



NACCB

NATIONAL ASSOCIATION OF CANADIAN CONSULTING BUSINESSES

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CHANGING WORKPLACES REVIEW

Submissions in Response to the Interim Report of the Special Advisors

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Presented by:

The National Association of Canadian Consulting Businesses (NACCB)

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Key Message: Knowledge Workers are not Vulnerable

Knowledge workers occupy a unique and important role in Ontario's economy, generating billions of dollars of economic activity each year. They have worked within existing legal parameters to establish a vibrant business environment, premised on highly-skilled information technology (IT) and other knowledge workers offering their services to a range of organizations within Ontario and elsewhere. Most knowledge workers are neither vulnerable nor can they be said to engage in precarious employment.

The National Association of Canadian Consulting Businesses (NACCB) submits that the *Employment Standards Act, 2000* (ESA) has sufficient protections for knowledge workers, and already provides the highest level of regulation of staffing agencies more generally in Canada. Therefore, there is no need to make additional changes at this time, and the government should focus its attention on education of employers and employees and the enforcement of existing laws.

Given the importance of the services provided by knowledge workers through their consultancy arrangements and the ease with which such services can be relocated to other jurisdictions, the NACCB submits in the alternative that, should further regulation be given consideration, the government must consult directly with the knowledge worker industry and must conduct a full economic impact analysis to ensure that the industry is not adversely impacted by any such regulation.

In addition to filing its own submissions to the Special Advisors, the NACCB endorses the submissions of the Ontario Chamber of Commerce (OCC), the Association of Canadian Search, Employment and Staffing Services (ACSESS) and the Association of Professional Canadian Consultants (APCC).

Who we are

The NACCB is an association of more than 70 businesses that provide professional staffing services to businesses across Canada. NACCB member organizations provide professional staffing services primarily by matching and placing knowledge workers – highly-skilled professionals who offer their services to the end-user client as independent contractors – with clients in four distinct sectors: Information Technology, Engineering, Finance and Medical Services.

NACCB member organizations offer the services of approximately 22,000 knowledge workers and 2,000 employees. Annual revenues generated through the provision of services by NACCB member organizations alone is approximately \$2.5 billion across Canada, with most generated within Ontario.

The NACCB offers a range of services and benefits to its members, including providing a forum for business leaders to discuss emerging issues, build networks and share best practices. The NACCB engages in education and awareness initiatives for its members on public policy issues that impact the professional services industry to ensure member compliance with legislation and to promote ethical business practices in the industry. To

that end, the NACCB has developed voluntary Business Principles to which it encourages all members adhere.

One further function of the NACCB is to promote the interests of its members to government, and to work with members to ensure that public policy makers understand the industry and the important part it plays in the country's economy. The NACCB is concerned with a number of the options being considered by the Special Advisors in the Changing Workplaces Review, as set out in the Interim Report, and is providing these submissions in response.

The Knowledge Economy

While all workers apply knowledge and thought in their work, these submissions are employing the term “knowledge worker” to refer to a special category of workers.¹ In these submissions, a knowledge worker is an individual whose primary working capital is his/her own knowledge and ability to apply it with highly developed “problem-solving” skill sets. They are highly skilled individuals who are sought after by business and government organizations, and who command a significant premium for their services. These are key individuals who help propel Ontario's knowledge economy.

The modern knowledge worker concept gained hold in the IT sector, in which individuals possess specialized technical understanding and skills, which are highly desired by organizations in all sectors of the economy. Due to the nature of organizational needs – often short term, project-based requirements – and to the independence and entrepreneurial spirit of the workers themselves, these services have largely come to be offered through knowledge workers who have established their own corporate vehicles through which they carry on business.

Knowledge workers are not confined, however, to the IT field. Various professionals offer their services through their own consulting businesses, including professionals in the engineering, financial and medical fields.

The staffing organizations that comprise the NACCB membership have developed a business model that connects knowledge workers with organizations that are seeking their services. In some cases, this business model grew out of traditional staffing services, while in other cases, the member organizations focused on the specialized knowledge worker industry from the start.

Under this model, knowledge workers are engaged by end-user organizations as independent contractors, with the engagement being agreed to by the end-user organization and the contractor. The NACCB member staffing agencies function more in the role of “match-maker”, using their knowledge of both end-user requirements and

¹ The term “knowledge worker” is attributed to noted author and management consultant, Peter Drucker, who was one of the first to foresee a shift toward a “knowledge society”, and the importance of knowledge workers for the modern economy. Various commentators have noted the absence of a consensus on the meaning of “knowledge worker”, but the description proposed in these submissions highlights the key features of these workers.

knowledge worker skill sets to ensure that appropriate workers are apprised of existing opportunities. This often involves reaching out to knowledge workers who generally work independently of any agency through social media and other internet platforms. Due to the high demand for their services, knowledge workers can command significant premiums on the rates that they will charge for their services.

It needs to be emphasized that knowledge workers in these circumstances are not vulnerable workers engaging in precarious work precisely because they have specialized knowledge to offer to organizations. The issues described by David Weil in his work, “The Fissured Workplace”, simply have no application to this group of workers.

Since approximately 1985, knowledge workers have had their own association – the Association of Professional Canadian Consultants (APCC) – through which they are provided professional development opportunities, industry advocacy, and a range of benefits (including access to group benefits).

The Importance of Keeping the Knowledge Economy in Ontario

The NACCB strongly urges that the Special Advisors not make any recommendations that would negatively impact the viability and strength of the knowledge economy. As noted at the outset, NACCB members alone generate revenues of over \$2.5 billion, and this does not represent the entirety of the sector.

Because the primary working capital of knowledge workers is their knowledge, the work performed by knowledge workers is highly mobile, and can be readily relocated to other jurisdictions if unfavourable regulations are passed. Given the degree of outsourcing already existing in this sector of the economy, this is a real risk.

Similar to the positions in the OCC and ACSESS responses, the NACCB urges the government to undertake a thorough and complete economic impact analysis prior to considering any recommendations that could affect knowledge workers and the manner in which they provide their services. Any such analysis must include meaningful consultation with knowledge workers themselves, and with others who participate in the knowledge economy, both to clarify how best to define who “knowledge workers” are and to ensure that there are no unintended consequences for them from any proposed legislative changes.

Response to the Interim Report

In this context, the primary submission of the NACCB is that the ESA has sufficient protections for knowledge workers. Given the position being advocated by the APCC and the absence of calls from knowledge workers for greater regulation of their sector, the NACCB submits that there is no basis for amending the ESA in any manner that would impact knowledge workers and their business model.

Furthermore, and as addressed more fully in the submissions of ACSESS, the ESA already provides the highest level of regulation of staffing agencies more generally in Canada. Therefore, there is no need to make additional changes to the ESA at this

time, either in respect of knowledge workers or of the staffing agency business more generally. Rather, the NACCB submits that the government should focus its attention on education of employers and employees and the enforcement of existing laws.

In terms of the options being considered by the Special Advisors in the Interim Report, the NACCB will address only a few specific options that could directly impact on knowledge workers and on the knowledge economy if implemented.

Independent Contractors

The NACCB submits that the ESA properly excludes independent contractors who have chosen to go into business for themselves. Consistent with its primary submissions, the NACCB agrees that the government should focus on education (option 2 on page 147 of the Interim Report), or enforcement focusing on misclassification (option 3 on page 148).

In terms of the fourth option being considered, the NACCB submits that it would not be appropriate to create a reverse onus on employers or other organizations to prove that an individual is an independent contractor. Given that the ultimate question to be decided in such cases is whether “the person who has been engaged to perform the services is performing them as a person in business on his own account” (671122 *Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR 983, 2001 SCC 59 (CanLII) at para. 47), it is that individual who will have much of the necessary information to answer the question. That is, only the knowledge worker will have details of his or her business, how it operates and how its services are provided. Likewise, an organization cannot be expected to know what other sources of income an independent contractor might have or might be choosing to forego, nor what rationale might lie behind any of those decisions. In the absence of objective evidence of a significant problem of misclassification, creating a reverse onus would impose an undue burden on businesses which legitimately engage independent contractors.

Dependent Contractors

Similarly, the NACCB does not support the creation of a category of “dependent contractor” in an expanded notion of “employee”. The NACCB submits that the current definition of “employee” is sufficiently broad to capture employment relationships that need regulating under the ESA. The “dependent contractor” definition could sweep a range of knowledge workers into an employment relationship where such need has not been established on objective evidence, and where the potential implications of such a designation have not been properly explored and understood.

The NACCB submits that this is precisely the type of change that could have unintended consequences for a vibrant part of Ontario’s economy. Therefore, the government must undertake appropriate consultation and consider an economic impact analysis. Should the government choose to regulate “dependent contractors” more generally, the NACCB submits that it should exclude knowledge workers from any such regulation.

Overtime

Furthermore, the NACCB submits that the ESA properly exempts “information technology professionals” from the hours of work and overtime provisions of the ESA. IT professionals who are engaged as employees play an important role in supporting the very ability of a business to operate in a modern, highly computerized economy. Employers need to be able to schedule hours of work for such employees to respond quickly to organizational needs, without incurring undue overtime costs. If there is concern that the exemption is being misapplied, the government should consider narrowing the exemption to ensure that it applies only to those engaged in an IT professional (as opposed to support) capacity.

The NACCB further submits that, if the IT professional exemption is to be maintained, it should be expanded to cover all knowledge workers who perform key services for organizations, akin to those performed by IT professionals. The rationale that supports the need for an IT professional exemption equally applies to all knowledge workers.

Alternative Submission –Recognizing the Uniqueness of Knowledge Workers through Sectoral Regulation

Finally, while the NACCB emphasizes that its primary position is that no changes are required to the ESA in relation to knowledge workers, the NACCB submits in the alternative that, should changes be recommended, the knowledge economy should be considered for special sectoral regulation because of its unique qualities. This alternative submission is premised on the importance of the services provided by knowledge workers through their consultancy arrangements and the ease with which such services can be relocated to other jurisdictions. In this environment, the NACCB submits that the government must proceed carefully to ensure that the knowledge economy is not adversely impacted, directly or indirectly, by any regulation that the government seeks to implement.

Before any such regulation would be developed, it must be repeated that the government must first directly consult with knowledge workers and other organizations in the knowledge economy and must undertake a thorough economic impact analysis to properly understand the implications of any regulation.

Summary – Compliance and Enforcement

In conclusion, the NACCB submits that the ESA sufficiently regulates knowledge workers and no changes are required as part of the Review. The NACCB supports increased government use of existing enforcement tools that are available to it under the ESA. The NACCB encourages the government to increase its education efforts to ensure that people better understand their obligations under the law, which the NACCB believes is the best way to ensure compliance with the law.