



MAY 2017

THE CHANGING WORKPLACES REVIEW

AN AGENDA FOR WORKPLACE RIGHTS

Summary Report

SPECIAL ADVISORS
C. MICHAEL MITCHELL
JOHN C. MURRAY



TABLE OF CONTENTS

THE CHANGING WORKPLACES REVIEW: AN AGENDA FOR WORKPLACE RIGHTS	03	RECOMMENDATIONS ON LABOUR RELATIONS	23	Related and Joint Employer	50
The Mandate	03	CONCLUDING RECOMMENDATIONS.....	29	Remedial Powers of the OLRB.....	51
Elements of the Review	04	Introductory Recommendations.....	29	Right of Striking Employees	51
General Observations & Upfront Recommendations	04	Enforcement and Administration	30	Just Cause Protection	52
Guiding Principles, Values and Objectives	07	Sectoral Regulation and Exemptions	37	Successor Rights	52
Trends in the Economy and the Workplace	08	Changes to Basic Standards.....	39	Ability of Arbitrators To Extend Arbitration Time Limits in the Arbitration Procedure	52
RECOMMENDATIONS ON EMPLOYMENT STANDARDS.....	11	Who is an Employer and Who is an Employee.....	44	Conciliation Boards	52
Changes to Basic Standards.....	17	Exclusions	44	Concluding Recommendations.....	52
		Exclusions from Collective Bargaining	44		
		Acquisition of Bargaining Rights	46		



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.

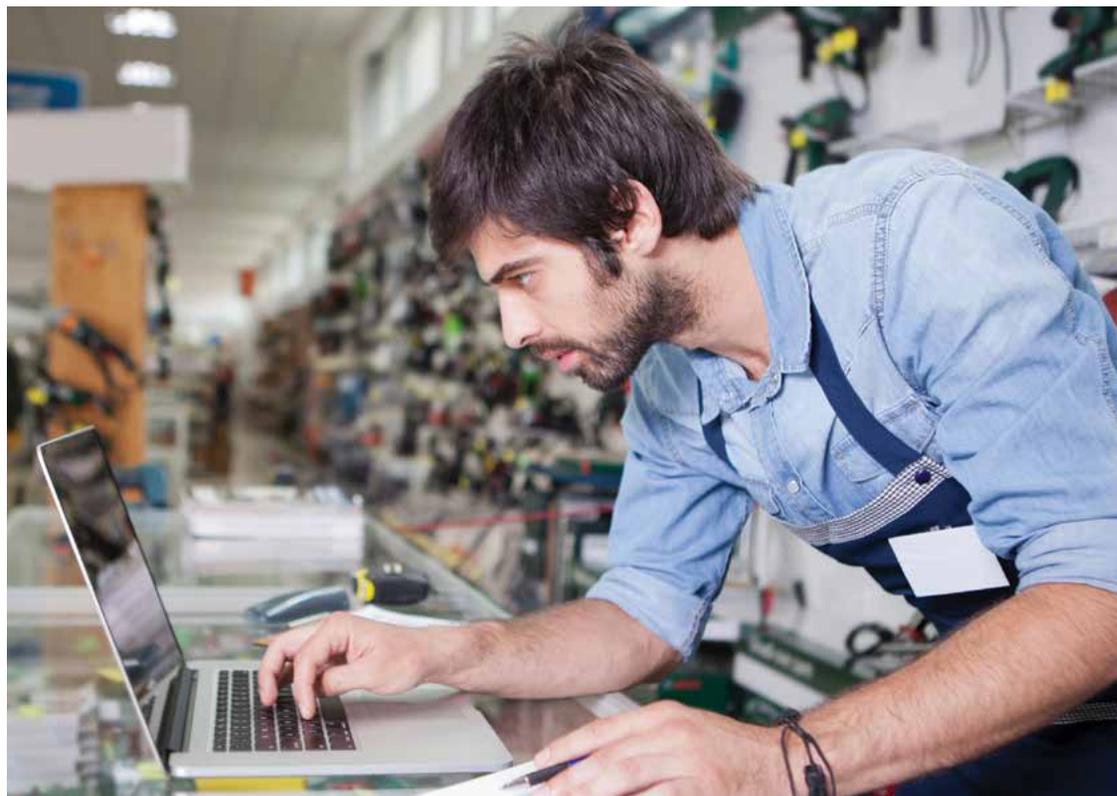
ELEMENTS OF THE REVIEW

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.

“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.”

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 have 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:

- ▲ Domestic;
- ▲ 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.

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. Section 1 (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

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 section 18.1 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

ISBN 978-1-4868-0092-6 (PRINT)
ISBN 978-1-4868-0094-0 (PDF)