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October 14, 2016

Hand-Delivered and sent by E-mail

Hon. John C. Murray, Co-Chair
C. Michael Mitchell, Co-Chair
Changing Workplaces Review, ELCPB
400 University Avenue, 12th Floor
Toronto, Ontario M7A 1T7

CWR.SpecialAdvisors@ontario.ca

Dear Sirs:

Changing Workplaces Review Interim Report

Thank you for the opportunity to respond to the Changing Workplaces Review Special Advisors' Interim Report, released in July 2016.

Aramark Canada Limited, Compass Group Canada Ltd. and Sodexo Canada Ltd. (collectively referred to for the purposes of these submissions as the "ACS Coalition") are leading competitors in the foodservice and facilities management for clients in fields including education, healthcare, business, corrections, and leisure and are all subject in many aspects of their business to the Building Services Provider provisions in the Ontario *Employment Standards Act, 2000*.

About Us and Our Shared Values

Aramark Canada Limited

Aramark employs 270,000 employees globally in 21 countries, and is publicly traded on the New York Stock Exchange under the trading symbol "ARMK".

Aramark Canada Limited currently employs 15,471 employees across the country, including 5,132 unionized employees covered by 95 collective bargaining agreements with 18 different unions. In Ontario, where Aramark primarily provides food, facilities and uniform services, we employ 7,641 employees, including 3,580 unionized employees under 55 collective bargaining agreements with 10 different unions.

Aramark is proud to have received a number of awards for its employment policies and practices including, most recently:

Canadian Awards:

- Canada's Greenest Employer (2016)
- Excellence in Public Outreach – Fair Trade (2015)

North American (Global) Awards:

- World's Most Admired Companies – Fortune Magazine (2016)
- Best Employers for Healthy Lifestyles Award (2016)
- Top 50 Employer for People with Disabilities (2016)
- Corporate Equality Index -100% on Human Rights Campaign Foundation's 14th Annual Scorecard on LGBT Workplace Equality (2016)
- Latino 100 List – Top 100 Companies Providing Business Opportunities for Latinos (2016)
- World's Most Ethical Company – Ethisphere Institute (2015, for the 5th time)
- Top 40 Companies for Diversity by Black Enterprise (2015)

Compass Group Canada Ltd.

Compass Group employs over 500,000 employees in 50 countries globally. It is listed on the London Stock Exchange and is a constituent of the FTSE 100 Index (CPG:London).

Compass Group provides food service and support services to offices and factories; schools and universities; hospitals and senior living communities; major sports and cultural venues; remote mining camps and offshore platforms. It serves approximately four billion meals a year around the world.

Compass Group Canada Ltd. currently employ 30,822 employees across Canada, including 13,701 unionized employees covered by 213 collective bargaining agreements with 24 different unions. In Ontario, we employ 14,109 employees, including 6,911 unionized employees under 129 collective bargaining agreements with 17 different unions.

Compass Group's recent achievements and wide recognition as an employer include the following:

- Progressive Aboriginal Relations Program - Gold PAR Level Achievement (2013 – 2016)
- Innovator of the Year Award for Nourish Program (2015)
- The Charlotte Observer: Top Workplace (2016)
- Best Employers for Healthy Lifestyles® Award
- Henry Spira Humane Corporate Progress Award from HSUS
- Food Management Top 50: #1
- Compassion in World Farming Good Egg Award
- Fortune Magazine's Change the World List
- Acterra Award for Sustainability
- Modern Healthcare: Best Places to Work in Healthcare
- PRSA - Chicago Skyline Award of Excellence
- Green Sports Alliance
- Modern Healthcare: Best Places to Work in Healthcare
- Food Management Magazine: Capital One, 2016 Innovator of the Year
- Becker's Hospital Review: One of "150 Great Places to Work in Healthcare"

Sodexo Canada Ltd.

Sodexo employs 425,000 employees in 80 countries globally, and is publicly traded on the European Stock Exchange under the trading symbol "SDXAY".

Sodexo Canada Ltd. delivers integrated facilities management services – food, hard and soft facilities management and building services – in diverse environments, including healthcare, education, energy and resources, business and industry, government services, and sports and leisure environments. We currently employ 5,933 employees across the country, including 5,872 unionized employees covered by 71 collective bargaining agreements with 17 different unions. In Ontario, we employ 3,767 employees, including 2,187 unionized employees under 31 collective bargaining agreements with 9 different unions.

Sodexo's achievements as an employer have been recognized widely throughout Canada and North America, including most recently:

2015 – 2016 Canadian Awards

- PAR Gold Certification
- Canada's Top Employers for Young People

- Hamilton-Niagara's Top Employers for 2015 and 2016
- Mediacorp Top Canada's Best Diversity Employers

2015 North American Awards

- Diversity Inc.
    - Top 10 Companies for Diversity Councils (#3)
    - Top 10 Companies for Mentoring (#3)
    - Top 10 Companies for Global Diversity (#5)
    - Top 10 Companies for Disabilities (#8)
    - Top 10 Companies for Recruitment (#10)
- Disability Equality Index (DEI)
- Working Mother Multicultural Women
- Latina Style Magazine: Top 12 Companies (#7)
- Human Rights Campaign Foundations Corporate Equality Index
- Top 100 Military Friendly Employer by GI Jobs
- RobecoSAM Sustainability Yearbook 2015: Best Performing Company for Economic, Social and Environmental Performance
- Dow Jones Sustainability Index 2015: Top-rated Company in its Sector
- North American Candidate Experience Award
- Flex Jobs: Top 100 Company for Remote Work
- Potentialpark's Online Talent Community Overall Rating
- Global Diversity List 2015:
    - Top 10 Women's Employee Networks Category
    - Top 10 Disability Networks Category

As all of the above indicates, the ACS Coalition believes in ethical employment. We strongly believe that all employers should comply with their obligations under labour and employment laws and embrace a culture of compliance.

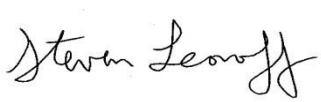
Each of us has well-established workplace policies that consistently meet or exceed the minimum statutory requirements. Along with competitive wages within our industry, we provide our respective employees with comprehensive benefits packages, including medical and dental benefits and disability insurance. Although the cost of doing so is significant, we have managed to remain profitable and competitive.

As employers and as competitive businesses, we are proud of our contributions in Ontario and throughout Canada. We are particularly proud of the strong relationships we have forged with our non-unionized and unionized employees.

The ACS Coalition welcomes this opportunity to comment on the Interim Report, and respectfully makes the following joint submissions on matters of common interest.

Thank you for considering our submissions.

Yours very truly,



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ACS Coalition Submissions:
Changing Workplaces Review Interim Report

Foundational Principles

Changes to the Ontario *Labour Relations Act, 1995* ("LRA") and the *Employment Standards Act, 2000* ("ESA") could have a profound impact not only on Ontario's workplaces, but also on Ontario's economy.

As stated by the Ontario Chamber of Commerce:

> Ontario's highly skilled workforce provides the province with a competitive advantage and contributes to our position as a leading North American destination for foreign investment.
>
> Despite this impressive distinction, new stresses have been placed on employers and employees, decisions that threaten our status as an investment destination of choice. Over the course of the coming year Ontario will implement a new mandatory pension plan and a cap-in-trade system – both of which will raise the cost of doing business in Ontario.[1]

On top of those stresses, many Ontario employers are still struggling to recover from the effects of the largest economic recession since the Great Depression, while adjusting to the impact of globalization and the lightning speed of technological change. Indeed, Ontario employers face significant and unprecedented political, economic and operational challenges in the current climate.

Accordingly, the ACS Coalition urges the special advisors to exercise considerable caution with regard to recommending any major changes to current labour and employment laws in Ontario. We are particularly concerned about changes that would overhaul of the current labour relations system, upset the existing balance between employer, union and employee rights and, in doing so, negatively affect Ontario's job growth, economic stability and competitiveness.

We agree with the special advisors that:

- We must recognize the diversity of the Ontario economy, its businesses and the competition they face.

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[1] Ontario Chamber of Commerce, Maintaining Ontario's Competitive Edge: The Business Perspective on Labour Reform, Submission to the Special Advisors of the Changing Workplaces Review (September 2015).

- A “one-size-fits-all” regulatory solution to a problem in a sector or an industry could have negative consequences if applied to all employers.

- The regulation of labour and employment laws must not be so burdensome as to unnecessarily impair the competitiveness of Ontario business.[2]

We agree with Professor Gunderson that: “…any policy initiatives must consider their effect on business costs and competitiveness especially given the increased competitive global pressures, the North-South re-orientation and the increased mobility of capital.”[3]

The Interim Report identifies approximately 50 issues affecting Ontario’s workplaces and over 225 options of varying size and scope for addressing these issues in the LRA and ESA. Although maintaining the status quo is listed as an option for most issues, many of the other options, if enacted, could increase costs and decrease competitiveness, negatively affecting both job creation and economic growth.

We appreciate that the special advisors will endeavour to craft recommendations for change that are balanced and, if implemented, will have a reasonable likelihood of being sustained by subsequent governments differently composed.[4] However, with respect, we believe that collectively the options listed in the Interim Report disproportionately favour unions and employee advocates. Indeed many of the options set out in the Interim Report appear to have been initially suggested by non-employer groups and organizations promoting a one-sided agenda.

Recommending options that would work to the disproportionate benefit of one stakeholder over another is inconsistent with the special advisors’ mandate to make recommendations on how the LRA and ESA “might be reformed to better protect workers while supporting businesses in our changing economy.”[5] The guiding principles, values and objectives of the Changing Workplaces Review are directed at creating an environment supportive of business that must operate in the face of rapidly advancing technological change, globalization and a market economy that must compete for business and investment.

In light of the above, the ACS Coalition believes that any change with respect to the following issues identified in the Interim Report would be highly problematic for Ontario employers and businesses, including the building services provider industry, and should not be further advanced or recommended by the Special Advisors in their final report to the Minister of Labour.

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[2] Changing Workplaces Review Special Advisors’ Interim Report (“Interim Report”), at p.11.
[3] Interim Report, at p. 19.
[4] Interim Report, at p. 19.
[5] Interim Report, at p. 11.

Labour Relations Act

In our view, many of the options for changing the LRA listed in the Interim Report and, particularly those addressed below, if enacted, would drastically overhaul Ontario's labour relations system, enhance union rights and unnecessarily skew the balance between employers and unions.

The ACS Coalition believes that the fallout of such change would be borne heavily by employers and businesses in terms of increased costs and decreased competitiveness. The fallout would ultimately be borne by all Ontarians in terms of threats to job creation and stunted economic growth.

Accordingly, in these submissions we stress the need for considerable caution with regard to making any major changes to the current labour relations system and, in particular, changes that would or could upset the current balance between employers and unions and, in doing so, negatively impact on Ontario's competitiveness.

In general, the ACS Coalition supports the views expressed by the employer community, as reported in the Interim Report. The following submissions focus on issues of particular concern to us and options that, if implemented, would have a particularly negative impact on the building services provider industry.

1. Successor Rights

The objective of the successorship provision of the LRA is to protect bargaining rights and collective agreement obligations where there has been a sale of a business. A "sale" for the purposes of the LRA has been interpreted broadly to capture many forms of business transactions. However, it does not apply to contracting out or contract tendering situations, given that such arrangements do not involve the transfer of assets from one party to another. As noted in the Interim Report:

> One major exception is that the section has generally not been applied to contracting out or contract tendering situations, in in which a lead company contracts out its work to a subcontractor or, more typically the contract is re-tendered and one subcontractor service provider replaces another. …

> Currently the bargaining rights and obligations under the collective agreement normally do not flow from one service provider to another.[6]

This situation changed briefly in Ontario from 1993 to 1995, when the NDP was in power. The LRA then in effect deemed that a sale of business had occurred where a building services contract was entered into by a lead company or re-tendered. The provision was repealed in 1995 soon after the Progressive Conservatives came to power.

As the Interim Report notes, labour relations legislation in all other Canadian jurisdiction extends successor rights where there is a sale of a business. However, except for one very narrow exception in that applies to pre-board security screening services in relation to a federal work, undertaking or business (*i.e.,* airport security screening), Canadian labour laws do not impose successor rights in contract service situations.[7]

One of the options in the Interim Report for reforming the LRA would extend successor rights to contracting out and contracting tendering arrangements similar to the short-lived law that was repealed in 1995. Another option would impose "other requirements or prohibitions on the successor employer in a contract for services situation" including, for example, a requirement to provide a union representing the former employer's employees with automatic access to the new employee list or other information.[8]

In our view, both of these options would enhance union rights at the expense of threatening the stability of well-established commercial arrangements within Ontario. Moreover, these options, if implemented, would fundamentally change the competitive landscape in the building services provider industry and stifle the ability of building services providers to realize savings they might have otherwise offered.

The cost of these options, if implemented, would also be borne by the Ontario government and the broader public sector, given that the public sector institutions (including universities, colleges and hospitals) are among the major users of third party building services providers to provide logistics, food, janitorial and other facilities management services.

Overall, extending the successorship provision to apply to contracting out or contract tendering situations could drastically raise the cost of doing business in Ontario.

The ACS Coalition agrees with submissions by the employer community, as summarized in the Interim Report, that contracting out and contract tendering arrangements are legitimate and necessary means of creating and maintaining efficiencies, and are no different from any other contracting out. They are distinguishable from a sale of business, as that term is interpreted

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[6] Interim Report, at p. 83.
[7] Interim Report, at pp. 83 – 84.
[8] Interim Report, at pp. 84 – 85.

under the LRA, because "the lead firm is not divesting itself of a part of its business but is simply having a part of it performed by a specialist contractor more cheaply and/or better than it could itself."[9]

Finally, the ACS Coalition submits that expanding coverage of the successor rights provision in the LRA to building services providers, which is one of the options listed in the Interim Report, would increase price in the market and inflation, further impact the ability of businesses in the sector to remain competitive, and serve as a barrier to the efficient management of operations. We note that section XIX of the ESA already provides significant protection for employees of building service providers when one provider is replaced by a new provider.

ACS Coalition Recommendations:

- **Maintain the status quo with respect to successorship under the LRA.**
- **Do not amend the LRA to extend successor rights and obligations to contracting out and contracting tendering arrangements.**
- **Do not expand coverage of the successor rights provision to building services providers.**

2. The Certification Process

(i) Card-based certification

The LRA currently requires a union to file an application with the Ontario Labour Relations Board ("OLRB") demonstrating that it has the support of at least 40% of employees in the proposed bargaining unit, after which the OLRB supervises a secret ballot vote. If a majority of the ballots cast are in favour of the union, the union is certified. Unfair labour practices are prohibited during the course of this process.

As the Interim Report notes, between 1950 and 1995, all sectors covered by the LRA operated under a card-based certification system. For most of this period the threshold for certification was 55%. From 1970 to 1975, the threshold was increased to 65%. In 1993 Bill 40, introduced by the NDP government, amended the LRA to consider employee support "as of the certification application date" and expressly prohibited the OLRB from considering post-application

[9] Interim Report, at p. 84.

membership evidence for or against the union. In 1995, when the Progressive Conservatives came into power, Bill 7 eliminated card-based certification and replaced it with the mandatory secret ballot vote model, with certification occurring when a majority of ballots cast are in favour of the union. In 2005, the Liberal government essentially restored the Bill 40 model of card-based certification in the construction industry.[10]

One of the options identified in the Interim Report is to return to the card-based system, possibly adjusting membership thresholds, for example, to 65% from 55%. Another option identified is to return to the Bill 40 and current construction industry model.[11]

In the Review consultation process unions strongly favoured card-based certification, arguing that it makes it easier for employees to have access to collective bargaining and would address the perceived decline in unionization rates.[12] However, what unions generally overlook is that card-based certification does not necessarily reflect the true wishes of employees or protect employees' privacy in the certification process.

Quite simply, a card is not equivalent to a secret ballot vote. Secret ballot vote certification aligns with democratic principles, safeguards employees' right to freedom of association and gives them both a voice and a choice.

Whether to unionize is an important and intensely personal choice for employees. The secret ballot vote ensures that every employee has the opportunity to vote his or her true wishes. It places no obligation whatsoever on employees to disclose to the union or their co-workers whether they voted for or against unionization. The secret ballot vote gives employees time to reflect on their true wishes and, more importantly, the opportunity to express those wishes in private without co-workers or union organizers watching what they do. It is entirely permissible for an employee who, for whatever personal reasons, has chosen not to sign a union card, to vote in favour of the union. Conversely, it is entirely permissible for an employee to vote against unionization, even if he or she has previously signed a membership card.

The assertion that card-based certification improves access to collective bargaining and addresses the perceived problem of decline in unionization rates is not necessarily accurate. Indeed, there is some debate within the academic research and various submissions made by stakeholders to the special advisors about the effect of card-based certification on labour organization. Some scholarship related to the Review indicates that card-based certification correlates with increased organization. However, some labour experts have questioned this conclusion, suggesting that it might not adequately consider other factors that have led to decreased organization, such as smaller workplaces.

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[10] Interim Report , at p. 71.
[11] Interim Report, at p. 73.
[12] Interim Report, at p. 73.

In light of the above, the ACS Coalition believes that the secret ballot vote is not only consistent with fundamental democratic values, but also necessary to determine the legitimacy of support for the union. Reverting to a card check model would place undue pressure on employees to "vote the way their friends do", and ostensibly negate their right to privacy.

As the legitimacy of support for the union is less clear with card-based certification, this model could potentially encourage more litigation. Therefore, if the special advisors decide to recommend reverting to card-based certification, we believe it will also be necessary to recommend legislating certain protections to ensure the integrity of that model.

ACS Coalition Recommendations:

- **Maintain the status quo.**
- **Maintain the requirement for a secret ballot vote in the certification process.**
- **Reject card-check certification.**
- **If card-based certification model is recommended, also recommend legislating certain protections into the LRA to ensure the integrity of that model.**

(ii) Access to Employee Lists

Submissions from labour groups have proposed that if the union meets a threshold of, for example, 20% of employees having signed union cards, the union could apply to the OLRB for an order requiring the employer to provide a list of employees in the proposed bargaining unit, including names, job information and contact information.

To this end, the Interim Report includes the following option: "Subject to certain thresholds or triggers, provide unions with access to employee lists with or without contact information (the use of the lists could be made subject to rules, conditions and limitations)."

We add our voices to those of other employers who have raised concerns about such proposals, including with respect to privacy implications for employees, the potential for unions to "game the system" by simply filing an application for certification, regardless of the level of support, in order to obtain the employee list to assist them in ongoing efforts to organize the workplace.

In light of the above, the ACS Coalition proposes that the LRA be amended to require that the list of employees provided in response to a certification application not be used by the union for any purpose other than for the application for certification to which it pertains.

ACS Coalition Recommendation:

- **Amend the LRA to require that the employee list provided in response to a certification application be used only for purposes of the application to which it pertains.**

3. Broader-based Bargaining Structures

(i) Sectoral bargaining

The ACS Coalition does not believe that broader-based bargaining (also referred to as "sectoral bargaining") is necessary as an alternative or addition to Ontario's current industrial relations model.

Allowing certification at a sectoral level – whether defined by industry or geography – and requiring the negotiation of a single multi-employer master agreement would impose a one-size-fits-all bargaining process on a disjointed group of employers and employees. We believe this would result in cumbersome and inefficient negotiations, with potentially hundreds of small employers bargaining with one union bargaining council. This would undoubtedly weaken the distinct voices of smaller employers and their respective employees.

Moreover, the two sectoral bargaining options described in the Interim Report, appear to be designed for a one-sided purpose: *i.e.,* to increase and enhance union coverage in Ontario.

We agree with the British Columbia employer quoted in the Interim Report that enterprise-based bargaining ensures both parties focus on the particular needs and circumstances of individual businesses; allows them to remain flexible, competitive and successful in the modern economy; and encourages further investment and job creation. Indeed, a fundamental pillar in our support of enterprise-based bargaining is that employees of a given enterprise have a direct voice in the terms and conditions that will govern their employment.[13]

[13] Interim Report, at pp. 121 – 122.

ACS Coalition Recommendations:

- **Maintain the status quo**
- **Do not advance or recommend the sectoral bargaining options described in the Interim Report.**

4. Renewal Agreement Arbitration

The LRA does not allow parties to apply to the OLRB for the referral of a collective bargaining dispute to binding interest arbitration where they are in the process of bargaining for a renewal collective agreement. The ACS Coalition supports the status quo in this regard.

Some unions have advocated amending the LRA to provide for interest arbitration in the context of bargaining renewal collective agreements. They submit that, even in mature bargaining relationships, intractable disputes can result in lengthy strikes and lockouts, and high human and financial costs to both sides.

The ACS Coalition believes that collective bargaining disputes should be resolved at the bargaining table by the parties, unless they voluntarily agree to have some or all matters resolved by a third party. Moving away from that system could damage the long-term bargaining relationship of the parties.

Finally, we agree with the view expressed by the employer community, as summarized in the Interim Report, that arbitrators cannot be expected to be knowledgeable about competitive market demands and the impact of globalization, technology and other factors that may impact employer decision-making.

ACS Coalition Recommendations:

- **Maintain the status quo.**
- **Do not permit parties bargaining for a renewal agreement to apply to the OLRB for the referral of a collective bargaining dispute to binding interest arbitration.**

5. Conciliation

The ACS Coalition supports the current provisions of the LRA with respect to conciliation. However, we believe that the conciliation process is rarely used to any effect.

The LRA currently allows either party to request that the Minister appoint a conciliator to assist with negotiations as soon as a notice to bargain is given. Parties must go through this process as one of the pre-conditions to a lawful strike or lockout. If the conciliator is unable to effect a collective agreement, the Minister of Labour has the authority to appoint a conciliation board to further assist.

In reality, a conciliation board is rarely appointed. In fact, we are not aware of any instance in which a board was appointed. However, we are aware of many instances where the union sent a notice to bargain and immediately asked for conciliation so that the clock started ticking on the no-board report and the commencement of a strike or lockout.

We submit that the LRA should be amended to set out a more effective conciliation process. As a pre-condition to issuing a no-board report, the LRA should require the conciliator to be actively engaged with the parties. The LRA should also require conciliators to be adequately trained to assist the parties in achieving a collective agreement by fostering a meaningful dialogue between them.

ACS Coalition Recommendations:

- **Maintain the status quo with respect to requiring conciliation as a pre-condition to a legal strike or lockout.**
- **Set out a more effective conciliation process in the LRA, requiring conciliators to be actively engaged in the process before a no-board report can be issued.**
- **Ensure that conciliators are adequately trained to carry out their duties.**

6. The Use of Replacement Workers during Industrial Disputes

Except from 1993 to 1995 when the NDP governed, the LRA has not prohibited the use of replacement workers by employers during a lawful strike or lockout.

The ACS Coalition concurs with submissions by the employer community that the right to operate during a strike is a core component of Ontario's industrial relations system. There are times when an employer has no choice but to keep operating in the face of apparently unreasonable bargaining demands by the union. Being able to operate during a strike is necessary to protect the viability of the enterprise and, in that sense, keeping the business going during a strike may protect the jobs of striking workers. Indeed, the *quid pro quo* of workers' right to withdraw their labour in a legal strike is the employer's right to continue to operate during that strike.

It is not surprising that union submissions to the Review strongly support a legislative ban on the use of replacement workers. However, such a ban coupled with the union's constitutionally protected right to engage in secondary picketing activities, including at the premises of the struck employer's clients and suppliers, could cause long-term harm to a business or even cripple it as a going concern.

A complete ban or even legislated restrictions on the use of replacement workers during legal strikes and lockouts would tip the scales heavily in favour of the union, with potentially devastating consequences for employers and Ontario businesses. We believe that the right to operate with replacement workers during a legal strike or lockout helps to level the playing field during industrial disputes and is "a necessary counterbalance to the actual or possible imposition of economic sanctions by the union."[14]

Finally, as noted in the Interim Report, over 95% of negotiations for new or renewal collective agreements are resolved without a strike or lockout and replacement workers are used in only a small minority of labour disputes where a strike or lockout occurs.[15] We submit that this is compelling evidence that permitting the use of replacement workers does not jeopardize labour relations stability.

ACS Coalition Recommendations:

- **Maintain the status quo.**
- **Do not amend the LRA to prohibit or fetter the right of employers to use replacement workers during a lawful strike or lockout.**

[14] Interim Report, at p. 90.
[15] Interim Report at p. 89.

7. Consolidation of Bargaining Units

While the *Canada Labour Code* and labour statutes in some other provinces contain provisions permitting bargaining unit reviews and consolidation, such provisions are notably absent from the LRA.

We agree with employer submissions that generally oppose a consolidation provision, describing it as simply boosting union bargaining power in situations where the union's presence is weak. We also note that unions have expressed concern that giving the OLRB the power to merge and reconfigure bargaining units, especially where different unions are involved, could force change against the wishes of a significant number of employees.

For these reasons, the ACS Coalition submits that there is no compelling reason to add a provision to the LRA permitting bargaining unit review and consolidation.

ACS Coalition Recommendations:

- **Maintain the status quo.**
- **Do not amend the LRA to permit bargaining unit review and consolidation.**

8. Referral of Grievances to Arbitration

The ACS Coalition believes that, as a pre-condition to arbitration, the parties to a grievance should engage in a meaningful dialogue about the grievance that was referred. The union should provide sufficient details about the nature of the grievance and the alleged violation of the collective agreement for the employer to comprehend the union's and the grievor's point of view. Employers should not automatically deny grievances with a "rubber stamp".

In light of the above, we submit that the LRA should be amended to require the parties to engage in a meaningful dialogue before the union refers a grievance to arbitration.

We also believe that, once a grievance is referred to arbitration, the arbitrator should strictly hold the parties to the procedures and rules they agreed to in their collective agreement, particularly with regard to the steps and timelines for referring the grievance to arbitration.

In our experience, many arbitrators appear too willing to give broad interpretation to such collective agreement provisions. As a result, grievance arbitrations get unnecessarily bogged down with lengthy and costly arguments and submissions on preliminary issues.

ACS Coalition Recommendations:

- **Add a provision to the LRA requiring the parties to engage in a meaningful dialogue before a grievance is referred to arbitration.**
- **Amend the LRA to require arbitrators to enforce collective agreement provisions setting out procedures, rules and timelines for referring a grievance to arbitration.**

Employment Standards Act, 2000

1. Definition of "Employee"

The special advisors note that two issues were raised consistently by unions and employee advocates: (i) the misclassification of employees as independent contractors; and (ii) the current definition of employee in the ESA.[16]

They state that currently 12% of the total Ontario workforce of 5.25 million is reported as "own account self-employed" (*i.e.,* self-employed individuals without paid employees) and indicate that "significant" anecdotal evidence suggests that a portion of these workers are misclassified and are actually employees within the meaning of that term in the ESA. The special advisors go on to suggest that there are several reasons employers would prefer to classify workers as independent contractors. However, they do not provide any discussion of why the workers themselves would prefer to be treated as self-employed.[17]

The ACS Coalition submits that independent contractors play a vital role in Ontario workplaces. In our experience, employers engage independent contractors when the contractors' unique expertise, cost, efficiency and availability cannot be duplicated by their own employees. In our experience, employers do not engage independent contractors in an attempt to "game" the system or defeat the purposes of the ESA which, with respect, the Interim Report seems to imply.

The ESA sets out minimum standards applicable to employees. Contractors are not employees; rather, they are in business for themselves. We believe that the current definition of "employee" in the ESA is sufficient and should not be expanded to include contractors.

[16] Interim Report, at pp. 145 – 147.
[17] Interim Report, at p. 141.

ACS Coalition Recommendations:

- **Maintain the status quo.**
- **Do not expand the ESA definition of "employee" to include contractors.**
- **Do not add a new provision to the ESA extending coverage to dependent contractors.**

2. Who is the Employer and Scope of Liability

(i) Franchising, contracting and other forms of employment-type relationships

The ESA places – and has always placed – responsibility and liability for employees' statutory entitlements on direct employers. However, many of the options advanced by the special advisors in section 5.2.2 of the Interim Report would significantly expand responsibility and liability to other parties higher up in the contracting and/or supply chain (including lead companies and franchisors), in order to address non-compliance by the actual employers. We submit that this is essentially a "deep pockets" argument and should be rejected.

Contracting, subcontracting, outsourcing and franchising are legitimate business tools for organizing the production and delivery of goods and services. Moreover, such arrangements are vital to the continued of the building services provider industry.

Many employers in Ontario rely on third party building services providers. As a presentation made to the special advisors by the Thunder Bay Chamber of Commerce points out, "Any explicit provision in the ESA that would force businesses to change the nature of their relationships with their contract employees could raise the coast of doing business in Ontario."[18] Moreover, as stated in presentation:

> There are also tremendous implications for the broader public sector. Many public entities, including universities, colleges, hospitals, and municipalities rely on a mixed permanent/contract workforce. Forcing

[18] Thunder Bay Chamber of Commerce, Maintaining Ontario's Competitive Edge: The Business Perspective on Labour Reform, at p. 5.

> these institutions to cease use of contract employment would almost certainly have a negative impact on the taxpayer.[19]

The ACS Coalition believes that wide-ranging legislative provisions making all businesses liable for the employment standards violations of their contractors, franchisees and other entities along the contracting and supply chain would be too great an interference in the market, would threaten the stability of well-established commercial arrangements within Ontario, and would have devastating consequences for the building services industry.

ACS Coalition Recommendations:

- **Do not expand responsibility and liability for ESA violations to lead companies and others (including lead companies and franchisors) higher up in the contracting and/or supply chain than the actual employer.**
- **Continue to hold the actual employer responsible for ESA compliance and solely liable for non-compliance.**

3. ESA Exemptions, Exceptions and Special Rules

The ACS Coalition agrees that, as stated in the Interim Report, one size of regulation cannot fit every industry and every group of employee.[20]

In Ontario's diverse and ever-evolving economy, flexibility is essential to meet the unique needs and circumstances of particular industries, occupational groups and the employees whose job security depends, in no small part, on the success of those industries. In light of this, it should come as no surprise that the exemptions, exceptions and special rules in the ESA are numerous and complex.

We agree with the special advisors that we "cannot simply discount the potential negative impact of the wholesale elimination of exemptions without further careful review."[21] Likewise, exemptions, exceptions and special rules in the ESA should not be modified or amended unless there are compelling reasons to do so.

[19] Thunder Bay Chamber of Commerce, Maintaining Ontario's Competitive Edge: The Business Perspective on Labour Reform, at p. 6.
[20] Interim Report, at p. 156.
[21] Interim Report, at p. 156.

Accordingly, the ACS Coalition believes that the exemptions contained in Category 1 and Category 3 of the Interim Report should be not be varied or eliminated without a thorough review process beyond the Review process currently underway. Such review process should be thoughtful and transparent, and include representatives from employer and employee groups.

The managerial exemption

We hasten to add that we were caught off-guard by the special advisors' inclusion of the "managerial" exemption among the Category 1 exemptions in the Interim Report. In the February 16, 2016 Interim Update to the Minister of Labour, the special advisors wrote:

> With respect to exemptions to the Employment Standards Act, 2000, we have said in the Interim Report that - given the large number of exemptions - it is not practical for us to consider the merits of all of these in the course of this review. However, our recommendation will be that the Ministry should conduct a thorough review of most of the current exemptions, the purpose of which is to assess whether they ought to be maintained, modified or eliminated taking into account the bona fide interests of employers and employees. Accordingly, we have invited submissions with respect to a <u>few specific exclusions</u> that may be the subject of recommendations in our Final Report but, for the rest of the exclusions, we are asking for submissions on a process for review. [underlining added]

We were very surprised to find the managerial exemption among the "few specific exclusions" referenced in the Interim Update. It is difficult, if not impossible, to imagine an employer in Ontario that is not affected by the managerial exemption. Any change to the managerial exemption could have a significant impact on all workplaces and, accordingly, we think it is inappropriate to make recommendations about it without a further review process. A thoughtful and measured approach is called for.

If the special advisors are determined to make specific recommendations in their Final Report with respect to the managerial exemption, we respectfully ask you to consider that it is Ministry of Labour policy and practice to interpret the managerial exemption very narrowly. As noted in the Interim Report, the fact that an employee has the title of "supervisor" or "manager" is in itself not sufficient for the exemption to automatically apply. The employee's actual job duties need to be assessed. To the extent that misclassification of employees as "supervisors" or "managers" is problematic, the ACS Coalition suggests that this is due mainly to a lack of clarity in the definition, as opposed to deliberate attempts by employers to skirt around the hours of work and overtime provisions in the ESA.

ACS Coalition Recommendations:

- **Maintain the current managerial exemption. However, it may be beneficial to set out more clearly the factors determinative of managerial status in the ESA itself.**
- **Maintain the status quo until such time as the exemptions included in Category 1 and Category 3 of the Interim Report are referred to a new review process rather than dealing with them as part of the current Changing Workplaces Review.**

4. Hours of Work and Scheduling

The Interim Report notes that during consultations, the limitations on hours of work "were not at the forefront of the debate."[22] This suggests that there is unlikely any compelling reason to change the status quo.

The ACS Coalition supports the opinion expressed by the employer community, as reported in the Interim Report, that the requirement for written consent from every employee to work excess hours is burdensome and that the consistent refusal to work excess hours by a minority within the workforce can threaten the ability of a business to respond to urgent issues.

In our experience, employers generally recognize the benefits of predictability in scheduling. However, it is also import for employers to maintain flexibility.

Flexibility in scheduling is particularly important in the building services provider industry. We regularly have to adapt to client demands with little advance notice. Last minute changes to client events - whether they involve extensive additional requests or, at other times, reductions or even cancellation of the services we were engaged to provide – necessitate a flexible approach to scheduling. The implementation of mandatory scheduling provisions that would prevent or significantly restrict the ability of building services providers to adapt scheduling to meet clients' needs would cause disproportionate harm to our industry. Accordingly, we strongly oppose the advancement of such options, as described in the Interim Report.[23]

The ACS Coalition believes that a one-size-fits-all approach for scheduling (*i.e.,* provisions that are applicable regardless of the size, location and industry) would not work and would introduce

[22] Interim Report, at p. 193.
[23] Interim Report, at p. 203, Options 3 and 4.

unnecessary obstacles for the building services industry. Hours of work and scheduling provisions should not hinder productivity.

ACS Coalition Recommendation:

- **Maintain the status quo with respect to the number of hours employees can work in a day or week.**
- **Maintain the status quo with respect to when overtime must be paid.**
- **Amend the ESA to eliminate the requirement for written consent for every employee to work excess hours.**
- **Do not amend the ESA to include specific provisions around employers' scheduling obligations.**

5. Just Cause Protection

Statutory unjust dismissal rights for non-unionized employees are not the norm in Canada and, in fact, have been implemented in only three jurisdictions: the federal jurisdiction, Quebec and Nova Scotia.

Virtually all collective agreements contain a "just cause" provision that prevents the employer from disciplining or dismissing an employee unless there is just cause at law to do so. Indeed, we submit that a major reason why employees join unions is to secure protection against unjust dismissal. Accordingly, adding an "unjust dismissal" provision to the ESA could lead to diminished interest in unionization within Ontario.

The ACS Coalition believes that there could be other unintended consequences to incorporating unjust dismissal protection into the ESA.

First, if employers do not have the ability to terminate the employment of unsatisfactory workers without cause (*i.e.,* with termination/severance entitlements under the ESA, the common law or a written contract of employment, as applicable), this would logically lead to fewer job openings and fewer new hires.

Further, employers would be able to work around statutory unjust dismissal protection, by hiring employees on fixed term contracts of varying length, rather than engaging new hires for an indefinite term. Fixed term employment contracts could essentially operate to impose a

probationary period, at the conclusion of which the employee could be dismissed without cause and without further notice.

Therefore, if an unjust dismissal provision is added to the ESA, rather than providing all employees with some degree of job stability, it could very well make it even more difficult for individuals trying to join the workforce to secure stable, long-term employment. We expect that this adverse impact would be felt most keenly by vulnerable workers, including younger workers entering the job market for the first time.

In light of the above, the ACS Coalition strongly opposes the option of providing just cause protection, whereby employees covered by the ESA could be reinstated by a government-appointed adjudicator if dismissed without cause.

ACS Coalition Recommendation:

- **Maintain the status quo.**
- **Do not amend the ESA to include a "just cause" provision that would prohibit "without cause" dismissal.**

6. Notice of Termination and Severance Pay

Employers are free to provide a greater right or benefit to notice and severance pay than what is required under the ESA. Moreover, unless the parties have a clear written agreement that the employee's termination and severance entitlements are limited to the ESA minimums, by default, the employee will be entitled to reasonable notice under the common law.

As the Interim Report acknowledges, the ESA permits employees whose employment has been terminated and/or severed to file a complaint with the Ministry of Labour or file a wrongful dismissal for "reasonable notice" damages. They cannot do both, however.[24]

The ACS Coalition submits there is no reason to increase ESA termination and/or severance pay standards merely because some employees, for personal reasons, may elect to settle for guaranteed ESA entitlements rather than pursue civil litigation.

We believe, however, that the current $2.5 million payroll threshold for severance pay should be eliminated. All employees who have worked for their employer for five years of more , should be entitled to receive statutory severance pay, regardless of the size of their employer's payroll.

[24] Interim Report, at p. 229.

All employers, whether large or small, should be on equal footing in this regard. This is particularly important in the building services industry. Under the current legislation, when a new building services provider succeeds in getting new business, it can choose to terminate the previous provider's employees as long as it recognizes employee service with the previous provider. If a provider with a payroll of less than $2.5 million succeeds in getting the new business, it effectively gets a discount – i.e., it can terminate the previous provider's employees without paying them any severance pay. As a result, the new provider's start-up costs are potentially much lower, providing that provider with an unfair advantage over the competition. More significantly, that advantage operates to the detriment of the previous provider's employees, who lose out on an important statutory entitlement.

ACS Coalition Recommendations:

- **Maintain the status quo for entitlement to statutory notice of termination/termination pay.**
- **Maintain the 5-year service condition for entitlement to statutory severance pay.**
- **Maintain the 26-week cap on the severance pay entitlement.**
- **Remove the $2.5 million payroll threshold.**

7. Greater Contractual Right or Benefit

Employers and employees are not permitted to contract out of the ESA or waive an employment standard. However, pursuant to section 5(2) of the ESA, an employer may provide employees with a greater right or benefit to an employee than the minimum standard required under the ESA. If a workplace policy or collective agreement provides a greater right or benefit than the minimum standard, the terms of the policy or collective agreement will apply instead of the standard.

As the Ontario Chamber of Commerce stated in its submissions to the Review:

> The provision is a logical one: it recognizes that employers often offer their employees workplace standards that exceed the ESA

> standards, and the Act ensures that those employers are not subject to needless regulation.[25]

We agree that, as submitted by the Ontario Chamber of Commerce, the elimination of the greater right or benefit provision would have serious consequences for employers, creating a scenario whereby employees are allowed to stack ESA benefits on top of their more generous contractual benefits. We also submit that the ESA should not be interpreted or applied in such a manner as to permit employees to stack ESA and contractual benefits.

We support the submissions of the employer community, as summarized in the Interim Report, "that collective agreements or employer policies, taken as a whole, should be assessed to determine whether the contract provides greater rights or benefits than the ESA standards, taken as a whole."[26]

ACS Coalition Recommendations:

- **Maintain the greater right or benefit provision in the ESA.**
- **Recognize that the ESA is not intended to act as a mechanism that allows workers to stack ESA benefits on top of their contractual benefits.**
- **Bundle contractual employment entitlements to determine whether there is a "greater right or benefit" as a whole, rather than comparing rights and benefits in a piece-meal manner.**

8. Enforcement and Administration

(i) Remedies and penalties

The ACS Coalition believes in ethical employment. We comply with our obligations under all labour and employment laws and strongly believe that all employers should embrace a culture of compliance. We agree with the special advisors that "[e]nforcement mechanisms that encourage compliance, deter non-compliance and provide appropriate and expeditious

[25] Ontario Chamber of Commerce, Maintaining Ontario's Competitive Edge: The Business Perspective on Labour Reform, Submission to the Special Advisors of the Changing Workplaces Review (September 2015), at p. 6.
[26] Interim Report, at p. 255.

restitution to employees whose ESA rights have been violated are essential to an effective compliance strategy.[27]

To encourage a culture of compliance, we support imposing higher penalties on employers who intentionally contravene the ESA, including repeat offenders who have knowingly contravened the same provision multiple times.

Finally, we cannot overlook the fact that the ESA is a very complex statute and many of its provisions can be difficult to interpret, particularly when an employer is providing employees with rights or benefits that appear to exceed ESA requirements.

In light of this, we believe it would be appropriate to issue a warning to first time offenders who have unintentionally contravened the ESA. We see no justification for imposing harsher penalties on employers who intend to comply with the ESA and make good faith efforts to do so.

ACS Coalition Recommendations:

- **Amend the ESA to impose higher penalties on employers who intentionally contravene the ESA.**
- **Amend the ESA to issue a warning to first-time offenders who unintentionally contravene the ESA.**

Conclusions

As the Changing Workplaces Review moves into the next phase, we believe it is critical for the special advisors to recognize that Ontario's economy is incredibly diverse, by sector and geographically. The LRA and the ESA must reflect this diversity and support the continued development of our economy.

In making recommendations for revising the LRA and the ESA, the special advisors must also take into account the uniqueness of Ontario's workplaces. We believe it would be a mistake to impose "one-size-fits-all" requirements on all employers, or simply import pre-assembled mechanisms from other jurisdictions. The building services provider industry is particularly unique and wholesale legislative changes, including to the successorship provisions of the LRA

[27] Interim Report, at p. 288.

and the scheduling provisions of the ESA, could have a devastating impact throughout our industry.

We believe that it would be counterproductive to recommend legislative changes that do not have a reasonable likelihood of surviving governments differently composed. For confirmation of this we need only look to what happened to Bill 40 and the card-based certification model, the ban on the use of replacement workers, and the changes to the successorship provisions ushered in by the NDP government in 1993, only to be promptly repealed in 1995 when the Progressive Conservatives came to power.

Therefore, for all the reasons stated in these submissions, the ACS Coalition respectfully urges the special advisors to exercise considerable caution with regard to recommending any major changes to the LRA or to the ESA.

Changes that would overhaul the current labour relations and employment standards systems and upset the existing balance between employer, union and employee rights could ultimately be counterproductive and negatively affect Ontario's job growth, economic stability and competitiveness.

We thank the special advisors for considering our submissions.

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