Changing Workplaces Review Submissions

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Introduction

About Apotex

Apotex is a Canadian pharmaceutical company established in Toronto in 1974, that manufactures and distributes a broad range of high-quality generic drugs to patients, healthcare providers, payers and governments worldwide. Apotex is the largest Canadian-owned pharmaceutical company operating in Canada and in Ontario. Apotex produces more than 300 generic drugs in approximately 4,000 dosages and formats used to fill over 89 million Canadian prescriptions each year.[1] Apotex exports products to over 115 countries worldwide.

The Apotex Group of Companies employs approximately 10,500 employees who work in research, development, manufacturing and distribution facilities worldwide. Over 6,100 of these employees work in Canada. Most of Apotex's Canadian employees work out of manufacturing and research facilities located in Richmond Hill, Toronto, Etobicoke, Brantford, and Windsor.[2]

Contributions of Generic Pharmaceutical Manufacturers to the Canadian Economy

Approximately 82% of all Canadian production workers, 86% of administrative staff, and 75% of research staff employed by the generic pharmaceutical industry are employed in Ontario.[3] Almost all generic drugs sold in Canada are manufactured in Ontario.

The Canadian generic pharmaceutical industry generates a significant portion of its revenue through export, primarily to the United States; approximately 40% of sales volume derives from exports. It is estimated that the Ontario pharmaceutical industry exports about $1 billion in generic drugs every year.[4]

The Changing Nature of Work in the Manufacturing Industry

Skill and Labour Shortages Can Impede Current and Future Manufacturing Growth

In the 2014 Canadian Manufacturers & Exporters' ("CME") Management Issues Survey, Jayson Myers, President and CEO of the CME, stated as follows:

> [Manufacturers] have had to restructure their businesses in order to compete and prepare for growth. They have had to find new customers, develop and commercialize new and more specialized products and services, improve productivity by investing in new technologies and reducing waste and ensure that their people and the way they operate keep pace with rapidly changing business needs.[5]

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1 Apotex Inc., "About Apotex", online: <http://www.apotex.com/ca/en/about/default.asp>.

2 *Ibid*.

3 Canadian Generic Pharmaceutical Association, *The Generic Pharmaceutical Industry's Contribution to Ontario's Economy* (2014), online: <http://www.canadiangenerics.ca/en/advocacy/ontario_economy_contribution.asp>.

4 *Ibid*.

5 Canadian Manufacturers & Exporters, *2014 Management Issues Survey*, page 1, online: <http://www.cme-mec.ca/english/publications-reports/cme-publications-reports.html>.

Canadian manufacturing is now more technology and research-driven than ever. Manufacturers are investing heavily in technology and research. In particular, Apotex, as the largest research and development investor among all pharmaceutical companies operating in Canada, spent an estimated $222 million on research and development in 2013 alone.

Because of the increased importance of research and development, Canadian manufacturers require a skilled workforce in order to compete in national and international markets. Canadian manufacturers have identified skills and labour shortages as one of the most pressing challenges they face today. More than half of respondents to the 2014 CME *Management Issues Survey* have reported that they are currently facing labour shortages.

The vast majority of these labour shortages affect well-remunerated occupations: about 55% of survey respondents indicated that more scientists, engineers, and R&D technicians are needed to address these shortages; similarly, 37% of respondents identified a need for skilled production employees such as welders, machinists, and operators. [6]

The manufacturing sector continues to create good, well-remunerated jobs: in May 2015, Canada added about 21,500 manufacturing jobs. This is estimated to be the largest monthly increase in manufacturing employment in the last 13 years.[7] In addition, the market pressures caused by labour shortages have driven manufacturing wages up: manufacturing wages have risen by 3.6% in the first quarter of 2015 compared to only a year ago.[8]

Labour Market Flexibility Is Necessary to Improve Economic Security and Promote Economic Success

Manufacturers are facing pressures due to the increasing cost of purchasing machinery and equipment, the rising cost of electricity in Ontario, a decline in productivity growth, and what appears to be a sharp decline in sales. The Canadian Manufacturers & Exporters ("CME") report that total manufacturing sales dropped by $2.2 billion in Q1 2015 when compared to the previous quarter.[9] In the 2014 CME *Management Issues Survey*, the President and CEO of the CME stated that:

> [e]scalating costs of energy, a more complicated and expensive regulatory environment, clogged logistics infrastructure and higher costs of services all continue to exert pressures on the bottom line. Finance is not easily available, especially working capital for operating or expansion purposes. And in a world where governments are competing fiercely for manufacturing investments, there is widespread concern that Canada is often just not in the game.[10]

If legislative reform is needed, it is in the areas of skill development and training, internal and international labour mobility and, on a provincial level, promotion of labour market flexibility.

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6 *Ibid* at page 5.

7 *Ibid* at page 2.

8 Canadian Manufacturers & Exporters, *Manufacturing Pulse. Quarterly Economic Update. Summer 2015*, online: <http://www.cme-mec.ca/english/publications-reports/cme-publications-reports.html>.

9 *Ibid* at page 1.

10 Canadian Manufacturers & Exporters, *2014 Management Issues Survey*, *supra* note 5 at page 1.

Labour market flexibility plays a fundamental role in encouraging economic activity. Rigid and unbalanced labour relations laws can negatively impact investment and decrease the participation of the young and the elderly in the labour market.[11] In countries where labour and employment regulation allows employers and employees to rapidly respond to changes in market conditions, job creation is higher and so are rates of economic growth.[12]

Labour market flexibility should not be conflated with precariousness. Precariousness, which has become a more formidable challenge since economies have "transitioned away from reliance on manufacturing […] [and] toward reliance on service and knowledge-based industries in the 1970s",[13] is associated with temporary work patterns and with low-skilled work.

As stated by the Law Commission of Ontario in its 2012 *Vulnerable Workers and Precarious Work Final Report*, the decline of the manufacturing industry has played a part in the increase of precariousness at work.[14] Canadian manufacturers can and do offer competitive remuneration for highly skilled positions. However, to continue to do so, both manufacturing employers and employees must have the flexibility to quickly respond to market swings and financial pressures. Introducing additional red tape will not address these pressures, and may inadvertently result in slowing job creation and decreased economic growth.

Employment Standards: Promoting Balance, Flexibility, and Employee Choice

Hours of Work Provisions Should Promote Flexibility Rather Than Hinder Productivity

The *Employment Standards Act, 2000*, SO 2000, c 41 (the "*ESA*") provides specific guidelines with respect to hours of work, rest periods, and time between shifts. These provisions are subject to special rules and exceptions depending on the nature of the industry affected, and by the type of industry operations involved (e.g. continuous vs. non-continuous operations). While the current version of the *ESA* continues to be based on the assumption that most employees work "regular workdays", the *ESA* recognizes that working conditions and production requirements may vary, and it often allows employees to choose when to work extended or non-traditional hours in response to individual needs.

The *ESA*'s key hours of work rules may be summarized as follows:

- **Daily and weekly limits on hours of work**: employees covered by the *ESA* may work a maximum of 8 hours per day or the number of hours in an established regular workday, if it is longer than 8 hours. This limit can be exceeded if there is a written agreement between the employee and the employer allowing the employee to work extended hours. Similarly, employees may only work a maximum of 48 hours a week; however, this limit can be exceeded if the employee and the employer agree to do so in writing and the employer obtains the approval of the Director of Employment Standards.

11 Fraser Institute, *Measuring Labour Markets in Canada and the United States* (2012), page 44, online:
<https://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/Measuring-Labour-Markets-2012.pdf>.

12 *Ibid* at page 8.

13 *Ibid* at page 12.

14 Law Commission of Ontario, *Vulnerable Workers and Precarious Work Final Report. December 2012* (2012), page 1, online:
<http://www.lco-cdo.org/en/vulnerable-workers-final-report> [Law Commission of Ontario, "Precarious Work Report"].

- **Hours free from work**: generally, employers subject to the *ESA* are required to provide their employees with 11 consecutive hours off work each day, and a minimum of 8 hours off work between shifts (unless the employee works no more than 13 hours on both shifts). While employees are prohibited from agreeing to be off work for less than 11 consecutive hours each day, employees may agree to be off work for less than 8 hours between shifts.

- **Eating periods and breaks**: under the *ESA*, employees are entitled to a 30-minute meal break every 5 hours, although employees may agree to split the meal break into two shorter breaks.

- **Exceptional circumstances**: the *ESA* recognizes that circumstances may arise where strict adherence to the above-noted rules may not be possible. As such, the *ESA* allows employees to work hours in excess to those discussed above in certain circumstances, though only so far as this is necessary to avoid serious interference with the ordinary working of the employer's operations.[15]

Currently, the *ESA* does not expressly regulate the start time of shifts, or the composition of a shift schedule. As such, employers and employees have the flexibility to work out a number of shift arrangements, as long as the shift arrangements comply with existing restrictions. Some advocates have taken the position that the regulation of shift scheduling should be more stringent. It is our position that the *ESA* does and must continue to allow for flexibility in the scheduling and planning of work-time arrangements.

In addition, some advocates have suggested that the *ESA*'s scheme is too complex. However, this view ignores the fact that the *ESA* applies to almost all industries in Ontario, and must therefore allow for exclusions, exceptions, and industry-specific provisions in order to provide meaningful minimum standards applicable across all sectors of the Ontario economy.

Flexibility As An Operational Requirement & Objective

Flexibility is not only beneficial to employees and to the economy as a whole; for the manufacturing industry, it has now become an operational requirement from a supply chain management perspective.

Scheduling decisions aiming to match existing production targets and/or future demand with manufacturing capacity and processes are at the core of supply chain management, and optimized supply chain management offers significant opportunities for company competitiveness and growth through increased output, flexibility, responsiveness, and lower costs. It has been estimated that improvements in supply chain management could provide a gain in $65 billion to the pharmaceutical industry if the productivity of lowest-performing companies could be brought to the supply chain productivity levels of the top performers.[16]

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15 For a concise summary of most of the main employment standards set out in the *ESA*, please see the Ministry of Labour's "Your Guide to the Employment Standards Act, 2000" (Queen's Printer for Ontario: Toronto, 2015), online: <http://www.labour.gov.on.ca/english/es/pubs/guide/>.

16 JM Lainez, E Schaefer & GV Reklaitis, "Challenges and opportunities in enterprise-wide optimization in the pharmaceutical industry" (2012) 47 *Computers and Chemical Engineering* 19 at page 25.

In particular, to reap market opportunities, manufacturers rely on improved supply chain management to increase their volume flexibility and operational efficiency and minimize the impact of equipment downtime. Manufacturers' ability to increase volume flexibility and operational efficiency allows them to output more or less product in response to orders and market demand and to do so at lower costs. Volume flexibility is primarily achieved through a choice of manpower strategy, which will likely include the choice to schedule longer or additional shifts.[17] Manufacturers may also mitigate the impact of set-up, changeover and cleaning time by scheduling these activities in a way that minimizes the impact of downtime of production machinery.[18]

Furthermore, production processes and batch sizing in the pharmaceutical industry tend not to fit into traditional scheduling arrangements and work hours. Production runs often extend over multiple shifts and may start or end in the middle of shifts, which thus requires the ability to operate on an uninterrupted basis into the next shift. An inability to do so would essentially mean further lost capacity, flexibility, and efficiency. In other cases, equipment cleaning and changeover processes are scheduled during weekend periods in order to maximize production uptime during the week.

In order to maximize operational efficiency, capacity utilization, operational flexibility and responsiveness, manufacturing and supply chain operations must be planned and executed on a 24 hour a day, 7 day per week basis. To achieve these objectives, manufacturers must be able to rely on non-traditional work hours and scheduling arrangements.

Balance and Flexibility Should Guide Employment Law Reform

The Changing Workplaces Review Consultation Guidelines suggest that there are three key objectives in the employment relationship: efficiency, equity and voice. We would suggest that all three objectives may be met by way of an increased focus on labour flexibility and balanced regulatory reform.

An efficient labour market should afford both employers and employees the opportunity to adjust to market and economic challenges in order to become more resilient to shocks caused by rapid changes in general economic conditions (e.g. economic downturns) and to respond quickly to upswings in market demand for manufactured goods during periods of increased economic growth. Employment and labour laws drafted in accordance with the principle of flexibility would allow employees to decide how to provide their labour (e.g. through a traditional employment relationship or as independent contractors), and employers to rapidly adjust and respond to economic downturns. In addition, flexibility should be at the heart of employment and labour reform in the 21st century because, at least since the 1990s, economic changes, technological development, and demographic shifts in the labour force have contributed to create a demand for non-traditional work schedules.[19]

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17 Nigel Slack, "Flexibility as a manufacturing objective" (1983) 3:3 *International Journal of Operations & Production Management* 4 at page 10.

18 "Set-up time" is the time for set up and cleaning as a percentage of scheduled time. See Thomas Friedli, Matthias Goetzfried & Pabir Basu, "Analysis of the implementation of Total Productive Maintenance, Total Quality Management, and Just-In-Time in Pharmaceutical Manufacturing" (2010) 5:4 *Journal of Pharmaceutical Innovation* 181 at pages 186, 191.

19 Harriet B. Presser, "Toward a 24-Hour Economy", (1999) 284 *Science* 1778 at page 1778.

Non-traditional work schedules including extended daily working hours also generate efficiencies, avoiding the need for workforce reduction or outsourcing. Operating on extended schedules avoids the cost of shutting operations down at the end of the day, only to restart in the morning.[20] In order to remain competitive manufacturers must be able to lower fixed capital costs for each unit produced. Extended plant utilization can help minimize fixed capital costs for each unit produced, and amortize capital invested in machinery and equipment more quickly. In addition, extended operation cycles may assist manufacturers in reacting to rising electricity costs. Extended shift arrangements that allow a plant to operate during off-peak hours can result in significant energy savings, especially for manufacturing processes that are energy-intensive.[21]

As a result of the advantages of non-traditional scheduling, increased competition on global markets, and rising costs, manufacturers are increasingly adopting continuous operation schedules and moving away from the "regular" work day upon which most employment and labour legislation is currently based.

Employment Inflexibility Is Neither Desirable Nor Required To Guarantee Adequate Employee Protection

Some advocates have suggested that the *ESA* should be amended to prohibit employee dismissals in all cases except in the presence of just cause. Effectively, these advocates are demanding that the *ESA* provide employees with a "right to the job" similar to that found in workplaces governed by a collective agreement.

It is Apotex's submission that the introduction of such a legislative amendment would be both unnecessary to protect non-unionized employees and detrimental not only to employers, but also to certain vulnerable groups of employees. Apotex takes this position for the following reasons:

(a) It is a basic principle of modern Canadian employment law that employees have no "right to the job" in the same way that employers have no right to retain their employees for an indefinite amount of time.

(b) It is also a basic principle of modern Canadian employment law that employees who are dismissed in an appropriate manner and who are provided with appropriate notice of dismissal have not been "wronged" or treated unfairly.

(c) The *ESA* already provides employees with adequate access to statutory remedies for employer misconduct.

(d) Studies have shown that strict employment protection laws that include excessive restrictions on dismissals may have detrimental impacts on the labour market and negatively affect vulnerable categories of employees who are already at a disadvantage in securing employment. As such, restrictions on dismissals are likely to harm the very employees who need the most support.

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20 Thomas M. Beers, "Flexible schedules and shift work: replacing the '9-to-5' workday?", (2000) 123:6 *Monthly Labour Review* 33 at page 37.

21 Hartmurt Seifert, "Competition, Flexibility and Working Hours", (2000) WSI-Discussion paper at page 5, online: <http://www.boeckler.de/pdf/p_wsi_diskp_078.pdf>.

Employees Have No "Right to the Job" In the Same Way That Employers Have No Right to Retain Employees Indefinitely

The modern law of employment has moved away from the older authoritarian and paternalistic view of the employment relationship. Before employment law began to rely on contract principles, there was both a legal obligation to accept and perform work on the part of individuals, and a corresponding obligation on the part of their "masters" to provide protection. In the same way that individuals are no longer obligated by law to come under the tutelage, guidance, and protection of a lord or "master", employers are no longer responsible for individuals' governance and protection.[22]

With the advent of the industrial revolution and the development of contract principles, British and Canadian employment law shifted away from this older view and towards a more individualistic conception of the employment relationship. Under this changed understanding of employment relationships, employers were no longer "lords", and employees were no longer literal "servants". In addition, the employment relationship became more constrained in scope, more fluid, and significantly less hierarchical. Eventually, both employers and employees gained the liberty of determining the characteristics and the length of their relationship, as well as defining most of the obligations owed to each other by virtue of such relationship.

The values underlying our modern law of employment – self-reliance, freedom of contract and individual liberty – are inconsistent with a view of the workplace where a benevolent employer retains an indefinite obligation to provide work, guidance and protection to individual employees.[23] Instead, the modern common law of employment grants employees the freedom to begin or end an employment relationship without bestowing them with a right to their job.

Termination of the Employment Contract with Adequate Notice Does Not Imply That a Party to the Contract Has Been "Wronged"

In response to the shift from an authoritarian and paternalistic conception of the employment relationship to one founded on contract law principles, the common law of employment has recognized that with freedom and independence also come certain responsibilities and duties, which have been implied by law into all employment contracts. Among such implied duties is the duty to provide reasonable notice of termination.[24] This duty is equally shared by both employers and employees, although the length of notice owed may differ significantly for employers and employees depending on the facts of each individual case.

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22 See Alan Fox, *History and Heritage: The Social Origins of the British Industrial Relations System* (London: George Allen and Unwin, 1985) at 7, 14-15, and 51, as cited in The Labour Law Casebook Group, *Labour and Employment Law. Cases, Materials, and Commentary*, 8th ed. (Toronto: Irwin Law, 2011) at page 11.

23 For a discussion of the values underlying the modern common law of employment, see The Labour Law Casebook Group, *Labour and Employment Law. Cases, Materials, and Commentary*, 8th ed. (Toronto: Irwin Law, 2011) at pages 23-24.

24 See *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 at para 50: "[a]n action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term" .

Where either the employer or the employee provides the other with reasonable notice prior to the end of the employment relationship, the employment contract is not breached and neither party has been "wronged". As stated by the Supreme Court of Canada, "wrongful dismissal" is not concerned with the wrongness or rightness of the dismissal; rather, a "wrong" arises only if the employer fails to provide the dismissed employee with reasonable notice of termination.[25] An employee dismissed without cause but with reasonable notice of termination has therefore not been wrongfully dismissed.[26]

The ESA Already Provides Adequate Access to Remedies for Employer Misconduct

Some advocates have demanded that the *ESA* be amended to include unfair dismissal provisions or similar restrictions by arguing that such a provision is necessary to protect vulnerable employees from employer misconduct. However, these advocates have neglected to consider the most recent amendments to the *ESA*, which provided vulnerable employees with better information and access to *ESA* remedies.

On November 20, 2014, Bill 18, the *Stronger Workplaces for a Stronger Economy Act, 2014* ("Bill 18")[27] received Royal Assent. Bill 18 made a number of amendments to various workplace statutes, including the *ESA*. In particular, Bill 18 removed the $10,000 cap for claims for unpaid wages made under the *ESA*. Changes were also made to the recovery period. While employees used to be able to claim unpaid wages for a period only going back six months, employees may now file claims for a period going back two years. In addition, employers are now required to provide each employee with a copy of a Ministry of Labour poster that summarizes the rights of most employees under the *ESA*. As such, since Bill 18 received Royal Assent employees have enjoyed better access to information regarding their employment rights, access to better remedies, and the benefit of a statutory limitation period that is now equivalent to that applicable to wrongful dismissal actions brought in court.

Bill 18 also granted Employment Standards Officers ("ESOs") the authority to order that employers conduct self-audits. An employer required to conduct a self-audit will have to examine its records and practices to determine whether it is in compliance with the *ESA*. If the self-audit reveals that an employer has failed to comply with the requirements of the *ESA*, the ESO would now be able to issue proactive compliance orders on the basis of these audits, without having to receive an individual complaint from an individual working for that employer.

In conclusion, the *ESA* amendments discussed above have provided vulnerable employees with access to better remedies and information. These amendments have also introduced compliance procedures that are not complaint-based, and are therefore less dependent on employee initiative and less likely to be impacted by employees' reticence to contact the Ministry of Labour. As such, at this point in time it is unnecessary to introduce more burdensome legislative requirements to promote compliance with the *ESA* and to discourage misconduct.

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25 *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 115.

26 *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at para. 63.

27 *Bill 18, Stronger Workplaces for a Stronger Economy Act, 2014*, SO 2014 c 10.

Strict Employment Protection Laws May Have a Negative Impact on Unemployment, Especially for More Vulnerable Workers

Employment protection legislation ("EPL") includes rules regarding the imposition of additional costs for collective dismissals, the regulation of temporary contracts, and legislation regulating the individual dismissal of workers with regular contracts (e.g. unfair dismissal legislation).

Recent research on the economic and labour market impact of EPL has found that strict EPL can reduce job flows, negatively impact the employment prospects of some vulnerable groups (e.g. youth), reduce productivity, and impede economic growth.[28] Possibly, strict EPL may negatively affect economic growth because employment protection can diminish employers' ability to adapt to the challenges posed by globalization and rapid technological change.[29]

As discussed in a 2004 study conducted by the Organisation for Economic Co-operation and Development ("OECD"), it is likely that EPL would reduce the re-employment chances of unemployed workers because employers take into account the potential cost of termination when making hiring decisions. The same study found that, where temporary employment is encouraged but strict regulation on permanent contracts is maintained, "job protection also has an adverse effect on exit rates from unemployment, thus prolonging the average unemployment spell. As such, it contributes to a certain form of labour market insecurity.[30]

In addition, there is evidence that strict employment protection legislation has a negative impact on certain vulnerable groups that generally encounter more difficulty in securing employment. On this subject, the 2004 OECD concluded as follows:

> While EPL is generally shown to have little or no effects on the employment rates of prime-age men, **several studies suggest that stringent employment protection tends to decrease the employment rates of both youth and women** […]. Indeed, there are reasons to think that youth, as new entrants into the labour market, and women with intermittent participation spells, will primarily be affected by any reduced hiring caused by EPL, while being less in a position to benefit from reduced firings than other groups. As a consequence, employment protection would damage their employment opportunities. On the other hand, those already in the core labour market, mainly prime-age men, will primarily benefit from any greater job stability induced by EPL. […] While the results for youth vary in significance, **EPL is found to significantly reduce the employment opportunities of prime-age women**, probably because they are more likely than men to move between employment and inactivity, in particular when seeking to balance the competing demands of work and family life (OECD, 2002a, Chapter 2). On the other hand, EPL does not appear to play a significant role for employment of prime-age men.[31] [Emphasis added]

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28 D. Venn, "Legislation, Collective Bargaining and Enforcement: Updating the OECD Employment Protection Indicators", *OECD Social, Employment and Migration Working Papers, No. 89* (Paris: OECD Publishing, 2009).

29 Organisation for Economic Co-operation and Development, "Employment Protection Regulation and Labour Market Performance" *OECD Employment Outlook 2004* (Paris: OECD Publishing, 2004) at page 62.

30 *Ibid* at page 99.

31 *Ibid* at pages 81-85.

In other words, strict employment protection regimes tend to favour the employment of groups that already have an advantage in the labour market, while decreasing employment rates for vulnerable groups, particularly women and youth.

In response to the concerns discussed above and to the economic shocks caused by the 2008 crisis, OECD governments have been progressively moving away from strict employment protection approaches. A recent OECD labour market study has noted that, since 2008, most changes to employment protection legislation across OECD countries have focused on limiting access to reinstatement and extending probationary periods, as these aspects of employment protection have typically been found to impact worker flows and job transitions.[32] The OECD estimates that these reforms will likely "yield dividends" in terms of increases in efficiency, productivity and the number of "outsiders" entering the labour market.[33]

In conclusion, given the current state of the Canadian economy, the documented impact of strict employment protection measures (including unfair dismissal provisions) on the labour market, and the negative effect of such provisions on vulnerable groups, the introduction of additional labour market restrictions by way of a right-to-the-job amendment to the *ESA* will likely be both untimely and unwise.

Labour Relations: Protecting Employee Choice in the Certification Process

Overview of Certification Regimes

Professor Marcel Boyer has described current certification regimes in Canada as falling into two distinct categories: the Card Majority Certification Regime (more commonly known as the card-check certification regime), and the Mandatory Secret Ballot Vote Certification Regime. Four out of ten Canadian provinces and the federal jurisdiction have adopted a card-check certification regime: Quebec, New Brunswick, Manitoba, and Prince Edward Island. The other provinces currently rely on the Mandatory Secret Ballot Vote Certification Regime.[34] In Ontario, the *Labour Relations Act, 1995*, SO 1995, c 1, Sched A (the "*LRA*") imposes the card-check regime only in the construction sector; unions operating in all other sectors are required to follow secret ballot vote certification procedures.

Under the card-check regime, unions can be automatically certified if they manage to obtain signed "membership cards" from a minimum percentage of employees as set out in the applicable labour legislation. Unions conducting card-check certification campaigns have no obligation to inform the employer of the campaign, and employees have no opportunity for second thoughts after signing a card. Should the union fail to obtain the number of cards required to obtain automatic certification, the union may still be able to call a vote if a lower number of cards has been signed (usually around 40%).

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32 OECD, "Protecting jobs, enhancing flexibility: A new look at employment protection legislation", *OECD Employment Outlook 2013* (Paris: OECD Publishing, 2013).

33 *Ibid* at page 107.

34 Marcel Boyer, "Union certification: Developing a level playing field for labour relations in Quebec" September 2009, at pages 14-15 [Boyer, "Union certification"].

On the other hand, secret ballot vote procedures require unions to collect a minimum number of cards, after which a secret ballot vote must be held within a set number of days. In Ontario, a union that has applied for certification must provide notice of the application for certification to the employer.[35] If the Ontario Labour Relations Board determines that 40% or more of the individuals in the bargaining unit proposed in the application appear to be members of the union at the time the application was filed,[36] a secret ballot vote is held within five days (excluding Saturdays, Sundays and holidays) after the day on which the union's application was filed.[37]

Ontario Should Continue to Require a Secret Ballot Vote Before Certifying a Union

Union advocates have suggested that certification involving a secret ballot vote has resulted in a decrease in certifications, and in a drop in the unionization rate. As a result, union advocates are demanding that Ontario's card-check certification process be extended from the construction sector to all other sectors. In support of their position, some advocates have advanced the argument that cards are as good as votes. For example, a submission made in the course of the Changing Workplaces Review went as far as stating as follows:

> Every person applying to be represented by a union signs a legal document to that effect, in the same manner that our signature, properly witnessed, can assign a lawyer or executor to represent our interests. Nobody demands that we undergo a trial by fire for five days to determine if those signatures are valid.[38]

It is our submission that a card is not equivalent to a vote, and that the requirement for a secret ballot vote following a card signing campaign should be maintained. The secret ballot system better balances the rights of both employees and employers, while still providing unions with a democratic method to represent employees.

In addition, it is our position that:

(e) The causes of the drop in unionization are multifactorial and cannot be addressed by removing employees' right to vote for or against a union;

(f) Card-check certification regimes are undemocratic and should be rejected;

(g) A switch to card-check certification deprives employers of the opportunity to make their views known, and may expose employees to additional pressure and possible unfair labour practices on the part of union organizers; and

(h) Secret ballot vote certification is aligned with international law principles.

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35 *Labour Relations Act, 1995*, SO 1995, c 1, Sched A, s 7(11).

36 *Ibid*, s 8(2).

37 *Ibid*, s 8(5).

38 Toronto and York Region Labour Council, "Submission to the Changing Workplaces Review", online:< http://www.labourcouncil.ca>.

The Causes of the Drop in Unionization Are Multifactorial

Surveys conducted by Statistics Canada between 1981 and 2004 show that, since the 1980s, the unionization rate throughout Canada has experienced a significant decrease. The drop in unionization has been particularly significant for men, as their unionization rate declined by almost 12%. A review of the data suggests that "changes within good-producing industries have been central to the overall decline in unionization since the early 1980s".[39]

The largest decline in unionization has occurred in the commercial sector. While the majority of the drop in unionization rate remains unexplained, a decompositional analysis conducted by Statistics Canada shows that, between 1981 and 1998, about 11% of the unionization drop for men could be attributed to changes in the composition of the industries and occupations employing men, and an increase in occupations that require a university degree and are traditionally not unionized (e.g. managerial and professional occupations, and occupations in the service sector).[40]

The drop in unionization rates may also be explained by the shift towards employment in smaller firms,[41] by the introduction of more collaborative management approaches relying on employee involvement initiatives and joint labour-management committees,[42] and by employees' decreased interest or even active opposition to unionization. A 2011 Nanos poll found that interest in unionization is somewhat low among non-unionized workers, and that a majority of Canadians workers would not opt for unionization given the choice, with less than 4 in 10 Canadians stating that they would want (or would have wanted) to be unionized.[43] The same poll also found that the proportion of formerly unionized Canadians who would still have wanted to be unionized if given a choice dropped from about 52% in 2008 to about 33% in 2011.[44]

Union advocates have suggested that secret ballot vote certification procedures are responsible for the drop in certifications, and therefore responsible for the drop in unionization in Ontario. However, in an empirical analysis of the effects of the switch from card-check to secret ballot vote certification, Sara Slinn noted as follows:

> An unexpected but interesting result was that in each of the Bill 40 [which introduced a card-check certification regime] and Bill 7 [which reverted to a secret ballot vote regime] periods, a distinct trend in the rate of success was discernible. **During the card-check period, there was a consistent, significant, and sustained decline in probability of certification. Conversely, there was a steady increase in the probability of certification over the course of the Bill 7 period. These results may reflect the fact that unions adapted, over a period of years, to a different procedural environment**.

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39 René Morisette, Grant Schellenberg & Anick Johnson, "Diverging trends in unionization", 6:4 *Perspectives on Labour and Income* 5.

40 *Ibid* at page 8.

41 *Ibid* at pages 9-10.

42 *Ibid* at page 10.

43 Nanos Research, "State of the Unions 2011. Report 2011-185" (LabourWatch: Vancouver, 2011) at pages 16, 19 [Nanos, "State of the Unions"].

44 *Ibid* at page 19.

> **Equally interesting is what this study did not find. The presence of a meritorious unfair labour practice complaint was not found to have a significant effect on the likelihood of certification under either system**, although this result may reflect limitations in the available data.[45] [Emphasis added]

This empirical analysis of Ontario certification data suggests that the certification rate may be significantly affected by the unions' familiarity with certification procedures.

As such, empirical analyses support the position that the causes of the drop in unionization experienced by employees are multifactorial and *cannot* be attributed for the most part to the choice of certification procedures. Larger economic and demographic trends are likely responsible for the dramatic changes in the labour landscape and consequently for the drop in unionization rates seen in the commercial sector in Ontario and generally throughout Canada.

Card-Check Certification Regimes Are Undemocratic

The card-check certification regime strips employees of their right to elect their bargaining representative, and obliges employees to decide whether to choose a bargaining representative without the benefit of additional time or information.

Unlike what some advocates have suggested, the signing of a membership card is not comparable to a secret ballot vote. In fact, there is often a mismatch between the number of employees signing cards and the number of employees voting in favour of union representation. Empirical studies show that higher vote participation is associated with a lower probability of certification.[46] This outcome should not be surprising given that, in order to be certified by secret ballot vote, unions generally only need a *minority* of employees to sign cards but then need a *majority* of employees to vote in favour of certification, and employees who are strongly against certification are likely to cast ballots but unlikely to sign cards. In addition, where employees are given an opportunity to freely vote for or against certification, shielded from peer pressure and undue influences, even employees who initially signed cards would be able to express their preference for not being represented by a union.

The stripping of employees' right to vote in card-check regimes is particularly problematic because any union that is successful in certifying a bargaining unit acquires the right to bargain with the employer and therefore contractually binds employees on all issues pertaining to working conditions. By agreeing to be represented by a union, employees give up their individual right to freely negotiate and enter into contractual arrangements with their employer. The certification process may allow employees to exercise their freedom of association, but it also results in the loss of their right to enter into contracts and to bargain on an individual basis. Such a consequential decision must be informed, confidential, and not subject to peer or political pressure. Only the secret ballot vote certification procedure allows employees some time for thought, guarantees the confidentiality of their decision, and provides them with a chance to cast any vote they choose, regardless of what the union or employer have campaigned for.

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45 Sara Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification" (2004) 11 *CLELJ* 259 at pages 300-301 [Slinn, "Change from Card-Check to Mandatory Vote"].

46 Slinn, "Change from Card-Check to Mandatory Vote", *supra* note 45 at page 297.

Card-Check Regimes Deprive Employers of the Opportunity to Communicate with Employees Prior to Certification While Exposing Employees to Union Pressure Tactics

As pointed out by Roy Heenan, card-check certification "often ignores the very real existence of either peer intimidation or substantial peer pressure".[47] Employees may sign union cards in the mistaken belief that they will not be allowed to work in a particular place if the certification campaign is successful, and that they must join the union to keep their job. Employees may also be pressed for time, or be asked to sign a card in view of their peers, in the total absence of privacy. Peer pressure, while not rising to the level of an unfair labour practice, is nevertheless "a major determining factor" in certification campaigns.[48] Unlike the card-check regime, secret ballot vote procedures lessen the influence of union pressure tactics on individual employees.

In addition to being exposed to peer and political pressures, employees receive one-sided information during card-check campaigns. As employers operating under card-check regimes are usually unaware that a certification campaign is taking place, employees will receive information about the consequences of certification and the implications of union membership exclusively from the union. This one-sided information process is inconsistent with the wishes of working Canadians. In a 2011 Nanos poll, 89% of respondents agreed that employees should have access to information from both the union and the employer during a unionization drive.[49]

There is at least some evidence suggesting that this one-sided process impacts employees throughout their employment in a unionized setting. A recent poll found that nearly 57% of currently and formerly unionized workers hold the belief that they cannot resign their union membership and keep their jobs.[50] It is of note that unionized workers are more likely to think that union membership is a requirement of the job relative to non-unionized employees.[51]

Secret Ballot Vote Procedures Are Consistent with International Law Principles

The preservation of employees' right to decide by secret ballot whether they should be represented by a union, and by which union, accords with international labour law principles.[52] One of the fundamental principles of international labour law is that, just as employees should not be subject to undue pressure from employers when deciding whether to join a union, any collective bargaining regime must also be established on a voluntary basis. Voluntariness is crucial not only because, as discussed above, employees lose their right to freely bargain with their employer upon the establishment of a collective agreement, but also because a collective bargaining relationship should not be established due to compulsion from the union. As previously stated by the ILO Committee,

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47 Roy Heenan, Card Majority Certification, presentation before The National Finance Industry Employment Law Committee (Philadelphia), June 2007 at pages 1-2, as cited in Boyer, "Union certification", *supra* note 34 at page 17.

48 Newfoundland & Labrador Employers' Council, *Elimination of the democratic right of the Newfoundland & Labrador workforce to freely and privately choose on union certification* (2012) at pages 10-11, online: <https://nlec.nf.ca/news/article/elimination-of-the-democratic-right-of-the-newfoundland-labrador-workforce-to-freely-and-privately-choose-on-union-certification/>.

49 *Ibid* at page 7.

50 Nanos, "State of the Unions", *supra* note 43 at pages 21-26.

51 *Ibid* at page 24.

52 Stefan Jan Marculewicz, "Elimination of the secret ballot union election and compulsory arbitration under the Employee Free Choice Act – a violation of fundamental principles of international labour law", (2009) *International Organisation of Employers Annual Labour and Social Policy Review* (accepted for publication) at page 17 [Marculewicz, "Elimination of the secret ballot"].

> **collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining** […] the Committee has considered that the competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of workers in an undertaking, provided that such a claim appears to be plausible and that if the union concerned is found to be the majority union, the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes.[53] [Emphasis added]

The policy reason behind the importance of voluntariness is legitimacy: only a union invested with the legitimacy of a fair, secret-ballot election will have the strength and authority to be recognized as a legitimate employee representative at the bargaining table. This is what makes the secret ballot vote "not only an acceptable but a desirable way to ensure that workers exercise their right to choose the organization which shall represent them in collective bargaining".[54]

In addition, where a legislative scheme allows only one union to be certified as the exclusive representative of a bargaining unit (as is the case under the *LRA*), it is important that the bargaining representative be chosen by majority *vote* in order to safeguard the employees' freedom of association. As remarked by Stefan Jan Marculewicz in his paper on the elimination of the secret ballot vote,

> [a]lthough the Committee will not criticize a national system of designating representativeness where only one labor union is certified as the exclusive bargaining agent of a group of employees, where such a system exists, it must include certain safeguards to conform it to principles of international labor law. **Central to these safeguards is a system where the representative organization must "be chosen by a majority vote of the employees in the unit concerned." Where "the authorities have the power to hold polls for determining the majority union which is to represent the workers for the purposes of collective bargaining…, [s]uch polls should always be held where there are doubts as to which union the workers wish to represent them."**[55] [Emphasis added]

Secret ballot vote certification procedures are consistent with international labour law principles and arguably with Canadian Charter principles. It gives employees both a voice and a choice, thereby truly safeguarding their right to freedom of association.

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53 U.N. ILOCFA, 309th Rep., Case No. 1852, United Kingdom, ¶337 (1995), as cited in Marculewicz, "Elimination of the secret ballot", *supra* note 52 at page 18.

54 U.N. ILOCFA, 333rd Rep., Case No. 2153, Algeria, ¶ 207 (2001) as cited in Marculewicz, "Elimination of the secret ballot", *supra* note 52 at page 19.

55 Marculewicz, "Elimination of the secret ballot", *supra* note 52 at page 22.

Conclusion: Guiding Principles and Recommendations

We respectfully submit the following recommendations for consideration in the course of the Changing Workplaces Review:

1. **Changes made to either the *LRA* or the *ESA*, if any, should encourage labour market flexibility**. Labour market flexibility is necessary to improve economic security and promote job creation.

2. **Employment and labour legislation reforms should be guided by the principles of balance and flexibility** in order to reflect the economic, technological, and demographic changes that have reshaped modern workplaces.

3. **Hours of work and scheduling provisions should not hinder productivity**. Employers should have the flexibility to determine shift arrangements, and employees should retain the ability to decide how long to work in order to meet their individual needs.

4. **Demands for the addition of "just cause" or "unfair dismissal" restrictions to the *ESA* should be rejected.** Legislative and labour market inflexibility is not required to guarantee adequate employee protection. Moreover, introduction of such a provision would be detrimental not only to employers, but to the labour market at large.

5. **Demands for moving to a card-check certification regime should be rejected**. The fall in unionization rates cannot be addressed by removing all employees' right to vote for or against certification. Card-check certification methods are undemocratic, and moving to card-based certification would deprive employers of the opportunity to make their views known, while further exposing employees to union pressure tactics.

6. **Secret ballot vote certification procedures should be preserved**. Secret ballot vote procedures are aligned with international law principles and give employees both a voice and a choice, truly safeguarding their right to freedom of association.

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