendations

1. Eliminate the 50 employee threshold and the Personal Emergency Leave provisions of the *Employment Standards Act, 2000* be made available to all employees in Ontario.

2. Enact a specific provision providing for unpaid bereavement leave for three days in case of the death of any of the family members covered by the existing Personal Emergency Leave provisions.
3. Amend the personal emergency leave provisions to provide an annual entitlement of seven days for all the reasons currently covered in the provisions, except bereavement.
4. Amend section 50 of the *Employment Standards Act, 2000* to provide that an employee can use Personal Emergency Leave days if the employee is or their minor children are a victim of domestic violence. Develop the definitions and requirements for confidentiality of supporting documentation for the entitlement to the leave based on Manitoba's legislation.
5. Require employers to pay for doctor's notes if they require them.
6. Amend section 50 of the *Employment Standards Act, 2000* to provide that employers must comply with all its minimum requirements but, employers can add to the entitlements.

7.5.9 Family Medical Leave

Family medical leave is a leave of up to 8 weeks in a 26-week period. It may be taken to provide care or support to certain family members and people who consider the employee to be like a family member in respect of whom a qualified health practitioner has issued a certificate indicating that he or she has a serious medical condition with a significant risk of death occurring within a period of 26 weeks.

The federal *Employment Insurance Act* provides 26 weeks of employment insurance benefits ("compassionate care benefits") to eligible employees taking this leave.

For example, two recent federal changes may have an impact on Ontario's Family Medical Leave:

1) an amendment to the *Employment Insurance Act* increased the number of employment insurance compassionate care benefit weeks from 6 weeks in a 26 week period to 26 weeks in a 52 week period; and

2) an amendment to the Canada Labour Code that increased maximum compassionate care leave from 8 weeks to 28 weeks for providing care or support to a family member with a serious medical condition with a significant risk of death within 26 weeks. The period in which the leave may be taken has increased from 26 weeks to 52 weeks.

We are advised that Nova Scotia has already amended its Compassionate Care Leave to mirror the recent employment insurance and Canada Labour Code changes to compassionate care leave and Newfoundland and Labrador is making changes.

Recommendation:

119. We recommend that the family medical leave provisions of the *Employment Standards Act, 2000* (section 49.1) be amended to provide for family medical leave of up to 26 weeks in a 52-week period.

7.5.10 Crime-Related Child Death or Disappearance Leave

The *Employment Standards Act*, 2000 currently provides leave of up to 104 weeks with respect to the crime-related death of a child and up to 52 weeks with respect to the crime-related disappearance of a child. An employee who takes time away from work because of the crime-related death or disappearance of their child may be eligible for the Federal Income Support for Parents of Murdered or Missing Children grant.

The issue raised in our consultations is whether special leave should be available for employees who are dealing with the death of a child that is not a result of a crime and whether it makes any sense to have different leave entitlements in these circumstances.

There is reason to provide leave of absence in the case of the death of any child if a parent wishes to take advantage of such leave. While there could be debate about how long such a leave of absence should be, this question has been answered by the existing provisions of the Act which provide for two years in the case of the crime-related death of a child. The duration of leave when a death is not crime-related should be the same.

Furthermore, while the Act provides an entitlement for leave of up to 104 weeks in circumstances of the crime-related death of a child, it is not easy to understand why the Act provides for up to 52 weeks of leave with respect to the crime-related disappearance of a child – an event that may be more disabling to a parent than the death of a child.

Recommendation:

120. We recommend that the *Employment Standards Act, 2000* be amended by expanding crime-related child death or disappearance leave to provide for a leave of up to 104 weeks with respect to:

    a) the death of a child;

    b) the crime-related death of a child;

    c) the crime-related disappearance of a child.

7.6 Public Holiday and Vacation Pay

7.6.1 Number of Public Holidays

Ontario has nine public holidays that most employees are entitled to take off work with public holiday pay. This is in line with the number of public holidays in other Canadian provinces and the federal jurisdiction, which ranges from six to ten days.

Recommendation:

121. No changes are recommended.

7.6.2 The Rest of the Public Holiday Standard (Part X of the ESA)

Introduction

The Public Holidays standard is dealt with in Part X of the ESA and is six pages long in the printed ESA.

Part X contraventions are one of the most common contraventions found during inspections. Many employers do not understand the provisions, while others, particularly those whose employees have irregular schedules and high turnover rates, rely on the intricacy of the provisions to attempt to not give employees their entitlements. Because of the complexity of Part X, employees often find it difficult to determine whether they have received what they are entitled to.

7.6.3 Public Holiday Pay Calculation

The current public holiday pay provision is a complex formula that states that an employee's public holiday pay for a given public holiday shall be equal to:

a) The total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20; or

b) If some other manner of calculation is prescribed, the amount determined using that manner of calculation.

Adding to the complexity of the calculation, employees who work on a public holiday are entitled to either:

a) Their regular rate for hours worked plus a substitute day off with PHP or

b) PHP plus premium pay of 1.5 times their regular rate of pay;

Because the calculation is based on a five-day work week over the course of four work weeks, the effect of the calculation is to pro-rate the amount of public holiday pay that part-time employees, and employees who were hired less than four work weeks before a public holiday are entitled to receive. It also has that effect for employees who work less than a five-day work week and who are away from work without pay during the four work weeks before a public holiday.

In 2001, changes were made to the calculation of public holiday pay, resulting in the current system. Public holiday pay under the new calculation is therefore a pro-rated average of recent earnings as opposed to a payment that reflects the hours that are normally worked on a day that is not a public holiday. The change in the way public holiday pay is calculated was intended to balance the impact on employers of extending the right to public holiday pay to more individuals.

General Considerations

A simplified PHP calculation could benefit both employers and employees as they would find it more straightforward and ESOs would be able to enforce it more easily.

Changes to the calculation may require employers to update their own payroll systems. These changes may be minor or may be substantial depending on the approach.

Small businesses have asserted that premium pay is an added burden for retailers who need to be open on public holidays. On the other hand, Ministry officials have advised that many employers are not aware that the default standard for working on the public holiday in most industries is the employee's regular rate for hours worked plus a substitute day off with public holiday pay. We also received advice that many employees are not aware of their public holiday pay entitlements and that simplification may assist in creating more awareness and understanding by employees.

Other Jurisdictions' Calculation for Public Holiday Pay

Of the Canadian provinces:

- Four provide a calculation that averages an employee's earnings over a period of time that ranges from 30 days to 9 weeks.
- Five require an employee to be paid their regular day's pay, and provide an averaging calculation if the employee has a varying schedule.
- Only a few jurisdictions provide for a percentage formula to be used in lieu of the regular public holiday pay calculation for the construction industry.

Calculate public holiday pay as a percentage of wages earned in a specified period prior to public holiday

We considered an approach that would be based on a percentage of wages over a period of time. For example, 10% of wages earned in the two work weeks prior to public holiday or 5% of wages earned in the four work weeks prior to public holiday.

This method of calculation would continue the current result of pro-rating the amount of public holiday pay owing to part-time employees (i.e. any employee who works fewer than 5 days a week) and new hires. With respect to new hires, the shorter the period over which the calculation is performed the less pro-rating there will be, i.e. the more they will be entitled to.

The shorter the time period over which the calculation is performed, the simpler it would be to perform. However, such a method would not likely result in a substantial simplification over the current calculation, as this option continues the requirement to add up the employee's daily earned wages over a period of time. If vacation pay payable were excluded from the calculation, employees who are on paid vacation in the period before the public holiday would have their amount of public holiday pay reduced. If vacation pay payable is to continue to be part of the calculation, it may be advisable to address the current anomaly whereby vacation pay paid out in a lump sum just prior to a public holiday results in a substantial increase to the amount of public holiday pay owing.

Pay periods and work weeks often do not coincide. Many employers, payroll providers and bookkeepers perform the public holiday pay calculation using pay periods as the reference point, rather than the work week. Using the wages earned during pay periods rather than work weeks would make the calculation easier for employers and for employees who want to verify whether they have received the correct amount, and for the employment standards officer. However, we are not recommending a change to the Act to require standardization of pay periods which means that a "one size fits all" approach to calculation of PHP is not practical. Different formulae would have to be devised depending on the pay period of an employer.

The Construction Industry Model - Percentage (3.7%) of Wages Earned "Pre-paid" Throughout the Year

A more formulaic way to calculate and pay public holiday pay is by the addition of a specific percentage to all wage payments. For example, employees could be paid 3.7% of wages earned in each pay period. This would be the equivalent of pre-paying holiday pay for 9 regular working days to reflect the 9 paid public holidays in a year. Employees who receive holiday pay in each pay cheque in the required amount would not receive public holiday pay on each individual holiday.

This concept is similar to the vacation pay calculation and consistent with the rule that applies to the construction industry (i.e. construction employees who receive 7.7% or more of their hourly rate for public holiday pay and vacation pay are exempt from the Public Holiday part of the ESA). It is therefore familiar to the employer/payroll community and should be easy to understand for employees.

Although prima facie attractive because of simplicity, it has practical impacts that are significant. Employees who receive PHP in every pay cheque as it accrues will experience a reduction in their pay cheque when a public holiday falls on a working day. Employees may respond to "losing" a day of pay by being more inclined to work on the public holiday – if not for the same employer, then for another. (Over Christmas, there could be a "loss" of three days' pay.) This could undermine the original intent of Part X to provide employees with additional days off to observe common pause days.

There was consideration given to recommending treating the 3.7% in a manner similar to vacation pay and have it accrue to be paid out on the public holiday (or at other times). However, this was not an attractive option because of the record-keeping and related complexity that could undermine the simplicity that the 3.7% calculation would be intended to achieve. For example, there would, of necessity be new record-keeping requirements for the employer for public holiday pay earned and paid, similar to the requirements with respect to accrued vacation pay. There would be requirements for the employer to reflect the public holiday pay accrued and paid on wage statements. There would have to be rules governing how long such monies could be allowed to accrue and rules governing payments including pay-out on termination.

7.6.4 Qualifying and Disqualifying Criteria

In order to earn public holiday pay, unless absent for reasonable cause, the employee must work all of his or her last regularly scheduled day of work before the public holiday and his or her first regularly scheduled day of work after the public holiday.

An employee must also, unless absent for reasonable cause, work his or her entire shift on the Public Holiday that he or she agreed to or was required to work.

More than 20 scenarios of an employee failing to perform certain work, and the implication for the employee's entitlement, are set out in Part X.

Conclusion

Both employers and employees would benefit from a simplified Part X. Employers would find it more straightforward to apply, and employees would find it easier to verify if they have received their entitlements. It is expected that fewer issues would arise, and ESOs would be able to enforce it more easily.

The formula for the calculation of PHP is just one issue to consider in a revised Part X. There are numerous other issues to be considered in simplification.

Recommendation:

122. Part X of the *Employment Standards Act, 2000* should be reviewed in its entirety, revised, and replaced by statutory provisions that are simpler and easier to understand and apply.

7.6.5 Paid Vacation

Employees are entitled to 2 weeks of vacation time after each 12-month vacation entitlement year. The ESA does not provide for any increases to the 2-week vacation time entitlement based on length of employment although a contract of employment or collective agreement might do so. There are rules around when vacation must be taken.

Vacation pay must be at least 4% of wages earned in the 12-month vacation entitlement year (or alternative period).

Compared to other Canadian provinces and the federal jurisdiction, Ontario has the least generous provisions with respect to vacation time and pay. Most other provinces and the federal jurisdiction start with 2 weeks of paid vacation, and increase it to 3 weeks after a certain period of employment, which ranges from 5 to 15 years. One province, Saskatchewan, starts with 3 weeks of paid vacation, and increases it to 4 weeks after 10 years of employment.

Recommendation:

123. We recommend increasing vacation entitlement to three weeks after five years of employment with the same employer, and making a corresponding amendment to the vacation pay provisions (i.e. at least 6% vacation pay).

08 | Who Is an Employer and Who Is an Employee Under the ESA

8.1 Who is an Employer?

8.1.2 Related Employers

The ESA's "related employer" provision (section 4) allows separate but related legal entities to be treated as one employer if the two criteria set out in subsection (1)(a) and (b) are met.

Section 4 of the ESA provides as follows:

4. (1) Subsection (2) applies if,
    - (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and
    - (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.

    (2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

    (3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

    (4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

(5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

A "related employer" provision first appeared in the ESA in 1970. An amendment in 1987 introduced the "intent or effect" test.

Other Canadian Jurisdictions and the Common Law

Eight other Canadian jurisdictions have related employer provisions in their employment standards legislation. None of them contains a requirement that there be an intent or effect of the corporate structure to defeat the purposes of the Act in order for a related employer declaration to be made.

The courts in Ontario and other Canadian jurisdictions have applied a "common employer" doctrine in wrongful dismissal cases since the 1980s.[351] The test to find a common employer is similar to the "relatedness" criterion in s. 4(1)(a). There is no requirement similar to the "intent or effect" criterion. Although Saskatchewan does not have a related employer provision in its ES legislation, it refers to this common law doctrine when administering its statute.[352]

The common employer doctrine has been recognized at common law. In the *Downtown Eatery* case,[353] the Ontario Court of Appeal said:

> *The common employer doctrine, in its common law context, has been considered by several Canadian courts in recent years. The leading case is probably Sinclair v. Dover Engineering Services Ltd. (1987), 11 B.C.L.R. (2d) 176 (S.C.), affd (1988), 49 D.L.R. (4th) 297 (B.C.C.A.) ("Sinclair"). In that case, Sinclair, a professional engineer, held himself out to the public as an employee of Dover Engineering Services Ltd. ("Dover"). He was paid by Cyril Management Limited ("Cyril"). When Sinclair was dismissed, he sued both corporations. Wood J. held that both companies were jointly and severally liable for damages for wrongful dismissal. In reasoning that we find particularly persuasive, he said, at p. 181 B.C.L.R.:*

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351 For example, see *Downtown Eatery (1993) Ltd. v. Ontario* [2001] O.J. No. 1879 (Ont. C.A.), Sinclair v Dover Engineering Services Ltd. (1988) 49 D.L.R. (4th) 297 (B.C.C.A.), *Bagby v Gustavson International Drilling Co.* [1980] A.J. 743 (Alta. C.A.), *Bartholomay v Sportica Internet Technologies Inc.* (2004), 32 C.C.E.L. (3d) 229 (B.C.S.C.)

352 See, for example, *Group Medical Services vs. Saskatchewan Labour Standards Branch*, [2007] S.J. 525 (Sask. Q.B.)

353 *Downtown Eatery, op. cit.*, para. 30.

The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January 1973. The defendants argue that an employee can only contract for employment with a single employer and that, in this case, that single entity was obviously Dover.

I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.

There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take- overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

The Purpose of a Related Employer Provision

The purpose of the related employer sections in various provincial and federal employment laws is summarized in the Alberta case of Cosentino Developments Inc.[354] In that case, the Employment Standards Umpire, Provincial Court Judge Donnelly, in applying the related employer provision of the Alberta *Employment Standards Code* stated:[355]

> *The [corporate] Appellants submit that allowing the [related employer] Declaration to stand, goes against the principle of law which recognizes the distinct and independent existence of a corporation from its shareholders or related or subsidiary entities or corporations. That may be so but the law also recognizes many instances where that principle gives way for a specific purpose. Section 80 provides for one such instance. It is purposive social legislation meant to alter the strict adherence to this principle when such adherence might prevent a worker from receiving her earnings from an entity for which she worked but whose connection to her was somehow obscured by a "corporate veil" or other business or organizational structure or arrangement. The court must give effect to this purpose but the application of section 80 to the Appellants does not affect the recognition of their separateness for other purposes. The law generally will treat two persons or entities as distinct although they may be connected in or profit from the operation of a single business by various means such as through partnerships, subsidiaries or agencies, common shareholding or directorships, or management or tenancy agreements. What is important for the purpose of section 80 is to determine whether the nature and extent of those commonalties result in them carrying on a business or activity together. If so, section 80 applies. That is the case here.*

In our view, the ESA should enable a related employer finding to be made once it is established that the activities or businesses are associated or related, i.e. once the relatedness test in s. 4(1)(a) is met. Such a finding should not be restricted to or limited to circumstances where "the intent or effect" of the arrangement between the related businesses "has been to directly or indirectly defeat the intent and purpose" of the ESA.

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354 *Cosentino Developments Inc.* [2001] A.E.S.U.D. No. 26.
355 *Ibid.*, para. 12.

There may be many bona fide reasons to structure a business by involving multiple entities and\or individuals – none of which have anything to do with defeating the purpose of the ESA. As was noted in *Cosentino*, there are many circumstances where the law recognizes the distinct and independent existence of a corporation. However, the related employer provision of employments standards legislation should be "purposive social legislation meant to alter the strict adherence to this principle when such adherence might prevent a worker from receiving her earnings from an entity for which she worked but whose connection to her was somehow obscured by a "corporate veil" or other business or organizational structure or arrangement."

An effective related employer provision would reflect its purpose - to protect employees against the implications of treating each entity as being separate and distinct when such entities operate as in an associated or related way, even if the activities or businesses are not carried on at the same time. (See ss. 4 (3).)

An effective provision would apply when separate entities are joint employers as recognized by common law and\or because more than one corporate entity or individual carry on associated or related activities or businesses and who should be treated as one employer for employment standards purposes.

In *Abdoulrab et al v. Ontario Labour Relations Board*,[356] the Ontario Court of Appeal had occasion to consider the interpretation and application of s. 4 of the ESA. In that case, the owner of an operating company terminated a large number of employees, triggering their entitlement to severance and termination pay under the ESA. The company then went into bankruptcy without making the required payments to its employees. The owner then incorporated a new company, purchased the assets of the bankrupt company and continued the business on the same premises using many of the same employees. Several of the terminated employees filed ESA claims with the Ministry of Labour for their termination and severance pay. An employment standards officer determined that the two companies were jointly and severally liable for severance and termination pay as related employers and issued orders to pay. The companies sought review of the orders to pay by the Ontario Labour Relations Board. The Board found that the companies met the relatedness test of s. 4(1)(a). However, it ruled that the "intent or effect" test set out in s. 4(1)(b) was not met because the insolvency of the direct employer was not caused by its relationship

356 *Abdoulrab et al v. Ontario Labour Relations Board ("Novaquest")*, 2009 ONCA 491 (CanLII).

with the related company. The Divisional Court dismissed the employees' application for judicial review of the Board's decision. The Court of Appeal dismissed the appeal.

The result in *Abdoulrab* underscores the impact of s. 4(1)(b). Entities that are in fact related to an employer that owes money to its employees can escape liability for those debts, resulting in fewer employees receiving their statutory entitlements. The "intent or effect" test operates to emasculate the original purpose of the provision. That purpose was to protect employees' monetary ESA entitlements by providing them with additional sources – i.e. entities that are related to their employer – to satisfy those entitlements when their direct employer cannot pay or refuses to pay.

The purpose of a related employer section is to protect employees against the implications of treating entities and other persons as distinct even though they are "connected in or profit from the operation of a single business by various means such as through partnerships, subsidiaries or agencies, common shareholding or directorships, or management or tenancy agreements." As was said in *Cosentino*: "What is important for the purpose of section 80 (the related employer section) is to determine whether the nature and extent of those commonalties result in them carrying on a business or activity together. If so, section 80 applies."

Conclusion

The elimination of s. 4(1)(b) of the ESA would result in a related employer section similar to that found in the current Alberta *Employment Standards Code*. Such an amendment would result in a related employer section that reflects its original purpose and intent. The current s. 4(1)(b) operates to defeat the purpose of the section.

Recommendation:

124. The "intent or effect" test of the related employer section in the *Employment Standards Act, 2000* (section 4) should be repealed. Section 4 should be amended by deleting paragraph 4 (1) (b). The section should otherwise remain unchanged.

    The new section 4 (1) would, therefore, provide as follows:

    4. (1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.

8.2 Who is an Employee?

8.2.1 Scope and Coverage of the ESA

Definition of Employee

Background

There are two issues that have been raised consistently:

1) the misclassification of employees as independent contractors; and
2) the current definition of employee in the ESA.

8.2.2 Misclassification of Employees

Workers who are employees under the ESA definition are sometimes "misclassified" by their employers – intentionally or unintentionally – as independent contractors not covered by the ESA. Currently, 12% of the total Ontario workforce of 5.25 million is reported as "own account self-employed" (i.e., self-employed individuals without paid employees).[357] The experience of the Ministry of Labour in enforcement and significant anecdotal evidence suggests that a portion of these "own account self-employed" workers are misclassified as they are actually employees but are treated by their employers as independent contractors.

Businesses that misclassify employees as independent contractors avoid the direct financial costs of compliance with the ESA and other legislation. These costs include:

- 4% vacation pay;
- approximately 3.7% of wages for public holiday pay;
- overtime pay;
- termination pay;
- severance pay; and
- premiums for Employment Insurance (EI) and the Canada Pension Plan.

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357 Leah Vosko, Andrea M.Noack, and Mark P.Thomas, *How Far Does the Employment Standards Act, 2000 Extend and What Are the Gaps in Coverage* (Toronto: Ontario Ministry of Labour, 2015). Prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review.

Additionally, employees who are misclassified as independent contractors are denied benefit coverage where such coverage is available to employees.

In sum, misclassification has significant adverse impact on those Ontario workers who are wrongly labeled independent contractors and not treated as employees. As was stated by Noack, Vosko and Thomas in a paper prepared for the CWR,[358]

> *Beyond Ontario, researchers have documented the deepening mismatch between the scope of ES and changing employment norms that leaves growing numbers of workers partially or entirely outside the scope of labour and employment laws (Vosko et al., 2014). These include workers in so-called 'new' forms of employment, for example those (mis)classified as independent contractors….*

The Law Commission of Ontario (LCO) recognized the problem of misclassification and has expressed the opinion that part of the solution is greater use of proactive enforcement:[359]

> *In the LCO's view, the most straightforward approach would be to target the actual issue, the practice of misclassifying employees, through improved enforcement procedures, policy development, ESO training and public awareness. This would protect the most vulnerable without negatively impacting those who benefit from self-employment. The advantages of compliance and enforcement practices such as proactive inspections and expanded investigations outlined earlier are equally applicable to the situation of identifying cases of misclassification. The most effective enforcement activities would be those directed at industries known to be at high-risk for practices of misclassification such as trucking, cleaning and catering, as well as identification and proactive monitoring of industries populated by workers known to be disproportionately affected.*

In the United States, David Weil, the Administrator of the U.S. Department of Labor Wage and Hour Division (DOL), issued interpretation bulletin No. 2015-1 on July 15, 2015 in which he stated:

> *Misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States, in part reflecting larger*

358 *Ibid.*, page 7.
359 Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: Law Commission of Ontario, 2012), 94.

> *restructuring of business organizations. When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation. Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers. Although independent contracting relationships can be advantageous for workers and businesses, some employees may be intentionally misclassified as a means to cut costs and avoid compliance with labor laws.*
>
> *…*
>
> *Moreover, the economic realities of the relationship, and not the label an employer gives it, are determinative. Thus, an agreement between an employer and a worker designating or labeling the worker as an independent contractor is not indicative of the economic realities of the working relationship and is not relevant to the analysis of the worker's status. … "Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA." Real v. Driscoll Strawberry Assocs. Inc., 603 F.2d 748, 755 (9th Cir. 1979).*
>
> *The ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself. If the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself (i.e., economically independent from the employer), then the worker is an independent contractor.*

The DOL has concluded that "the misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers and the entire economy."[360]

Underscoring the importance of the misclassification issue, the DOL has allocated significant resources to the issue by prosecuting cases in federal court, and by signing partnership agreements with numerous states to encourage detection and prosecution of misclassification cases. In 2015 the DOL's investigations resulted in

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360 "Misclassification of Employees as Independent Contractors," United States Department of Labor, http://www.dol.gov/whd/workers/misclassification/

more than $74 million in back wages for more than 102,000 workers in industries such as the janitorial, temporary help, food service, day care, hospitality and garment industries.[361]

8.2.3 Definition of Employee in the ESA

The ESA applies to "employees" – workers who are in an employment relationship with an employer. Independent contractors are not employees.

The ESA currently defines "employee" as including:

- a person, including an officer of a corporation, who performs work for an employer for wages;
- a person who supplies services to an employer for wages;
- a person who receives training from a person who is an employer, as set out in subsection (2); or
- a person who is a homeworker; and
- includes a person who was an employee.

Similar definitions have appeared in previous versions of the ESA. The current definition has been in place since 2001. In conjunction with the statutory definition, various common law tests are used when determining whether a worker is an employee. These tests have evolved and become more expansive of workers as employees over the years.

Over time, the Ontario economy has grown more sophisticated, workplaces have fissured and a spectrum of relationships and arrangements has evolved between workers and employers ranging from standard employment relationships at one end of the spectrum to independent contractors at the other. The result of these changing relationships is that the old definitions are not well suited to the modern workplace. Not every worker fits neatly into the category of employee or independent contractor. Within this spectrum, there are those whose relationship is more like a traditional employment relationship than that of an independent contractor and who are deprived of the protection of the ESA.

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361 *Ibid.*

The common law has long recognized that there is a category of worker who is not a traditional employee and is not an independent contractor but who is entitled to some of the common law protections of an employee such as reasonable notice of termination of employment. The Ontario Court of Appeal[362] has concluded that an intermediate category between employee and independent contractor exists, "which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as 'dependent contractors' and they are owed reasonable notice upon termination." The Court noted that the recognition of an intermediate category based on economic dependency accords with the statutorily provided category of "dependent contractor" in the *Labour Relations Act, 1995* (LRA). The LRA provides that an "employee" includes a "dependent contractor" defined as:

> *a person who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.*

Katherine Gilchrist, in her paper "Independent Contractors",[363] canvasses the scope of the problem of misclassification in the U.S, western European countries and in Australia and the various responses by governments in those jurisdictions to rectify the problem. She concludes as follows:[364]

> *All of the countries analysed in this report have taken steps to reduce misclassification. Most commonly these steps have been taken at the administrative level, with guides directed to employers explaining the law and clarifying ambiguous situations. Less common has been the adoption of specific legislation changing or clarifying the common definition of an employee (this has been the case in Italy and Germany for example). 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. Enforcement, particularly in the US*

362 *McKee v. Reid's Heritage Homes Ltd.*, (2009) ONCA 916.
363 Katherine Gilchrist, "Independent Contractors", prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review, July 25, 2016.
364 *Ibid.*, page 62.

> *and Australia, plays a large role, and legislation is aimed at the malicious employer who knowingly misclassifies employees. All the governments analyzed in this report have either issued administrative guidelines to clarify who is an employee, increased sanctions, adopted a presumption of employment for certain types of workers and/or used innovative enforcement methods (such as collaborating with tax agencies) to tackle misclassification.*

The ES Program applies the statutory definition of "employee" under the ESA and the tests that have arisen under that statute, and does not refer to the definitions or case law under the LRA when determining "worker status" issues.
The program purports that a comparison of the results of "worker status" cases decided under the ESA and the LRA reveals that the expansive definition of "employee" under the ESA that is given by the Program, OLRB and courts likely captures the types of relationships that would fall into the "dependent contractor" category under the LRA.

We reject the notion that the Ministry of Labour in Ontario can effectively redress the problem of misclassification of workers who would be called "dependent contractors" under the LRA at the administrative level by interpreting the existing ESA definition of employee to include such people. We offer several reasons in support of this conclusion.

Firstly, the ESA should communicate to employers and employees with as much clarity as is reasonable the scope of coverage of the ESA. Achieving that objective is more likely if the Act is clearer in the definition of who is an employee covered by the ESA and entitled to its protections. An administrative interpretation of the scope of the definition of "employee" in the ESA that has the result of including arrangements that would fall into the "dependent contractor" category under the LRA without any corresponding definition in the ESA does not assist in education, understanding or interpretation. It does not assist in achieving compliance. This is the very point Gilchrist made when she concludes:[365]

365 *Ibid.*, p. 63.

> *While no model appears to be working perfectly, as all countries cite problems with employee misclassification, there appears to be movement towards clarifying the distinctions between employee and self-employed at the administrative level as opposed to legislative, as has been the case in nearly all countries analyzed, as well as increasing enforcement through working toward a joint legal/tax definition of employment and labour inspectorates working with tax bodies to identify misclassification. Where legislation does define a third 'hybrid' category of worker it appears to work best where the scope, definitions, and protections are clear and comprehensive, as is the case in the UK, or they run the risk of being ineffective, or worse, as was the case in Italy, used as a legal justification for employer misclassification.*

There is another very strong argument based on well-established principles of statutory interpretation that the failure to include the term dependent contractor in the definition of employee in the ESA is fatal to any administrative or policy based interpretation of "employee" that results in or seeks to extend the protections of the ESA to dependent contractors.

The LRA, in section 1(4), specifically defines "employee" for purposes of the Act as including a dependent contractor as follows:

> *"dependent contractor" means a person, 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 dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;*

Once the legislature has specifically included dependent contractors in the definition of "employee" in the LRA, it is more important than ever that this definition be included in the definition of employee in the ESA to avoid a court, by applying standard rules of statutory interpretation, coming to the conclusion that dependent contractors were not intended by the legislature to be "read in" to the definition of employee in the ESA. In our view, the current administrative policy and practice of the Ministry (to include dependent contractors in the scope of the current definition of "employee") is vulnerable to legal challenge.

Simply put, a court may well conclude that the failure of the legislature to include dependent contractors in the definition of "employee" in the ESA means that this category of employee was not intended by the legislature to be covered by the ESA. This unfortunate result could occur by the application of the rule of statutory interpretation known as *expressio unius est exclusio alterius* (to express one thing is to exclude another). The application of this rule could result in a court coming to the conclusion that because both the LRA and the ESA deal with employees and employee rights, the meaning of employee in the ESA may be determined in light of the definition of "employee" in the LRA. In other words, it might be reasonable for any court or for any person reading the ESA to conclude that if the legislature had intended to include "dependent contractor" in the definition of "employee" in the ESA, then it would have made specific mention of dependent contractors in the definition of "employee" as it did in the LRA. As the Ontario Court of Appeal said in *Canada Post Corp. v. Key Mail Canada Inc.*:[366]

> *The maxim "to express one thing is to exclude another" applies in statutory interpretation terms "whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly": R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) at p. 186.*

In sum, the specific inclusion of dependent contractors in the definition of "employee" is essential to ensure that subsequent statutory interpretations of the definition of "employee" in the ESA by the Courts will include "dependent contractors." Without such an expanded definition, there is little doubt that the current administrative\policy interpretation is vulnerable to challenge.

8.2.4 Independent Contractors

A further issue that has been raised by some is that independent contractors should also be covered by the Act. A 2002 study for the Law Commission of Canada argued that although there were good reasons to include independent contractors under the ESA, because of the complexity of applying all standards to independent contractors, further study was required.[367] In 2012, the Law

366 *Canada Post Corp. v Key Mail Canada Inc.*, 77 OR (3d) 294 at para. 22.
367 Judy Fudge, Eric Tucker, and Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Toronto: Law Commission of Ontario, 2002), 111.

Commission of Ontario, however, essentially rejected including independent contractors under the ESA.[368]

Under the US Fair Labor Standards Act (FLSA), to determine if a worker qualifies as an employee, the law focuses on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for her/himself.

Harry Arthurs, in Fairness at Work recommended an "autonomous worker" provision that was conceptually similar to a dependent contractor provision in the Canada Labour Code (CLC).[369] While the LCO rejected the inclusion of independent contractors under the ESA,[370] it did recognize that legislative provision for extending protection to dependent contractors should be explored, recommending that the Ontario government consider extending some ESA protections to self-employed persons in dependent working relationships with one client, focusing on low wage earners, and/or identifying other options for responding to their need for employment standards protection.[371]

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368 Law Commission of Ontario, *op. cit.*, page 94. The report states, "It is difficult to understand the justification for regulating the work of those who are legitimately self-employed. Furthermore, we are of the view that implementation of such a policy would have feasibility challenges. For example, should self-employed individuals be required to limit themselves to a certain number of hours per week or be required to pay themselves a certain wage? Such regulation would not only be unenforceable but also undesirable. Furthermore, how would the responsibility for a 2-week vacation be divided among an independent contractor's multiple clients? In our view, the real issue is how to identify and remedy the situation of workers erroneously misclassified as self-employed when an employment relationship actually exists. A secondary issue is whether additional protections should be put in place to protect self-employed workers in dependent working relationships (i.e., low-wage workers with only one client), while allowing for other self-employed persons to benefit from flexibility and choice in self-determination of working conditions."

369 The recommendation essentially dealt with truck –drivers carrying on as owner-operators, and he recommended it in part for their protection and in part because omitting them would undermine others who were employees. However, many did not want to be covered by all of the statutory protections and he recommended sectoral exemption or special applications as required.

370 Law Commission of Ontario, *op. cit.*

371 "Beyond considerations of consistency, extending protection to workers in relationships of dependency (i.e., low-wage contractors with one client) presents unique challenges. For example, a state of dependency may be fluid in that some such workers may be dependent upon one client at one point in time and have several clients at another time. Consideration of a definition of "employee" that extends itself to include such workers would need to take into account the needs of independent and/or self-employed persons who benefit from flexibility and control over their working arrangements. It would also have to respond to concerns expressed by employee representatives that have, in the past, suggested that such measures could cause employers "who already mislabel workers to do so with respect to newly-protected dependent contractors, i.e., labeling them as 'independent' contractors." In other words, it could make things worse instead of better. These would have to be considered in carefully drafting any new standard and it should also leave room for the recognition of new and emerging forms of employment with a range of individual situations. Recognizing that such changes cannot anticipate all impacts, any such policy and legislation should be evaluated after a reasonable period of time to determine effectiveness and whether adjustments are required."

We reject the suggestion that independent contractors should be entitled to the benefits or the protections of the ESA. Of course, employees of such independent contractors are entitled to the protection of the law – but that is the responsibility of the contractor and not the contracting party by whom the independent contractor has been retained. There are some critics of the specific inclusion of dependent contractors who argue that the inclusion of dependent contractors in the definition of employee will inevitably extend ESA coverage to independent contractors. We take issue with this assertion. Independent contractors are not economically dependent on one employer and are performing business on their own account. They are distinguishable and not covered by the scope of the proposed definition of "dependent contractor".

Having rejected the inclusion of independent contractors under the ESA, we do note that of course difficulties can be encountered in making a determination of who is an employee or an independent contractor. As the Supreme Court of Canada said in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*:[372]

> *… there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor.…*
>
> *Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. 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.*

372 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR 983 at paras. 46-47.

Recommendations:

125. The definition of employee in the *Employment Standards Act, 2000* should be expanded to include a dependent contractor defined, as in the Labour Relations Act, 1995, as follows:

    "dependent contractor" means a person, 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 dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

126. The *Employment Standards Act, 2000* should provide that in any case where there is a dispute about whether or not a worker is an employee, the person receiving the worker's services has the burden of proving that the person is not an employee covered by the Act and has a concomitant obligation to adduce all relevant evidence with regard to the matter.

127. The Ministry of Labour should make misclassification a priority enforcement issue.

09 | Exclusions from Basic Standards

Generally speaking, the ESA applies to an employee and his or her employer if the employee's work is performed in Ontario. There are, however, exclusions from this rule of general application.

9.1 Interns/Trainees

Section 1 (2) of the Act provides that trainees (referred to in the ESA as persons receiving training) are employees for purposes of the ESA and are entitled to the minimum standards set out therein, *unless* certain conditions are met. This subsection provides:

> For the purposes of clause (c) of the definition of "employee" in [section 1(1)], an individual receiving training from a person who is an employer is an employee of that person if the skill in which the individual is being trained is a skill used by the person's employees, unless all of the following conditions are met:
>
> 1. The training is similar to that which is given in a vocational school.
> 2. The training is for the benefit of the individual.
> 3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained.
> 4. The individual does not displace employees of the person providing the training.

5. The individual is not accorded a right to become an employee of the person providing the training.
6. The individual is advised that he or she will receive no remuneration for the time that he or she spends in training.

Background

The ESA was amended to reflect the jurisprudence of the OLRB as established in *Hakimi v. Canadian Aesthetic Academy Inc.*[373] In that case, the OLRB, at the urging of the employer and the Ministry, applied the criteria set out in 1947 by the US Supreme Court in *Walling v. Portland Terminal Co.*[374] to determine whether the claimant was a trainee entitled to be compensated in accordance with the ESA. Based on the *Walling* criteria, the OLRB denied the claim in part.

Walling involved claims to be paid for time spent on the employer's premises, under the employer's direction, performing labour, in order to learn to qualify for jobs when the employer might need them. The facts in *Walling* reflected a "good faith understanding following a long-established custom of an industry whose labor relations have long been subject to collective bargaining." Even so, the court observed that "We have not ignored the argument that such a holding may open up a way for evasion of the law. But there are neither findings nor charges here that these arrangements were either conceived or carried out in such a way as to violate either the letter or the spirit of the minimum wage law."[375]

The issue is whether section 1 (2) of the ESA, which creates an exclusion for a "person receiving training," should be retained or removed.

The section should be removed from the ESA.

The current provision is unclear and difficult to understand. For example, what is "training…similar to that which is given in a vocational school"? What are the circumstances in which the person providing the training "derives little, if any, benefit from the activity of the individual while he or she is being trained"? Will the average trainee or employer understand exactly what these conditions mean?

In our view, the current provision is not only difficult to understand but also almost impossible to monitor and enforce.

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373 (2002) CanLII 27778 (ON LRB)
374 330 US 148
375 *Ibid.*, 153.

Individuals categorized as "persons receiving training" are unlikely to understand their rights or to complain when the exclusion is misused. They may be anxious to obtain references and work experience that could lead to paid employment. They therefore become vulnerable to being misclassified by employers seeking to benefit from free labour.

The current provision thus "opens the door to evasion of the law."[376]

In April 2014 and again in September 2015, the Ministry conducted proactive enforcement blitzes, focusing on interns at workplaces across the province. In the 2014 blitz, out of 31 employers who had internship positions, 13 employers were found in contravention of the Act. In the 2015 blitz, out of 77 workplaces with internships, 18 employers were found in contravention of the Act.

There is no good policy reason to maintain section 1 (2) of the ESA.

Recommendation:

128. Section1 (2) of the *Employment Standards Act, 2000*, with respect to persons receiving training, should be removed.

9.2 Crown Employees

Currently Crown Employees are exempt from certain provisions of the ESA. Section 3(4) of the Act provides that:

Only the following provisions of this Act apply with respect to an employee and his or her employer if the employer is the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown:

1. Part IV (Continuity of Employment).
2. Section 14.
3. Part XII (Equal Pay for Equal Work).
4. Part XIII (Benefit Plans).

376 *Ibid.*

5. Part XIV (Leaves of Absence).
6. Part XV (Termination and Severance of Employment).
7. Part XVI (Lie Detectors).
8. Part XVIII (Reprisal), except for subclause 74 (1) (a) (vii) and clause 74 (1) (b).
9. Part XIX (Building Services Providers).

We have had no submissions supporting the continuance of the partial exemption of ESA coverage for employees of the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

Recommendation:

129. The provision of the *Employment Standards Act, 2000* that provides a partial exemption for designated Crown employers should be eliminated.

10 | Scope and Coverage of the LRA

10.1 Coverage and Exclusions

The LRA does not apply to:

- a domestic worker employed in a private home;
- a person employed in hunting or trapping;
- an agricultural employee (covered by the *Agricultural Employees Protection Act, 2002* (AEPA));
- a person employed in horticulture (subject to certain conditions and exceptions);
- a provincial judge; or
- a person employed as a labour mediator or labour conciliator.

In addition, the LRA provides that no person shall be deemed to be an employee:

- who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity;

  or

- who, in the opinion of the OLRB, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

Finally, the LRA either does not apply at all to, or its application is modified for, certain groups of employees in the public sector who are covered by specialized legislation outside the scope of our review.[377]

10.1.1 Freedom of Association and Collective Bargaining

In previous reviews of labour law in the province of Ontario, the scope of freedom of association had not yet been fully articulated by the Supreme Court of Canada. This is the first review of the *Labour Relations Act* where the Ontario government must take account of the fact that in Canada the right to meaningful collective bargaining (including the right to strike) is an essential component of freedom of association, pursuant to section 2(d) of the *Charter*. Prior legislative decisions to exclude these categories of employees must now be reconsidered in a significantly altered and different legal framework.

The Supreme Court of Canada has given freedom of association under section 2(d) of the *Charter* a robust and purposive interpretation that is binding on all governments in Canada. In numerous cases, the Court has unambiguously set out the importance of the constitutional right that is protected. In the *Mounted Police Association of Ontario v. Canada Attorney General* case, the Court said:

> *Freedom of association ... stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.*[378]

As in other labour cases, the Court, in *Mounted Police Association*, made it clear that in the employment context, freedom of association guarantees the right of employees to "meaningfully associate in the pursuit of collective workplace goals" and "includes a right to collective bargaining":[379]

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377 In particular:
- police (covered by the *Police Services Act* and the *Ontario Provincial Police Collective Bargaining Act*, 2006);
- professional firefighters (covered by the *Fire Protection and Prevention Act*, 1997);
- employees of colleges of applied arts and technology (covered by the *Colleges Collective Bargaining Act*, 2008);
- employees in teacher bargaining units (covered by the School Boards *Collective Bargaining Act, 2014*); and
- crown employees (covered by the *Crown Employees Collective Bargaining Act*, 1993).

378 2015 SCC 1, para. 49.

379 *Ibid.*, para. 67.

> *Without the right to pursue workplace goals collectively, workers may be left essentially powerless in dealing with their employer or influencing their employment conditions. This idea is not new. As the United States Supreme Court stated in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), at page 33:*
>
>> *Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation;* that a single employee was helpless in dealing with an employer*; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment ... [Emphasis added.]*[380]

On numerous occasions, the Court has recognized the importance of freedom of association in responding to the imbalance between the employer and its economic power and the relative vulnerability of individual workers:

> *... section 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of section 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.*[381]

The Court emphasized that collective bargaining is a fundamental aspect of Canadian society that enhances human dignity, liberty and the autonomy of workers:

> *Collective bargaining constitutes a fundamental aspect of Canadian society which "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (Health Services, at para. 82). Put simply, its purpose is to preserve*

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380 *Ibid.*, para. 68.
381 *Ibid.*, paras. 70-71.

> *collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.*[382]

Furthermore, the Court stressed that, to be meaningful, the process cannot substantially interfere by reducing the negotiating power of employees, as the intention is to provide a counterweight to the historic imbalance of bargaining power between employees and employers:

> *The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (Health Services; Fraser). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in Health Services: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees ..." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d)."*[383]

In *Saskatchewan Federation of Labour v. Saskatchewan*, the Supreme Court of Canada clarified that the right to strike is also protected by the freedom of association. The majority stated:

> *The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations.*[384]

And later in the judgment:

> *Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.*[385]

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382 *Ibid.*, para. 82.
383 *Ibid.*, para. 71.
384 2015 SCC 4, para. 3.
385 *Ibid.*, para. 54.

In the context of labour relations, it is clearly established that these principles apply and operate to guarantee the right of employees to associate meaningfully in pursuit of collective workplace goals.

10.1.2 The Right to Strike for Essential Service Employees

The Supreme Court has upheld the right of government to abrogate the right to strike in narrow circumstances involving labour disputes of employees engaged in essential services. "Essential services" should be interpreted in a manner consistent with that mandated by Chief Justice Dickson in the *Reference Re Public Service Employee Relations Act (Alberta)*,[386] who made it clear that "essential services" must be properly interpreted and applied in a manner consistent with section 1 of the *Constitution*, which states as follows:

> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

Chief Justice Dickson stated that, to conform with section 1, any limit on the freedom to associate should not be impaired by an overbroad definition of essential services but that, where interruption of service would endanger the life, personal safety or health of the whole or part of the population or involved persons essential to the maintenance and administration of the rule of law, it may mean the abrogation of the right to strike is warranted as a reasonable limit on freedom of association.

In the *Alberta Reference* case, Chief Justice Dickson was also concerned about the profound bargaining imbalance created when the removal of the right to strike is not accompanied by a meaningful mechanism for resolving collective bargaining disputes:

> *Clearly, if the freedom to strike were denied and no effective and fair means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party. I agree with the Alberta International Fire Fighters Association at p. 22*

386 [1987] 1 S.C.R. 313, para. 14.

> *of its factum that "It is generally accepted that employers and employees should be on an equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn". The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.*[387]

In *Saskatchewan Federation of Labour*, above, the Supreme Court of Canada confirmed that where the right to strike is abrogated for an essential service an independent, effective dispute resolution process is required. In that case, the Court was required to deal with the question of whether designated "essential" employees could be prohibited by legislation from striking. In deciding this issue, the Court relied on numerous international obligations including Canada's international human rights obligations, about which the Court stated:

> *Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. These obligations led Dickson C.J. to observe that:*
>
> > *… there is a clear consensus amongst the [International Labour Organization] adjudicative bodies that [Convention (No. 87)* concerning freedom of association and protection of the right to organize *(68 U.N.T.S. 17 (1948)] goes beyond merely protecting the formation of labour unions and provides protection of their essential activities – that is of collective bargaining and the freedom to strike. [Alberta Reference, at page 359].*[388]

The Court held that the right to strike is an essential part of meaningful collective bargaining and concluded that because the legislature abrogated the right to strike and provided no alternate dispute resolution mechanism, the prohibition of the right to strike was unconstitutional.The Court, in referring to Saskatchewan's *Public Service Essential Services Act, 2008* (PSESA), stated:

> *Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour*

387 Ibid., para. 116.
388 *Saskatchewan Federation of Labour*, op. cit., para. 62.

> *relations. Where essential services legislation provides such an alternative mechanism, it would more likely be justified under s. 1 of the Charter. In my view, the failure of any such mechanism in the PSESA is what ultimately renders its limitations constitutionally impermissible.*[389]
>
> *The trial judge concluded that the provisions of the PSESA "go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike". I agree. The* unilateral *authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the trial judge's conclusion that the PSESA impairs the section 2(d) rights more than is necessary [Emphasis in original].*[390]

10.1.3 The Obligation of Government to Eliminate Barriers to the Exercise and Realization of Rights of Freedom of Association

In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, ("B.C. Health Services"), Chief Justice McLachlin and Justice LeBel, writing for the majority, explained that freedom of association places positive obligations on governments to extend legislation to particular groups, they stated:

> *… Dunmore recognized that, in certain circumstances, s. 2(d) may place positive obligations on governments to extend legislation to particular groups. Underinclusive legislation may, "in unique contexts, substantially impact the exercise of a constitutional freedom" (para. 22). This will occur where the claim of underinclusion is grounded in the fundamental Charter freedom and not merely in access to a statutory regime (para. 24); where a proper evidentiary foundation is provided to create a positive obligation under the Charter (para. 25); and where the state can truly be held accountable for any inability to exercise a fundamental freedom (para. 26).*[391]

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389 *Ibid.*, para. 25.
390 *Ibid.*, para. 81.
391 2007 SCC 7, para, 34.

In *Ontario (Attorney General) v. Fraser*, the majority of the Supreme Court of Canada stated:

> *After Dunmore, there could be no doubt that the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of association, and that this right extends to realization of collective, as distinct from individual, goals. Nor could there be any doubt that legislation (or the absence of a legislative framework) that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association. Finally, there could be no doubt that the guarantee must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments."*[392]

In B.C. Health Services, the Court stated:

> *Before going further, it may be useful to clarify who the s. 2(d) protection of collective bargaining affects, and how. The Charter applies only to state action. One form of state action is the passage of legislation. In this case, the legislature of British Columbia has passed legislation applying to relations between health care sector employers and the unions accredited to those employers. That legislation must conform to s. 2(d) of the Charter, and is void under s. 52 of the Constitution Act, 1982 if it does not (in the absence of justification under s. 1 of the Charter).*[393]

The *Supreme Court has, in B.C. Health Services and Fraser*, made it clear that governments have an obligation to eliminate legislative barriers to collective bargaining in light of the constitutional right of freedom of association.

10.1.4 The Current LRA Exclusions

Professor Michael Lynk stated in his Review of the Employee Occupational Exclusions under the Ontario Labour Relations Act, 1995:

> *… if collective bargaining, one of our most important public goods, now occupies a protected place within the Charter, then access to collective*

392 2011 SCC 20, para. 32.
393 B.C. Health Services, op. cit., para. 88.

bargaining should be determined not only by reasons of economic and social policy, or only by the consequences of market and political strength, but also by considerations that are consistent with the fundamental rights and core values which animate our Constitution.

Second, a prevailing theme in modern industrial relations thought is that all employees – regardless of the work they perform and their position or status in the workplace – are intrinsically the vulnerable party in the employment relationship because of the inherent inequality in bargaining power between those who command and those who obey in the workplace. In adopting this perspective, the Supreme Court of Canada has added that: "...the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship." According to this view, the concept of employment vulnerability, and the corresponding antidote of statutory protection and access to collective bargaining, would be a defining characteristic for anyone who is in an employment or employment-like relationship, wherever he or she may be located across the spectrum of the labour force.

Hand in hand with this understanding of the scope of employee vulnerability in the law is the concept of universality. This concept postulates that collective bargaining as a protective institution should be available to every occupational category of employee, a sort of labour law without borders. Indeed, universality has animated the work of the International Labour Organization and lies at the centre of its fundamental statement on freedom of association in the workplace with respect to the extension of collective bargaining coverage to all employees: "without distinction whatsoever".[394]

Our recommendations with respect to the scope and coverage of the LRA are informed by the scope of the constitutional right of all employees in Ontario to freedom of association, by a constitutional mandate to government to eliminate barriers to the exercise by employees of their constitutional rights, and by our views of appropriate public policy.

We will deal with the current exclusions from the LRA in the order in which they appear in the LRA.

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394 (Toronto: Ontario Ministry of Labour, 2015), prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review, p. 7.

10.2 Domestics Employed in a Private Home

Domestic workers employed in a private home are "those employees who are directly employed by households to provide personal care at the home or residence of a family with children, an older person with personal care needs, or a person with an illness or disability without supervision and who live at the household."[395]

The LRA does not apply to a domestic worker employed in a private home. The situation of domestic workers is unique. The historical exclusion of this group was apparently based on the belief that domestic workers formed an intimate social bond with the private households they worked for, and that the possibility of unionization would be an inappropriate barrier to this necessary bond.[396]

It is a practical reality that the elimination of this domestic workers exlusion will not achieve much for domestic workers since many are the only persons employed in a private home by a householder. The promise of the freedom to associate with other employees and engage in collective bargaining will be, in most cases, illusory. However, there is no valid policy reason to deny this group of workers their constitutional rights to freedom of association.

As Professor Lynk noted in his *Review*:

> *… without re-imaging how collective bargaining or an effective form of collective voice could meaningfully work for the domestic worker employment relationship, the removal of their exclusion from the OLRA, even if accompanied by the relaxing of the two-employee bargaining unit minimum, would not advance the possibilities of genuine collective bargaining for this occupational sector.*[397]

This classification of employees has distinct characteristics as outlined by Lynk in his *Review*. These are summarized as:

> *First, they are largely a female and racialized migrant workforce that currently are in Canada, or initially came to Canada, on temporary work permits via*

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395 *Ibid.*, p. 41.
396 A.Macklin, "*On the Inside Looking In: Foreign Domestic Workers in Canada*," in Maid in the Market: Women's Paid Domestic Labour, eds. W. Giles & S. Arat-Koc (Halifax: Fernwood Publishing, 1994), p. 32.
397 Lynk (2015), *op. cit*, p. 46.

the federal government's Live-in Caregiver Program (in place since 1992) through agreements with the Philippines and countries in the Caribbean.

…

Second, legal and social science scholars who have studied the employment and social status of domestic workers in Ontario and Canada have remarked upon the particular vulnerability and marginalization of this workforce. This arises from their multiple employment and social insecurities: their temporary work status, their living arrangements under the same roof as their employer, language restrictions, their social and work isolation, their political invisibility, the fact that they are female, migrants and racialized, and the character of their relatively low-skilled and low-paid work. A primary theme in the social science writings is that these workers are heavily dependent upon the goodwill of their employers to protect and maintain the three dominant features of their lives in Canada: their employment, their domestic living arrangements and their immigration status. As migrant workers in Canada, they work and live in a country where they are unfamiliar with the prevailing cultural assumptions and patterns, where they have, at best, a rudimentary understanding of their rights under the employment regulatory system, and where many of them will be working and speaking in a language that is not their native tongue. Above all, they work and live in relative isolation, with little contact during working and home hours with others who share their social and ethnic background and their occupation. They have had only minimal input into negotiating their terms and conditions of their employment, they are often reluctant to challenge an employer's decision that contravenes their employment contract, and they have little effective recourse to the ordinary regulatory complaint routes should their complaint or concern be rejected by their employer. Among the more commonly reported features of workplace mistreatment includes a trend towards longer works hours than stipulated in their contracts or under the employment standards legislation, the persistent lack of boundaries between work hours and personal hours, and the pervasive feeling that they are under surveillance and lack personal privacy while living in their employer's household.[398]

398 *Ibid.*, pp. 43-44.

Given the unique vulnerability of domestic workers and the practical lack of access to collective bargaining, it is suggested that government should consider revising the specific regulation of the rights and protections of these employees under the ESA to be "shaped to the particular nature of work and the particular vulnerabilities of domestic work."[399] In our recommendations for sectoral regulation under the ESA (see Chapter 6), we recommend a specific sectoral committee composed of employers and representatives of employees to address the specific issues of domestics.

Recommendation:

130. The domestic workers exclusion should be removed from the *Labour Relations Act, 1995*.

10.3 Persons Employed in Hunting or Trapping

The LRA does not apply to a person employed in hunting or trapping. No other Canadian jurisdiction excludes this group from coverage of the applicable provincial labour legislation. It is an anachronism in 2017.

Recommendation:

131. The exclusion of persons employed in hunting or trapping should be removed from the *Labour Relations Act, 1995*.

10.4 Agricultural and Horticultural Employees

The LRA does not apply to an agricultural employee (covered by the AEPA) or to a person employed in horticulture (subject to certain conditions and exceptions). We have decided to deal with these two exclusions together, starting with agricultural workers.

399 See: Lynk (2015), *op. cit.*, p. 45, from a 2010 report on domestic workers prepared by Professor Adelle Blackett of McGill University issued by the International Labour Organization.

10.4.1 Agricultural Employees

Agriculture is defined in the LRA as:

> *"agriculture" includes farming in all its branches, including dairying, beekeeping, aquaculture, the raising of livestock including non-traditional livestock, furbearing animals and poultry, the production, cultivation, growing and harvesting of agricultural commodities, including eggs, maple products, mushrooms and tobacco, and any practices performed as an integral part of an agricultural operation, but does not include anything that was not or would not have been determined to be agriculture under section 2 of the predecessor to this Act as it read on June 22, 1994*

Until 1994, agricultural workers were excluded from Ontario's labour relations regime.

In 1992, the Ontario Government received recommendations from the consultative Task Force on Agricultural Labour Relations, composed of representatives from the agricultural community, organized labour, farm workers and government.[400] The Task Force's recommendations opposed absolute exclusion from the LRA to achieve the government's objective of protecting agricultural production and viability.[401]

The Task Force considered whether — and how — agricultural workers should be entitled to bargain collectively, given the unique characteristics of the agricultural sector. It concluded that "all persons employed in agriculture and horticulture" should be able to engage in collective bargaining, including those on family or smaller farms, but in accordance with a separate labour relations scheme that is sufficiently modified to reflect the particular needs of the agricultural sector.[402]

The "single most critical issue" raised by farm owners before the Task Force was the "threat of work stoppage".[403] In response to this and many other submissions, the Task Force recommended that all forms of work stoppage be prohibited and replaced by a dispute resolution process that provided an arbitration process for the final and binding resolution of all outstanding matters between the parties

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400 Report to the Minister of Labour (June 1992) [First Report]; Second Report to the Minister of Labour (November 1992).

401 The government asked the Task Force to study and report back on the option to extend the LRA to landscape gardening and to those parts of the agricultural/horticultural sectors that used "industrial or factory-style methods of production". The Task Force ultimately recommended that the exclusion be eliminated entirely.

402 *Op. cit.*, First Report, pp. 7-8.

403 *Ibid.*, First Report, p. 3.

following exhaustion of the negotiation process.[404] It also recommended that there be an Agricultural Labour Relations Act, to be administered by a separate Board.[405]

The Task force reviewed the legislation in other provinces, where extending bargaining rights to agricultural workers is the norm, and concluded that the availability of the right to bargain collectively in these provinces has not "had a significant negative impact on farm economics".[406] This state of national affairs clearly does not preclude the government from offering a section 1 justification unique to Ontario, but it has not explained, and perhaps realistically cannot explain, why Ontario's farming interests are so different as to warrant a complete exclusion rather than less intrusive means of achieving its objectives. The agricultural sector undoubtedly faces significant economic challenges, but so do many others, and in none of those sectors are employees deprived of access to a process of collective bargaining.

In 1994, the *Agricultural Labour Relations Act*, 1994 (ALRA), was enacted by the Ontario legislature, adopting most of the Task Force recommendations. Provisions of the ALRA included, among other things:

- a preamble indicating that it was in the public interest to extend collective bargaining rights to the sector and that agriculture and horticulture sectors have certain "unique characteristics" (e.g., seasonal production, climate and time sensitivity, perishable nature of agricultural and horticultural products, the need to maintain continuous processes to ensure the care and survival of animal and plant life);
- a prohibition against work stoppages (bargaining disputes that could not be resolved in bargaining or mediation were referred to final offer selection or, with the agreement of the parties, to voluntary interest arbitration);
- incorporation by reference of many key provisions of the LRA (subject to certain modifications), including: provisions relating to the duty to bargain in good faith; successor rights; unfair labour practices; and enforcement by a special agriculture industry division of the OLRB;
- certification and decertification of bargaining agents;

404 *Ibid.*, First Report, p. 10.
405 *Ibid.*, Second Report, p. 17.
406 *Ibid.*, First Report, p. 3.

- restrictions on the certification of bargaining units containing seasonal workers (such bargaining units could be certified only if a regulation allowed it and the unit contained only seasonal employees); and
- protections to ensure that family members could perform work for the employer, despite any provisions in a collective agreement, a union constitution, the ALRA, or the LRA, as it then was.

The ALRA was in effect from June 1994 to November 1995. During that period, the United Food and Commercial Workers Union was certified as the bargaining agent for a single bargaining unit in Leamington, Ontario, and filed two other certification applications.

In 1995, the ALRA was repealed in its entirety and the *Labour Relations and Employment Statute Law Amendment Act* (Bill 7) was enacted. In addition to terminating any agreements reached under the ALRA, Bill 7 terminated any certification rights of unions. Bill 7 was enacted pursuant to an initiative of the government and repealed the only statute ever to extend union and collective bargaining rights to Ontario's agricultural workers.

In *Dunmore v. Ontario (Attorney General)*,[407] the Supreme Court of Canada considered a challenge to the constitutionality of the exclusion of agricultural workers from the LRA. Farm workers argued that Bill 7, combined with section 3(b) of the LRA, prevented them from establishing, joining and participating in the lawful activities of a union, denying them a statutory protection enjoyed by most occupational groups in Ontario.

The Supreme Court quoted from the Ontario Court (General Division) decision in which Justice Sharpe stated that the government of Ontario has:

> *...a very different perspective from that of its predecessor on appropriate economic and labour policy" and, indeed, rejects any attempt to include agricultural workers in its labour relations regime ((1997), 155 D.L.R. (4th) 193, at p. 199). Moreover, the affidavit evidence in this case "presents in stark contrast two conflicting views of an appropriate labour relations regime for agricultural workers in Ontario," one denying the existence of any "industrial relations rationale" for the current exclusion, and the other maintaining that the collective bargaining model of the ALRA or the LRA would unduly threaten*

407 2001 SCC 94.

> *the province's farm economy (pp. 201-2). This latter view is evidently shared by the Legislature of Alberta, which is the only other Canadian province to exclude agricultural workers from its labour relations regime.*[408]

In *Dunmore*, in discussing the scope of state responsibility with respect to freedom of association, the Court asked whether:

> *... in order to make the freedom to organize meaningful, section 2(d) of the Charter imposes a positive obligation on the state to extend protective legislation to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime substantially contributes to the violation of protected freedoms.*[409]

The answer to the question of whether excluding agricultural workers from the LRA contributed to the violation of protected freedoms was unequivocal. The Supreme Court stated:

> *...it is reasonable to conclude that the exclusion of agricultural workers from the LRA substantially interferes with their fundamental freedom to organize. The inherent difficulties of organizing farm workers, combined with the threats of economic reprisal from employers, form only part of the reason why association is all but impossible in the agricultural sector in Ontario. Equally important is the message sent by s. 3(b) of the LRA, which delegitimizes associational activity and thereby ensures its ultimate failure. Given these known and foreseeable effects of s. 3(b), I conclude that the provision infringes the freedom to organize and thus violates s. 2(d) of the Charter.*[410]

In declaring the exclusion of agricultural workers from the LRA to be invalid, the Supreme Court gave the government eighteen months to implement amending legislation if the government saw fit to do so. In providing this remedy, the Court neither required nor forbade the inclusion of agricultural workers in a full collective bargaining regime, whether in the LRA or a special regime applicable only to agricultural workers such as the ALRA. In deferring to the legislature, the Court stated that the "question of whether agricultural workers have the right to strike is one better left to the legislature, especially given that this right was withheld in the ALRA".[411]

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408 *Ibid.*, para.5.
409 *Ibid.*, see paras.19-20.
410 *Ibid.*, see para. 48.
411 *Ibid.*, see para. 68.

In 2002, in response to Dunmore, the Ontario legislature enacted the *Agricultural Employees Protection Act*, 2002 (AEPA) that came into force on June 17, 2003. Employees employed in agriculture are covered by that Act.

10.4.2 *The Agricultural Employees Protection Act, 2002*

The AEPA creates a separate labour relations regime for agricultural workers. The AEPA grants agricultural workers the right to form and join an employees' association, to participate in its activities, to assemble, to make representations to their employers through their association on their terms and conditions of employment and the right to be protected against interference, coercion and discrimination in the exercise of their rights. The employer must give an association the opportunity to make representations respecting terms and conditions of employment and the employer must listen to those representations or read them. Complaints under the AEPA can be filed with the Agriculture, Food and Rural Affairs Appeals Tribunal. The Act falls under the purview of the Ministry of Agriculture, Food and Rural Affairs.

In *Fraser*, a majority of the Supreme Court of Canada held that section 5 of the AEPA, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer. In declining to find the AEPA unconstitutional, the Court noted that no effort had been made to resort to the Agriculture, Food and Rural Affairs Appeals Tribunal and that the Tribunal "should be given a fair opportunity to demonstrate its ability to appropriately handle the function given to it by the AEPA."[412] The Court stated:

> *Section 11 of the AEPA specifically empowers the Tribunal to make a determination that there has been a contravention of the Act, and to grant an order or remedy with respect to that contravention. The Tribunal may be expected to interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way.*[413]

The Court also reaffirmed that a meaningful process of collective bargaining guarantees a process rather than an outcome or access to a particular model of labour relations. In other words, the *Wagner Act* is a particular model of collective bargaining but not a necessary model, to ensure the right of employees to meaningfully associate in pursuit of collective workplace goals.

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412 *Fraser, op., cit.* para 111, quoting from Justice Farley's decision in the Ontario Superior Court of Justice.
413 *Ibid.*, para. 112.

10.4.3 Employees Engaged in Agriculture – Factors To Be Taken into Account

In addition to rights of employees to freedom of association, the formulation of labour policy for agricultural employees and the implementation of such policy by legislation of necessity involves the consideration of numerous other factors. Some of these are set out below. This list is not exhaustive; there are undoubtedly others.

1. After the promulgation of the AEPA, the Supreme Court of Canada released its decision in *Saskatchewan Federation of Labour*, wherein it further elaborated on what is meant by the Charter guarantee in section 2(d), holding that the right to strike is an essential part of meaningful collective bargaining and that where such right is abrogated, an independent, effective dispute resolution process must be put in place.

2. Some agricultural enterprises have unique characteristics including: seasonal production; climate and time sensitivity; the perishable nature of agricultural products; and the need to maintain continuous processes to ensure the care and survival of animal and plant life.

3. Strikes by agricultural workers could have significant adverse impact on planting, growing and harvesting, on animal health and safety, on bio-security and on other important interests.

4. Agricultural workers are vulnerable in their workplaces. This vulnerability was the subject of comment by Justice Bastarache in *Dunmore*. He found that legislative protection of agricultural workers and their rights to organize are absolutely critical considering their plight. He stated that:

   > *Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J., agricultural workers are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility".*[414]

   The vulnerability of agricultural workers was also the subject of comment by Justice Abella in *Fraser* where she stated that they are "particularly vulnerable employees" and quoted with approval Professor David M. Beatty who "vividly observed" that agricultural workers are "among the

414 *Dunmore, op. cit.*, para. 41.

most economically exploited and politically neutralized individuals in our society".[415] She went on to quote Beatty:

> *Because they are heavily drawn from a migrant and immigrant population, these workers face even more serious obstacles to effective participation in the political process. … Denying agricultural workers the benefits of [collective bargaining] means that the legal processes which enable much of the rest of our workforce to be involved in decision-making at the workplace in a realistic way are unavailable to the farm workers. Thus a group of workers who are already among the least powerful are given even less opportunity than the rest of us to participate in the formulation and application of the rules governing their working conditions.*
>
> *(Putting the Charter to Work: Designing a Constitutional Labour Code (1987), at p. 89)*[416]

We urge that attention be paid to Professor Lynk's Review. In his discussion of the agricultural employee exemption he points out a number of significant factors to be taken into account by policy makers:

a) The social science literature is rich in its description of the particularly vulnerable and precarious nature of the temporary migrant workers employed in the Ontario agricultural sector. In 2013, there were approximately 20,845 temporary migrant labourers employed through the Seasonal Agricultural Worker program (SAWP) and another 1,260 foreign labourers working through other federally administered agriculture migrant programs.[417]

b) [The label "unfree labour"] fits the condition of modern migrant agricultural work, these scholars maintain, insomuch as these workers are highly dependent upon their employer because [of] their restricted immigration and work permit status (which ties them to their employer and work location) and through their worksite living accommodations. These workers cannot exercise, without exceptional difficulty, what every other person in the Canadian labour market has the formal right to do: to leave a job that is unsatisfactory and search for better work

415 *Fraser, op., cit.*, para. 348.
416 *Ibid.*, para. 348.
417 Lynk (2015), op. cit., pp. 36-37.

elsewhere. This diminished status of unfree labour is compounded by the inability of these migrant agricultural workers to effectively access collective voice and collective bargaining to articulate, defend and improve their employment interests.[418]

c) A number of scholars have remarked upon the racial basis of the migrant labour program, both in its origins and through to the present day, where the ethnicity and the lack of effective power of the migrant agricultural workforce in Canada and Ontario replicates a troublesome racial hierarchy that does not fit well within the aspirational social and multicultural goals of a liberal democracy.[419]

d) [W]orking conditions of the migrant farm labourers are demanding, even harsh in many cases. The work usually involves long hours, physically challenging work, rudimentary living conditions and, commonly, adverse consequences for the health of many migrant agricultural workers. Almost all of them live in dormitories at their workplace, in circumstances where both their working and their private lives are closely regulated by their employers.[420]

5. The leading International Labour Organizations forums on freedom of association have criticized Ontario in recent years for its statutory barriers to effective collective bargaining for agricultural workers.[421]

6. While some agricultural enterprises are family farms, others included in the scope of the AEPA resemble traditional manufacturing businesses. In *United Food and Commercial Workers Canada v. MedReleaf Corp.*, Chair Bernard Fishbein observed as follows:

> *As Vice-Chair MacDowell observed about the result he reached in Wellington Mushroom, … there may be little, or no, "industrial relations basis" in not treating MedReleaf's employees as any other employees under the LRA. Whatever the merits of an agricultural exclusion from the LRA, these employees work in a factory-like environment with typical industrial-like features like job classifications, etc. Many, if not all, of the "unique characteristics" of agriculture, its seasonal nature, its sensibility to climate, the need to protect animal and plant life, referred to among the purposes of the AEPA, do not appear to be present here.*[422]

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418 *Ibid.*, pp. 37-38.
419 *Ibid.*, p. 38.
420 *Ibid.*, p. 38.
421 *Ibid.*, pp. 40-41.
(2015) CanLII 85534 (ON LRB), para. 47.

The observations of Vice-Chair MacDowell in the Wellington Mushroom Farm case and referred to by Chair Fishbein are apposite. Vice-Chair MacDowell, in describing the business of the respondent employer in the case, stated that the nature of this kind of farm does "not differ in any material respect from a typical manufacturing plant".[423] He further observed that:

> *There is no close involvement with the family farm. The production process is not seasonal, but rather, resembles a production cycle. The labour force is neither casual nor transitory. The operation is of considerable size, employing close to 200 employees in a single location with a "factory atmosphere"; and the company is much less economically vulnerable than many other employers to which The Labour Relations Act applies.*[424]

These observations by Chair Fishbein and Vice-Chair MacDowell underscore what Justice Bastarache said in *Dunmore* that the agricultural sector is highly diversified and that there is an "increasing trend … towards corporate farming and complex agribusiness."[425]

7. The family farm may warrant special legislative treatment. As was said in *Dunmore*:

> *Judging from the parties' evidence, I am satisfied both that many farms in Ontario are family-owned and -operated, and that the protection of the family farm is a pressing enough objective to warrant the infringement of s.2(d) of the Charter.*[426]
>
> *[A]griculture occupies a volatile and highly competitive part of the private sector economy, that it experiences disproportionately thin profit margins and that its seasonal character makes it particularly vulnerable to strikes and lockouts.*[427]

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423 [1980] OLRB Rep. May 813, para. 59.
424 *Ibid.*, para. 25.
425 *Dunmore, op. cit.*, para. 62.
426 *Ibid.*, para. 52.
427 *Ibid.*, para. 53.

10.4.4 The Defects of the AEPA

We offer no legal opinion on the constitutionality of the AEPA. However, viewed through a policy lens (which must be informed by and take into account *Charter* principles), and as a practical matter, in our view, the AEPA is defective as it contains barriers to the realization by agricultural employees of their ability to advance their interests and to protect themselves. The AEPA creates an illusion that there is some potential effective voice and some protection for farm workers, whereas the reality in Ontario is that there is effectively neither of these. Some of these barriers are outlined below. This list does not purport to be exhaustive.

In our view:

1. While the AEPA does provide the right to join an employees association, it does not clearly state that such employees have the right to join a trade union and participate in its lawful activities.
2. Unlike the LRA, the AEPA does not prohibit an employer or employers' organization from participating in or contributing financial or other support to an employee association or trade union. The AEPA does not protect employee independence to the same degree as does the LRA.
3. The scope of protection of employees against employer misconduct is insufficient as the Tribunal has no jurisdiction analogous to that of the OLRB to remedy employer misconduct for engaging in such activities as coercion, intimidation, threats, promises or undue influence.
4. The AEPA contains no right to collective bargaining. It contains no obligation on the parties to meet, engage in a meaningful dialogue, and make reasonable efforts to arrive at a collective agreement. As Justice Abella noted in her dissenting opinion in *Fraser*, quoting *B.C. Health Services:* "[T]he right to collective bargaining cannot be reduced to a mere right to make representations."[428] Indeed, as noted by Justice Abella in Fraser, a review of the Legislative record makes it clear that there was no

428 *Fraser, op., cit.*, para. 326. At para 327 Justice Abella said: This requirement of meaningful dialogic consultation has long been recognized in collective bargaining regimes: Royal Oak Mines Inc. v. Canada (Labour Relations Board [1996] 1 S.C.R. 369, at para. 41; *U.E.W. and DeVilbiss Ltd.*, [1976] 2 C.L.R.B.R. 101 (Ont.); George W. Adams, Canadian Labour Law (2nd ed. (loose-leaf)), vol. 2, at paras. 10.1710 and 10.1870-10., 1920; Donald D. Carter et al., Labour Law in Canada (5th ed. 2002), at paras. 621-22; Wesley B. Rayner, Canadian Collective Bargaining Law (2nd ed. 2007), at pp. 333-34; Elisheva (Elika) Barak-Ussoskin, "Collaboration in the Tripartite System: The Right to be Consulted and the Duty to Consult", in A. Höland et al., eds., Employee Involvement in a Globalising World: Liber Amicorum Manfred Weiss (2005), 439, at p. 445.

intention to create any right to collective bargaining. The then Minister of Agriculture and Food, the Honourable Helen Johns, when she introduced the AEPA confirmed that the legislation included no such right. She stated:

> *However, I need to make one thing very clear here. While an agricultural employee may join an association that is a union, the proposed legislation does* not extend collective bargaining to agricultural workers*. (Legislative Assembly of Ontario, Official Report of Debates (Hansard), No. 46A, October 22, 2002, at p. 2339.*[429]

Since the AEPA imposes no duty to bargain in good faith to reach a collective agreement, the Agriculture, Food and Rural Affairs Appeals Tribunal has no jurisdiction or mandate to grant a remedy to any party for failure to bargain in good faith. Contrast this to the remedial jurisdiction of the OLRB in section 43(2) of the LRA where the OLRB is empowered to order first contract arbitration and under section 96 to remedy bad faith bargaining.

5. The AEPA does not require the employer to recognize the exclusive agency or bargaining authority of the union or employee association. Contrast this to the LRA which in section 45(1) states that: "Every collective agreement shall be deemed to provide that the trade union that is a party thereto is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein." In section 73(1), the LRA provides: "No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them." And finally, the LRA further provides that the OLRB may grant first contract arbitration if the employer refuses to recognize the bargaining authority of the trade union.

   The exclusivity of the trade union as agent for employees is a long-standing and basic principle in Canadian labour law. We can do no better than quote Justice Abella in Fraser when she stated as follows:

429 *Ibid.*, para. 332.

> *With the exception of specific public services and the construction industry in Quebec (An Act respecting labour relations, vocational training and workforce management in the construction industry, R.S.Q., c. R-20), majoritarian exclusivity has remained a defining principle of the Canadian labour relations model (Rayner, at p. 16; Carter et al., at para. 574).*
>
> *The reason for the protection is grounded in common sense and the pre-1944 experience. A lack of exclusivity allows an employer to promote rivalry and discord among multiple employee representatives in order to "divide and rule the work force", using tactics like engaging in direct negotiations with individual employees to undercut "the credibility of the union . . . at the bargaining table" (Paul Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (1980), at p. 126; see also Adams, at para. 3.1750).*
>
> *…*
>
> *The inevitable splintering of unified representation resulting from the absence of statutory protection for exclusivity is particularly undermining for particularly vulnerable employees.*[430]
>
> *…*
>
> *Permitting multiple representatives of disparate individuals or groups in such a workplace effectively nullifies the ability of its workers to have a unified and therefore more cogent voice in attempting to mitigate and ameliorate their relentlessly arduous working conditions.*[431]

6. The AEPA neither prohibits nor provides a right for agricultural workers to strike and does not provide for any alternate dispute resolution if their "discussions" reach an impasse. Contrast this to the provisions of the ALRA which substituted final offer selection to resolve bargaining disputes in place of strikes and lockouts. In *Dunmore*, the Supreme Court of Canada stated: "the question of whether agricultural workers have the right to strike is one better left to the legislature. …".[432] It is now clear that the abrogation of the right to strike by government,

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430 *Ibid.*, paras. 345–348.
431 *Ibid.*, para. 350.
432 *Dunmore, op. cit.*, para. 68.

permissible in appropriate circumstances, must be accompanied by an alternative dispute resolution mechanism.

7. Like the LRA, the AEPA makes no distinction between the family farm and agribusiness. All employees in agriculture are excluded from the coverage of the LRA. The implementation of the AEPA covering all agricultural employees is, as a matter of public policy, overbroad.

8. There is no mandatory dispute resolution mechanism for enforcement of collective agreements under the AEPA and, as a result, any negotiated collective agreement negotiated pursuant to the AEPA would be difficult if not impossible to enforce. In contrast, section 48(1) of the LRA requires that: "Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable."

9. As a practical matter the AEPA does not work as a framework for the exercise of employees of their rights of freedom of association. No collective agreements have been signed in the agricultural sector since the passage of the legislation. This is consistent with the intention of the government at the time of passage of the legislation not to implement collective bargaining legislation.

In conclusion, in our view, the AEPA does not provide an effective mechanism for employees to access collective bargaining and to improve their working conditions, leaving them powerless to deal with their employer or to influence their terms and conditions of employment. At a practical level, the lack of any effective voice and protection for agricultural workers over the years, since the AEPA was enacted, is proof of the ineffectiveness of the Act.

10.4.5 Other Canadian Jurisdictions

For the most part, other Canadian jurisdictions include agricultural and horticultural workers under their general labour relations statutes. In this regard, we note that in reviewing the consequences of the near-universality of extending bargaining rights to Canadian agricultural workers, the 1992 Task Force concluded that the

availability of the right to bargain collectively in these provinces has not "had a significant negative impact on farm economics".[433]

Alberta has recently passed legislation that will extend labour relations coverage to agricultural workers (these changes are not yet in effect). Our understanding is that the Alberta government is consulting with stakeholders in the sector with a view to developing sector-specific regulations.

Before 2014, Quebec's *Labour Code* provided, in section 21, that: "Persons employed in the operation of a farm shall not be deemed to be employees for the purposes of this division unless at least three of such persons are ordinarily and continuously so employed." The alleged purpose of this provision was to exempt small farms from the provisions of the *Code*. However, the effect of section 21 of the *Code* was that, on a farm that employed two full-time workers and many seasonal employees, the seasonal workers were not covered by the provisions of the *Code* and were effectively denied the benefits of organizing and of collective bargaining. Section 21 of the Code was challenged in the Quebec Superior Court and was found to be unconstitutional. In response to the Superior Court decision, in 2014, the current government amended the Code implementing "Special Provisions Applicable to Farming Businesses". The Special Provisions are modeled after the Ontario AEPA. They are applicable to agriculture operations where fewer than three employees are ordinarily and continuously employed. In agriculture, where three or more employees are ordinarily and continuously employed, the general provisions of the Code apply allowing for certification of bargaining agents and collective bargaining. As with the former section 21 of the *Code*, the fact that many seasonal workers may be employed in a farm business does not trigger the application of the general provisions of the Code relating to the rights of employees to join a union and engage in collective bargaining. Those rights are triggered only where three employees are ordinarily and continuously employed.

From a policy point of view, it is significant that agricultural workers in every province except Alberta have the same collective bargaining rights as other employees excepting the exemptions in Quebec and New Brunswick, which appear to be based on the family farm (discussed above).

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433 *Op. cit.*, First Report, p. 3.

By way of summary, in our view, all of the factors outlined, below, point strongly in support of the removal of the exclusion of agricultural workers from the LRA:

a) the particularly vulnerable and precarious nature of temporary migrant workers employed in the Ontario agricultural sector, including the dependence arising from their restricted immigration and work permits status, which ties them exclusively to their employer and which significantly exacerbates the power imbalance between employees and employers;

b) the racial basis of the migrant labour program, both in its origins and through to the present day;

c) the demanding – and even harsh, in many cases – nature of the work, long hours, rudimentary living conditions, commonly adverse health consequences, and close regulation of their private lives;

d) the overbroad exclusion of enterprises, which are, for all intents and purposes, traditional manufacturing businesses and do not have a seasonal nature, or the sensitivity to climate or the need to protect animal and plant life;

e) the lack of any truly effective mechanism in the AEPA for agricultural workers to protect themselves and advance their interests, both at a theoretical and at a practical level;

f) the fact that almost every other Canadian jurisdiction allows farm workers access to collective bargaining;

g) the availability of fair and reasonable alternative dispute resolution mechanisms as alternatives to strikes and lockouts, which is one of the primary reasons in support of the exclusion; and

h) the values which underlie the Charter protection for collective bargaining, namely "that it enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work."[434]

Conclusion

The continued exclusion of agricultural workers from the LRA is unjustified.

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434 *B.C. Health Services, op. cit.*, para. 82.

10.4.6 Horticultural Employees

The LRA does not apply "to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture."

"Horticulture" is not defined in the LRA, but has been interpreted by the OLRB to include activities such as gardening, landscaping, nurseries, growing trees, etc.

Horticultural workers are excluded from the LRA but have no separate labour relations regime.

Horticultural workers are not excluded from the labour relations legislation in other Canadian jurisdictions.

There is no valid policy reason to exclude this category of employees from LRA coverage. Having said that, it is recognized that horticultural employees may be engaged in work necessary to ensure the growing of and the health and survival of plants and trees, and that strikes by horticultural workers in some circumstances could have significant adverse impact on planting, growing, harvesting and caring for plants and trees.

Recommendations:

(Recommendations for Agricultural and Horticultural employees):

132. Agricultural and horticultural employees should be included in the *Labour Relations Act, 1995* and be given the same rights and protections as other employees.

133. The government should consider whether protection of the family farm is a pressing and substantial objective warranting the exclusion of some or all persons employed on a family farm from *Labour Relations Act, 1995* coverage. We offer no specific advice to the government on the appropriate definition of "family farm" but caution that any definition should not be overbroad so as to impair the Charter rights of other agricultural workers.

    Some, but not all, agricultural enterprises have unique characteristics, including: seasonal production; climate and time sensitivity; the perishable nature of agricultural products; and, the need to maintain continuous processes to ensure the care and survival of animal and plant life. In some

circumstances, strikes by agricultural workers could have a profound adverse impact on planting, growing and harvesting, on animal health and safety, on bio-security and on perishable products. Horticultural enterprises employees may also be required to maintain continuous employment to secure the growth, health and survival of plants and trees and, therefore, employers may be peculiarly adversely affected by strikes. With this reality in mind, we make the following recommendations.

134. The *Labour Relations Act, 1995* should be amended to provide the Ontario Labour Relations Board with authority to prohibit or limit a strike by employees of an employer in the agricultural or horticultural sector where the employer's enterprise needs to be maintained to protect some or all of planting, growing and harvesting or the integrity, health and safety and/or security of plant or animal life.

135. Where a strike is prohibited, the Ontario Labour Relations Board should be given authority in the *Labour Relations Act, 1995* to be able, at its discretion, to require mediation of the collective bargaining dispute and to request the mediator, if the matter is not resolved, to make recommendations for terms of settlement of the labour dispute including a recommendation on an appropriate dispute resolution mechanism in the absence of a mediated settlement.

136. The *Labour Relations Act, 1995* should be amended to provide that the Ontario Labour Relations Board must impose an efficient and effective dispute resolution mechanism to resolve collective bargaining impasse *in any case where it has abrogated or limited the right to strike for agricultural or horticultural employees and where the impasse is not resolved on a voluntary basis by the parties to the dispute*. The mechanisms for final dispute resolution should include: final offer selection (including issue by issue final offer selection); mediation/arbitration; arbitration; or any other dispute resolution mechanism which is capable of resolving, in a fair, effective and expeditious manner disputes that arise between employees and employers.

10.5 Provincial Judges

The LRA does not apply to provincial judges. Judges are appointees to judicial office and are not employees. Under the constitution they enjoy judicial independence.[435] The processes through which judicial associations are involved in fixing the terms and conditions applicable to judges are determined by various Framework Agreements between the various judges associations and government and in legislation such as Appendix A to the *Judicature Act*. From a constitutional point of view, this is not an issue that can be addressed by the LRA.[436]

Recommendation:

137. The exclusion of provincial judges should remain unchanged.

10.6 A Person Employed As a Labour Mediator or Labour Conciliator

The LRA does not apply to a person employed as a labour mediator or labour conciliator. This exclusion is designed to preserve the neutrality of persons who are engaged in mediation and conciliation. Being a member of a trade union could lead to conflicts of interest, real or perceived, and detract from the mediators' or conciliators' important role as neutrals in dispute resolution. There is no policy reason to change the current law.

Recommendation:

138. The exclusion of a person employed as a labour mediator or labour conciliator should remain unchanged.

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435 See: *Reference re Remuneration of Judges of the Prov. Court of P.E.I.; Reference re Independence and Impartiality of Judges of the Prov. Court of P.E.I., [1997] 3* SCR 3.

436 *Ibid.*

10.7 Professionals – Members of the Architectural, Dental, Land Surveying, Legal or Medical Profession Entitled to Practice in Ontario and Employed in a Professional Capacity

The LRA provides that no person shall be deemed to be an employee who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity.

It may be that these professionals were seen as having adequate protection through their self-regulated professional bodies. As well, their exclusion may have seemed appropriate given the conflict between a professional's continuing duty and obligation to his or her patients or clients and the right to strike. Certainly, many have questioned whether the historical rationales for excluding these groups from the LRA continue to be relevant. There are, for example, 19 non-health professions and 27 regulated health professions in Ontario; however, only architectural, dental, land surveying, legal and medical professions are excluded under the LRA.[437] In sum, there are 46 regulated professions and employees belonging to 41 of these regulated professions entitled to unionize and collectively bargain either under the LRA or another labour relations statute.[438]

In the late 1960s, the *Task Force on Labour Relations* (better known as the Woods Task Force) reviewed the exclusions that then existed under the federal legislation (broadly similar to what exists in the LRA today) and could find no justification for any of them when measured against the principle of freedom of association.[439] The Woods Task Force recommended that the statutory right to bargain collectively should be extended to licensed professionals, among others. When the *Canada Labour Code* was subsequently enacted in 1973, it reflected this advice, providing an expansive definition of "employee" including licensed professionals.

In 1993, the *Ontario Labour Relations* Act was amended and the list of exclusions under the legislation was revised. The new law allowed architects, dentists, land surveyors, legal professionals and some doctors[440] to apply for certification.

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437 Lynk (2015), *op. cit.*, p. 50.
438 Lynk (2015), *op. cit.*, p. 9.
439 Task Force on Labour Relations, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (Ottawa: Government of Canada, 1968).
440 With respect to doctors, the 1993 amendment did not apply to a physician subject to the *Ontario Medical Association Dues Act, 1991* or to an intern or resident as defined in that Act.

In 1995, the law was changed again, and the previously existing exclusions, including those for professionals were reintroduced.

This prohibition directed at professionals employed in a professional capacity is inconsistent with, and contrary to, the constitutional guarantee of freedom of association. The Court's purposive approach to section 2(d) was most recently summarized by Chief Justice McLachlin and Justice LeBel in *Mounted Police Association*, where they said:

> *The jurisprudence on freedom of association under section 2(d) of the Charter … falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.*
>
> *… after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(d) …*[441]

There is no suggestion in any of the recent jurisprudence that professionals employed in a professional capacity should be denied the constitutional right of freedom of association. Quite the contrary, the broad and purposive interpretation of section 2(d) of *The Constitution Act, 1982* mandates the removal of this exclusion and extending LRA coverage to this group of employees.

The fact that some of these professional employees may provide essential services is not a reason to deny their constitutional rights to freedom of association. Although speculative, it is acknowledged that there could be occasions where the exercise of constitutional rights (including the right to strike) by some of these professional employees could impair the delivery of essential services by public sector employers.

Our use of the term "essential services" in this section of the Report should be interpreted in a manner consistent with that mandated by Chief Justice Dickson in the *Reference Re Public Service Employee Relations Act* (Alberta), above.

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441 *Mounted Police Association, op. cit.*, paras. 30 and 46.

As noted, above, In *Saskatchewan Federation of Labour*, the Supreme Court confirmed that where the right to strike is abrogated for an essential service an independent, effective dispute resolution process is required.

In conclusion, the LRA should be amended to extend coverage to members of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity, recognizing that, in appropriate circumstances, removing or limiting the right to strike may be warranted.

Recommendations:

139. Members of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity should be included in the *Labour Relations Act, 1995* and be given the same rights and protections as other employees.

    Some, but not all, professional employees may provide essential services to members of the public. In recognizing this fact, we remain cognizant of the opinion of Chief Justice Dickson in *Alberta Union of Provincial Employees*, *Canadian Union of Public Employees* and *Alberta International Fire Fighters Association*[442] that, to conform with section 1, any limit on freedom to associate should not be impaired by an overbroad definition of essential services but that, where interruption of service would endanger the life, personal safety or health of the whole or part of the population or involved persons essential to the maintenance and administration of the rule of law, it may mean the abrogation of the right to strike is warranted as a reasonable limit on freedom of association. With this caution in mind, we make the following recommendations.

140. With respect to the professionals whose inclusion may result from our recommendations, the Labour Relations Act, 1995 should be amended to provide the Ontario Labour Relations Board with authority to prohibit or limit a strike by those providing essential services to a community.

    Some professionals now engage in collective bargaining outside the scope of the LRA, These negotiations are pursuant to Framework Agreements that provide effective dispute resolution mechanisms for the resolution of differences. Before the Ontario Labour Relations Board deals with issues relating to potential strikes/lockouts, it is assumed that

442 [1987] 1 SCR 313.

the Board will provide the parties with an opportunity to address the issues in a Framework Agreement, subject to the approval of the Board.

141. Where a strike by professional employees is prohibited or limited, the Ontario Labour Relations Board should be given authority in the *Labour Relations Act, 1995* to be able, at its discretion, to require mediation of the collective bargaining dispute and to request the mediator to make recommendations for terms of settlement of the labour dispute, including a recommendation on an appropriate dispute resolution mechanism in the absence of a mediated settlement.

142. The LRA should be amended to provide that the Ontario Labour Relations Board must impose an efficient and effective dispute resolution mechanism to resolve collective bargaining impasse *in any case where it has abrogated or limited the right to strike for professional employees providing essential services and where the impasse is not resolved on a voluntary basis by the parties to the dispute*. The mechanisms for final dispute resolution should include: final offer selection (including issue by issue final offer selection); mediation/arbitration; arbitration or any other dispute resolution mechanism which is capable of resolving in a fair, effective and expeditious manner disputes that arise between professional employees and employers.

10.8 A Person Who Exercises Managerial Functions or is Employed in a Confidential Capacity in Matters Relating to Labour Relations

The LRA provides that no person shall be deemed to be an employee who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

All Canadian jurisdictions exempt those performing management functions or those who are employed in a confidential capacity in matters relating to labour relations from the definition of “employee” under their respective labour legislation (although there is some variation in the scope of the managerial exclusion).

Persons who perform managerial functions and who direct and control employees have a clear conflict of interest with the interests of employees under the LRA. They are responsible for implementation of the policies and procedures of the employer and usually can impose some level of discipline on employees under their direction and control. Similarly, those employed in a confidential capacity in matters relating to labour relations possess information confidential to the employer and could not function effectively if included in bargaining units. Furthermore, the exclusion of managers and persons employed in a confidential capacity in matters relating to labour relations helps to ensure that the union representing employees remains independent of employer influence.

The only substantive issue encountered in our review is whether the managerial exclusion should be modified to allow for collective bargaining for persons whose functions are more supervisory than managerial and are at the "entry level" of managerial ranks. This issue is not a priority for reform at this time and the issue of who exercises managerial functions is best left to the OLRB to interpret and apply in the different industries and contexts which come before it.

There is no policy reason to question the exclusion of this group of persons from coverage under the LRA.

Recommendation:

143. The exclusion regarding managers and those employed in a confidential capacity in matters relating to labour relations should remain unchanged.

11 | Access to Meaningful Collective Bargaining: The Decision to Unionize

The broad issues surrounding the acquisition of bargaining rights are probably the most contentious between employers and unions and certainly some of the most important from a public policy point of view. In the last approximately 25 years, there have been many important changes in the legislation and in the interpretation of the *Constitution*. There have also been changes in the labour market and in the structure of employment. These changes, together with the decline in union coverage in the private sector, has made rethinking and reassessment in this area necessary.

The decline in unionization in the private sector (from about 19.2% in 1997 to only 14.3% in 2015)[443], and the lack of unionization amongst small employers is striking. This is especially so because, as we pointed out in the Interim Report, vulnerable workers in precarious work abound in many areas of the private sector where there is little unionization.

A second important recent development is the change in the law, as set out by the highest court in Canada, where freedom of association has become a broadly interpreted constitutional right. The Supreme Court of Canada has told Canadians and government that freedom of association requires meaningful access by Canadians to collective bargaining.

A third notable set of events are the rapid changes to the certification rules. After more than a 40-year period of relative stability in the certification system, the rules changed rapidly in 1993, 1995, 1998, and then again in 2005.

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443 Statistics Canada, Labour Force Survey.

Changes have been initiated by all three political parties. For reasons that were not always apparent and were not supported by outside independent analysis, everyone seemed to reject the status quo on the acquisition of bargaining rights that had prevailed from the 1940s and 1950s to 1993. Our goal is to try to find a new stability and to recommend a set of changes in this area that can be accepted as a basis for going forward for some time into the future, unless subsequent developments show them to be erroneous or insufficient.

Until 1993, the process for the acquisition of bargaining rights by trade unions was widely accepted as a consensus compromise developed over many years of Progressive Conservative, followed by Liberal governments, although to be fair, some in the trade union movement always opposed the petition process that was part and parcel of card-based (or card-check) certification in those years. The form of card-based certification that was in place for this long period permitted unions to be certified without a secret ballot vote if more than 55% of employees signed membership cards. However, the system allowed a short period after a certification application for employees who signed cards to change their minds (sign a petition) and for employers to make their views on unionization known, provided they did not interfere, threaten, promise, coerce, intimidate or use undue influence (hereafter, collectively referred to as “illegal activity” or “employer misconduct”). If enough employees changed their minds, there would be a secret ballot vote. Due to the presumptive power imbalance in the workplace between employers and employees, when employees purported to change their minds, the onus was on employees to demonstrate that the change was voluntary and did not occur because the hand of the employer was behind it or because there was a perception of employer involvement in the change. In most cases, employees had difficulty demonstrating that the change of heart was voluntary, either because there was employer support or, more often, because there was the perception or appearance of the hand of the employer behind the change.

The new card-based system instituted from 1993 to 1995, under Bill 40, differed from the old system in that changes in employee views past the application date were not legally relevant. If the union had more than 55% support based on the membership evidence at the date of application, it would be certified. This was also the approach that had been in place under the *Canada Labour Code* for many years.

This change was perceived by the employer community and the subsequent government as an important and unwelcome change from the previous decades-

old status quo. However, in 1995, the newly-elected government passed legislation (Bill 7) requiring secret ballot votes in every case. This was a new and radical departure from Ontario's historical approach. The new compulsory secret ballot vote provisions have remained in place for over 20 years, with one exception: card-based certification was brought back for the construction industry in 2005. The pre-1993 system over which there was broad consensus, has never been revived.

The remedial certification (without a vote) provisions of the LRA have changed even more frequently since 1993. Prior to 1993, if employer misconduct resulted in the true wishes of employees being unlikely to be ascertained in a vote, the union would be certified without a vote, provided there was adequate membership support for bargaining. Then in 1993, the requirement for adequate membership support for bargaining was eliminated. However, in 1995, the requirement for adequate membership support was reinstated. More importantly, in 1995, remedial certification was limited to situations where the OLRB found that no other remedy, other than a second vote, would counter the employer's misconduct. Then, in 1998, remedial certification was eliminated altogether. Finally, in 2005, remedial certification was reinstated, but the OLRB could now certify the union without a vote only if "no other remedy would be sufficient to counter the effects of the contravention." That remains the situation today. The OLRB may also now consider the results of a previous representation vote and whether the union has "adequate membership support" for collective bargaining.

These changes were introduced without any independent or outside assessment and, from time to time, represented political positions and some compromises over the interests of labour and employers, with profound impact on the rights of employees.

There have been few cases of remedial certification since the 2005 amendments, numbering perhaps an average of three per year. In our view, this is not surprising given that there was a complete absence of remedial certification from 1998 to 2005 and that since 2005, there has been restrictive remedial certification. In any event, the rules surrounding remedial certification are important, not because they affect the results in a few litigated cases each year, but because the rules for remedial certification strongly impact the conduct of the parties in the hundreds of certification campaigns that occur every year. It is that conduct we seek to influence through our recommendations, rather than simply the outcomes in a few cases at the OLRB.

We acknowledge that the reasons given for why there have been few cases of remedial certification are based on anecdotal evidence and are somewhat speculative, but in the view of experienced union organizers with whom we have spoken, it is not because employer conduct affecting the vote has declined. Employer conduct will always have an impact on the vote. Rather, based on our discussions, there are few applications because, based on the current legislation, unions are reluctant to seek remedial certification in circumstances where support for the union has been undermined by unlawful employer conduct. Where employee support has been undermined by unlawful employer conduct, even if certification is achieved, collective bargaining is very difficult without the availability of remedial first contract arbitration. Where union support is eroded by employer misconduct, support for achieving reasonable collective bargaining objectives is also eroded. Decertification is a more likely prospect where there has been employer misconduct. Also, cases in which a union seeks remedial certification tend to be expensive and litigious. The small number of cases in this area is likely circumstantial evidence that the law is too weak to be helpful in many cases.[444]

Much more important than the number of cases, however, is how the rules around certification and remedial certification affect employer and union conduct. What we seek to accomplish is a fair and common sense system that may reduce the prospect of unlawful conduct during organizing drives and that is both workable and consistent with the constitutional right of employees to a meaningful process of collective bargaining.

11.1 Criteria for our Recommendations

In our view, the approach to the issues in this area must involve an integrated and comprehensive set of ideas, not a hodgepodge of compromises and cherry-picking amongst the various elements that make up the issues facing policy-makers. That is why one of our most important recommendations regarding the acquisition of bargaining rights is that our recommendations in this area, specifically Recommendations 1 through 6, be accepted in their totality as a package.

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444 This view is supported in the limited literature on the subject: See Sara Slinn, Collective Bargaining (Toronto: Ontario Ministry of Labour, 2015), prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review, pp. 52-53. The view is also supported in the literature where Slinn reported that the better interpretation as to why unfair labour practice complaints under the Bill 7 regime fell is not because of a decline in employer resistance to unions but because unions were less likely to file complaints as a result of the greater scope for employer avoidance activity and more limited remedies: Slinn p. 15, including reference to Timothy J. Bartkiw, "Manufacturing Descent? Labour Law and Union Organizing in the Province of Ontario," Canadian Public Policy, 34.1 (2008), pp. 111-131.

We have carefully put together our recommendations to reflect balance and policy; they constitute a complete system and framework. For example, if one starts with secret ballot votes as a bedrock position, certain consequences follow. To permit unions or employers to select only the elements they prefer, but not the elements they do not embrace, is not a rational way to make policy. Both sides will have their reasons to criticize aspects of our package of recommendations but if the goal of labour relations policy is to please the parties, there will be very little policy change indeed.

All unions strongly advocated for what they refer to as the "restoration" of card-based certification, which, it is said, was in place for decades. As we pointed out above, the form of card-based certification that was in place prior to 1993 was quite different from the 1993 model. The 1993 model was in place outside of construction for only two years and is the model the unions now seek. The unions claim that the card-based system is democratic, and, in effect, that it is a necessary counterweight to illegal employer misconduct in certification campaigns because it measures support often before the employer knows there is an organizing campaign. The reality behind union support for card-based certification is that unions tend to succeed more often in a card-based model than in a compulsory vote model.[445]

Employers oppose card-based certification as strongly as unions support it. Card-based certification is a focal point of employer opposition to changes to the LRA. Every employer group strongly opposes card-based certification. Even though Ontario had a system in place for more than 40 years that provided for certification without a vote based on card-based check majorities of more than 55%, employers distrust the authenticity of the card-based system. Employers tend to believe employees sign cards because they are potentially fooled by undeliverable promises, or because of misrepresentation, undue union or peer pressure, or intimidation. Moreover, they stress that the democratic norm for voting in our society is a secret ballot vote where the privacy of the individual is protected. At the bottom of this employer position, however, is that unions tend to be less successful when there are secret ballot votes and an important part of that system is that the employer has an opportunity to make its views known prior to the vote.

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445 "These studies consistently find that the presence of an MVC (mandatory vote certification) is associated with a statistically significant reduction in certification application activity, including success rates": Slinn (2015), *op. cit.*, pp. 11-12.

The union opposition to the present system and the reason for the union support of card-based certification is practical and important. First, the unions say they encounter powerful and often unlawful opposition from employers to applications for certification and that this activity frequently frightens and intimidates employees. Their experience is that employee support for the union drops dramatically if employees become afraid for their jobs or benefits once the employer begins to mobilize. Sometimes employer opposition and misconduct is overt. In many cases, it is hidden or subtle, but no less effective.

In the study by Professor Sara Slinn undertaken for this Review, she substantiated that the academic literature supports the view that reductions in certification success are associated with some specific employer tactics including many that are illegal:

> *This research has found that significant reductions in certification success are associated with specific employer tactics including the tactic of frustrating union access to employees (Bentham, 2002). Reductions in likelihood of certification success are also associated with: illegal terminations (31% reduction), group coercion (19% reduction), and ULPs [unfair labour practices] directed at individual employees to employees (7% reduction) (Riddell, 2001). As well, reductions in certification success are associated with captive audience speeches, small group meetings held by the employer, distribution of anti-union literature, employer promises of increased wages and benefits, tightening of work rules, threats against union supporters, and interrogating workers (Thomason and Pozzebon, 1998). (Page 13)*[446]

Certainly, the facts seem to bear out that certification applications tend to be less successful where there is no card-based certification. The difference in percentage terms is high. During card-based certification under Bill 40, 72.7% of certification applications succeeded while under the first few years of the Bill 7 compulsory vote procedure, the success rate fell to 64.3%.[447] In the 2014-15 year 58.7% of certification applications disposed of were granted.[448]

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446 Slinn (2015), *op. cit.*, p. 13, quoting Bentham, Karen, "Employer Resistance to Union Certification," Relations industrielles / Industrial Relations, 57.1 (2002), pp. 159-187; Thomason, Terry and Silvana Pozzebon, "Managerial Opposition to Union Certification in Quebec and Ontario," Relations industrielles / Industrial Relations, 53.4 (1998), pp. 750-771; Chris Ridell, "Union Suppression and Certification Success," Canadian Journal of Economics, 34 (2001), pp. 396-410.

447 Sara Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification", Canadian Labour & Employment Law Journal, 11 (2004), pp. 259-302 at p. 271.

448 Calculated from OLRB Annual Report, Table 4 Certification and Termination of Bargaining Rights Cases.

More generally, the union certification success rates in card-based regimes tend to be about 20 percentage points higher than under compulsory vote systems and studies show that this difference is concentrated in the private sector.[449] Some cross-jurisdictional studies, measuring public and private sector certifications together, estimate about a 9-10 percentage point difference.[450]

The power of the employer to influence the vote process through overt or subtle actions including sometimes – and the unions would say oftentimes – misconduct, is the central reason why unions seek card-based certification. The vulnerability of employees to employer misconduct that can nullify or impair the rights of employees is the most compelling justification for the card-based system.

In this debate between unions and employers, we think the most important considerations in deciding on an outcome are the criteria that lie at the heart of the constitutionally-protected process of meaningful collective bargaining. According to the Supreme Court of Canada, these criteria are employee choice and employee independence.

To reiterate, freedom of association is a constitutional *Charter* right of individual Canadians, entitling them to a meaningful system of collective bargaining, if they desire it. As the Court said, the purpose of the constitutional right of individual employees to combine is to enhance their strength as a collective and to prevent them from being overwhelmed by more powerful employers. Employee choice, along with the ability to associate together to determine a collective interest, is the very essence of meaningful collective bargaining:

> *… s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals….*

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449 Chris Riddell, "Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998," Industrial and Labor Relations Review, 57 (2004), p. 493-517; Sara Slinn (2004), *op. cit.*, pp. 259-302.

450 Felice Martinello, "Correlates of certification application success in British Columbia, Saskatchewan and Manitoba", *Relations Industrielles/Industrial Relations* (1996), pp. 544-562; Susan Johnson, (2002), Card check or mandatory representation vote? How the type of union recognition procedure affects union certification success, *The Economic Journal, 112*(479), pp. 344-361.

> *Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties…*
>
> …a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them. *[emphasis added]*[451]

Freedom of choice by employees should be protected by a secret ballot vote process that protects both choice and secrecy, provided that the law also protects their independence to select (or reject) a bargaining agent. Employer (or union) misconduct that undermines employee independence destroys the reliability of the secret ballot process. The Supreme Court has acknowledged the power imbalance between employees and employers and that a meaningful process of collective bargaining includes protecting employees' rights to join associations or unions that are free of the influence of, or domination by, the employer:

> *[there is] a presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker.*
>
> *The function of collective bargaining is not served by a process which is dominated by or under the influence of management. This is why a meaningful process of collective bargaining protects the right of employees to form and join associations that are independent of management (Delisle, at paras. 32 and 37).*[452]

The significant power imbalance in the workplace and the ability of the employer to influence employees has long been recognized in the LRA.

The right of an employee to choose freely whether to be represented by a trade union is protected under the LRA. It is specifically protected from interference by the employer, whether by coercion or bribery. The LRA makes it an unfair labour practice for an employer to "seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to

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451 *Mounted Police Association of Ontario v. Canada (Attorney General)*, (2015) 1 SCR 3, para. 81.
452 *Mounted Police Association, op. cit.*, para. 88.

cease to exercise any other rights under this Act".[453] In addition, the LRA makes it an unfair labour practice for an employer to "participate in or interfere with the formation, selection or administration of a trade union", while acknowledging the right of the employer to express views "so long as the employer does not use coercion, intimidation, threats, promises or undue influence".[454] These prohibitions are based on the fact that employees who may be engaged in organizing a trade union are vulnerable to the power and influence of the employer. Employer actions and/or communications that are designed to underscore employee vulnerability to the economic power of the employer are inconsistent with the freedom of employees "to form and join associations that are independent of management." Such conduct also undermines the secret ballot process and makes the results of such a vote unreliable.

The OLRB, like courts and other labour tribunals, has recognized the importance of independent choice free from employer interference. The OLRB has stated that employers cannot align themselves with those who favour or oppose a union and has cautioned employers in expressing their views that they should not interfere. In Emco-Fab Ltd., Vice-Chair Picher stated:

> *An employer can align himself neither with the employees who favour a union nor with those who are opposed. Doing so distorts the balance of choice and frustrates the free exercise of employees' rights under the Act. Support to either camp, whether open or covert, amounts to interference contrary to the Act. While it may be impossible in the real world to expect employees to make their choice for or against a union in "laboratory conditions" unaffected by any outside influences, the Act strives insofar as possible to insulate the process by which employees select or reject union representation. Apart from the right to express his views, a right whose exercise requires some care, the Act imposes a simple rule for the employer: "Do not interfere."*[455]

The current provisions of the LRA are not sufficiently responsive to the adverse impact that employer misconduct has on the rights of employees to free and independent choice.

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453 Section 72 of the LRA.
454 Section 70 of the LRA.
455 [1982] OLRB Rep. August 1162.

Under the current law, second votes are possible in every case of remedial certification, and the OLRB can certify the union only "if no other remedy would be sufficient to counter the effects of the contravention."[456] Also, in considering whether to order a second representation vote, the OLRB may take into account the results of the previous representation vote and whether the union appears to have "membership support adequate" for collective bargaining.[457] If employer misconduct has eroded union support prior to a first vote, or made it impossible to obtain enough support for an initial vote, it is illogical to consider the results of that vote or the absence of membership evidence, as factors in determining whether there should be a second vote. A second vote in such circumstances is not an effective response to counter unlawful conduct aimed at influencing employee choice. It is tantamount to condoning a violation of the Act.

The premise that steps can be taken to ensure a second vote is sufficient to counter the effects of employer misconduct is flawed. While there may be rare cases where a union could win a second vote following employer misconduct, in our collective experience over a lifetime of practice, like scrambled eggs, the status quo ante cannot be restored and the second vote will generally be tainted by the misconduct. Employer conduct that is designed to raise or results in employee concern about the future stability or security of their employment leaves an indelible mark. Fear of supporting the union, or the hope of reward for voting against the union, which results from illegal threats or promises, is not likely rectified by a decision of a labour board finding unlawful conduct, even if coupled with a "mea culpa" statement made by the employer to employees as a result of a board order.

The power of the employer to influence the livelihood of employees is real. Everyone who has been employed, in positions high or low, understands the power of those in authority to control employment, including allocation of duties and responsibilities, career advancement and promotion, demotion, compensation and continued employment. Employees understand the power of the employer to make decisions affecting the future of the entire enterprise such as layoffs, or moving, or closing all or part of its operations. Once employer misconduct undermines the true wishes of employees, the results of a vote are, more likely than not, unreliable.

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456 Section 11 of the LRA.
457 *Ibid.*

11.2 A Recommended Package

We do not believe that there is a single "correct" certification procedure. Our recommendations are designed to protect employee choice and employee independence to decide whether to engage in collective bargaining free of undue influence or threats. This is the employee's fundamental constitutional right.

Moreover, while we have concluded that a secret ballot vote is preferable to membership evidence alone as a reliable indicator of employee views, we do not share the broad employer community's opposition to card-based certification. For many years in Ontario, card-based certification was accepted as a reliable indicator of employee preference and less susceptible to the adverse impact of opposition to certification by employers than a secret ballot process. The irony is that secret ballot votes, which are said by the employer community to be necessary to safeguard against the unreliability of the card-based process, are unreliable if there is employer misconduct.

When, in 1992, the Special Advisors to the British Columbia Government on labour law reform recommended a return to card-based certification – a unanimous recommendation of a respected tripartite group[458] – it was on the basis that card-based certification was required to offset illegal employer conduct:

> *The surface attraction of a secret ballot vote does not hold up to examination. Since the introduction of secret ballot votes in 1984, the rate of employer unfair labour practices has increased by more than 100%. When certifcation hinges on a campaign in which the employer participates, the lesson of experience is that unfair labour practices designed to thwart the organizing drive, will inevitably follow….Unions would sign up a clear majority of employees as members and a vote would be ordered.Then key union organizers would be fired or laid off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign."*[459]

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458 The Special Advisors were composed of a neutral, Vince L. Ready, and leading union and management lawyers, John Baigent and Thomas A. Roper Q.C.

459 Recommendations for Labour Law Reform, V. Ready, J. Baigent, and T. Roper, Victoria: Queen's Printer for British Columbia, September 1992, p.26.

For reasons outlined below, we recommend preservation of the secret ballot vote process for certification with appropriate remedies for employer misconduct. Without effective remediation for unlawful employer conduct, there are compelling reasons for a return to card-based certification.

There were other considerations in making our recommendation. First, the secret ballot vote is the norm for the expression of democratic outcomes, at least in elections, and should not be discarded without greater proof that it cannot be made to work effectively.

Second, the secret ballot vote has been the norm in labour relations in Ontario for over 21 years now, and the clock is not easily set back. In that regard, Ontario's situation is different from the federal system, where compulsory votes were in place for an extremely short period of time before the card-based system was restored. Large unionized employers are much more prominent in the federal private sector, whereas Ontario's private sector is far more diverse. Smaller private sector employers are fearful of unionization and if card-based certification were reintroduced in Ontario, there is a high probability that the business community would look to a subsequent government to restore secret ballot votes. The basic system and rules for the acquisition of bargaining rights should not be subject to change every time the government changes.

Third, the results of a secret ballot vote have greater credibility with everyone, including employees, employers and the public. Legitimacy and credibility are important and are undermined by not having secret ballot votes as the norm.

Fourth, and, perhaps most importantly, we have not had a secret ballot process where illegal employer conduct in the certification process, which makes the true wishes of employees unlikely to be known, would lead to certification without a vote and to first contract arbitration, if necessary.

The current compulsory secret ballot vote process, with the existing remedial certification and first contract arbitration provisions, is insufficient to protect the freedom of association of employees. If employer misconduct has a profound impact on the employees and undermines free choice, then the existing system, which prefers second votes and adequate support for bargaining in circumstances where that support has been undermined by the employer's conduct, is skewed. There is no level playing field for the determination of the true and independent wishes of the employees.

In policy terms this choice is clear. If a secret ballot vote is to be maintained as the norm in our labour relations system, then it is proper and correct policy to insist on the integrity of that process by not permitting employer misconduct and interference to undermine it. It is unreasonable to insist on the most democratic and preferred means of determining employee choice, namely the secret ballot vote, while at the same time effectively sanctioning and countenancing employer misconduct, which undermines the integrity of the voting process. A second vote, following employer misconduct, cannot rectify or eliminate the impact of employer misconduct and is an unreliable measure of free and voluntary support of the union. Once everyone knows the well is poisoned, no one will drink the water. Accordingly, if an employer unlawfully interferes with the employees' rights to freedom of association and honest independent choice, that conduct must trigger a meaningful remedy, namely certification without a vote and access to first contract arbitration.[460]

Therefore, our recommendation is that the secret ballot for certification be maintained, but government should assess whether remedial certification and easier access to first contract arbitration in response to employer misconduct will effectively deter such conduct. If true employee choice and independence ultimately prove to be incompatible with a secret ballot system, then resort may need to be had to the Ontario construction certification model or the federal system of certification in which the certification procedure is just seen as, in effect, an efficient licensing system, which authorizes a union to act on behalf of a group of employees.[461]

In the current circumstances, the policy we favour is a secret ballot voting system that includes effective remedies of certification and access to first collective agreement arbitration where there is employer misconduct undermining the integrity of the vote.

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460 Unless the union forfeits its right to arbitration by bargaining improperly as we discuss, below.

461 Card-based certification in the federal system is essentially an administrative procedural model. These procedures do not treat the certification procedure as a contest. Instead, the approach to certification is akin to licensing a union to act as the exclusive bargaining agent for a unit. Supporters of this perspective argue that it accurately reflects the fact that certification is no more than the first step to bargaining. The focus is on an efficient administrative procedure, that "…without much fanfare, will get the parties to the negotiating table as quickly as possible": Weiler, Paul, 1983, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," *Harv. L. Rev.* 96 (8), 1769-1827. In short, it addresses the certification application and certification decision as an administrative decision by a labour board. The certification process is not treated as a competition between the union and employer for employees' "hearts and minds": Weiler, *op cit.*, p. 1809. Reflecting this administrative approach, a card-based system may restrict the legitimate role of the employer in the certification procedure to challenging matters, such as the scope of the proposed bargaining unit, voter eligibility, and membership card validity, and does not explicitly recognize a campaign period, as in the construction certification model.

We submit that the package of recommendations will result in a principled and workable system, which both unions and employers should be able to support. Unions should favour a system where employee free choice is maximised and unlawful employer interference is effectively remedied. Employers should support the preservation of the secret ballot, legitimate employer free speech and open discussion of the issues by unions and employees. Most employers understand that unlawful conduct, which negates or impairs the constitutional rights of employees to freedom of association, requires effective remediation. Most employers understand that employers who engage in unlawful conduct should not be rewarded with the defeat of a union. In our estimation, the employer community, which is overwhelmingly law-abiding and respectful of the rights of its employees under labour law and the constitution, will have no interest in protecting those employers who violate the law and who undermine the integrity of the secret ballot process.

Recommendation:

144. The secret ballot process for certification should be preserved, provided that recommendations 2 – 6, below, are also accepted.

11.2.1 Remedial Certification (Certification Without a Vote)

For reasons outlined above, our view is that a second vote is an inappropriate response to employer misconduct that undermines employee choice and independence and the integrity of a first vote. We also consider that the criterion of adequate support for bargaining is inappropriate as a threshold test for remedial certification where there has been employer misconduct. This criterion is incongruous with a fair outcome because it rewards employers who violate the LRA early to prevent the union organizing campaign from getting off the ground, or who engage in illegal activity later in the campaign, which demoralizes and frightens employees, thereby destroying support for the union. Employer misconduct that warrants a conclusion by the OLRB that that the true wishes of the employees of the employer are not likely to be ascertained in a secret ballot vote should result in certification.

Recommendation:

145. We recommend that section 11 of the *Labour Relations Act, 1995* be revised to provide as follows:

    Where an employer, an employers' organization, or a person acting on behalf of an employer or employer's organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, the Board, shall on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

11.2.2 First Contract Arbitration

Unions have argued that following certification, access to first contract arbitration should be automatic once the parties are in a position to strike and lock-out. Employers have generally opposed first contract arbitration, and third-party intervention, as an interference with free collective bargaining.

We are opposed to a right to interest arbitration whenever a union is certified. Imposing mandatory interest arbitration for first contracts in every case would mean a blanket denial of the right to strike, a right which the Supreme Court of Canada has found is an "indispensable component" of the constitutional right to collective bargaining.[462] Further, an automatic right to first contract arbitration would be a substantial deviation from the accepted values of voluntarism and of parties accepting responsibility for outcomes. As set out below, we favour a system of intensive mediation for first contract negotiations, which is modeled on the British Columbia legislation and which, in addition, provides access to first contract arbitration as a remedy for employer misconduct.

First contract arbitration is justified as a remedial response to employer misconduct for at least two reasons. First, employer misconduct makes access to first contract arbitration a necessity. If employer misconduct has eroded support for the union and the employer has made its anti-union animus known to employees, then employee support for collective bargaining will also have been eroded. Access to first contract arbitration is the only practical way to ensure that employees have meaningful access to collective bargaining where there has been misconduct resulting in remedial certification.

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462 *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

Second, the availability of first contract arbitration as a response to employer misconduct in the certification process will function as a deterrent to employer misconduct. Employers will know that unlawful conduct may result in certification and access by the union to first contract arbitration.

However, the right to first contract arbitration should not be absolute. Unions and employers must be given an opportunity to bargain in a first agreement, following remedial certification. Remedial certification should not be an opportunity for a union to take unreasonable positions in collective bargaining for a first contract. Accordingly, we are proposing an intensive mediation model, below, for first contract negotiations. In the model proposed, access to arbitration may be denied following remedial certification if the union bargains in bad faith or is uncompromising without reasonable justification.

Recommendation:

146. Where remedial certification under section 11 is ordered, first contract arbitration under section 43 of the *Labour Relations Act, 1995* should be available, unless the union has bargained in bad faith or is uncompromising without reasonable justification. Where collective bargaining between the parties has not resulted in a collective agreement, the matter should be referred to an expedited and intense mediation/arbitration process and mediated either by a person selected by the parties or by the *Labour Relations Act, 1995* in the event the parties are unable to agree.

11.2.3 An Intensive Mediation Process for First Contracts

Under the existing law, a direction of first contract arbitration by the OLRB can be made in the following circumstances: the employer refuses to recognize the union; an uncompromising bargaining position is adopted by the union or the employer without reasonable justification; either party fails to make reasonable or expeditious efforts to conclude a collective agreement; or for any other reason the OLRB considers relevant. We agree that first contract arbitration is justified in these circumstances and following remedial certification as well.

We also recommend additional changes to the current system under the first contract provisions in section 43 of the LRA.

First contracts are typically more difficult to bargain than subsequent renewal agreements. There are many reasons for this, including circumstances set out in the previous paragraph. The parties may be inexperienced, or there may have been conflict in the certification process damaging the formation of a relationship.

All first collective bargaining negotiations that do not reach settlement on a voluntary basis will benefit from an intensive mediation process where the mediator, working actively with the parties, has the authority to recommend substantive terms of an agreement and/or further mediation, mediation/arbitration, or ordinary arbitration, or that the parties be able to strike or lock-out.

The "mediation-intensive" model introduced in British Columbia in 1993, offers a reasonable model for Ontario that could significantly improve labour relations success in first contract negotiations, including after remedial certification. Certainly, following remedial certification, a different approach to collective bargaining is warranted, but facilitating first contract arbitration in all cases where there is a strike vote (unless the union can show that employer misconduct made a strike vote untenable) is desirable for labour relations in Ontario. According to Professor Slinn, studies have shown that the intensive mediation approach in British Columbia is likely to produce more enduring relationships.[463]

Pursuant to our recommendations, a mediator would be appointed early in the process to provide assistance to the parties by facilitating and encouraging collective bargaining and by educating the parties on practices and procedures, all of which should help avoid an irreparable breakdown in their collective bargaining relationship. Most cases will, with the help of a mediator, result in a first collective agreement but, if not, there is a process for settling the agreement, including one or more of: mediation, mediation/arbitration, arbitration by an independent arbitrator or by the OLRB, or permitting the parties to engage in strike/lock-out. The OLRB will make the final decision as to which process should be used.

The following is a non-exhaustive list of factors that the British Columbia Labour Relations Board has indicated it will consider when deciding whether first contract negotiations should be referred to arbitration:[464]

- evidence of bad faith bargaining or surface bargaining;
- employer conduct demonstrates refusal to recognize the union;

463 Slinn (2015), *op. cit.*, pp. 46-47.
464 *Yarrow Lodge Ltd., et al. v. HEU et al.* (1993) BCLRB No. B444/93.

- a party adopts an uncompromising bargaining position without reasonable justification;
- a party fails to make reasonable or expeditious efforts to conclude a collective agreement;`
- unrealistic demands or expectations arising from either the intentional conduct of a party or from their inexperience with bargaining; and
- evidence of a bitter and protracted dispute in which it is unlikely that the parties will be able to reach an agreement by themselves.

Based on the case law as it has developed in British Columbia[465], the general approach is that all cases following a strike vote get the benefit of intense mediation, if the parties request it. The process in B.C. is that the cases which, under the current Ontario law, would be eligible for interest arbitration are ultimately sent to arbitration if they do not resolve in mediation, but disputes which do not fall into that category are resolved without arbitration. In other words, except for our recommendation that all cases following remedial certification are eligible for first contract arbitration, the intensive mediation model is not intended, and does not expand the category of cases eligible for first contract arbitration under current Ontario law.

We are in agreement with the general philosophy and approach in British Columbia and believe it would be an improvement for Ontario to adopt a similar, although not identical, approach. Our new system envisages that the OLRB would apply these or similar criteria and these would replace the express criteria in the current section. Based on our experience, we have considerable confidence in mediation and mediation/arbitration processes. If these processes were to be made available in first contract negotiations with experienced mediators, not only would more first collective agreements be resolved without strike or lock-out but, also, better and more successful collective bargaining relationships would result.

465 *Yarrow Lodge Ltd.*, *ibid.*

Recommendation:

147. The *Labour Relations Act, 1995* should be amended to enable an "intensive mediation" approach similar to the approach currently in use in British Columbia. It should generally follow the statutory scheme in British Columbia with some different or additional elements:

    a) Either the employer or the union may apply to the Chair of the Ontario Labour Relations Board to appoint a mediator to help the parties reach a first collective agreement once the following thresholds have been met: (1) the parties have bargained collectively but failed to conclude an agreement; and (2) the union has obtained a strike mandate.

    b) The second requirement in (a), above, does not apply where the union has obtained remedial certification, or where the union can demonstrate that employer misconduct following certification has resulted in the union becoming unable to obtain a successful strike vote.

    c) Once an application is filed, the parties cannot engage in a strike or lock-out unless subsequently so permitted by the Ontario Labour Relations Board.

    d) An application must include a list of the disputed issues and the position of the party making the application on those issues. Within 5 days the other party must give a list of disputed issues and their position on those issues to the other party and to the Ontario Labour Relations Board.

    e) The Chair will appoint a mediator within 7 days of receiving the application.

    f) If within 20 days the mediation is unsuccessful and a first collective agreement is not reached, the mediator must report back to the Chair and recommend the following steps:

        - the terms of the first collective agreement for the parties to consider; and/or,
        - a process for concluding the first collective agreement, including one or more of the following:
            - further mediation;

- mediation/arbitration or arbitration alone, by a single arbitrator or by the Ontario Labour Relations Board; or,
- strike or lock-out.

g) If the parties do not accept the mediator's recommended terms for the first collective agreement or if an agreement is not reached within 20 days of the mediator's report, the Chair must direct a method for resolving the dispute from the above list.

h) A union that has obtained remedial certification is prima facie entitled to have the dispute subject to mediation/arbitration or arbitration, unless its conduct in bargaining is found to disentitle it to such a remedy.

i) If the Chair orders further mediation or arbitration, the parties cannot engage in a strike or lock-out until subsequently permitted to do so.

j) Any agreement imposed upon the parties is for a term of two years and is binding.

11.2.4 Timeliness of Displacement and Decertification Applications

One issue that needs to be addressed is the timeliness of displacement applications ("raids") or decertification applications when a first contract application is pending, or in the circumstances discussed, above, in Recommendation 4. The wrong approach could easily undermine the other recommendations. Allowing decertification or displacement applications before remedial certification or first contract arbitration has had a chance to work would undermine or nullify the impact of granting either of those remedies.

Where remedial certification or first contract arbitration is ordered as a result of employer misconduct, decertification and displacement applications should not be allowed. Decertification applications and displacement applications should be prohibited from the time certification without a vote is ordered until the open period after the expiry of the first contract, unless the union is found to be disentitled to first contract arbitration, in which case a raid or displacement application would be timely according to the ordinary rules. A decertification or displacement application should also not be heard when an application for intensive mediation[466] has been

466 Under our proposed new rules, or first contract arbitration under the existing rules.

made. To permit a decertification application to have priority over the intensive mediation process or the first contract arbitration process undermines the remedial approach we have recommended.

Recommendation:

148. Where a union is certified under section 11 of the *Labour Relations Act, 1995*, applications for decertification or certification should be untimely until the open period of the collective agreement subsequently entered into, unless first contract arbitration is denied, in which case, the current timeliness rules should apply. Where a union or employer apply for intensive mediation under the new proposed rules or for first contract arbitration under section 43 of the Act, no application for decertification or certification should be allowed until that process is completed.

11.2.5 Access to Employee Lists and Contact Information

The constitutional right of employees to effective and meaningful collective bargaining, and to enhance their bargaining strength, is founded on the freedom of employees to associate.

This has important implications for the certification process because employees cannot practically band together to pursue their workplace goals if they don't know who the other employees are, where they work, how to contact them, or how many of them there are. Canadians in a workplace cannot exercise their constitutional right to associate for purposes of collective bargaining if they are unable to communicate with their fellow employees in the same workplace. Absent the ability to know who the other employees are and how they can be contacted, the constitutional freedom of association is potentially sterile and ineffective.

The secret ballot voting process protects free employee choice, provided it is free of improper employer influence and, as in any election, it makes "democratic sense" to enable contending viewpoints to be communicated to the voting constituency.

The process of acquisition of membership evidence is an integral part of the secret ballot process. The accumulation of 40% support is a precondition for a vote. Prior to the ordering of a vote, there is as much need for the employees and the union to know who the members of the voting constituency are and to be able to communicate effectively with them as there is for competing candidates for

public office to know the names on the voters list. Both are vital to the exercise of the democratic process and the exercise of constitutional rights. In other democratic arenas, such as governmental elections, there are publicly available lists of constituent voters containing information on where the voters reside so that political parties can communicate with them in person or by mail.

There are other reasons why employee information is practically necessary for freedom of association to be meaningful for employees. Workplaces can be large and geographically spread out and it can be very difficult and onerous, if not impossible in some circumstances, to know the number of employees and where they work. Moreover, in the changing workplaces of today, employees can be employed on numerous shifts, or on a part-time or temporary basis or away from the workplace altogether, and it can be difficult for other employees to know how and where to reach them. These many practical obstacles should not be placed in the way of the exercise of the constitutional right to freedom of association, especially when the employee information exists and can be easily provided. Where freedom of association, and the exercise of the right to meaningful collective bargaining, is a constitutional right, organizing should not be a game of pin the tail on the donkey.

We have examined and assessed this issue in the context of the decisions of the Supreme Court of Canada, which set out the role of collective bargaining in constitutional terms.[467] The secret ballot vote process is premised on an informed, free and accessible electorate of employees. Being unable to determine who comprises the electorate and being unable to communicate with them, are barriers to achieving certification based on the wishes of a majority of employees in a secret ballot vote and is inconsistent with the principles of employee choice and independence. If the union cannot communicate effectively with the electorate, or if only the employer can communicate, there is a barrier to accessing meaningful collective bargaining.

In a secret ballot system predicated upon a threshold of support to trigger a vote and where majority support is required in order to be successful, the identification of the voting constituency and the ability to communicate is essential. Otherwise, the result is a flawed democratic process. Those who champion the secret ballot process as the best mechanism for the expression of employee choice should be supportive of an informed electorate.

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467 *Mounted Police Association of Ontario, op. cit.*; Saskatchewan Federation of Labour, op. cit.

A further reason for promoting a system where there is an ability to have an open expression of views on unionization is that it will help to achieve a culture of compliance and a broader knowledge of the rights of employees. At the moment, there is a stark contrast between the rights of employees and the reality of the fear that accompanies the entire issue of unionization. On the one hand, there is a statutory scheme that grants everyone the right to belong to a trade union and participate in its lawful activities and a constitutional right to associate, organize, bargain collectively and strike. On the other hand, in many workplaces, the very idea of a union is considered to be a betrayal of the employer, a disloyalty, and something that cannot be openly discussed for fear of the repercussions. Open discussion and debate, untainted by employer misconduct, will help to alleviate fear and concern and help to establish an environment in which employees are free to make an independent choice on whether they want to engage in collective bargaining and, if so, who they wish to represent them.

Many employers have objected to providing access to employee lists and contact information. In submissions made to the Changing Workplaces Review, employers have asserted that there is no precedent and no demonstrated need for such a change and that it would interfere with employee rights to privacy.

In terms of a lack of precedent, it is true that no jurisdiction requires the provision of employee information before an application is filed. Quebec requires the provision of names and addresses before a vote[468] and the U.S. requires the employer to provide names and contact information including email addresses in the election period,[469] although this may not remain in place under the new US Administration. Under the *Public Sector Labour Relations Transitions Act, 1997* (PSLRTA), the practice and OLRB decisions provide that during the campaign, unions are allowed a list of names, addresses and phone numbers of employees, information meetings at the employer's site(s) as well as an information table on the employer's premises during the campaign period.[470] As to lack of precedent, with any new change, some jurisdiction has to go first and it cannot be public policy in Ontario that Ontario can only follow what other jurisdictions have already done.

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468 Section 15 of the Regulation respecting the exercise of the right of association under the Labour Code states: "For the purposes of voting, the employer shall draw up a list of employees according to the bargaining unit agreed upon by the parties or, if necessary, according to the decision of the Tribunal. The list shall contain the surname, given name and address of the said employees."

469 NLRB, Representation Case Rules Effective April 14, 2015.

470 See, for example, *St Thomas Elgin General Hospital v OPSEU Local 152*, (2013) CanLII 76996 (ON LRB) *and The Rehabilitation Institute of Toronto v. Canadian Union of Public Employees, Local 1156*, (2000) CanLII 12710 (ON LRB).

Of course, where a policy initiative is unprecedented, it is important to examine it carefully. In the academic literature, there is strong support for the provision of names and contact information during the organizing process.[471]

We have set out the reasons why we recommend this change and why we conclude that there is a demonstrated need for it, both on the application of constitutional and democratic principles.

Although privacy interests are important, there are also other public policy interests, and these interests must be balanced. For example, voters in a public election have no privacy interest not to be contacted or identified and there is a public list of voters and where they live. During an organizing campaign, employees are entitled to participate fully in discussions about the desirability or utility of collective bargaining. An employer maintains the right and the means to communicate to its own employees, and it often does communicate as soon as it finds out an organizing campaign is occurring. To level the playing field, unions should have the information necessary to communicate effectively with the employees. In addition, in the current certification process, some of this information is already produced, e.g., employee lists are already made and filed with the OLRB in response to certification applications and employees are named on the voters list for representation votes.

When Should a Union Be Given Access to Employee Lists and Contact Information?

There must be some limits on the ability of unions and employees to obtain information on the number, location, and contact information of employees. There must also be prohibitions on the use of the information for purposes unrelated to organizing. A union must show a core level of support among the employees in a proposed bargaining unit to justify acquiring the information.

A union currently requires the support of 40% of an appropriate bargaining unit to trigger a vote. In our view, an applicant union should be required to demonstrate that 20% of the potential bargaining unit supports collective bargaining through joining the union in order to acquire the right to be provided with the names, addresses, work locations and contact information, including emails and phone numbers, of the employees. A threshold of 20% membership is sufficient to demonstrate that it has a reasonable chance of obtaining the 40% necessary to trigger a secret ballot vote, A similar standard could be applied to employees seeking to de-certify a union.

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471 See Slinn (2015), *op. cit.*, at pp.18-19.

To the extent that it is necessary for this requirement to take precedence over any statutory or common law privacy concerns, it should be clear in the statute that these rights supersede any statutory or common law privacy rights and the OLRB should be entitled to decide the matter quickly based on written submissions, without a hearing and/or consultation.

Employers have expressed a legitimate concern that this provision could lead to further extensive litigation. For that reason, we do not envisage that 20% should be a fixed and absolute threshold for the union to meet in order to obtain the list. To do so would simply invite prolonged litigation with status tests and other similar issues being litigated to determine if the union had reached the threshold entitling it to the information. This would be both a waste of resources and destructive. Rather, the test for entitling the union to the list and the contact information should be that the union demonstrate that it has signed approximately 20% of the unit it considers appropriate for collective bargaining. The process we envisage is simple: the union will submit membership evidence as it does in the ordinary course of an application for certification and the employer will submit its list of employees who are in the bargaining unit that the union claims to be appropriate for collective bargaining. If it appears to the OLRB that the union has membership support of approximately 20% of the unit, then the employer would be ordered to disclose the complete list and contact information to the union.

To protect the integrity of the process and to assure the employer community that an application for access to employee lists is not made for an improper purpose (i.e., to prevent the union from just applying to obtain the list when it has no entitlement to it), the union would not be permitted to see the employer list or to challenge it the way it would in a certification application. Rather, the OLRB would simply examine the membership evidence supplied by the union and the lists supplied by the employer and decide the matter based on the material submitted.

Such a safeguard will place the OLRB itself in a more active role in ensuring that the list submitted by the employer is an accurate response to the application and not an effort to mislead or gerrymander. The OLRB can do this by asking questions of the employer through its labour relations officers, as necessary, and checking the responses, without revealing confidential information to the union. If the OLRB decides it is necessary to disclose some or all of the information to the union in order to ensure a fair determination of whether the union meets the threshold test, then it could do so to the extent necessary for a fair disposition

of the matter by redacting certain information if necessary and/or imposing such terms as may be required, and prohibiting the union from keeping or copying the list or any portion of it.

In most cases, the OLRB will be able to make an informed assessment of whether the union meets the test of approximately 20% support, without disclosing the list to the union. In the same vein, the OLRB should not be required to reveal to the employer, as it would on a certification application, the actual number of cards that the union has submitted.

If the employer is ordered to produce the list and the contact information, it must also make the list available, if requested, to employees in the bargaining unit. Employees asking questions of the union or opposing the union should also be able to communicate with their fellow employees. If 20% of employees wish to have access to the information for purposes of a decertification application, the same provisions should apply.

Recommendation:

149. We make the following recommendations:

    a) Upon application by a union, if it appears to the Ontario Labour Relations Board that a union has the support of approximately 20% of the employees in a bargaining unit, the Board shall require the employer to disclose to the union the list of employees in the bargaining unit, together with the work location, address, phone number and personal email address of each employee. The same requirement shall apply if, upon application, it appears to the Board that approximately 20% of the employees in an existing bargaining unit have demonstrated that they no longer wish to be represented by a union; the same list shall be provided to the employee representative.

    b) The Board may meet with the parties but is not required to hold a hearing or engage in a formal consultation process.

    c) The Board shall not disclose the employer list to the union unless it considers it necessary to disclose some or all of the list in order to fairly determine the matter, in which case it shall disclose only as much information as may be necessary for the union to respond, and it may impose such terms as it considers necessary to preserve the confidentiality of the list so that the union does not obtain it on a

permanent basis. The Board shall also not disclose to the employer the number of employees the union has demonstrated as being members of the union.

d) It shall not be a breach of the common law or of any statute for the employer to provide the list of employees in the proposed bargaining unit to the union upon a direction from the Board.

e) The union shall not use the list or any information taken from it at any time for any purpose other than to seek the support of members of the bargaining unit.

f) If the union is provided with a copy of the list pursuant to an order of the Board, employees in the bargaining unit may ask the employer for the same list and the employer shall provide it. The employees to whom the list is provided shall not use the information for any purpose unrelated to the organizing campaign.

g) The same procedure shall apply if approximately 20% of employees in an existing bargaining unit wish to decertify the union.

11.2.6 The Recommendation Package: Recap and Rationale

As indicated above, we are recommending that Recommendations 1-6, above, be accepted in their entirety. The "package" is based on the rationale summarized below.

1. Our core recommendation is that secret ballot votes be continued. However, the recommendation is conditional upon the secret ballot vote process being free, independent and a true reflection of the desires of the employees. If, because of employer misconduct, the true wishes of the employees are not likely to be reflected in a representation vote, there must be effective remediation in the form of certification without a vote (remedial certification) and access to first contract arbitration. Those are Recommendations 1-3.

2. An intensive mediation process should be integrated into the first contract arbitration process. The parties to first contract negotiations will receive intensive mediation assistance to help them reach a first collective agreement. A union certified by remedial certification will be entitled to first contract arbitration but only after undergoing the intensive mediation process. Other cases that currently meet the test for first contract

arbitration will also have access to interest arbitration if an agreement is not reached through intensive mediation. Other first contract negotiations will be permitted to move to strike and lock-out, if necessary, if agreement is not reached in the intensive mediation process. This recommendation is designed to improve labour relations by increasing the likelihood of the successful conclusion of first contract negotiations and by reducing the number of cases where first contract arbitration is utilised. The use of intensive mediation will help parties in first contract negotiations succeed in resolving their disputes without third party dispute resolution and make arbitration more responsive to the needs of the parties where it is necessary. Overall, this should lead to more successful and long-lasting relationships. This is Recommendation 4.

3. Recommendation 5 is that decertification applications and displacement applications by other unions are prohibited while the intensive mediation and first contract arbitration process is ongoing. There is no point in setting up a new remedial system and intensive mediation process only to have it undermined by decertification applications or raids that occur before the remediation and intensive mediation process have had an opportunity to work.

4. Recommendation 6 is part of the package of recommendations because the secret ballot vote system, with membership evidence at 40% as its trigger, requires that all interested parties have the ability to communicate effectively with the voting constituency. A fair and democratic voting process requires a list of eligible voters and contact information to be made available so that employees can be informed participants in the election process.

11.3 Electronic Membership Evidence

The background to the issue of electronic membership evidence is set out in the Interim Report. In our digitalized world, limiting membership evidence to hard-paper copies is an anachronism. Unions should be able to campaign on the internet and through emails, texting, and social media, and employees should be able to respond affirmatively, if they wish, from the comfort of their homes or on their portable devices without having to arrange a physical meeting with someone or being required to sign a piece of paper. In a world where people work in different locations, on different shifts, part-time, temporarily and erratically, it impedes organizing to insist that membership cards be signed in 2017 in the same way that they were in the 1940s.

The failure to provide for electronic membership is a barrier, since it impedes new and more modern approaches to organizing. In addition, to many employees, especially millennials, the lack of an electronic means to join the union is likely to make the union appear anachronistic and antiquated. The rule compelling hard copies of membership evidence should be changed promptly. A potential concern about electronic membership evidence is its reliability; however, in an age where it is commonplace for people to provide identification electronically and agree to terms and conditions of contracts online, a system that permits both electronic membership evidence and verification should be easily achieved and the OLRB is able to determine whether the membership evidence is bona fide. In a recent decision, the British Columbia Labour Relations Board[472] accepted electronic membership evidence and set out what it would require in further cases, ensuring authenticity through the attendance of the union organizer and an audit trail.

The OLRB should modernize its rules concerning electronic membership evidence as soon as possible, using either the same tools as British Columbia or such other ones as it devises to ensure the authenticity and reliability of electronic membership evidence. The government should provide the funds necessary to modernize the electronic submission of information to the OLRB.

Recommendations:

150. The government and the Ontario Labour Relations Board should prioritize the provision of funds to modernize the electronic submission of information to the Board.

151. The Ontario Labour Relations Board should modernize its rules permitting electronic membership evidence as soon as possible, using either the same tools as British Columbia or such other ones as it devises to ensure the authenticity of electronic membership evidence.

11.4 Voting

We have been invited to consider recommendations for alternative voting procedures outside the workplace and/or off-site, telephone and internet voting. The current section 111(2) (h) of the LRA appears to give power to the OLRB to

472 *Working Enterprises Consulting & Benefits Services Ltd. v. United Food and Commercial Workers International Union, Local 1518*, (2016) CanIII 29625 (BCLRB).

control the voting process on the employer's premises, although the section can be read more broadly. The OLRB does now occasionally hold votes outside the employer's premises.

The powers of the OLRB should be broadened to give it clear discretion to hold electronic votes or to conduct votes outside the workplace. The Board should have the power to order these when it believes it appropriate to do so in circumstances where the integrity and secrecy of the voting process can be secured.

The argument has been made to us that the fact that votes are held at the workplace creates an intimidating atmosphere for employees in the exercise of their right to vote, either by the employer or the union. There is not a lot of evidence to support this assertion but it has been taken seriously in the academic literature and much consideration has been given to mail, off-site and/or electronic, telephone and internet elections (IETV).[473] However, a wholesale change in the practice of holding votes at the employer's premises is not warranted at this time. Rather, it should be left to the discretion of the OLRB on a case-by-case basis. In most circumstances, the Labour Relations Officer in charge of the vote will ensure the integrity of the vote. Longer term, however, the goal should be to move towards IETV voting.

It should be clear that holding votes in intimidating circumstances, or where the employer or union would have unique access to observe who was voting and speak to voters before they voted, is improper. Conduct by either the union or the employer around the holding of the vote undermining employee choice and independence, should not be permitted. Labour Relations Officers who conduct the votes should have the clear authority and duty to make arrangements and to give binding directions on the employer's premises that assure a neutral environment for the conduct of the vote.

Holding votes quickly is generally recognized as being very important. The OLRB is viewed by the community as having done an excellent job in holding votes expeditiously and anything that the process gains in terms of a greater perception of neutrality through electronic or off-site voting could be lost if it takes a longer period of time to arrange and conduct the vote. One important reason for holding votes in employer premises is that it likely provides the best assurance of high participation by employees as the workplace is likely the most accessible

473 See Slinn (2015), *op. cit.*, pp.19-21.

location for voting. Holding a vote in a location outside the workplace will likely make access to the voting station more difficult for employees. Also, voting in a location outside the workplace would require finding a suitable and available location, renting premises or making other arrangements for employee access and providing notice to employees, all of which is likely to mean cost and delay. Having the vote at another location, away from the workplace, may also discourage certain voters and this may affect the outcome.

Electronic voting requires that employees be provided with passwords or code access for voting, which preserves the secrecy of the vote, as well as instructions on how to vote and time to provide the information. While electronic voting may facilitate voter participation, free of any perception of improper influence, there is a concern that it may delay voting because of the added time that it might take to organize and communicate that information. Aside from that consideration, IETV voting offers freedom from any interference with the voter as well as secrecy and privacy. If, in the future, all the information on how to vote can be standardized and transmitted quickly to all voters by email or other electronic means, electronic voting may be more common and replace workplace balloting altogether.

In short, as experience with electronic voting increases and as technology progresses, it may be possible to have electronic voting systems that are quick, efficient, affordable and that assure the secrecy of the process.[474] That would be the best solution as people could vote away from the workplace at their convenience on any device or by telephone. Until the speed of arranging electronic votes can match that of the ballot box, it may be that the OLRB will conclude that off-site and electronic voting will only be used in special situations where the benefit of doing so outweighs any downside. For example, off-site and electronic voting may be most suited for voting in multiple workplace locations. This is consistent with the Canada Industrial Relations Board's use of these voting formats.

Recommendations:

152. The Ontario Labour Relations Board should be given the explicit power to conduct voting procedures outside the workplace, including telephone and internet voting.

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474 The Slinn study reports that use of IETV has wide support in the literature and the experience of various boards using IETV is encouraging: Slinn (2015), *op. cit.*, pp. 20.

153. The Ontario Labour Relations Board should prioritize the investigation and development of electronic voting systems that are quick, efficient and preserve the secrecy of the ballot such that this becomes the standard form of voting.

154. Labour Relations Officers should have the explicit authority and duty to give binding directions and to make arrangements in the workplace that assure the neutrality of the voting process.

11.5 Consolidation and Amendment of Bargaining Units

The issue is whether the OLRB ought to be given explicit power to revise, vary, amend and consolidate bargaining units. Ontario is one of the few Canadian jurisdictions not to have given this general authority to its labour board. The lack of such a jurisdiction has important negative effects.

First, the absence of the general power to amend a bargaining unit means that the OLRB could be powerless to respond if there is a need for the rationalization or modernization of bargaining unit structures in circumstances where the original bargaining structure is no longer appropriate in the circumstances, for example, where bargaining units are overly fragmented or for other sound labour relations reasons. Second, the OLRB currently has no general power to consolidate bargaining units where there are multiple small units in multiple locations of a single employer or at a single location. This impedes effective organizing in those sectors where unionization has not taken hold and where there are many vulnerable employees in precarious work.

We deal with each of these issues, below.

Modernizing Labour Relations Structures

One of the OLRB's most important functions, especially in the formative years of collective bargaining, is to determine whether a proposed bargaining unit is appropriate, based on sound industrial relations considerations and on the community of interest of employees. Over time, the OLRB has developed a number of policies to determine the appropriateness of a bargaining unit. For example, the OLRB certified units of part-time employees separately from full-time employees and plant employees separately from office and clerical employees. There have also been distinct policies for different industries and sectors such as hospitals, municipalities, universities, newspapers, etc. In the last 25 years, the

OLRB stopped relying heavily on the criterion of community of interest in favour of examining whether the bargaining unit proposed by the union had a "sufficiently coherent community of interest" so that the employees could bargain together on a viable basis without, at the same time, "causing serious industrial relations problems for the employer".[475]

Units have generally, but not always, been determined by single location in a municipality. Alternatively, there could be a single bargaining unit across several locations in a municipality if certain criteria were met. However, if a second location or a third location was certified after the first certificate was issued, there is no power in the OLRB to consolidate the bargaining units in the second location with the first, even if it makes good labour relations sense to do so. Of course, the parties could always do this voluntarily and often did.

The result is that a single employer could wind up with many different bargaining units and many collective bargaining agreements with the same or different unions. If this fragmented bargaining landscape gave rise to labour relations problems, the OLRB has continuously said that it does not have the authority to revise or rationalize the various bargaining units. This results in a labour relations system that could grow more ossified over time.

With some minor exceptions, the only way in which to change the configuration of bargaining units now is for parties to agree voluntarily to changes. While the parties are free to expand or to reduce the scope of bargaining units, it is an unfair labour practice to take such issues to impasse (i.e., to make such a dispute the subject of a strike or lock-out). This is an effective bar to changing the bargaining unit structure where one party resists it.

Concerns have been expressed that creating this power could lead to instability if the appropriateness of long-standing bargaining relationships is put into question, but, in our view, not granting the OLRB the authority to revise existing bargaining structures creates a greater risk that there will be inefficiencies and a more significant risk of instability resulting from fragmentation. The concern over instability can be addressed by putting the onus on the party seeking change to demonstrate that the existing bargaining unit structure is no longer appropriate in the circumstances. We have used the words "in the circumstances" to indicate

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475 *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, which is cited in *The Mississauga Hospital*, [1991] OLRB Rep. Dec. 1380.

that the test for appropriateness should not be based on the set of facts and concerns that existed at the time the bargaining unit was first certified. Rather, the test for appropriateness relates to the current conditions that exist.

We have been urged to recommend that the power to consolidate should be restricted to situations where there is one union representing the different bargaining units involved. This was a condition of the statutory consolidation provision that was in force from 1993-95 (under Bill 40). By restricting the variance and consolidation power to cases where there is a single union, existing representation rights are preserved and unions are not exposed to the risk of losing bargaining units. The trade union movement favours this approach, arguing that it preserves employee choice of bargaining agent and also discourages a form of "raiding".

While we are sympathetic to the desire of employees to be able to select and maintain their existing bargaining agent, if an ineffective bargaining structure leads to a labour relations problem, such as fragmentation or inefficiencies that have evolved over time, the system must be able to respond appropriately. Placing unnecessary and unjustifiable restrictions on the power to amend a bargaining unit does not accord with common sense. Labour relations problems arising from fragmentation will often arise in situations where there is more than one union. The OLRB must have a power to rationalize and modernize labour relations structures while giving due deference to employee wishes and existing structures that work. Limiting the power to rationalize only where the same union is involved unreasonably puts the narrow interests of unions above the interests of the community. Accordingly, we recommend that, in the case of a single employer, the OLRB be given the explicit power to revise, vary, consolidate and restructure bargaining units in a collective agreement or in a certificate if it is satisfied that the existing bargaining unit or units are no longer appropriate for collective bargaining in the circumstances.

Varying Bargaining Unit Descriptions and Consolidation of Multi-Location Units of a Single Employer in Sectors/Industries Historically Underrepresented by Unions

The need for intervention described above arises mostly in established relationships. However, there is also a need to expand the OLRB's power to vary and consolidate bargaining units in new and immature bargaining relationships, especially in sectors where collective bargaining has not developed and where there are vulnerable workers in precarious work. The focus here is on organizing and bargaining in areas of the economy that have been traditionally difficult to organize and where employees are historically under-represented by unions.

This is not a new concept for Canada. In this regard, the jurisdiction of the OLRB is limited compared to other labour boards. In British Columbia, for over 40 years, the British Columbia Labour Relations Board has had the jurisdiction to modify its policy of bargaining unit determination in industries that are difficult to organize in order "to afford collective bargaining some room to put down firm roots".[476] In determining appropriate bargaining units in initial certification applications, the British Columbia Labour Relations Board gives effect to the principle that "access to collective bargaining is the most important principle to consider in determining appropriateness"[477]. In large part, the British Columbia Labour Relations Board has been able to develop and apply this principle because it has the power to vary bargaining unit descriptions to create larger units.[478] The OLRB does not have these general powers[479] and, accordingly, is unduly limited by the legislation in making collective bargaining accessible, especially to vulnerable workers in precarious work.

The principle of permitting a "relaxed policy of appropriateness" in an initial certification application or a subsequent variance of the unit or a consolidation of units, applies to a single employer in a single location and to single employers with multiple locations. In multi-location, single-employer situations, structural, practical and legal barriers combine to make it virtually impossible to establish meaningful collective bargaining relationships in some sectors, such as restaurants, fast food, retail stores and similar workplaces, especially when each location is small. Realistically, in the case of an employer with multiple locations, it may only be possible to organize location by location as organizing all the units in a municipality, or even multiple units at the same time, is very difficult and some would say impossible as a practical matter. However, a single small unit of a large employer with multiple locations is likely to have almost no bargaining power and the chances of failure in achieving meaningful collective bargaining outcomes are very high. It is difficult to build support for unionization among employees where there is little likelihood of meaningful bargaining.

Viable, effective and stable bargaining where some improvement in terms and conditions of employment can be achieved is likely only possible where there is a larger unit. If units can be certified on a smaller basis and then varied or consolidated afterwards, this could make collective bargaining in those industries or sectors more viable.

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476 *Woodward Stores (Vancouver) Limited*, BCLRB No. 129/74.
477 *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), 19 C.L.R.B.R. (2d) 161.
478 *Woodward*, *op cit.*
479 *International Brotherhood of Electrical Workers v. Casino Rama Services Inc.*, (2009) CanLII 3266 (ON LRB).

The probable reason why the law does not provide for the consolidation or varying of bargaining units, particularly with multiple smaller locations, is because in the 1940s, there were many single location enterprises. The traditional Wagner Act model, on which our current labour law is based, focuses on union organization at the enterprise level. The failure in Ontario to provide for consolidation of units of a single employer, or even a variance of existing units to permit growth, was not a principled omission. The current LRA was not designed for the current realities of the modern economy that has seen massive growth in the service sector, a significant increase of multiple small locations of a single, and often large, corporate employer and the development of large-scale franchising as a business model. There is no sound labour relations reason to allow for certification of bargaining units in single locations and not permit them to grow. Indeed, as the OLRB has found in many cases, larger units and the avoidance of fragmentation generally best serve the interests of the employees and the employers.[480]

The current LRA offers no effective or meaningful access to collective bargaining for thousands of workers in multiple location enterprises or franchise operations. In many sectors, these workers are vulnerable and perform precarious work. As Professor Slinn has said, "This Wagner Model orientation to determining representation may be effectively though not explicitly, excluding more vulnerable workers, including women, racialized and new immigrant workers from statutorily protected collective bargaining."[481] There needs to be some change to give meaningful access to collective bargaining – a constitutional right – to vulnerable employees in some sectors of the economy.

In making this recommendation, we are not offering a legal opinion that the failure to enact a consolidation power or a power to vary bargaining unit descriptions is a breach of the *Constitution*. That is not our role. However, the reasons underpinning the Supreme Court of Canada's definition of freedom of association and protection of the constitutional right of employees to meaningful bargaining are engaged. The Court is clear that a process of collective bargaining is not meaningful if it denies employees the power to pursue their goals. In a system that is intended to "palliate the historical inequality between employers and employees", the process is inconsistent with constitutional rights if it substantially interferes with meaningful bargaining by reducing the negotiating power of the employees.[482] In Fraser, the majority of the Supreme Court of Canada said that after the *Dunmore* case, there

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480 See recently: *North of Superior Healthcare Group v Service Employees' Union Local 1 Canada*, (2016) CanLII 55190 (ON LRB).
481 Slinn (2015) *op cit.*, pp. 31-32.
482 *Mounted Police Association of Ontario*, *op. cit.*, para 71.

could be no doubt that "legislation (or the absence of a legislative framework)" that makes achievement of collective bargaining "substantially impossible" is a limit of the exercise of constitutional rights.[483]

Limiting bargaining units to a single location of the employer and/or the potential for having many small bargaining units at a single employer location, none of which have any real bargaining clout because there is no mechanism for consolidation except by consent of the parties, does reduce or limit the power of the employees and is a legislative deficiency, interfering with the objective of attaining meaningful access to collective bargaining.

On our reading of the OLRB jurisprudence, the OLRB tends to be flexible in approaching the question of which units are appropriate for bargaining and in accepting different units that the union may be able to organize. It will likely be sensitive to the difficulties of organizing multiple locations in a geographic area. It is also likely to recognize the difficult labour relations issues that would occur if it was necessary to bargain many collective agreements for multiple small locations of the same employer. Accordingly, if a hypothetical employer has multiple locations in a municipality, the OLRB would likely be receptive to an application for certification for a single location, or for any combination of locations. However, the OLRB currently does not have the power to certify a single unit and then later consolidate it with other certified units. As we have stated, above, this is a major obstacle to making organizing and collective bargaining meaningful in those parts of the economy where there are many vulnerable workers in precarious work.

There are two key elements. First, the OLRB must retain its jurisdiction to generate flexible policies concerning appropriate bargaining units for certification. Second, the OLRB should be given jurisdiction to consolidate and vary existing bargaining units, both before and after a collective agreement is in place. This requires legislative measures.

This approach has been suggested in the academic literature.[484] A form of this idea, but in a multi-employer context, was discussed in the report in British Columbia in the 1990s[485] and, subsequently, this precise idea for single employers was endorsed in the Sims Report, federally, in 1996:

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483 *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, para. 32.
484 See the discussion by Slinn (2015) *op cit.*, pp. 30-32.
485 Sub-committee of Special Advisors (September 1992), *Recommendations for Labour Law Reform, A Report to the Honourable Moe Sihota, Minister of Labour*. The employer-side representative on this sub-committee dissented from this recommendation (his view is set out in Appendix 3 to the report).

There are industries in the federal jurisdiction where large employers operate many worksites in an area. The Board's bargaining unit policies would normally require certification to take place worksite by worksite. Were the Board to allow regional bargaining units, the union would have to obtain majority support in the whole region. This would be difficult to organize and, if successful, would include individual worksites that might not want representation. We can see distinct advantages for both labour and management in having the Code allow a single employer but multi-establishment variant to the sectoral bargaining scheme. It might work as follows. Certification (and revocation) would continue to be granted on a worksite by worksite basis (by "worksite" we mean basically whatever is the appropriate bargaining unit at present). However, once certified, the Board could be given the power to consolidate bargaining for two or more units so that they could thereafter bargain together for one collective agreement to cover all the worksites of that one employer certified within the sector with that union. As new worksites of that employer became certified, they could apply to become part of that wider consolidated bargaining process. Newly certified units could either be joined automatically to the existing collective agreement or try to negotiate their own agreement first. In the event of a failure to negotiate their own agreement, should the first contract need to go to the Board, the Board could order that the consolidated bargaining agreement apply, with any necessary modifications it deemed appropriate.

We believe this form of local unit, sectoral, single employer bargaining offers efficiencies to both sides. It meets the objections concerning competitiveness between employers, and preserves the right of employees at the bargaining unit level to opt for or against collective bargaining.

We recommend that the Board be empowered to approve a single employer sectoral bargaining scheme which would provide that, while representation questions continue to be considered locally, certified units could be consolidated, for collective bargaining with the employer, over all certified worksites within a given region.[486]

We generally agree with the Sims Report recommendation with minor exceptions. First, while we agree that votes could be taken unit-by-unit on the representation issue, there is no magic to a unit-by-unit determination or vote where there are

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486 Andrew Sims, Rodrigue Blouin, and Paula Knopf (1996), *Seeking a Balance: Canada Labour Code Part One Review*. Hull: Minister of Public Works and Government Services, pp. 97-98.

multiple units of a single employer. If, for example, a union was certified in a single location and then, subsequently, applied for certification of three new locations together, wishing to treat the three as a single unit and then consolidate it with the first unit, a single vote could take place across the three units and not necessarily in each of the three units separately. But these are questions better left to the OLRB in individual cases. The point is that the three new locations could be consolidated with the initial one, singly or together, and if there was a collective agreement for the first unit, either party could seek to apply it to the subsequent consolidation(s), or not, with or without modifications.

It is important that the consolidation of units is not automatic, particularly where there is an existing collective agreement. Parties should have to discuss and bargain the terms upon which the existing agreement applies, such as whether there is seniority by location or different wages or schedules for different locations. If the parties cannot agree, they ought to have the right to persuade the OLRB that the existing agreement should not apply in whole or in part to the new units, or should be applied in a restricted or particular way. For example, if there was a pre-existing collective agreement in one location and one of the parties was seeking to consolidate the new locations with the old one, the employer might seek to persuade the OLRB that consolidation would interfere with its ability to continue significantly different methods of operation or production at each location, or to argue that the employer's ability to continue to operate these locations as viable and independent businesses would be undermined by the consolidation. An employer or a union that, for whatever reasons, believes the existing agreement should not apply to the newly certified unit, ought to be able to try to persuade the labour board of the merits of its case. The OLRB should have the discretion on a case-by-case basis to do what is appropriate from a labour relations perspective.

These powers, while limited to a single employer, need not be limited to a single union. Other unions, in addition to the first certified or voluntarily recognized union, could apply for certification and then consolidation or variance if there was a second successful application. There could also be a council of unions structure in place where the council represented all the constituent unions.

Finally, there is a need for separate provisions in the legislation and separate legal tests for the two-different consolidation and variance situations, described above.

We have already indicated that the test for changing longstanding bargaining units and bargaining relationships should be whether the OLRB is satisfied that the

existing bargaining unit(s) is no longer appropriate for collective bargaining in the present circumstances.

The second consolidation or variation power is intended to apply in a more restricted situation and not to the entire private or public sector. It is a specialized provision, intended to provide an option for unionization where there are multiple units of a single employer, or smaller units of a large single location employer, in sectors/industries, (including subsectors) where employees are historically underrepresented by unions. In our view, the test would centre around whether the proposed new consolidated or varied unit contributes to the development of an effective collective bargaining relationship and serves the development of collective bargaining in the sector.

In response to the options in the Interim Report, some employer representatives argue that employees in that sector are not interested in collective bargaining or in unions. This may be true. It may also be true that unions have been dinosaur-like in their inability to adapt to modern culture, modern business structures, and the use of social media and that they have not communicated effectively with the working population. If these assertions are true and do not change, the recommendations will have little or no practical impact. However, this speculation by employers about employee preferences is not a reason to inhibit change designed to provide a meaningful option for employees who have a constitutional right to freedom of association, including meaningful access to collective bargaining.

Conclusion

Freedom of association, as interpreted by the Supreme Court of Canada, informs our recommendations in this area. The existing law is defective, both from a labour relations point of view and from a constitutional point of view and needs to be reformed.

Recommendations:

155. The *Labour Relations Act, 1995* should be amended based on section18.1 of the *Canada Labour Code* with the important modification that the test should be that the Ontario Labour Relations Board can review the structure if it is satisfied that the bargaining unit or units are no longer appropriate for collective bargaining in the circumstances.

156. The *Labour Relations Act, 1995* should be amended to provide that where the Ontario Labour Relations Board certifies a union (or council of unions) for a bargaining unit, including certification without a vote under section 1, and the same union or council of unions is certified for a unit of employees in a separate location of the same employer or for an additional bargaining unit at the same location, whether or not a collective agreement is in effect in the prior certified unit, the Board, on request, can review the structure of the bargaining units and consolidate or vary the description as the Board may determine. The Board will have the power to apply, with or without modifications, the terms of an existing collective agreement between that employer and union, to the newly constituted unit. The section will apply in sectors or industries *where employees have been historically underrepresented by unions*.

The legal test should give the Board broad authority to determine which factors it considers appropriate and, also, whether the proposed new unit and/or terms of the agreement contribute to the development of an effective collective bargaining relationship and serve the development of collective bargaining in the sector/industry. The remaining provisions of the new section would mirror, as the context required, the provisions of section 18.1 of the *Canada Labour Code*. For example, votes would not be required since the unit being added would have already met the certification requirements.

11.6 Broader-Based Bargaining

The above section dealt with the consolidation and variance of bargaining units in relation to a single employer. It did not deal with broader-based, multi-employer bargaining.

We have pointed out, above, and in our Interim Report, that the current *Wagner Act* single employer and single enterprise model of certification does not provide for effective access to collective bargaining for a large number of employees of small employers and employers with multiple locations. Organizing and bargaining individual contracts in thousands of small locations is inefficient, expensive and impractical. The single employer recommendations, above, address the single and multiple location issues of larger employers, but not the issue of many individual small employers, thus leaving a significant vacuum in many areas where collective bargaining is unlikely to take root. In Ontario, the union coverage rate in the private

sector is below 7% in workplaces with fewer than 20 employees.[487] Like the majority of Special Advisors in British Columbia, we share the concern about the nature of the problem but, unlike them, we have concluded that providing a multi-employer bargaining framework is not practical at this time.

Options Canvassed in the Interim Report

In our Interim Report, we canvassed two different labour relations models for multi-employer bargaining. One model[488] took a bottom up, unit-by-unit approach, followed by consolidation of bargaining units as a gateway to multi-employer bargaining. The second model conceived of an entire sector in an appropriate geographic area being subject to unionization.[489] We also canvassed other models in the Interim Report, which we would term "extension" models, common in Europe but not in North America (except for the decree system in Quebec, which is much smaller in its application today than previously) by which certain terms (negotiated through a collective agreement or at a sectoral table) can be extended by decree to cover all workers within a sector.[490]

Current Multi-employer Bargaining in Ontario

We do have important examples in our province, where a large number of smaller employers and the unions representing their employees, have determined that they are well-served by standardized labour costs and have willingly combined to bargain on a sectoral basis. Also, unions have often agreed to bargain with multiple employers in councils of unions or individually. In construction, employers sought a compulsory system of province-wide bargaining and this, subsequently, was imposed legislatively. In other industries, such as healthcare, printing, trucking, the creative and entertainment industries and others, employers have seen their interests as being advanced and protected in a broad system of bargaining together.

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487 Changing Workplaces Review – Interim Report, (Toronto: Ontario Ministry of Labour, 2016), Section 4.6.1, p. 114.
488 *Ibid*., Section 4.6.1, p. 124.
489 *Ibid.*, Section 4.6.1, pp. 124-125.
490 *Ibid.*, Section 4.6.1, Option 2, p. 123. Unifor, in its submission to the Changing Workplaces Review, proposed a detailed model for the application of employment standards and collective bargaining at a sectoral level. Among other things this proposed model would provide authority to the OLRB to define an industry and prescribe for that industry one or more terms or conditions of employment, applying to employers and employees in the industry: Unifor, *Building Balance, Fairness, and Opportunity in Ontario's Labour Market*, September 2015, Part VI.

Analysis

The Extension Model

With respect to the extension models, canvassed in Option 2 of the Interim Report, we have concluded that these are out of keeping with Ontario's history and culture. In Europe, unions and broadly-based employer organizations commonly bargain and set sectoral terms and conditions of employment. The institutions and practices that are commonplace in Europe have evolved in the context of a distinct labour relations history. Similarly, Quebec's history of a decree system is unique in Canada. In Quebec, various decrees have extended negotiated terms and conditions of employment to non-unionized employees in various sectors. However, the scope of that system has narrowed very considerably in recent years with the result that fewer and fewer employees are covered by it. More importantly, the Quebec model is also not in keeping with Ontario's history and culture, even though Ontario had a similar but more limited experience with the *Industrial Standards Act*.[491] In its last years, the *Industrial Standards Act*, had narrow application and essentially only affected the garment industry. The history and practice in that industry and under that Act have not had any lasting impact on other sectors that could be built upon, at least not at this time. A system where sectoral standards are determined by the OLRB to apply to the non-unionized sector is, similarly, out of keeping with Ontario's history and culture and with democratic principles.

A recommendation based on an extension system, whereby some of the terms of the non-unionized sector are set by the unionized sector and then imposed when there is no democratic basis for the consent of the employees, does not seem practical or likely to be acceptable to most Ontarians. In our view, however, the process of sectoral regulation that we recommend under the ESA,[492] which provides for the direct input of employers and employees in a sector (or subsector) followed by government regulation, is a better and more inclusive way to accomplish some improvement in outcomes for employees in smaller non-unionized workplaces, as regards to scheduling, for example, particularly for those who are vulnerable and in precarious work.

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491 Slinn (2015), op. cit., pp. 69-74.
492 See Chapter 6.

The Labour Relations Options

As for options 4 and 5 that we canvassed in our Interim Report, there was virtually no support for Option 5 in the submissions made to us. Option 5 outlined a process for the acquisition of bargaining rights for an entire sector and geographical area, followed by multi-employer bargaining across the entire sector. However, there was interest in Option 4.

Option 4 was the option originally put forward in British Columbia in 1992 by a majority of the Special Advisors there.[493] That proposal takes a bottom-up, location-by-location approach, followed by a consolidation as a gateway to multi-employer bargaining. The proposal was aimed at sectors historically underrepresented by unions and at small employers of fewer than 50 employees. It would permit any employer in a sector to be certified by a union and then that unit would, subsequently, be consolidated into a pre-existing unit in the same sector. The pre-existing collective agreement would be binding on the unit and potentially tailored to it, if necessary, by the British Columbia Labour Relations Board. No union had exclusivity in a sector. The approach is similar to what we have proposed for consolidation and variance, above, in Recommendation 11, except the critical difference is that the BC proposal would apply to multiple employers and our proposal, above, only applies to a single employer.

While the British Columbia idea is creative and worthy of further exploration, it is not clear that it is workable to move from a situation where a sector has almost no collective bargaining at all to one in which a diverse group of employers in that sector would have to bargain together. For example, if, in a large urban market, several independent fast food operations were certified and then had to bargain together with a few different fast food franchisees of different franchisors and a few corporate stores of one large franchisor that had more than one union, it is unclear how effective bargaining would proceed. The process could be chaotic.

This is fundamentally a capitalist economy and employers are fiercely competitive. Large employers could easily work together in multi-employer bargaining to raise the cost of labour to crowd out smaller players and broaden market share. Also, how effective leverage would be brought to bear by the unions upon such a diverse group of employers is unclear.

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493 Recommendations for Labour Law Reform (1992), op. cit., pp. 30-33. There was a strong dissent by Tom Roper Q.C., a management labour lawyer: *ibid.*, Appendix 3.

Contemplating how this proposal would work raises very challenging issues. It would be much easier to assess and to resolve these issues, if there had been some experience of collective bargaining in the sector, for example, if a pattern agreement had already emerged and if some labour relations dynamic supporting broader bargaining had also emerged. It may be the case that in British Columbia, where the proposal originated in 1992, the practicalities seemed less daunting because there had already been some history of bargaining in multiple locations of single employers, such as in the fast food sector.

While there are some voluntary examples of multi-employer sectoral bargaining, and some example of compulsory multi-employer sectoral bargaining (as in the construction industry in Ontario), no jurisdiction that we are aware of has imposed a mandatory multi-employer collective bargaining regime on employers in a sector without any history of collective bargaining in that sector. Such an option, therefore, calls for a considerable degree of caution and careful assessment.

We have concluded that in order for broader-based multi-employer bargaining to be workable, there has to be a history of at least some collective bargaining in the sector. It is too large a step to go from no bargaining experience at all to a highly sophisticated multi-employer, multi-union collective bargaining regime. In other words, before forcing employers to bargain together, collective bargaining has to take root first with individual employers.

Our recommendation about facilitating the organization of multiple units of a single employer in specified sectors/industries where there are vulnerable workers in precarious work, if implemented, will potentially offer a way forward to multi-employer bargaining down the road. For example, if employers and franchisees in restaurants, retail, fast food and other specified sectors, become part of a collective bargaining regime as single employers, this could lead to some natural expansion towards multi-employer sectoral bargaining in those areas. An evolutionary approach is more likely to be successful than an imposed multi-employer model that has no current foundation to support it.

What Is the Alternative?

The alternative is to provide for and encourage movement towards broader-based bargaining structures where it is appropriate and workable.

First, there are some industries where franchising is commonplace. Although technically, there are multiple employers, these employers are tantamount to

a single employer multi-location operation and should be treated in the same way. Second, there are special situations that lend themselves to broader-based bargaining and the government should work in these areas to facilitate and make sectoral bargaining effective. Third, there should be wider discussion of whether the statute should contain additional tools to allow broader-based bargaining to function effectively where it already exists, or as it develops naturally. Finally, we think it is important to encourage an ongoing discussion of sectoral bargaining and to keep the issue in focus as the economy and industries develop.

We stated, above, that there are some industries where, although technically, there are multiple employers, the employers resemble a single employer multi-location operation and should be treated in the same way. We now address this issue.

11.6.1 Franchising in Restaurants, Fast Food, and Similar Specified Sectors/Industries

Franchising is a modern business model found in a range of industries and enterprises. The LRA does not explicitly deal with franchising, likely because, at the time of its development, franchising was not a significant factor in the economy.

Franchising is a form of chain store organization. Some businesses market their brands in multiple retail locations and may use a corporate model for each location, hiring a manager(s) at each, or they may use a franchise model to finance and operate the separate locations, or do a combination of both.[494] The structure used at a location may change from corporate to franchise and vice versa.

Franchisors are many and varied, operating in different industries and ranging in size from small businesses to multi-billion dollar international corporations whose brands can be found everywhere. Franchisors can expand in multiple locations and jurisdictions, selling the rights to market-branded products in a geographic location or area to a franchisee. The franchisor and franchisee operate through sophisticated contractual arrangements, which bind the franchisee to operating the business as set out and described in the contract and in operating manuals that are typically contractually binding on the franchisee. Through these mechanisms, the franchisor often mandates virtually every aspect of the business so that, from a

494 For example, MacDonald's Canada's website states that: "Approximately 80% of McDonald's Canadian restaurants are locally owned and operated by independent entrepreneurs in communities from coast to coast": http://www.mcdonalds.ca/ca/en/our_story/our_history.html.

public point of view, the product and the brand are the same, or almost the same, in every location. Price and product may differ in some ways, from time to time, but, overall, the entire point of the franchise model is to sell the products of the franchisor and to protect the brand; franchisees are normally bound by contract to do so. The franchisee contributes capital, manages the business and typically hires, fires and manages the employees.

A franchisor may or may not be an employer for LRA purposes depending on whether the conditions in section 1(4) of the LRA (the related employer provision) apply. We do not recommend a change to that section. For the purposes of our recommendation, we have assumed that the franchisee – not the franchisor – is the employer. In short, our proposals do not force franchisors to the bargaining table unless they are related employers under the existing law. Our goal is to make collective bargaining an effective option where there are many vulnerable workers in precarious low-paid work who do not currently have access to meaningful collective bargaining in the present legal framework.

We have recommended, above, that the LRA be amended where a single employer has multiple locations in sectors/industries that have been historically underrepresented by unions, including restaurants, fast food and retail. The question to be answered is whether businesses that are organized to sell a brand and products through a franchise system should be treated as though they were a single employer with multiple locations.

Competitors in an industry may operate either through a corporate model or a franchise model, or a combination of both, and there is no good public policy reason to treat one model differently from the other. So, for example, take three business competitors, which are large purveyors of fast food. One operates only corporate stores or locations. A main competitor in the same market, and selling similar products under a different brand, uses a franchise model where all of the locations are operated by franchisees. A third competitor uses a combination of corporate-owned stores and franchised stores. Should the different organizational models for selling three competing brands in the same market mean that one should be subject to unionization under a set of rules that are not applicable to the other two? Is it fair to employees of the many franchisees of the same franchisor that they have no effective access to collective bargaining while the employees of a competitor, who has multiple or some corporate locations, do? We think the answer to that question is obvious.

At the same time, it should be clear that we are not recommending a system where franchisees of different franchisors are compelled to bargain together. Nor are we recommending, as mentioned above, that the franchisor should be named as an employer with its franchisees, unless it is already a related employer within the meaning of section 1(4) of the LRA. As a result, the franchisor – absent a related employer determination by the OLRB – will not, as a matter of law, be involved in certification and/or bargaining if a franchisee is certified. Of course, a franchisor that operates through corporate stores may be certified as an employer.

The question is whether the franchisees of the same franchisor (and any corporate locations) should be treated as a group of employers who must bargain together if their various locations are certified. The argument against compelling franchisees of the same franchisor bargaining together is that they are individual businesses owned and operated by different people. Forcing them to bargain together is said to be unfair since it could impede their ability to operate their business as they choose.

We conclude that, for many reasons, it is good labour relations policy to treat franchisees of a common franchisor like a single large employer with multiple locations. It is reasonable that franchisees of the same franchisor bargain together. The essence of their franchise operations is that they do not operate their businesses in a way that is materially different. Moreover, to the extent that there are material differences, collective bargaining has flexibility to accommodate them.

Franchisees of a single franchisor market the same brand, sell the same products and operate in the same market, under the same contracts and policy manuals of the same franchisor. Their staffing, labour costs, and methods of operation are either the same or so similar that any differences are manageable. Franchisees of a single franchisor have such an obvious and overwhelming commonality that, except for location and size, the public cannot distinguish them. They have no distinct identity apart from the identity of the franchisor and the brand. Operating in the same municipality or region, they likely both share the same labour market and the same worker demographics. Any differences between franchisees can be addressed in collective bargaining.

The policy reason behind recommending the ability to consolidate units at multiple locations of a single employer, namely, to create a structure that makes employee access to meaningful collective bargaining possible, applies equally to multiple locations of the same franchisor. Collective bargaining cannot be meaningful if it is limited to a single franchisee location. It is likely that no single bargaining unit

for a single location of a franchisee has sufficient leverage to improve terms and conditions of employment when, in the same geographic area, there are many other locations selling the exact same product at the same or similar price. The only way to bargain effectively is to be able to bargain collectively with multiple locations involved with that brand in that geographic area. In circumstances where the franchisees are all operating virtually identical businesses and selling the same brand and product in the same labour market, there are compelling reasons to treat them like a single employer with multiple locations.

Accordingly, we propose recommendations similar, but not identical, to those we made in relation to single-employer multiple-locations apply to franchisees of the same franchisor. Central bargaining will create stability by diminishing fragmentation and the concomitant vulnerability to strike/lockout in the location(s) of a single employer. It will reduce the possibility that franchisees will be whipsawed by a union on an individual basis. There is enormous flexibility built into the model we have recommended for single employers with multiple locations. The parties and the OLRB can be trusted to adapt appropriately to accommodate the interests of different franchisees of the same franchisor, where these differences are material.

Recommendation:

157. We recommend a model wherein certified, or voluntarily recognized, bargaining units of different franchisees of the same franchisor by the same union in the same geographic area, could be required by the Ontario Labour Relations Board to bargain together centrally, with representatives of the franchisee employers in that area, as set out below:

    a) An employer bargaining agency, composed of representatives of the franchisees, will represent the franchisee employers at the bargaining table. The Board should be given the authority to require the formation of an employer bargaining agency and set its terms, if necessary. The employer's obligation to bargain centrally would remain so long as the union held bargaining rights.

    b) To mirror the recommendation on newly certified locations of a single employer, the Board would have the authority, if requested by a party involved, to direct that the terms of a collective agreement between a franchisee and a union could be extended to apply, with or without modifications, to a newly certified bargaining unit involving the same union and a different franchisee (in the same franchise organization). The Board would also have the power to require that the franchisee employers bargain centrally.

c) In exercising its authority, the Board should consider whether the proposed terms and bargaining structure contribute to the development of an effective collective bargaining relationship and serve the development of collective bargaining in the sector/industry.

d) Each franchisee would have individual responsibility for compliance with the resulting collective agreement and would sign an agreement binding on its location(s). In this model, agreements by the parties to distinct provisions applicable to some but not other franchisees can be dealt with in collective bargaining.

e) Multiple locations owned by the same franchisee, a common situation in the franchise industry, could be consolidated as a single bargaining unit by the Board in appropriate circumstances pursuant to the recommendation on newly certified locations of a single employer, but that employer would also participate in central bargaining under this recommendation as a franchisee of the same franchisor. Similarly, if corporate stores owned by the franchisor of the franchisees governed by central bargaining were certified, these could be consolidated as a single bargaining unit of the same employer pursuant to the recommendation on newly certified locations of a single employer as well. In addition, if it was the same union as the union centrally bargaining with the franchisees that certified the franchisor, collective bargaining with the franchisor employer would be part of the franchisee central bargaining process.

f) In centralized bargaining, any strike or ratification vote would involve the entire constituency of bargaining units and not the individual bargaining units.

11.6.2 Publicly-funded Home Care

Publicly-funded home care is a critical service that will grow in importance as Ontario's population ages. The care is delivered and regulated through a complex system of institutional structures, which have been in a state of change. The vast majority of workers in home care are Personal Service Workers (PSWs) although there are also nurses and others. Among this group are many non-union employees, many of whom could be described as vulnerable workers, doing precarious work. There appear to be over 25,000 employees in the sector and approximately 30% are unionized. There are approximately 18 large employer service providers, some of which are for profit and some of which are non-profit.

Unions are continuing to organize in the sector. There are two main unions in the field, although there are also some others with collective agreements. There is no sectoral bargaining but one collective agreement covers almost 4,000 employees and operates province-wide.

The employees largely work on a split shift basis, obligated to be available to those needing care at home often twice a day. Scheduling and hours of work are difficult issues inherent in the nature of the work.

The hourly rates for these workers were addressed by the government at a macro level in 2013/14. As a result, the wages of PSWs were raised dramatically over three years. These increases were achieved as a result of effective lobbying with senior levels of government; they were not accomplished through collective bargaining. It now appears that the funding formula for all the service provider employer agencies will be standardized in all parts of the province.

In other publicly-funded health care industries, such as hospitals and nursing homes, central bargaining mechanisms have evolved over the years, although none are legally required under the LRA. There is currently no mechanism whereby centralized bargaining for the home care sector could be required under any legislation.

In our view, given that there are only a relatively small number of service providers, two major unions, and, now, common funding for all the service providers, it is likely that, at some point, centralized bargaining will develop voluntarily in this industry. This makes sense when all these factors are present. How long it will take is speculative, but it may take many years to occur, or it may never happen. Parties would have to consent and see it as being in their interests.

Our mandate is to improve security and opportunity for those who are vulnerable and in precarious work and to support business in today's changing economy. In our view, these employees would undoubtedly have been classified as vulnerable prior to the most recent set of significant wage increases. Their rates of pay were very low, they lack, or have limited, entitlements to benefits and pensions, 70% of the sector is not unionized, and the nature of their work gives rise to difficult issues around scheduling and hours of work. The workforce is also largely female and includes many immigrant workers.

Although less so now, as a result of the recent pay increases, a significant portion of the employees working in home care is likely still vulnerable. These workers have not lost the justification for specialized policy consideration in this review just because they received a dramatic wage increase. Indeed, the fact that these employees only received a significant wage increase because of lobbying and direct intervention by government, and not through collective bargaining, demonstrates that a meaningful system of collective bargaining is in their interests and also serves the public interest. Lobbying, as a method for changing the terms and conditions of employment of a specific group of public sector workers is not, in the long-term, a reasonable or reliable method for advancing the groups interests or to achieve the public need for a sustainable, critical health care service.

Collective bargaining, conducted on a centralized and sectoral basis, is likely in the interests of both the employees and the relatively small number of employers in the sector, and also serves the public interest in having broader-based bargaining mechanisms. Applying commonality and standardization where possible would likely lead to efficiencies. This is particularly so where government funding to employers is, or will be, done on a standardized basis and where the government has already established a history of making a funding decision for all PSWs. It is not in the public interest, nor is it in the interest of employees and employers in this sector, to simply allow the system to evolve towards centralized bargaining. On the other hand, voluntarism has been an important component in the evolution of centralized bargaining mechanisms and this may or may not be an important factor here.

Our recommendation is that the government commission a special and expedited inquiry to consult with all the relevant parties and to make recommendations as to whether and how centralized bargaining in the home care industry could be established within a reasonable time frame.

The inquiry should also consider the issue of dispute resolution. At the moment, strikes and lock-outs are permitted in this sector, but when a strike occurs the work is transferred to another provider. Some argue that this is fair because the employee loses the work and the employer loses the income, so both sides have equal incentives to resolve the matter. Whether this is the case or not, there are other factors that need to be considered with respect to the form of dispute resolution, such as other alternate dispute resolution mechanisms, the needs of the people who require home care services, the structure of home care bargaining, and numerous other issues that should be considered as part of an inquiry.

Recommendation:

158. The government should conduct an expedited inquiry, in consultation with the parties involved in the government-funded home care industry, into whether and how sectoral bargaining could be established in the sector within a reasonable time frame. The inquiry should include the issue of dispute resolution.

11.6.3 Arts and Entertainment: the Creative Industries

The arts, entertainment and recreation sector of the economy has 57% of its workers in non-standard employment.[495] It comprises 5% of the overall non-standard workforce.[496] In many ways, the creative industries have modelled various unique approaches with respect to the problems of contingent work, the need for scale agreements, and collective bargaining. Some of this bargaining occurs inside the boundaries of the LRA but much of it is outside of the Act. Some of the artist groups would view a solution within the boundaries of the LRA as anathema, while some would not.

Although important and effective collective bargaining models are utilised, some argue that there are deficiencies and gaps in this sector that remain unresolved and are destabilising. For example, the federal *Status of the Artist Act*, while creative in its approach, has obvious limitations. It allows for the certification of artist associations and for the creation of producers' associations, but producers are not required to form associations or to bargain together, potentially leaving artists' associations with no sector-wide group with which to bargain. Because of its orientation to employees, the LRA may not address the needs of some groups whose employees and independent contractors may have to bargain together in order to be effective. Confusion over the status of workers (i.e., whether they are employees, dependent contractors, or independent contractors) and the absence of an employers' organization are issues causing difficulties in newer industries like Reality TV production, an industry where there are allegedly few recognized rules and which union organizing describes as the "wild west" of the industry.

We have reviewed the submissions of the stakeholders in this area and all raise complex issues, which we think merit careful attention. Most of the artist and worker organizations discussed these issues amongst themselves and have urged

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495 Ontario Ministry of Finance, based on Statistics Canada, Labour Force Survey.
496 *Ibid.*

us to adopt some of the philosophy and general approaches of the Quebec status of the artist act,[497] modified to some degree. There was no real detail provided on those proposed modifications.[498]

On the other hand, the Canadian Media Producers Association (CMPA), which is involved in English language television, film and digital media production, has warned us about the high costs of the Quebec system, including constant negotiations, labour relations instability and competition, and a lack of certainty, which is antithetical to the needs of a project-oriented, time-sensitive industry. The Association claims the Quebec act is causing the loss of investment and jobs in that province. It claims that such an act would have a profoundly detrimental impact on the entire sector of English language television, film and digital media production in Ontario. Overall, the Association argues that the sector is already heavily unionized, highly organized on a craft and sectoral basis, and successfully serves the needs of the various interest groups and, therefore, should not be interfered with.

We are aware that government has previously looked at potential change in this area and not proceeded with any action. In our view, there are several reasons why government should, once again, examine the advisability of legislative reform.

First, the area is very important to the Ontario economy, where the GDP contribution to the economy is higher than agriculture, mining or energy.[499] The lack of certainty about the permanence and effectiveness of the current structures creates potential long-term instability. It may be that the CMPA is correct in its claims that the status quo is adequate and that no measures need to be taken. However, given the Quebec experience and the strong support of many artist organizations for legislation, an informed decision should be made after careful study. This review has not provided the opportunity for the kind of in-depth review that is required.

Second, the creative industries provide the main historic examples of the issues faced by contingent workers in our economy, and as those issues grow for a whole range of contractors and workers in other industries, a workable model

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497 *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters.*

498 Very late in the process, we received a draft model act from one group but there was no opportunity to discuss it, much less consult with respect to its contents.

499 Ontario's Creative Cluster: Growing Faster than the Rest of the Economy: Ontario Ministry of Tourism, Culture and Sport, November 2, 2015: http://www.mtc.gov.on.ca/en/creative_cluster/cluster_report_growth.shtml.

of collective bargaining under new or amended legislation for the arts and entertainment industry could result in a model that others, engaged in contingent work in other industries, could follow.

Recommendation:

159. We recommend that Ontario conduct an inquiry and consultation with all affected interest groups to examine potential changes to the laws, which affect how personal services and labour are provided in the arts and entertainment sectors of the economy, for the purposes of supporting the artistic endeavour in those sectors and those who work in them.

11.6.4 Added Legislative Tools Needed to Facilitate Sectoral Bargaining

Except for the construction industry provisions, the current LRA may lack all the regulatory tools needed to organize and regularize multi-employer sectoral bargaining, even for those sectors where some level of broader-based bargaing has already developed (e.g., hospital sector). The LRA has rules regulating the possible certification of, and bargaining involving, councils of unions. The Act also has rules governing bargaining with an employers' organization. However, whether employers' organizations or councils of union are established is left to a voluntary decision by those parties. In short, the LRA is built around voluntarism.

Voluntarism is important and should be given due regard, but it has its limitations, such as where unions and employers manoeuvre inside and outside voluntary sectoral and multi-employer bargaining for strategic advantage. In our opinion, our society and economy have a strong interest in providing effective systems where common terms and conditions of employment for unionized employees can be negotiated across a wider swath of the economy. Therefore, where the conditions that support multi-employer or even single-employer sectoral bargaining exist, voluntarism may be limited and society's interest in broader-based bargaining systems may predominate over the strategic interests of individual unions and employers.

The concept of broader-based bargaining merits a wider and more focused discussion than was possible in this Review. This discussion should address the question of whether the legislation should provide additional tools to compel multi-employer bargaining in some circumstances.

We recommend several matters for further discussion.

- The first issue is accreditation of employer organizations. Accreditation allows a majority of employers with a majority of employees in a sector to form an employer's organization and compel the other unionised employers in a sector to be part of a unified bargaining agency.
- The second issue is whether employers should have available to them a process in which they can seek an order requiring unions to form a council of unions in circumstances where a single employer has more than one bargaining unit and bargaining relationships with more than one union.
- A final issue is whether there should be provision for multi-employer certification where a union could compel employers to bargain together through an employer bargaining agency.

British Columbia has a long history of provisions in their legislation in relation to these issues. It currently has tools for accreditation and for compelling unions to form a council of unions,[500] and it has a previous complex history of multi-employer certification.[501] All of the British Columbia experience and history should be examined as part of the broad discussion of multi-employer bargaining in the future of Ontario.

Recommendation:

160. The government should convene a consultation on whether the *Labour Relations Act*, 1995 should be amended to include:
    - mandatory accreditation of employer bargaining agencies;
    - mandatory councils of unions; and,
    - mandatory certification for multiple employers.

11.6.5 The Future of Sectoral Bargaining

As we have indicated above, the *Wagner Act* enterprise model is largely irrelevant to large groups of employees who work in smaller enterprises. Our recommendations with respect to multiple-location single-employer enterprises and the operations of

500 Sections 41, 43 and 44 of the British Columbia *Labour Relations Code*.
501 Recommendations for Labour Law Reform (1992), *op. cit.*, p. 30.

franchisees provide some significant opportunity to broaden the enterprise model. If unionization did become more commonplace in chain restaurants, franchise operations and the retail sector, this would undoubtedly have a market impact affecting other employers, including an impact on market compensation rates, perhaps making sectoral bargaining more attractive for employers.

For employees, generally, the key public policy question is: should there be other means to advance freedom of association and collective bargaining for those who work in small workplaces? For both employers and employees, one of the key questions is: does it make sense to work towards common labour rates and working conditions?

In our view, this report should not be the end of the discussion on these issues. In our Conclusion, we recommend the creation of an Ontario Workplace Forum where leaders of the employer community, unions and employee advocates, together with government, could discuss important issues and opportunities regarding the workplace. We recommend that this issue of sectoral bargaining and regulation be a standing issue in those discussions.

12 | Who Is the Employer Under the LRA?

One of the most difficult questions we have had to grapple with is the identity of the employer under the LRA. We have considered whether the tests for determining the identity of an employer should be altered at all, and if so, whether they should be altered on a broad application or tailored to more specific and narrow circumstances. In response, we have generally determined to maintain the status quo, with one exception, tailored for a specific circumstance.

In our Interim Report, we set out some of the issues that were raised with us, the approach that had been taken in recent decisions by the U.S. National Labor Relations Board (NLRB),[502] and the options that have been put forward and considered.[503] The question of who should be treated as an employer for the purposes of the LRA is important in the context of changing workplaces because of the growing incidences of a triangular relationship between assignment workers, assigned by temporary help agencies to work at the workplaces of, what we refer to as, their "enterprise/clients", and because of the growth of franchising and the question of whether franchisors should be treated as employers in respect of their franchisees' employees.

The area is difficult because the range of commercial circumstances in which related and joint employer issues may arise is quite broad, the American jurisprudence – where there is ongoing controversy – is complex, and the jurisprudence of the OLRB is extensive.

It appears that there are significant differences between the statutory framework

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502 Particularly in *Browning-Ferris Industries of California, Inc.* (2015), 362 NLRB No. 186.
503 We do not repeat all of that material here but refer the reader to Section 4.2.2 of the Interim Report.

under the NLRA and the LRA, which have led Ontario and the U.S. federal jurisdiction to take somewhat different jurisprudential approaches to the resolution of the issues. There are, however, important elements of commonality. The NLRA does not have an equivalent statutory provision to section 1 (4), the related employer provision of the LRA. Instead, the NLRB applies three related but different concepts to the issue of "who is the employer", namely, the single employer, alter ego and joint employer doctrines.

In the U.S., a "single employer" will be found to exist where two apparently separate entities operate as one integrated enterprise. The NLRB examines a number of factors, including common ownership and control, common management, centralized control of labour relations and whether there is a functional integration, or interrelationships, in the operations of the business. It has been said that a lack of an arms-length relationship characterizes these cases.[504]

The NLRB's "alter ego" test examines whether different entities have substantially the same management, business purpose, customers, equipment and other factors, but an important element of the test is whether there was any anti-union animus in the creation of the arrangements.[505]

The third doctrine in the U.S., that of the "joint employer", is quite different from the first two as it assumes that the entities are independent. However, it is designed to apply where the independent entities jointly share or co-determine terms and conditions of employment. One does not need to show there is a common enterprise.[506]

The concept of a joint employer is a long-standing one in American law. There is significant controversy over a purported change to the NLRB's test for a joint employer in the recent *Browning-Ferris* case ("BFI").[507] In BFI, in determining whether a potential joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining," a majority of the NLRB overruled earlier cases in which it was found that the control had to be "direct and immediate" and held that it was sufficient for the control to be indirect, including through an intermediary or even a reserved

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504 *Browning-Ferris Industries of Pennsylvania, Inc.* (1982), 691 F.2d 1117.

505 The focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations: *A. Dariano & Sons Inc. v. District Council of Painters No. 33, and Northern California Painters Administration Fund Inc.* (1989), 869 F.2d 514.

506 *Browning Ferris*, 691 F.2d 1117, *op. cit.*

507 *Op. cit.*, 362 NLRB No. 186.

right to control, whether or not that right is exercised.[508] The reason for the controversy is not simply that this change could alter the relationships between franchisors and franchisees or temporary help agencies and clients; the majority's approach was also criticized in the dissenting reasons because of the alleged potential for its wide application, which could have the effect of broadening who might be found to be an employer. This decision is currently being appealed in the U.S. courts.

In Ontario, as we described in the Interim Report, in situations where more than one entity could potentially be the employer, the OLRB often approaches the issue of employer status in two different ways. It can declare two or more entities to be related employers under section 1 (4) of the LRA, or it may determine that one of the entities is the "true employer" for the purposes of the LRA.

The OLRB has the power under section1 (4) to treat related or associated businesses as a single employer for the purposes of the LRA, where they carry on associated or related activities under common control or direction. These activities need not be carried out simultaneously and there is no need to establish that the businesses were structured for anti-union purposes. Where these criteria are met, the OLRB also has the discretion to determine whether to make a related employer declaration or grant other relief, having regard to the labour relations policies and purposes that may be at stake on the facts of each case. These considerations could include, preventing the erosion of bargaining rights, ensuring there are viable collective bargaining structures, and allowing employees to bargain with the real economic power, not merely the nominal one.

The OLRB emphasizes that it makes a purposive and contextual analysis when wrestling with the issue of determining the true employer in cases of triangular relationships between temporary help agencies, their enterprise/client and the employees.[509] There is no single factor that is determinative and no exhaustive list of factors to apply mechanically to a situation. The question to be asked is, "having regard to all of the facts of the specific case, which entity should the union be required to bargain with and represent the employees with so that collective bargaining can be as effective and stable as possible?"[510]

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508 *Ibid*, pp. 2 and 7. The employers must also both be employers at common law. The NLRB has said the change in the test is merely a return to the original test previously used by the Board and the courts, and is not a new test.

509 *Labourers' International Union of North America, Ontario Provincial District Council v. Rochon Building Corporation*, (2015) CanLII 4680, ON LRB.

510 *Ibid.*, para. 60.

It appears to us that the Ontario related employer provision, section 1 (4), is applied, generally speaking, in the same kind of factual situations where the single employer and alter ego tests are applied in the U.S. However, the OLRB does not have a separate express "joint employer" doctrine that uses the precise test set out by the NLRB in the BFI case (either the new or the old test) for cases where there are two independent entities allegedly co-determining terms and conditions of employment. In temporary help agency cases, the OLRB most often looks to determine who the true employer is[511] and in both franchise and temporary help agency cases, it has used section 1 (4) to determine whether two or more entities should be treated as related employers, whereas the NLRB uses the joint employer doctrine for both situations.

As indicated above, the significance of these jurisprudential approaches and the source of the controversy lay in their application to two business models that are important commercial realities in the modern workplace, namely, temporary help agencies and franchising.

Both business models have grown significantly and both have an impact on vulnerable workers in precarious jobs.

Temporary help agencies have become ubiquitous in Ontario. (Please see the discussion on temporary help agencies in Chapter 7 which is also relevant here.) These workers are generally paid less than employees of the enterprise/client performing the same work.

Franchising has grown throughout the economy but its growth in sectors where there are many vulnerable employees in precarious work, such as fast food, restaurants and retailing, has lead the NLRB to consider whether the franchisor should be treated as an employer with the franchisee for purposes of collective bargaining.[512]

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511 On two occasions involving temporary help agencies, the OLRB used a true employer analysis and concluded that it was too difficult or unclear to determine the "true" employer or, for that matter, whether there even is a single "true" employer at all, or that it was not necessary to make a finding because section 1(4) was available. It found that the employers shared power and day-to-day authority over employees, exercised common control and direction, or were functionally and economically integrated at the workplace and were, therefore, related employers under section 1(4): *PPG Canada Inc.*, (2009) CanLII 15058 (ON LRB) and *Metro Waste Paper Recovery Inc. (Metro Municipal Recycling Services Inc.)*, (2009) CanLII 60617 (ON LRB), upheld (2010) ONSC 7050 CanLII (Ont. Div. Ct.).

512 Similarly, in the case of temporary help agencies, the issue of liability for breaches of the ESA is a major issue, which we deal with in Chapter 7.

The BFI case involved a supplier of labour to an enterprise/client (BFI) where the supplier's own supervisors purportedly directed its own employees while they were assigned to work at the enterprise/client. In deciding that it should reassess the legal test, the NLRB explicitly gave, as its primary reason, the fact that the diversity of workplace arrangements had increased, contingent work had grown substantially and the use of temporary help agencies, in particular, had increased, rising to a 2% share of the workforce.[513] The decision was clearly one aimed at the temporary help industry even though the particular facts may not necessarily have been typical. The NLRB found that the supplier of labour and enterprise/client were joint employers. The case is proceeding to review in the courts. In Ontario, most cases involving temporary help agencies appear to have been decided on the basis of which of the two entities, the agency or the enterprise/client, was the true employer.

With respect to franchising, there is ongoing U.S. litigation before the NLRB involving McDonald's, where the NLRB is being asked to apply the same new joint employer test developed in the BFI case to this franchise situation and to find that both the franchisor and franchisee are joint employers. The issue of whether franchisors and franchisees are related employers has been considered in Ontario under section 1 (4) in a few cases over a long period, and the OLRB has determined that each case will be determined, on a case-by-case basis, on its own facts.

We have considered the desirability of adopting a new and different test for the determination of "joint employers", which would be incorporated into the LRA, including the new test set out by a majority of the NLRB in the BFI case. We have determined that it is likely unnecessary and unwise to adopt a sweeping new legislative test, which would be extremely controversial and which may be unclear in its application. While we have no view on the correctness of the competing opinions expressed in the BFI case, we think the legislative adoption of a new test would be unhelpful and unnecessary in Ontario, at least at this time, and would create controversy and uncertainty. The uncertainty over how sweeping the test would be in its application is heightened by the uncertainty over whether the test will be accepted in the United States and how it will be interpreted by the courts there. That uncertainty, in turn, is compounded by the uncertainty over whether a reconstituted NLRB, under the current new American administration, will take a different view in the future, a likely outcome given the vigorous opposition by the business community there to the new test set out in the BFI case.

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513 *Op. cit.*, 362 NLRB No. 186, p. 11.

Instead of changing the test for determining common or joint employers in Ontario for all employers in all industries, in our view, we should concentrate on problem areas and consider whether any legislative changes are required. In our view, the two pressing problem areas facing vulnerable workers with respect to the identity of the employer, as concerns labour relations, are franchising and temporary help agencies, but the issues and experience in these areas are different and call for different approaches.

12.1 Franchising

The issue directly affecting franchising, is whether the franchisor and franchisee are common or related employers. Here we can see no pressing need, at this time, to amend current section 1 (4) or to legislatively mandate a different test. The Canadian Franchise Association opposed any change to section 1 (4). That section has been used for over thirty years to determine this issue but it has arisen in relatively few cases. We agree with the OLRB's current approach that the issue should be determined on the facts of each case and that there is no presumption one way or another.[514] In some cases, franchisors will be found on the existing law to be related employers with a franchisee and a declaration will be made, while in others, they will be found not to be related employers or the OLRB will not exercise its discretion, having regard to the labour relations factors at play. We believe the issue is best left to the OLRB on the particular facts and in whatever labour relations situation presents itself at the time.

If the issue does come up with greater frequency in the future and if experience with respect to the collective bargaining of franchisees develops, revealing a gap in the jurisprudence or in the legislation and demonstrating that collective bargaining is not meaningful because of that gap, then legislative changes based on that experience can be contemplated at that time.

The franchise industry seems to want a rule that franchisors can never be the employer of persons employed in the franchisee's operation. We do not agree. Such a rule would fly in the face of both the current law in Ontario and common sense. As the franchising industry has explained many times, the franchising model is used in a wide variety of industries with different franchisors taking varying approaches. Accordingly, no general rule or presumption can be applied, at least not at the present time.

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514 *The United Food and Commercial Workers' International Union, Local 175 v. Sobeys Ontario Division of Sobeys Capital Inc.*, (2001) CanLII 10338 (ON LRB), para. 117.

The truly important structural aspect of franchising that needs to be addressed now is not the related employer issue, but the structural weakness in the current legislation, which effectively denies the employees of franchisees in multiple locations the opportunity to bargain collectively in a meaningful fashion. Under the current law, the employees in a franchise operation could be restricted to bargaining in each franchisee location(s) separately, as there is no legislative consolidation mechanism compelling collective bargaining to take place across the unionised operations of the different franchisees of the same franchisor. We deal with that issue below.

12.2 Temporary Help Agencies

The issues with respect to temporary help agencies, and the workers they assign, are different from the related employer issue with respect to franchising. The triangular nature of the relationship between the employee, the agency and the enterprise/client, along with the temporary nature of the employment, create an enormous vulnerability for the employee. The triangular relationship and the instability and the contingency inherent in that relationship results in some temporary help agency employees being among the most vulnerable and precariously employed of all workers. (Please see the discussion in Chapter 7 on the triangular relationship.)

The law, through the ESA, has tried to protect the worker from both the agency and the enterprise/client by putting different, and sometimes overlapping, responsibility on each. For the purposes of that Act, which imposes primary obligations on the agency for payment of wages, vacation, holiday pay etc., the worker is deemed to be an employee of the agency. Under the ESA, the enterprise/client is jointly liable for some, but not all, obligations. The employee's status as "employee of the agency", for the purposes of the ESA, makes sense because the employee may have a longer-term relationship with the agency wherein he/she is placed with various enterprise/clients. That relationship requires protection.

However, in the context of an application for certification by a union in respect of an enterprise/client, the fiction that while working in the enterprise at the direction of and for the benefit of the enterprise/client, the worker is not the employee of the enterprise/client but, rather, is employed by the THA, does not accord with the reality of most workplaces. The OLRB has recognized this by ruling, in most cases, that assignment workers from a temporary help agency are, in fact, employees of the enterprise/client.

Temporary help agencies are ubiquitous, prominent and a growing part of the economy. In many certification applications in factories, warehousing operations, and other workplaces where such employees exist, uncertainty and litigation regarding the status of these employees is common. Whether such employees are employees of the enterprise/client or the agency is an issue that is raised repeatedly. A certification application always raises the questions of the level of support the union enjoys and who is eligible to vote. Uncertainty over whether these persons are employees of the enterprise/client creates uncertainty for both the union and the company, and often results in expensive and time-consuming litigation where the facts and the law are argued repeatedly. The result is unwarranted delay that can easily adversely impact the application. The maxim, "labour relations delayed is labour relations defeated and denied"[515] certainly applies as a reason to try and deal with this issue in a decisive manner and to remove the uncertainty and litigation.

In 1997, the Supreme Court of Canada commented on the legislative gap in Canadian law as a result of the tripartite relationship:

> *Unfortunately, tribunals and courts must often make decisions by interpreting statutes in which there are gaps. The case at bar shows that situations involving tripartite relationships can cause problems when it comes to identifying the real employer if the labour legislation is incomplete in this regard. The tripartite relationship does not fit very easily into the classic pattern of bilateral relationships. The Labour Code was essentially designed for bipartite relationships involving an employee and an employer. It is not very helpful when a tripartite relationship like the one at issue here must be analysed. The traditional characteristics of an employer are shared by two separate entities — the personnel agency and its client — that both have a certain relationship with the temporary employee. When faced with such legislative gaps, tribunals have used their expertise to interpret the often terse provisions of the statute. In the final analysis, however, it is up to the legislature to remedy those gaps. The Court cannot encroach upon an area where it does not belong.*[516]

The Court pointed out that, up to 1997, in applying collective labour relations legislation similar to that in Quebec, Canadian administrative agencies determined

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515 *Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild* (unreported, March 31, 1977, Ont. C.A.), Estey JA.

516 *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 SCR 1015, 1997 CanLII 390 (SCC), para. 63.

the essential test for identifying the employer in a tripartite context to be fundamental control over working conditions. In applying that test, the Court found that the OLRB and the (former) Canada Labour Relations Board have generally, but not always, concluded that the client is the temporary employee's real employer.[517] This result has been just as common in the last 20 years.[518] The fact is that when this issue has been litigated before the OLRB, in most of the cases, the enterprise/client has been found to be the employer.[519] Frankly, this accords with the common sense understanding of the law shared by most practitioners and adjudicators.

The comments by the Supreme Court of Canada about the legislative gap are apt and the legislature should address the issue in the statute. We have been urged to recommend a rule with respect to the employee status of temporary help agency workers, to discourage uncertainty and litigation. We agree that there ought to be a rule and we have rejected other options.

We considered but recommend neither a legal rebuttable presumption that THA workers are employees of the enterprise/client nor a legal rebuttable presumption that they are employees of the THA. We also reject a rule that deems both the agency and the enterprise/client to be joint employers.

In our view, the creation of a rebuttable presumption will do little to discourage litigation. Moreover, litigation involves delays, which almost always harm the chances of a successful certification application and impair access to meaningful collective bargaining and the long-term bargaining relationship. We also reject recommending a rule that the enterprise/client and the THA are joint employers. To do so would not serve any purpose or add value to the collective bargaining process. The presence of the THA is not required for effective bargaining.

In our view, there are good reasons to create a rule that deems THA workers assigned to work at an enterprise/client to be employees of the enterprise/client for the purposes of the LRA.

First, the experience of the last 40 years shows that this is the common result in any event. There have been many cases before the OLRB where, in a variety

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517 *Ibid*, para. 50.

518 See *United Food and Commercial Workers International Union, Local 1000A v. Nike Canada Ltd.* (2006), CanLII 24724 (ON LRB), para. 94: "The facts before the Board in this case are similar, if not identical, to many of the Board's "who is the employer" cases. In almost all of those cases the Board has concluded that the client is the temporary employee's real employer. In my view these facts do not lead to a different conclusion."

519 *UFCW, Local 1000A v. Nike Canada Ltd.,* (2006) CanLII 24724, para. 94.

of different business settings, the facts of the triangular relationship have been explored in great detail. In the vast majority of those cases, the enterprise/client has been found to be the employer for the purposes of the LRA. This result makes sense because the workers are present at the request of the enterprise in order to match operational needs, they are working at the business of the enterprise/client, and they are typically controlled and directed by the enterprise/client.

If the fundamental policy question for the statute is the same as the one addressed by the OLRB in individual cases, namely, which entity should the union be required to bargain with so that collective bargaining can be as effective and stable as possible, there is no question that the answer is the enterprise/client. The tripartite relationship is decided upon and mainly serves the interests of the enterprise/client, which makes use of workers supplied by the THA as it sees fit, in the context of its human resources plan and operation of the enterprise/client. The enterprise/client's policies and work and the interests of the enterprise/client in having the work completed as it requires, are at the center of the entire relationship with employees assigned by a THA. The relationship between employees and the THA is fragile and contingent. The THA does not normally play any real role in determining the work to be done, the underlying rate for the work performed for the enterprise/client, or any of the other important working conditions that relate to that particular workplace. Form cannot triumph over substance.

From a labour relations perspective, limiting the employer to being the THA would not make collective bargaining effective, stable or meaningful but, rather, would have the opposite effect. If not virtually impossible to organize, a THA is, at a minimum, highly unlikely to be organized because it assigns people to work for many clients. Even if a union was certified for THA employees, it may not be able to bargain effectively regarding the work in a particular workplace because the THA has virtually no role in determining those working conditions, which are typically controlled by the enterprise/client. Further, temporary help agencies have almost no experience in being certified in a bargaining relationship with their employees.[520] The link that the THA has to the work of the enterprise/client is tenuous; the contract with the agency can be easily terminated and a new THA brought in. If the OLRB were to certify a union to bargain with a THA for employees working at a location for the enterprise/client, there would be little to stop the enterprise/client from terminating its relationship with the THA, either at

520 Timothy Bartkiw, "Unions and Temporary Help Agency Employment," *Relations Industrielles* 67, no.3 (2012): 460-470; Gerard Notebaert, "The Impact of the Legislative Framework on Unionization Rates for Temporary Workers in Quebec and in France," *Relations Industrielles* 61, no.2 (2006): 223-246.

that time or later. What is required is a direct bargaining relationship between those persons providing the services to the enterprise/client and those who are subject to the control of the enterprise/client.

One of the important interests for us to consider is that of the most vulnerable workers. A rule that allows the inclusion of THA workers in a bargaining unit with other employees of the enterprise/client not only recognizes the reality of the role of the enterprise/client but also serves the interests of, and provides access to, meaningful collective bargaining for many vulnerable and precariously-employed people.

For these reasons, we recommend that persons assigned by agencies, to perform work for clients of the agency, shall be deemed to be employees of the clients for the purposes of the LRA.

This recommendation is not intended to preclude the possibility of an application for certification of a temporary help agency or other supplier of labour separate and apart from an enterprise/client. While it is unlikely that a certification application would be brought in respect of a THA, there are issues that *could* be bargained between a THA and its "employees", such as terms and conditions relating to the selection of employees to be referred, and the terms of the referral. The issues potentially subject to collective bargaining may not be issues relating to the terms and conditions of work performed at the enterprise/client but, rather, to the relationship between the assignment employee and the THA. These are issues best left to the OLRB, if such an application is made.

One of the concerns we have in making this recommendation is that the rule could obstruct the ability of unions to organize establishments with large groups of workers made available through a THA. Their vulnerability, transitional attachment to the workplace, and numbers, may make organizing problematic. This recommendation, however, does not mean that assignment employees must always be included in a bargaining unit upon certification. The OLRB has a broad discretion to determine whether a bargaining unit is appropriate and there may be circumstances where the Board might decide to exclude these employees, given that their transitory relationship with the workplace may make them harder to organize. In our view, the OLRB should be sensitive to the realities of organizing and the workplace, as well as to the interests of the employees assigned by the agency and those on the payroll of the client/enterprise, when determining whether the persons assigned by the agency are included or excluded from the bargaining

unit.[521] In that regard, the recommendations we are making with respect to the powers of the OLRB to consolidate bargaining units may be relevant as, if that change is made, excluding persons from a bargaining unit would not deny them collective bargaining rights, as they could be organized later and the unit description could be varied or bargaining units potentially consolidated into a larger unit.

We are not naïve in thinking that a deemed rule of this kind will end the issue of who is the employer in all situations. In some cases, there will be an effort to make THA arrangements look like true subcontracting or there will be new forms of arrangements for supplying labour that could raise issues, like those that have arisen previously, wherein efforts were made to subcontract core functions of an enterprise to a third party, engaging section 1 (4).[522] We are not attempting to regulate genuine subcontracting arrangements; it must be left to the Board to determine, on a case-by-case basis, whether the true employer doctrine or the related employer provisions of section 1 (4) apply in those circumstances. However, because THA arrangements are ubiquitous and well-understood, a clear legislative rule should remove much of the unnecessary litigation around this issue. In our view, the provision should apply not just to temporary help agencies, as defined in the ESA, but to suppliers of labour, generally, whether they meet the ESA definition of an agency or not.

Recommendation:

161. Persons assigned by temporary help agencies to perform work for clients of the agency, or persons assigned by other suppliers of labour to perform work for a person, shall be deemed to be employees of the client or of the person, respectively, for the purposes of the *Labour Relations Act, 1995*.

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521 *UFCW Canada, Local 1000A v. Sysco Fine Meats of Toronto* (2013), CanLII 9932 (ON LRB).
522 See *Meadowcroft (c.o.b. Livingston Lodge) & Nutra 2000*, [1998] OLRB Rep. May/June 430; *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931; and *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9.

13 | Other

13.1 Remedial Powers of the Ontario Labour Relations Board

13.1.1 Interim Orders

An interim order is an order made before a final disposition on the merits.

Background

Before 1993, the *Labour Relations Act* expressly provided the OLRB with the power to grant interim orders in limited circumstances, such as jurisdictional disputes. Although the OLRB did not have the express power to make interim orders with respect to other substantive or procedural matters, it appears to have done so, on occasion, pursuant to its general powers.

Amendments in 1993 to the LRA provided the OLRB with a broad power to make substantive interim orders. Interim relief could be requested with respect to any "pending or intended proceeding" and was not limited to unfair labour practice complaints in the certification context. The OLRB was empowered to consider a variety of applications seeking interim relief with respect to hiring, workplace postings, union recognition, operation of a subcontracting clause, scheduling changes, permission to choose vacation time, prohibiting work stoppages, and other matters.

The 1993 amendments also introduced a provision for expedited hearings in cases where a worker was disciplined or terminated in the context of a union organizing drive. Upon request by the union, the OLRB was required to begin its inquiry into the complaint within fifteen days of the application, and to continue hearing the complaint on consecutive days from Mondays to Thursdays until the hearing was completed. The OLRB was then required to render its decision within two days.

In 1995, the 1993 provisions regarding interim orders and expedited hearings were repealed. The OLRB retained the power to make interim orders with respect to procedural matters, but was expressly prohibited from ordering the interim reinstatement of an employee.

In 1998, the LRA was further amended to provide that the provisions of the *Statutory Powers Procedure Act* (SPPA), permitting administrative tribunals to make interim decisions and orders, did not apply to the OLRB.

In 2005, the LRA was amended to restore the OLRB's power to make interim orders where workers are terminated or disciplined during an organizing campaign.

Current Provision of the LRA – Section 98

The OLRB is empowered, under subsection 98 (1) of the LRA, to make interim orders with respect to procedural matters.

The OLRB is also empowered to make substantive interim orders under this subsection requiring an employer to reinstate an employee in employment on such terms as it considers appropriate.

Furthermore, the OLRB may make substantive interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated but whose terms and conditions of employment have been altered, or who has been subject to reprisal, penalty or discipline by the employer.

This power to make substantive interim orders may be exercised only if the OLRB determines that all of the following conditions are met: 1) the circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway; 2) there is a serious issue to be decided in the pending proceeding; 3) the interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives; and, 4) the balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding (subsection 98 (2)).

Under subsection 98 (3), the OLRB is prohibited from exercising its interim relief powers if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the LRA by the employee.

The LRA does not impose on the OLRB a specific timeframe for commencing proceedings in relation to interim orders or for rendering a decision. However, the OLRB has issued guidelines providing for the scheduling of hearings of applications for interim relief within four to six days after filing. Additional filing requirements and timelines are set out in the OLRB's Rules of Procedure.

Apart from the specific powers granted under the LRA to make interim orders, the Act makes it clear in subsection 98 (5) that, "With respect to the Board, the power to make interim orders under this section applies instead of the power under section 16.1 (1) of the *Statutory Powers Procedure Act*".

In addition, section 166 of the LRA provides the OLRB with jurisdiction to issue interim relief it considers appropriate in the construction industry, after consulting with the parties. Construction labour relations are outside the scope of this Review.

Other Jurisdictions

In every jurisdiction where the labour relations board or commission is expressly provided with a general power to make interim or provisional orders (i.e., Alberta, British Columbia, Manitoba, New Brunswick, Quebec, Saskatchewan and the federal jurisdiction), the test for application has been developed by the board or commission rather than set out in legislation.

With the exception of Newfoundland and Labrador, all Canadian provinces and the federal jurisdiction expressly provide that labour relations boards have the power to make interim or provisional orders. The scope of this power varies depending on the jurisdiction and is not always restricted to circumstances where workers are terminated or disciplined during an organizing campaign.

In six provinces (Alberta, British Columbia, Manitoba, New Brunswick, Quebec, and Saskatchewan) and the federal jurisdiction, labour relations boards are expressly provided with a general power to make interim or provisional orders where there has been an alleged contravention of their labour legislation or unfair labour practice, or to protect the rights of a party.

In Nova Scotia and Prince Edward Island (as well as Ontario, as described above), the power of the labour relations board to provide interim relief is expressly limited to certain circumstances. In Nova Scotia, the board may make interim orders regarding ongoing and potential work stoppages caused by unlawful lock-outs or strikes or by jurisdictional disputes. In Prince Edward Island, the board may issue an interim order regarding the assignment of work in a jurisdictional dispute.

Courts and Other Administrative Tribunals

The courts have a residual discretionary power to grant interlocutory relief, such as an injunction. This power flows both from various statutes and from the inherent jurisdiction of the courts over interlocutory matters.[523] One example is the ability of courts to make interim awards in family law matters with respect to such important matters as custody and access, child and spousal support and possession of the matrimonial home. These orders are commonly made to protect the best interests of children and dependent spouses. Likewise, administrative tribunals in Ontario are often granted the authority to provide interim relief, either by their enabling statutes or by virtue of section 16.1(1) of the SPPA (or by equivalent statutory provisions in other jurisdictions),[524] which gives tribunals the power to make interim decisions and orders. The Ontario Securities Commission (OSC) has a mandate to protect investors and foster fair and efficient markets by making and monitoring compliance with rules governing the securities industry in Ontario. The OSC has the authority to make interim orders under section 16.1(1) and does so to protect the public interest. For example, it can issue temporary cease trade orders (CTOs) against individuals and/or companies, prohibiting those individuals and/or companies from trading in specified securities over a certain period of time, and interim orders freezing assets such as bank accounts in order to protect investors and foster fair and efficient markets.

In summation, both courts and tribunals have jurisdiction to grant interim orders, which are an essential component of protecting important rights and interests.

Should the OLRB Have an Expanded Jurisdiction to Grant Interim Relief?

Our answer to this question is yes.

The OLRB is a tribunal with exclusive jurisdiction to administer the LRA. It is an expert tribunal with expertise in labour relations and in the interpretation and application of the LRA.

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523 *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, (1986) 1 SCR 704, para 727; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, (1996) 2 SCR 495, para. 5.

524 R.S.O.1990, c. S.22.

The exclusive jurisdiction of the LRA is established by section114 (1), which states:

> *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, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.*

In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*,[525] Justice Dickson, as he then was, described the Public Service Labour Relations Board in that case as: "… a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area." This description is equally applicable to the OLRB.

Having exclusive jurisdiction over labour matters means that the courts are not available to grant any interim relief in labour matters within the jurisdiction of the OLRB. If the tribunal has no power to make interim orders, complainants are left to wait for the final disposition of complaints of unfair labour practices before any relief can be obtained.

There is little doubt that unfair labour practices committed by employers in the context of a union organizing campaign can cause irreparable harm to the campaign and interfere with and frustrate the exercise of the employees' constitutional rights to join a union and engage in collective bargaining.

Dr. Sara Slinn[526] reports on the research and commentary regarding the utility of interim relief power:

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525 [1979] 2 S.C.R. 227, pp. 235-236.

526 Sara Slinn, *Collective Bargaining*, (Toronto: Ontario Ministry of Labour, 2015), prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review, p. 59, citing Cornish, Mary, Simond Harriet and Sheilagh Turkington, "Ontario's Interim Order Power - How a Procedural Reform Brought Substantive Change," Canadian Labour & Employment Law Journal. 4 (1996).

> *… the Bill 40 interim relief power significantly increased parties' ability to enforce OLRA rights, and this was most apparent regarding organizing and first contract negotiations. … Overall, the authors concluded that the interim relief power substantially reduced the advantages to employers of engaging in ULPs [unfair labour practices]. …*

The constitutional jurisprudence relating to freedom of association is replete with references to the superior power of management and to the vulnerability of employees to the unilateral exercise of power by employers. The unfair labour practice provisions of the LRA also recognize this imbalance of power by, among other things, prohibiting any employer speech that amounts to coercion, intimidation, threats, promises or undue influence and by prohibiting any intimidation or coercion to compel any person to refrain from becoming or to cease to be a member of a trade union or to refrain from exercising any other rights under the LRA. The termination of employees for exercising rights under the LRA is only one way that employers can try to snuff out an organizing campaign. There are many more.

One of the purposes of the LRA is to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees. The OLRB is the protector of the constitutional rights of employees to organize and participate in collective bargaining. The OLRB is a tribunal with specialized labour relations expertise in Ontario and a sophisticated understanding of the impacts of action or inaction in a particular case. It has a long history of excellence and adjudicative fairness, which is vital to its effective and independent role in labour relations.

It is trite to observe that the adverse impact of employer unfair labour practices on union organizing can be profound. In our view, it is imperative that the OLRB be granted the power to issue interim relief in order to protect the constitutional rights of employees to organize and form a trade union and participate in its lawful activities. These rights are of fundamental importance to individuals in our society and the OLRB requires the power to make interim orders in order to fulfill its mandate as the protector of the constitutional rights of employees to organize and participate in collective bargaining.

Section 16.1(1) of the SPPA is designed to give broad authority to administrative tribunals to deal with matters on an interim basis before a final decision is made. Such authority is vital to the rule of law in order to effectively protect the rights of

all parties in litigation while a decision is being made on the merits. Absent such a power, the system of justice in the labour relations community is much diminished. There is no justification for the legislature to dictate to the board the legal test it should apply and the circumstances in which it can apply. The LRA establishes an expert, experienced and independent tribunal to adjudicate matters. The timing and substance of an interim order are matters best left to the OLRB to determine on a case by case basis.

Before turning to our recommendation, it is appropriate to acknowledge the special role of the courts in granting relief in cases of legal strikes and picketing activity related to such strikes.

Picketing and Section 102 of the Courts of Justice Act

"Picketing is a crucial form of collective action in the arena of labour relations. A picket line is designed to publicize the labour dispute in which the striking workers are embroiled and to mount a show of solidarity of the workers to their goal. It is an essential component of a labour relations regime founded on the right to bargain collectively and to take collective action. It represents a highly important and now constitutionally recognized form of expression in all contemporary labour disputes. All of that is beyond dispute."[527]

In this constitutional context, section102 of the *Courts of Justice Act* sets out requirements to be met before the Superior Court of Justice will grant interim relief by way of an injunction to restrain a person from an act in connection with a labour dispute.

Our recommendations do not seek to encroach on, diminish, interfere with, supplant or conflict with the injunctive authority of the Superior Court of Justice as established by section 102 of the *Courts of Justice Act*.

Recommendations:

162. We recommend that section 98 of the *Labour Relations Act, 1995* be repealed, and;

163. We recommend that the power of the Ontario Labour Relations Board to issue interim orders and decisions pursuant to section 16.1(1) of the *Statutory Powers Procedure Act* be restored.

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527 *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214, Dickson C.J., para. 27.

For purposes of clarification, our Recommendations are intended to augment the jurisdiction of the OLRB to issue interim orders. The recommended repeal of section 98 is not intended in any way to interfere with or diminish the OLRB's jurisdiction to make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate. Furthermore, it is not intended to interfere with or diminish the jurisdiction of the OLRB to make interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated but whose terms and conditions of employment have been altered, or who has been subject to reprisal, penalty or discipline by the employer.

13.1.2 Prosecutions and Penalties

In Ontario, anyone who contravenes the LRA may be subject to OLRB orders and prosecution before the provincial courts. A contravention of the LRA is an offence under the LRA and the *Provincial Offences Act*.

A prosecution for a violation of the LRA may be commenced before the Ontario Court of Justice but only with the prior written consent of the OLRB. If the OLRB grants consent, the applicant may initiate a private prosecution in the Provincial Court of Justice against the alleged wrongdoer. The applicant has a heavy onus to persuade the OLRB that nothing else would resolve the issue and that prosecution is consistent with the promotion of good labour relations in the province.[528]

Upon conviction of an offence, individuals can be fined up to $2,000 and corporations and unions can be fined up to $25,000. Each day that a contravention continues may constitute a separate offence.

Prosecutions under the LRA are very rare. In the period from 2004-2014, the OLRB dealt with thousands of unfair labour practice complaints but only received 29 applications for consent to prosecute, and only three were granted.

The question is whether these provisions act as a sufficient deterrent for unlawful activity and, if the answer is no, should the OLRB be given jurisdiction to impose monetary administrative penalties for non-compliance with the LRA?

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528 *Ontario Hospital Assn. v. Ontario Public Service Employees' Union*, (2004) CanLII 14343, ON LRB.

Other Jurisdictions

All Canadian provinces and the federal jurisdiction have taken a similar approach. Labour relations boards or commissions have general remedial powers and offences are prosecuted before the courts. However, there are some differences.

In Manitoba, the Labour Board is expressly permitted to order monetary awards of up to $2,000 for an unfair labour practice, even where the unlawful activity has not resulted in any monetary damages or loss. Consent to prosecute is not required in British Columbia and Quebec, whereas all other jurisdictions require some form of consent unless an exemption applies.[529]

The maximum fines for conviction of a general offence also vary depending on the jurisdiction, ranging from $100 to $5,000 for individuals and $500 to $100,000 for employers, corporations, and unions. Prince Edward Island also mandates minimum fines.[530] Many jurisdictions, such as Quebec, set out different fines for certain types of contraventions, such as unlawful work stoppages.

In the United States, the approach under the *National Labor Relations Act* (NLRA) is similar to Ontario. The National Labor Relations Board (NLRB) has broad remedial powers but the prosecution of offenses is before the courts. The right of an individual to initiate a private prosecution in the courts was removed following a 1981 decision by the United States Supreme Court.[531]

Should the LRA Be Amended To Allow the OLRB To Impose Administrative Penalties for Contraventions of the LRA?

It has been suggested that one of the advantages of giving the OLRB such jurisdiction to impose significant monetary sanctions for violation of employment standards law would not only underscore the important public policy objectives of compliance but would also act as a deterrent to employers and unions and individuals from engaging in violations of the LRA.

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529 Depending on the jurisdiction, consent may be required from a labour relations board, Minister of Labour (or equivalent) or Attorney General. In Prince Edward Island, Nova Scotia and Manitoba, consent is not required where the prosecution is instituted by the Minister or the Attorney General. In New Brunswick, consent is not required where the prosecution is instituted by the Attorney General. The procedures for private prosecutions also vary depending on the jurisdiction.

530 The minimum fine for individuals is $100 and the minimum fine for employers, unions and employers' organizations is $500.

531 *Leeke v. Timmerman*, (1981) 454 US 83.

In our opinion, the appropriate starting point in attempting an answer to this question is the tribunal's expert view on the subject of administrative penalties. Former Chairman George Adams, in *United Steelworkers of America v. Radio Shack*, stated:

> *If deterrence was all that the Board had to keep in mind, it would be a simple matter to set up a system of penalties which would achieve this end. There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating The Labour Relations Act. But the Legislature did not provide the Board with this role and probably with good reason. See Little Bos. (Weston) Limited [1975] OLRB Rep. Jan. 83, at 91. Section 85 of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. Additional penalties may exist elsewhere in appropriate situations. See Criminal Code, R.S.C. 1970, c. C-34, s. 5, 423(2)(a); Re Regina v Gralewicz et al (1979), 45 C.C.C. (2d) 188 (Ont.C.A.) By implication, and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that the Board should not fashion its remedies under section 79 with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment. If it were otherwise, the Board's accommodative and settlement role under section 79 and more generally would be a most difficult one to maintain. Offenders would be wary of compromise lest their candor be subsequently met by stiff penalties issued by the very agency that encouraged an informal and early resolution of a complaint. Indeed, settlement and compromise might have to give way to a public clamor for a more tangible enforcement of the legislation not unlike the current concern over plea-bargaining in the criminal law context. Labour law has historically been more interested in accommodation than "two-fisted" enforcement. But of course, the failure to comply with a Board order can result in the application of penalties by the Court in the exercise of the Court's contempt jurisdiction.*[532]

The OLRB has also made it clear that, in its expert opinion, consent to prosecute, which can result in the imposition of monetary penalties, should be granted in exceptional circumstances. In *Ontario Hospital Assn. v. Ontario Public Service Employees' Union*, former Chair Kevin Whitaker (now Justice Whitaker) stated:

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532 (1979) CanLII 817, para. 94, ON LRB.

> *Since 1975 there have been only a small handful of cases where the Board has granted consent to prosecute (less than half a dozen). Given the vast range of unfair labour practices and otherwise illegal activity that the Board has been called upon to remedy in the last twenty nine years, the small number of cases where the Board has resorted to prosecution underscores the use to which the Board has confined this device – as an instrument of last instance, to be used when all else has failed.*
>
> *It is fair to say that in 2004, the Board will require an applicant to shoulder the very heavy burden of persuading us that nothing else will "work" to "fix" a labour relations "problem", except the prosecution of the respondent – and that this must be done for the purpose of assisting labour relations not only between the parties, but in the province more generally. It must be remembered that the prosecution of a provincial offence – even if maintained privately – is not strictly speaking, a private piece of litigation. Such a prosecution engages the broader public interest.*[533]

In another case, where consent to prosecute was granted, the OLRB recognized that there is "a useful labour relations principle to be served in deterring parties from acting as if they are simply free to 'opt out' of the collective bargaining regime and the [LRA] and its provisions."[534]

The reluctance of the OLRB to grant consent to prosecute, unless it is satisfied "that nothing else will 'work' to 'fix' a labour relations 'problem'"[535] and its view that deterrence is necessary, is consistent with its view of the efficacy and advisability of the imposition of deterrent monetary penalties in labour disputes, as stated in *Radio Shack*, above.

We think that the approach taken by the OLRB to deterrent penalties and to consent to prosecute is deserving of substantial deference.

In considering whether to recommend an amendment to the LRA to permit the OLRB to impose administrative monetary penalties, we also think it important to recognize that it has broad general remedial powers to provide monetary and other compensatory relief where there has been unlawful activity under the LRA.

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533 *Op. cit.*, paras. 39-40.
534 *United Food and Commercial Workers International Union (UFCW Canada) Local 102 v. Quality Hotel and Conference Centre Niagara Falls, Ontario*, (2013) CanLII 14707, ON LRB, para. 25.
535 *Ontario Hospital Assn. v. Ontario Public Service Employees' Union, op. cit.*, para. 40.

Section 96 (4) of the LRA currently provides:

> *(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,*
>
> *(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;*
>
> *(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or*
>
> *(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.*

In the exercise of its general remedial authority, the OLRB has ordered awards for damages, benefits, interest, organizing and negotiating costs, harassment and indignity, and prospective losses. As Kevin Whitaker stated in *Ontario Hospital Assn. v. Ontario Public Service Employees' Union*, above:

> *Since 1975 however, the Board has been granted a much broader range of remedial authority. Over time, the Board has in exercising this authority, constructed and refined a broad array of remedial devices designed to further the aims and goals of the statute.With these in hand, the Board has repeatedly (as the parties agree), sought to craft its own remedies to support collective bargaining, rather than resort to prosecution in the courts.*[536]

536 *Op. cit.*, para. 38.

The OLRB does not make orders that are primarily intended to punish the wrongdoer, although, as George Adams said in Radio Shack: "effective remedies will likely have a deterrent effect."[537]

In considering this question, it is also important to note that orders of the OLRB are enforceable as orders of the court. Section 96 (6) provides:

> *(6) A trade union, council of trade unions, employer, employers' organization or person affected by the determination may file the determination, excluding the reasons, in the prescribed form in the Superior Court of Justice and it shall be entered in the same way as an order of that court and is enforceable as such.*

Non-compliance with OLRB orders filed in the Superior Court of Justice can result in a finding of contempt resulting in the imposition of fines and/or imprisonment. For example, engaging in an illegal strike has been and is still regarded as one of the most serious illegal activities. If unions or employees engage in illegal strikes, especially in essential services such as health care, or in sensitive areas such as transportation, there is a risk of severe consequences. Where public safety is threatened, the consequence to unions and their members of defying legislation or court orders, prohibiting illegal strike activity or directing employees to return to work, can and has resulted in both the imposition of fines and imprisonment.

On the other hand, deterrence by the imposition of monetary penalties through granting consent to prosecute is recognized by the OLRB as an appropriate response to unlawful activity when it is satisfied "that nothing else will 'work' to 'fix' a labour relations problem"[538] or that deterrence is necessary because of flagrant disregard of the provisions of the LRA. In such cases, consent to prosecute may be a necessary and appropriate response to unlawful conduct. We think the OLRB is in the best position to assess whether to grant consent to prosecute on a case by case basis.

As noted above, on conviction of an offence for a violation of the LRA, individuals can be fined up to $2,000 and corporations and unions can be fined up to $25,000. Each day that a contravention continues may constitute a separate offence.

These maximum amounts have not changed since 1990.

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537 *Op. cit.*, para. 94.
538 *Ontario Hospital Assn. v. Ontario Public Service Employees' Union*, op. cit., para. 40.

It is appropriate, in our view, to increase the amount of the maximum fine that can be imposed by the Ontario Court of Justice where consent to prosecute is granted and a conviction is obtained. This change more accurately reflects both the engagement of the public interest where consent to prosecute is granted and the seriousness of the alleged misconduct. Furthermore, increasing the maximum penalties is more likely to act as a punishment and a deterrent and it recognizes that the passage of time has, to a substantial degree, eroded the punitive impact of the maximum fines currently allowed.

Recommendation:

164. We recommend that the provisions of the *Labour Relations Act, 1995* relating to prosecutions and offences remain unchanged except for section 104 (1) of the Act where it is recommended that the maximum amount of fines potentially imposed on conviction be increased as follows:

    Every person, trade union, council of trade unions or employers' organization that contravenes any provision of this Act or of any decision, determination, interim order, order, direction, declaration or ruling made under this Act is guilty of an offence and on conviction is liable:

    a) if an individual, to a fine of not more than $5,000; or

    b) if a corporation, trade union, council of trade unions or employers' organization, to a fine of not more than $100,000.

Our Recommendation should be seen in the context of and as an integral part of other recommendations in this report relating to the remedial jurisdiction of the Ontario Labour Relations Board, including giving the Board additional authority to order arbitration of collective bargaining disputes as well as the authority to make interim orders so as to be able to better protect the exercise of rights by employees under the *Labour Relations Act, 1995*.

13.2 Right of Striking Employees to Return to Work

We recommend making a change to the rights of employees in the following circumstances:

1. where an employee, engaged in a legal strike, makes an application to return to work after the expiration of the six-month period following the beginning of the strike;

2. where an employee is disciplined during the course of a strike/lock-out; and
3. where an employee is disciplined following the expiry of a collective agreement.

13.2.1 The Right to Return to Work After Six Months From the Beginning of a Legal Strike

The current provisions of the LRA relating to an employee's right to return to work after the commencement of a legal strike are:

> 80.(1) Where an employee engaging in a lawful strike makes an unconditional application in writing to the employee's employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection (2), reinstate the employee in the employee's former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee for exercising or have exercised any rights under this Act.
>
> Exceptions
>
> (2) An employer is not required to reinstate an employee who has made an application to return to work in accordance with subsection (1),
>
> a) where the employer no longer has persons engaged in performing work of the same or similar nature to work which the employee performed prior to the employee's cessation of work; or
>
> b) where there has been a suspension or discontinuance for cause of an employer's operations, or any part thereof, but, if the employer resumes such operations, the employer shall first reinstate those employees who have made an application under subsection (1).

As can be seen from a review of section 80, the LRA provides, subject to certain conditions, that an employee engaging in a legal strike may make an unconditional application to return to work within six months of the commencement of the strike. If the employee does apply to return to work within the six-month period, the employer is required to reinstate the employee in the employee's former employment on such terms as the employer and employee may agree upon and

the employer, in offering terms of employment, is prohibited from discriminating against the employee for exercising or having exercised any rights under the LRA.

The employer is not obligated to reinstate a striking employee if the employer no longer has persons engaged in work that is the same or similar to that which the employee performed before the strike, or where there has been a suspension or discontinuance for cause of an employer's operations or any part of the operations. If the employer resumes operations, the employer is required to reinstate the employees who have made an application within the six-month period.

Other Jurisdictions

Legislation in the federal jurisdiction, Alberta, Manitoba, Ontario, Prince Edward Island, Quebec and Saskatchewan include provisions dealing with the reinstatement of employees following a work stoppage.

Similar to the LRA in Ontario, legislation in Alberta and Prince Edward Island provides that employers are not required to reinstate employees in circumstances where the employer no longer has persons engaged in performing the same or similar work that the employee performed prior to the work stoppage, or the employer's operations, or some part of them, have been suspended or discontinued (but if the employer resumes such operations, the employer will reinstate those employees who wish to return to their jobs).

Legislation in Manitoba and Saskatchewan requires that seniority be considered in reinstatement protocols in circumstances where no agreement respecting the reinstatement of employees is reached between the employer and the union.

The federal, Quebec and Prince Edward Island legislation also specifically gives striking employees priority over replacement workers hired during the strike.

Ontario is the only jurisdiction in Canada that mandates a time period within which a striking employee must make an application to return to work while a strike is ongoing.

Should the Right To Return To Work Be Limited to Striking Employees Who Make Unconditional Application To Return To Work Within Six Months from the Commencement of a Strike?

In our experience, striking employees who make an application to return to work typically do so when they conclude that the strike in which they are engaged

is not likely to settle or where there is no end in sight or because of lack of financial resources. Applications by striking employees to return to work during the currency of a strike also often occur when an employer continues to operate during the course of a legal strike by using replacement workers.

We are in favour of eliminating the six-month time limit for a number of reasons.

1. Elimination of the six-month period would protect the ability of a striking employee to make an application to return to work at any time during the currency of a legal strike. This is a valid public policy objective.
2. Elimination of the six-month period means a strike can continue without potential job loss to striking employees for the sole reason that they engaged in a strike of that duration. To protect jobs when people engage in lawful strike activity is also a valid public policy objective.
3. A well-established fundamental protection for employees exercising their constitutional rights to freely associate is contained in the LRA:

   72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

   a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

   b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

   c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

   The statutory obligation on striking employees to apply for their jobs within six months of the commencement of a strike or risk losing their employment is fundamentally inconsistent with the basic protections

granted in section 72 of the LRA. Subsection 72 (a) prohibits employers from refusing to "continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was exercising rights under this Act." However, the current provision of the LRA allows an employer to refuse to continue to employ an employee who exercises the right to engage in lawful strike activity, a right under the LRA.

The threat of job loss if no application is made within the six-month period is also inconsistent with subsection 72(c) of the LRA, which prohibits an employer from seeking, by threat of dismissal, to compel an employee to cease "to exercise any other rights under this Act". The requirement that an employee engaging in a strike must apply to return to work within six months is a threat that the employee may have no right to reinstatement otherwise. It is a threat of dismissal. Of course, the six-month requirement is not a requirement established by employers but by the LRA. If such a requirement were to be established unilaterally by an employer in the course of a labour dispute, without the sanction of section 80 of the LRA, there is little doubt that it would be found by the OLRB to be an unfair labour practice. As a matter of policy, the government should not legitimize threats to employment where employees exercise their legal rights to engage in a lawful strike under the LRA.

4. The Supreme Court stated in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees"[539] and in *Mounted Police Association of Ontario v. Canada (Attorney General)*, "A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d)."[540] On some occasions, the existence of the six-month time limit may, as a practical matter, undermine the effectiveness of a legal strike in that it discourages employees from pursuing their collective bargaining goals by means of continuing a strike action, and has the effect of reducing the negotiating power of employee bargaining agents in those unfortunate circumstances where the outcome of a lengthy strike is uncertain. It should not be

539 2007 SCC 27, para. 84.
540 2015 SCC 1, para. 71.

government policy to enact legislation that erodes and undermines collective action by putting a time limit on the rights of striking employees to apply to return to work.

5. In *Saskatchewan Federation of Labour v. Saskatchewan*, the Supreme Court clarified that the right to strike embodied in section 2(d) of the Charter, which also protects the workers' right to collective bargaining and "is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations."[541] The time limit for striking employees to make an application to return to work is a limit on the constitutional right to strike.

6. As noted elsewhere in this report, section 1 of the Charter directs a comparison of how other democratic governments limit freedom of association, by stating that the rights guaranteed are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It is, therefore, significant that Ontario is the only jurisdiction in Canada that mandates a time period within which a striking employee must make an application to return to work during the currency of a legal strike. (See: "Other Jurisdictions", below).

Recommendation:

165. Section 80 of the *Labour Relations Act, 1995* should be amended by eliminating the six-month time period for striking employees to make an application to return to work. The section should otherwise remain unchanged.

13.2.2 Should Employees Engaged in a Lawful Strike or Lock-out, Who Are Disciplined or Discharged for Strike- or Lock-out-Related Misconduct, Have Access to Arbitration?

A very contentious issue in the resolution of some labour disputes can be the refusal by the employer to reinstate employees terminated during a strike or lock-out, or to remove lesser discipline imposed on employees during a strike or lock-out. Often the discipline imposed is based on alleged misconduct on the picket line or on other misconduct by the employee related to the labour dispute.

541 2015 SCC 4, para. 3.

Since no collective agreement is in operation during a legal strike and/or lock-out, employees who the employer wishes to discipline or who have been disciplined because of alleged misconduct during the strike and/or lock-out, have no access to a grievance and arbitration procedure. When employers refuse to reinstate employees for strike-related misconduct and refuse to submit such disputes to arbitration where just cause for discipline is disputed by the union, problems in the resolution of the labour dispute are often created that are very difficult to resolve. Typically, unions are not prepared to agree to the settlement of a labour dispute where the employer refuses to reinstate some employees for reasons of misconduct and where just cause for termination (or lesser discipline) is in dispute. Disagreement about employees who have been disciplined by the employer for alleged cause may prolong a labour dispute even though the parties have agreed to all terms of a collective agreement or a renewal collective agreement.

Other Jurisdictions

In Manitoba, the law requires the employer, at the conclusion of a strike or lock-out, to reinstate employees in accordance with the agreement reached between the union and the employer or, where no agreement is reached, in accordance with the seniority of the employee at the time the strike or lock-out commenced. The refusal to reinstate an employee is an unfair labour practice unless the Labour Board is satisfied that the employer refused to reinstate the employee because the employee's strike- or lock-out-related conduct resulted in a conviction for an offence under the *Criminal Code* (Canada) and, in the opinion of the Labour Board, would be considered just cause for dismissal of the employee even in the context of a strike or lock-out.

In Saskatchewan, the legislation provides that striking employees are entitled to replace replacement workers at the conclusion of the labour dispute and it provides for a return-to-work protocol in the event that the union and the employer are unable to agree. The Saskatchewan legislation also provides for arbitration of the discipline or discharge of any employee when there is no collective bargaining agreement in force after certification of the union. Since a refusal to reinstate is tantamount to a discharge, employees who are refused reinstatement have protection against unjust dismissal through arbitration.

In British Columbia, striking or locked-out employees, who are terminated or disciplined by the employer for activities during a strike or lock-out, have access to arbitration in order to determine whether the termination or other discipline is for just cause.

As was said by the Supreme Court of Canada in the *Saskatchewan Federation of Labour* case, above, a strike enables workers to "come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives."[542] Lawful strikes operate to guarantee the right of employees to associate meaningfully in pursuit of collective workplace goals. Similarly, a lawful lock-out of employees is available to employers for the purposes of trying to compel or induce employees to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees. In summation, strikes and lock-outs under the LRA are permitted and recognized as actions designed to put pressure on the other party to agree to the terms and conditions of a collective agreement. In other words, strikes and lock-outs are designed to allow workplace parties to advance their workplace goals relating to the terms and conditions of the employment of employees.

The status of a person as an employee does not cease because of a strike or lock-out, but employees may engage in conduct during a lawful strike or lock-out that warrants termination or other discipline for cause by the employer.

However, we are of the view that providing for independent third-party dispute resolution in the manner of the British Columbia legislation is appropriate. In British Columbia, striking or locked-out employees who are terminated or disciplined by the employer for activities during a lawful strike or lock-out have access to the grievance and arbitration process in order to determine whether the termination or other discipline is for just cause.

In our view, if a similar provision were to be included in the LRA, it would be beneficial to the efficient resolution of disputes and be good public policy for a number of reasons, some of which are set out below.

1. Lawful strikes and lock-outs are permissible economic sanctions designed to allow workplace parties to advance their workplace goals relating to the terms and conditions of employment of employees. A dispute over the termination/discipline of an individual employee for strike- or lock-out-related conduct is not, in any meaningful sense, a dispute about the terms and conditions of employment of all employees affected by the imposition of economic sanctions. Indeed, it is sometimes the case that all disputes related to terms and conditions of employment have been resolved by

542 *Op. cit.*, para. 54.

the parties and the only remaining disputes relate to the parties' failure to agree on the appropriateness of termination/discipline of employees that occurred during the course of a strike or lock-out. This usually means the continuance of economic sanctions, which continues economic harm to both employees and the employer's business, because of the inability to resolve an issue that is not relevant to the terms and conditions of a new collective agreement for all employees. Providing a dispute resolution mechanism for cases of termination/discipline of employees in relation to conduct during the strike or lock-out will not interfere with free collective bargaining, which is focused on the terms and conditions of employment of all employees in the bargaining unit. Such a provision should operate to facilitate the resolution of the more difficult labour disputes because contentious issues relating to termination/discipline that are not relevant to the resolution of the terms or conditions of employment for all employees in the bargaining unit can be resolved outside collective bargaining.

2. To provide a dispute resolution mechanism for cases of termination/discipline of employees in relation to conduct during the strike or lock-out would not prevent unions and employers from agreeing on the appropriate discipline of employees during collective bargaining but, as a practical matter, would mean that disagreements about the discipline of employees in relation to conduct during the strike or lock-out could not be taken to impasse by either party. Removing an issue from the bargaining table that has, or should have, no bearing on the resolution of differences related to the terms and conditions of employment of all employees in the bargaining unit, is consistent with the existing duty on both parties to bargain in good faith and make reasonable efforts to reach a collective agreement.

3. Providing for arbitration of such cases should reduce the length of some labour disputes where resort has been made to economic sanctions. Currently, there is no mandatory dispute resolution mechanism for these cases. The fact that the parties can now voluntarily agree to submit discipline cases to arbitration is not sufficient. Either party may have a case that they do not wish adjudicated for numerous reasons, one of which may be that they think they are unlikely to be successful. Ontario has had several lengthy labour disputes in recent years that were prolonged as a result of these issues.

4. There are often disputed facts and significant disagreement about whether cause for termination or other lesser discipline exists. As a practical matter, a provision permitting arbitration would make employers and unions assess

their actions against a standard of just cause, including making a careful assessment of the reliability and the substance of the evidence available to be tendered in support of their position at arbitration.

5. Such a provision would also eliminate or reduce the potential risk that employers will penalize an employee for exercising the right to strike where no cause exists or where the discipline imposed is too harsh or is inconsistent with the treatment of other employees who, to the knowledge of the employer, engaged in similar conduct.

6. While most employers probably act in good faith, such a provision will prevent any employers from using a strike or a lock-out as an opportunity to "clean house" by refusing to reinstate employees it unilaterally decides should not return to the workplace.

7. A union having a view of the facts that is significantly different from that of the employer, or who views the discipline meted out as excessive, is currently in a difficult position in collective bargaining. In addition to the duty to bargain in good faith, the union has an on-going duty of fair representation "so long as it continues to be entitled to represent employees in a bargaining unit" and is required not to act "in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union" (section 74 of the LRA). The availability to an employee of an arbitration process for challenging discipline imposed by an employer during a strike or lock-out will reduce the union's vulnerability to complaints that it has abrogated its duty of fair representation by not pursuing the cases of discharged or disciplined strikers. It is unfair for a union to be placed in a position of conflict where its duty to fairly represent one employee has the effect of prolonging a labour dispute affecting all employees.

8. It is unfair for an employer that terminates/disciplines an employee where there is just cause, to then be required to resolve that issue in collective bargaining because the union is prepared neither to resolve the case nor to agree, on a voluntary basis, to submit the dispute to arbitration. A prolonged labour dispute with continuing economic sanctions is the result.

We conclude that to provide for independent adjudication of disputes regarding the discipline of employees during the course of a lawful strike or lock-out will facilitate the resolution of labour disputes and, at the same time, respect the rights of employees and employers to strike and lock-out over terms and conditions of employment. If implemented, the recommendation

should help focus collective bargaining on the terms and conditions of employment of all employees while, at the same time, lead to less protracted labour disputes. Access to justice for both parties will be enhanced if there is the right to obtain a decision from a neutral third party adjudicator.

We recognize that, in some circumstances, the discipline of a striking employee could amount to an unfair labour practice. For example, if the termination of an employee by an employer, allegedly for just cause, was motivated by the exercise of rights by the employee that are protected under the LRA, the employer's conduct would amount to an unfair labour practice. Some have submitted to us that the OLRB is in the best position to determine whether a refusal to reinstate an employee, terminated based on alleged misconduct during the labour dispute, is an unfair labour practice. On the other hand, in determining whether just cause exists, an arbitrator is required to take into account and apply the relevant law and legal principles. There is no compelling reason to require arbitration by the OLRB, nor do we have strong views about the appropriate forum for dispute resolution in such cases.

Should Employees Who Are Disciplined After the Expiry of a Collective Agreement Have Access to Arbitration?

Where a union and an employer are bargaining for the renewal of a collective agreement, there is no just cause protection for employees after the "freeze" period ends (subsection 79(2) of the LRA), even if there is no strike or lock-out. During the currency of the collective agreement, and prior to the expiry of the statutory freeze period, the grievance and arbitration provisions of the collective agreement remain in effect. After expiry of the "freeze" period, concomitant with the right of employees to strike and the right of the employer to lock-out, employers are legally entitled to unilaterally change terms and conditions of employment and to continue to operate. The right to change terms and conditions of employment means that the arbitration provisions of the expired collective agreement are not required to be maintained by the parties prior to entering into a renewal agreement. Employers (and unions) are not bound to recognize and/or allow grievances relating to discipline to proceed to arbitration.

The end of the freeze period should not provide the employer with an opportunity to discipline employees where no cause exists. Neither should it provide a trade union the opportunity to insist on reinstatement of an employee, who has been dismissed for cause, as a pre-condition of a renewal collective agreement. Without

access to arbitration, the practical reality is that the good faith efforts of both parties to reach agreement on the terms and conditions of a renewal collective agreement can be adversely affected by disputes about whether there is just cause for discipline in a particular case. As noted above, these disagreements are not related in any meaningful sense to the negotiation of the renewal collective agreement but can prove difficult to resolve in the context of bargaining and, without a mandated dispute resolution process, may lead to protracted labour disputes.

Recommendation:

166. The *Labour Relations Act, 1995* should be amended to provide for arbitration, by the Ontario Labour Relations Board or by an arbitrator, of:

    a) the refusal to reinstate an employee at the conclusion of a strike or lock-out;

    b) any discipline of an employee by an employer during the course of a legal strike or lock-out; and

    c) any discipline of an employee by an employer after the expiry of a collective agreement.

13.3 "Just Cause" Protection from Certification to Date of First Collective Agreement

The issue that was raised in our consultations and in the Interim Report is whether there should be protection against unjust termination of employees from the time a union is certified or voluntarily recognized until the effective date of the first collective agreement. In first contract negotiations, this protection would extend to employees who are engaged in a strike or who are locked out by the employer before implementation of the first collective agreement.

Statutory "just cause" protection for employees generally provides protection for employees from unjust discharge by an employer. Commonly, such statutory protection allows an employee who asserts that there was no cause for termination to bring a complaint of unjust dismissal before a neutral third party adjudicator with jurisdiction to determine the issue. In such proceedings, the legal burden to prove just cause falls on the employer who must prove, on a balance of probabilities, that such action was justified. The adjudicator has jurisdiction to decide whether just cause exists and the dismissal is warranted and, where

no cause is proven, to order an appropriate remedy (including damages and reinstatement) or to substitute a lesser penalty if there was wrongdoing by the employee but the discipline imposed by the employer was excessive.

The goal of a just cause provision is to ensure that employees are not treated unjustly by the exercise of management's authority to terminate employees.

We note that a similar issue may arise after the expiry of a collective agreement during negotiations for a renewal collective agreement, when the union is in a legal strike position and the employer is entitled to lock out employees. Under the current LRA, employees are vulnerable to termination without cause by an employer unless such termination is an unfair labour practice. We have made a recommendation with respect to the termination of employees engaged in a legal strike in section 13.3.

In practical terms, under the current law, after certification, but before a first collective agreement is in place, an employee has no protection against unjust termination by the employer unless the termination is motivated in whole or in part by the employee's exercise of rights under the LRA.

Unions generally support the introduction of a provision for just cause protection during the period subsequent to certification and prior to the first collective agreement to protect employees where cause for termination does not exist. Unions assert that not only can the termination of employees erode the confidence of employees in the newly certified bargaining agent but it will likely also create issues that are difficult to resolve in collective bargaining. Access to just cause protection will help to ensure stability in the workplace during the critical period following certification until implementation of a first contract.

Employers generally did not comment on this specific LRA issue in their submissions.

Background

Amendments to the LRA, introduced in 1993, provided that a just cause provision was deemed to be in effect during:

a) the interval following certification or voluntary recognition and before a first collective agreement was entered into;

b) the course of the collective agreement;

c) strikes and lock-outs; and

d) the open period before a new collective agreement was in operation or until the union was decertified.

The 1993 amendments to the legislation also allowed for a lesser standard for "cause" to apply during an employee's probationary period. These provisions were repealed in 1995.

Other Jurisdictions

Three Canadian labour relations statutes contain just cause protections during periods where no collective agreement is in force. The federal jurisdiction provides just cause protection during the period from the date of certification to the date when a first collective agreement is implemented. British Columbia's legislation provides that an employer may not discharge, suspend, transfer, lay-off or discipline an employee except for proper cause when a union is conducting a certification campaign. Saskatchewan's law states that, in circumstances where no collective agreement is in force, the board has certified a union, and an employee is terminated or suspended for a cause other than a shortage of work, an arbitrator may determine whether there is just cause for the termination.

Should "Just Cause" Protection Be Extended to all Employees in a Bargaining Unit From Certification to the Date of the First Collective Agreement?

Pursuant to the provisions of the LRA, an employer is prohibited from dismissing, threatening to dismiss or imposing any other penalty if the purpose is to prevent an employee from joining a union or from exercising any rights under the Act. As a result, the OLRB has jurisdiction to protect employees from unjust discipline or discharge if they are discharged or disciplined for exercising their rights under the LRA, (e.g., because they have joined a union or participated in other lawful activities related to organizing or certification of a union, including participating in collective bargaining and/or in a lawful strike). If the OLRB finds an employer has terminated or disciplined an employee because of the exercise by the employee of his or her rights under the LRA, it has jurisdiction to reinstate the employee and to award damages in cases of termination. In such cases, the burden of proving that the employer did not act contrary to the LRA lies on the employer.

Once the first collective bargaining agreement is effective, employees will have protection against unjust dismissal or discipline because of the just cause

provisions that are almost always contained in collective agreements. Virtually without exception, collective agreements in Ontario contain provisions permitting the grievance and arbitration of employee discipline cases. Arbitrators have the authority to determine whether an employee has been discharged or otherwise disciplined for cause and may substitute another penalty for the discharge or discipline that the arbitrator deems just and reasonable.

Even after the expiry of a collective agreement, employees in the bargaining unit will have protection against unjust dismissal or discipline because the terms and conditions of employment are frozen until the union and the employer are in a position to engage in a legal strike or lock-out.

We are not inclined to recommend any general just cause protection for employees in the LRA from the date of certification of a trade union to the date of the commencement of a first collective agreement.

The LRA protects employees against termination by an employer that is motivated in whole or in part by the exercise of rights under the LRA.

The purpose of the LRA is not to curtail the employers' authority to terminate an employee upon giving notice or where there is cause unrelated to the exercise of rights by the employee under the LRA. If insufficient notice is given under the ESA or at common law, the employee has other remedies available. Similarly, if cause is successfully challenged and no ESA or common law notice is given, the employee has other remedies available.

We do not advise extending the LRA to protect employees from employer action unrelated to the exercise by employees of rights under the LRA.

Recommendation:

167. It is our recommendation that "just cause" protection should not be extended to all employees in a bargaining unit from the date of certification to the date of the first collective agreement.

    Our Recommendation should be seen in the context of, and as an integral part of, other recommendations in this Report.

    In particular, it should be seen in the context of our recommendation on the Right of Striking Employees to Return to Work, above.

13.4 Successor Rights

The issue here is whether and how to address the precariousness that exists for vulnerable workers when services such as security, food services, cleaning and others are contracted out and retendered.

Where a union has bargaining rights, the successor rights provision of the LRA protects employee and union bargaining rights where there is a sale of a business. The law provides that bargaining rights and collective agreement obligations of the original employer flow through to the new successor to whom the business is sold or transferred. Although the term "sale" is very broadly defined and applied, the contracting out and re-tendering of contracts have generally not been considered by the OLRB to be included in that term and, therefore, the successor rights have not applied to those situations.

In these situations, the employees in question simply lose the protection of the rights under their collective agreement, and their union loses its bargaining rights to act on their behalf. Unionization could be expected to improve terms and conditions of employment over time, but this potential for improvement is undermined by the fact and the threat of re-tendering.

To understand the contrast between the protection available to employees in a sale of a business and contract re-tendering, consider the example of a manufacturer whose workforce is unionized but whose building security for the factory is contracted out. Assume that the union representing the workers in the plant also represents the security workers who are covered by a separate collective agreement with a security firm. If the manufacturing business is sold, the new purchaser is, by application of the successor rights provisions of the LRA, bound to the existing collective agreement with the union, and the plant workers continue to have the same protections. The plant employees cannot be terminated or replaced, except in accordance with the terms of that agreement, and their negotiated terms and conditions of employment are protected and preserved. Of course, the new purchaser can renegotiate an agreement when the current one expires.

The situation is very different with the unionized security guards at the same manufacturing facility. If we assume that the new owner of the manufacturing business re-tenders the security contract and the contract is awarded to a new security firm, the old collective agreement with the former security firm employer is no longer applicable. The union no longer has bargaining rights at that plant for security guards. The new security provider company that wins the tender is not

obligated to offer the existing employees jobs, can terminate some or all of the workers if it so chooses, and can unilaterally determine rates of pay and working conditions. There is an incentive for the new security provider to maintain the employment of the security guards because the new provider is, in most cases, liable to pay termination and severance pay if it doesn't, but it is not obliged to offer or to continue their employment.[543] Indeed, the new security provider can be selective in who it wishes to retain, so long as it complies with legal requirements not to discriminate. If a union (typically the same union that has previously organized and bargained for the same group of security guards) organizes the employees of the new security provider, it will be negotiating a first agreement. The union and the employees will have to start the bargaining process with a new employer all over again.

The basis for this difference in treatment is that contracting out is generally not considered to constitute a sale of a business. Whether or not this is just a technical distinction or a substantive one, there are reasons to allow for the efficiencies that can be achieved through contracting out and to not have a rule of general application providing that a collective agreement is binding on a new contractor. Certainly, in the case of a contracting out by a lead employer for some parts of its business, perhaps there is justification, from time to time, for the difference in treatment between contracting out and a permanent sale. We are not suggesting, as part of this review, that this general approach should change.

We do conclude, however, that in industries mostly populated by vulnerable and largely unskilled workers, the constant re-tendering of contracts is, in many cases, not a mechanism aimed at achieving efficiencies through acquiring greater expertise or different methods of production but, rather, a mechanism to reduce costs by substituting a cheaper, non-union contractor for a unionized one. The social cost and impact of this "efficiency" is borne by those least able to bear it, namely, the vulnerable and the precarious employees in that industry. If a union in collective bargaining negotiates improvements in the working conditions for the unskilled and vulnerable people it represents, these gains are negated by re-tendering. The effect of constant re-tendering is not only to keep compensation low but also to eliminate improvements achieved through collective bargaining.

It should be clear, however, that our recommendation is not intended to be a rule of general application applying to all re-tendering or contracting out. Our recommendation is confined to a few sectors where employees are particularly

543 Section 75 of the ESA and O. Reg. 287/01.

vulnerable and, in those sectors, we recommend that existing bargaining rights and collective agreements be binding on the new "successor" employer when contracting out and re-tendering occur. Of course, while the new contractor is bound to the old collective agreement, it can negotiate the terms of a new agreement when the old one is set to expire, or earlier if the union agrees.

This situation of contracting out and re-tendering is perhaps one of the best examples of a fissured workplace, creating competition among suppliers of low-skilled services on a constant basis to keep wages and benefits as low as possible. Clearly, this is a major contributor to the continued presence of vulnerable workers in precarious work in some sectors. Stability and advancement through meaningful collective bargaining is not sustainable when the workers are unskilled and the lead employer can reduce costs, keeping them at rock-bottom through an endless series of re-tendering.

As noted above, an intrusion into the contracting out process, where all contracting out or re-tendering would be subject to the successor employer rule, is an unwarranted and unwise step. However, in a few sectors, it is important to take steps that benefit society and help reduce the precarious nature of employment for employees by protecting the improvements achieved through collective bargaining and the stability and the security of employment.

Currently, the ESA recognizes the particular vulnerability of workers in the building services sector by providing that the new employer will be liable in most cases for termination and severance pay if it does not maintain the employment of the employees of the old firm.[544] In addition, when a new contractor wins a contract, the ESA protects the length of employment with the former contractor by including that time when determining any rights and benefits that are based on length or period of employment the employee has with the new contractor, such as, termination notice/pay, severance pay, and vacation entitlement.[545] These are important protections for workers, but successor rights are more valuable in the case of unionized employees because they would protect the job security of the employees and all their existing compensation, benefits and other collective agreement rights until the next agreement is negotiated.

The law currently protects the bargaining rights of unions and the terms and conditions of employment of employees when businesses are sold. In the

544 Sections 75 and 76 of the ESA and O. Reg. 287/01.
545 Section 10 of the ESA.

building service sector, contracting out and re-tendering is the equivalent of a sale and should be treated in the same way. Accordingly, we recommend – in the interests of protecting negotiated gains, stability and security for employees – that successor rights should be applied to the building services industry.[546] Whether this recommendation should apply to other sectors is discussed below.

In what sectors of the economy should successor rights pass to a new employer on re-tendering or contracting out? Certainly, they should apply to building services where cleaning, food services and security contracts are commonly performed by third parties. We would add to building services home care funded by the government, where there appear to be approximately 25,000 unionized employees. Presently, approximately 30% of the sector is unionized. Although wages in this sector have increased substantially in the last three years, employment in the sector remains precarious. In home care, employees have small pension and benefit entitlements, split shift work often creates hardship, and employees are mostly female. It is a growing and important area of publicly-funded health care. For the moment, government has limited contract re-tendering in this sector for some years but it is likely to be permitted again. Whatever the merits, an end to union-negotiated terms and conditions of employment in the home care sector resulting from re-tendering should not be permitted and successor rights ought to apply.

There are likely unskilled and vulnerable workers performing precarious work in other areas, such as bus drivers working for school boards where constant re-tendering produced such low wages that, last year, employers apparently had difficulty finding sufficient employees to perform the work. We recommend further examination to determine whether the same approach recommended for building services and the home care sector should apply to other sectors as well.

There are likely other areas of the economy comprised of unskilled, vulnerable workers in precarious work where successor rights should apply in cases of re-tendering to preserve existing collective agreements, either now or in the future. We recommend that the legislation should provide government with the flexibility to apply this same provision by regulation, where necessary.

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546 In 1993, *An Act to amend certain Acts concerning Collective Bargaining and Employment* ("Bill 40") introduced section 64.2 to the LRA, which provided for successor rights in respect of building services (including cleaning services, food services and security services) by deeming that a sale of business had occurred where a building services contract was transferred.

We make the following recommendations:

Recommendation:

168. Successor rights should be applied to the building services industries (security, food services, cleaning) and home care funded by the government.

169. A regulation-making authority should be added to the *Labour Relations Act, 1995* to allow for the possible expansion of coverage to other services or sectors in the future.

13.5 Ability of Arbitrators to Extend Arbitration Time Limits in the Arbitration Procedure

The Issue

Prior to 1992, the legislation allowing arbitrators to relieve against time limits was very similar to what it currently is today, that is, the legislation extended the ability to relieve against time limits with respect to the grievance procedure, and did not include the words "arbitration procedure". However, there were some decisions of arbitrators extending time-limits when referrals to arbitration were missed, when there were reasonable grounds for the extension and there was no substantial prejudice.[547] In 1992, Bill 40 included a provision stating explicitly that an arbitrator "may extend the time for any step in the grievance or *arbitration procedure* under a collective agreement" if the arbitrator believed that there were reasonable grounds for the extension and the opposite party would not be substantially prejudiced (emphasis added). As part of amendments under Bill 7 to the LRA in 1995, the legislation was amended to remove the words "arbitration procedure". As a result, courts have held that arbitrators no longer have the authority to extend time limits that were missed in referring a case to arbitration.[548] Some stakeholders assert that the result of this situation is that potentially meritorious grievances can be defeated on technical grounds.

547 *S.E.I.U., Local 204 v. Leisureworld Nursing Homes Ltd.*, [1997] O.J. No. 1469, 70 A.C.W.S. (3d) 281, 99 O.A.C. 196.
548 *Ibid.*

Analysis

The purpose of this section of the LRA is to relieve against missed time limits, when appropriate. Objections to arbitrability based on missed time limits were very common in labour arbitration proceedings for a long period of time. These objections, when upheld, prevented a dispute from being heard on its merits because a time limit had been missed. The section allowing arbitrators to extend time limits was originally introduced because of a concern that technical objections were preventing issues from being addressed on their merits when there were reasonable grounds for an extension of time and there was no substantial prejudice to the party making the objection.

Most legal systems have a device to relieve against time limits when it is in the interests of justice to do so. In the labour arbitration context, it is now universally accepted that arbitrators should have the ability to relieve against time limits in the grievance procedure if the arbitrator believes that there are reasonable grounds for an extension and the opposite party will not be substantially prejudiced. As indicated above, prior to 1992, some arbitrators applied the existing provision to extend the time limits where referrals to arbitration were out of time.

We can see no justifiable policy reason for differentiating between a missed time limit in referring the grievance to arbitration and a missed time limit in the grievance process itself. Grievance arbitration is a statutorily-mandated process designed to promote expeditious and effective dispute resolution during the currency of a collective agreement. If in the case of the grievance procedure, an arbitrator has the authority to determine whether there are reasonable grounds for an extension and no substantial prejudice, there is no reason for the same power not to apply to the arbitration procedure, which is the critical element of the dispute resolution process. Permitting technical objections to prevent dispute resolution when an extension would be appropriate serves no policy purpose and discredits the system of labour relations in the province.

Recommendation:

170. We recommend that section 48 (16) of the *Labour Relations Act, 1995* be amended to include the arbitration procedure, as well as the grievance procedure, so that an arbitrator has the power to relieve against time limits if he or she is satisfied that there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced.

13.6 Conciliation Boards

Under the LRA, parties must go through the conciliation process before a strike or lock-out would be legal. If a conciliation officer is unable to effect a collective agreement, the Minister has the option of either appointing a conciliation board or issuing a notice in writing, informing each of the parties that he or she does not consider it advisable to appoint a conciliation board. This is known as a "no board" report. In practice, conciliation boards are never appointed and have not been for decades. It is not clear when this mechanism fell generally into disuse. From the perspective of labour relations practitioners, there is no purpose in having detailed procedures set out in the legislation that are simply not used in practice. There is no opposition in the labour relations community to the removal from legislation of what has effectively already disappeared in fact.

Recommendation:

171. We recommend that the Labour Relations Act, 1995 be amended to remove the conciliation board provisions.

14 | Concluding Recommendations

A Provincial Forum for Discussion between Employers, Unions, Employees, and Government

In our consultations with the various stakeholders in this process, it became apparent that while the "stakeholder" representatives may express their views to government, they rarely meet together and likely only when their interests are aligned.[549] This lack of interaction and ongoing discussion between the key stakeholders on labour law and employment reform, with respect to significant changes in the workplace and the economy, hinders the development of effective and balanced public policy. While open dialogue will not lead to consensus on all contentious issues, it may lead to a better appreciation of interests and perspectives and, on occasion, to a limited range of matters where there might well be a convergence of interests. All parties are interested in a strong economy and in the provision of decent working conditions for employees.

If there was a forum for discussing broad work-related issues, there would be much to discuss and much to learn. At a time when there is uncertainty and the nature of work has changed for so many, the list of issues is extensive: changes to work-related law and regulation; enforcement of the laws of the workplace; the education and training of employees and employers; the development of a

549 We believe there were discussions amongst unions and employee advocates during the consultations with respect to this Changing Workplaces Review, but none that really involved business.

research database for labour and employment matters; the impact on Ontario of changes to free trade agreements, just to name a few. In our view, much is to be gained by providing a forum for discussion where stakeholders with competing interests can discuss how and what change might make Ontario a place where "the goals of economic growth and improved employee rights" might be achieved.

There is a history of attempts to form tripartite multi-party discussions between management, labour, and government in Ontario. Most have been short-lived, although numerous "section 21" committees under OHSA do function effectively.[550]

Given the imperatives of global competition, the rapidly changing nature of work and workplaces, and the potential imminent changes to trade agreements that may affect Ontario, there is a compelling case to be made for bringing together government, business, labour and employee advocate leaders, at a senior level, to discuss these and other issues, to foster broader understanding of what is occurring and to attempt to find consensus on possible alternatives and options.

To be clear, we do not suggest that this new forum be involved in the government's decision-making process in its response to our Report. We have attempted to hear the views and understand the interests of stakeholders in making our recommendations and hope that the government will determine the steps that it will take in response to our Report. Once decided, the evaluation of changes implemented by the government could usefully be discussed in such a forum.

We recommend, accordingly, that an Ontario Workplace Forum be established with an independent chair who will function as facilitator. Business leaders, labour leaders, employee advocates, all at a senior level, and government at the Deputy level, should participate. The Committee should meet as often as required, but no less than quarterly. It should have some modest staffing and resources to support its work, which can be revaluated and strengthened if the process demonstrates value.

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550 The Minister has appointed section 21 committees in the following sectors: construction, mining, health care, fire services, police, film and television, and electrical and utilities

Institutionalizing the Process of our Review

There is no history of a joint review of both statutes in Ontario or Canada and little history in Ontario of independent review of either statute at the request of government.[551]

We are aware of the criticism of the politicization of the process of law reform of labour relations law in the 1990's,[552] and we have, therefore, endeavoured to conduct a full and open consultation on an independent and apolitical basis. The consultation process was a valuable exercise. Looking at the issues in both statutes together allowed for a better understanding of how the same issues are approached in unionized and non-unionized settings and necessitated an examination of similar issues under both Acts. The process was lengthy because it had been so long since a review was conducted, there was much to cover, and the statutes are complex. We endeavoured to prioritize the issues that we determined required immediate examination and put off those which, while important, were less pressing.

Whatever changes are made coming out of this review based on our recommendations, they should be reviewed after a period of time to assess their effectiveness in the context of changes in international commitments, changes in other jurisdictions, and future changes that may occur in the workplace and in the economy. The process of reform must be responsive to those changes and should occur on a reasonably regular basis regardless of the government in power.

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551 In 1993 in Ontario, there was a Tripartite Review of a list of subjects, directed by government and conducted in a very constrained timeframe with no meaningful consultation, in which, according to the Chair, the circumstances undermined the reform process: Kevin M. Burkett, The Politicization of the Ontario Labour Relations Framework in the Decade of the 1990's. The 1975 amendments to the LRA were regarded as having emanated from an independent process despite the fact that it was led by the MOL. (See Burkett, infra). The Law Commission of Ontario produced an independent but self-generated report on the ESA in 2012: Vulnerable Workers and Precarious Work (Toronto: Law Commission of Ontario, 2012) and in the 1980's, there was an independent review of the Hours of Work provisions of the ESA: Donner, A. (Chair), Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime, Toronto, Ontario Ministry of Labour, 1987.

552 "In the space of five years, Ontario has undergone two major revisions of the Labour Relations Act without the benefit of in-depth study and analysis and full consultation with both sides of the collective bargaining process. The legacy of this short-sighted and partisan political intervention has been to create a climate of uncertainty, to the detriment of all, and to accentuate divisions within the labour relations community such that there have been negative impacts upon society and opportunities lost for collaborative approaches to the economic challenges of the day": Burkett op. cit. 18

Recommendations:

172. We recommend that Ontario create an Ontario Workplace Forum of senior business and labour leaders, employee advocates, and senior government officials, with an independent Chair facilitator. The Committee should meet no less than quarterly and have modest support from government. The Forum would discuss the impact of changes in the workplace and the economy from the perspective of the stakeholders and attempt to achieve consensus on appropriate measures that could be taken by government and by the stakeholders. The Forum would also monitor, support and make recommendations to improve any changes implemented by government as a result of this Review.

173. We recommend that Ontario make an ongoing commitment to the process of independent review of the new Workplace Rights Act every five to seven years.

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Final Report

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