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Ontario Midwives
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Ontario Midwives on the Changing Workplaces Review

Submission to the Special Advisors

leading the Changing Workplaces Review

September 18, 2015

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C. Michael Mitchell and the Honourable John C. Murray
Special Advisors, Changing Workplaces Review
Employment, Labour and Corporate Policy Branch
Ministry of Labour
400 University Ave, 12th floor
Toronto, ON M7A 1T7

Dear Sirs:

RE: Changing Workplaces Review

Thank you for taking the time to review this submission from the Association of Ontario Midwives (AOM) to the *Changing Workplaces Review*.

Registered Midwives in Ontario provide comprehensive primary care to pregnant women and their newborns. Midwifery is a unique and growing profession that is not adequately reflected in the Employment Standards Act (ESA) or the Labour Relations Act (LRA). The review's objective to "better protect workers while supporting businesses in our changing economy" aligns perfectly with these proposed amendments, which ensure protection of the midwifery model of care (or the "business" of midwifery).

We are writing to ask for two changes to the legislation under review:

1. An exemption from aspects of the ESA for members of the midwifery profession and those training in the midwifery profession, similar to the exemptions already granted to other regulated professionals. These exemptions are important for midwives because their professional obligations (as defined by their regulatory body) and the logistics of caring for women in labour conflict with aspects of the ESA.
2. An amendment to the LRA to include Registered Midwives as a class of workers to whom the labour relations regime applies. This will allow midwives the right to collective bargaining, ensuring that their rights and needs can be adequately addressed.

These important changes will ensure that the LRA and ESA more accurately reflect the context of midwifery and ensure protection for midwives as well as for clients within the midwifery model of care.

Midwifery in Ontario

Midwives have provided personalized, excellent care for more than 180 000 Ontarians since 1994. There are currentlyover 800 midwives providing care in more than 86 communities across the province. Each year, the number of practicing midwives increases by approximately 10% as demand for midwifery continues to grow. (1)

Since 1994, the work of a Registered Midwife has been defined in Ontario by the Regulated Health Professions Act (RHPA), the Midwifery Act and the Ministry of Health and Long-Term Care (MOHLTC) through its funding contracts since 1994. (2) The College of Midwives of Ontario (CMO) defines the midwifery model of care, which requires midwives to provide continuity of care to their clients. This requirement means that midwives are on call for their clients 24/7 and may provide services to women for long periods of time. Often the work of a midwife is difficult to schedule as it is dictated by the health needs of the client, the client's pregnancy, the timing of the labour and birth, and the needs of the newborn. Therefore, since midwives were first regulated, they have been engaged in non-standard employment. To protect this model of care and, at the same time, not put midwives into a position where they would be breaching the ESA on a regular basis, the Ministry of Health determined that midwives would work in small practice groups, like physicians do, as independent contractors.

Throughout a client's pregnancy, her midwife or a small group of midwives gets to know her and her family while providing prenatal care. Midwives recognize the pregnant client as the primary decision maker and in order to provide informed choice take the time to establish a strong relationship of trust with each client. To satisfy the CMO's continuity of care requirement, clients must have access to a known midwife at all times during their pregnancy and labour, and for 6 weeks postpartum. This means that a client can reach a care provider who she knows at any time during the day or night and can expect to be attended throughout active labour by a midwife with whom she has an established relationship. (3-5)

For the midwife, this means working alone or on a team to provide comprehensive care and to be constantly available to pregnant, laboring and postpartum clients. Midwives are autonomous, primary care providers; that is, the midwifery is most responsible care provider in the care of the woman and her newborn from 6 weeks pregnancy to 6 weeks post-partum. If all proceeds well through this course of care, it is likely the woman and newborn will only see midwives for their care; no physicians or nurses would be required. Midwives are on call workers and do not follow a set, reliable schedule. A typical day may include running a prenatal clinic and providing postpartum care at home to a number of clients, while simultaneously addressing the urgent concerns of clients by telephone and in person. To accomplish this, midwives carry a pager at all times. It is not unusual for this typical day to be interrupted by the page of a woman who is going into labour, and for the midwife to reschedule her day to ensure that the client in labour is continuously attended until the baby is born, and

then remain with that client[1] for a few hours after the birth to ensure medical stability for both the mother and infant. If the midwife reaches a point where she[2] must go off call, usually due to sleep requirements, the midwife has a professional and ethical responsibility to bring in another midwife known to the client to take over.

While ensuring constant access to a known midwife can at times be challenging to facilitate, the midwifery model of care in Ontario consistently demonstrates excellent clinical outcomes, cost-effectiveness and high rates of client satisfaction. (6-9) The availability of a known midwife at all times is consistently cited as one of the key components of midwifery care that contributes to such excellent outcomes.

Context and Objectives

> *Are these key objectives or are there others? How do we balance these objectives or others where they may conflict? What are the goals and values regarding work that should guide reform of employment and labour laws? What should the goals of this review be?*

While we agree that efficiency, equity and voice are important aspects of the employment relationship, the context of the work (for example as part of a larger health care system) should be considered along with the specifics of a workplace, and the needs of the patient, client or customer.

In the context of midwifery, regulatory requirements and the needs of the client must always be considered. Standards of the CMO, developed based on client need, hold midwives to a particular model of care that honours the individual client experience above all else. The profession of midwifery exists in order to support and care for clients in a personal and respectful way. Applying the current ESA requirements to the midwifery model of care is impossible because it ignores the context of a regulated profession serving the needs of clients. Any changes to ESA standards should provide consideration for the flexibility required in a unique model of employment such as midwifery; this flexibility has been a key success factor in the tremendous success of midwifery in Ontario over the past 20 years.

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[1] Midwives provide care to both women and transgendered persons. Midwives use the term “client” rather than “patient” in acknowledgement that pregnancy is a healthy, physiologically normal event rather than an illness.
[2] Though this paper uses the pronoun “she” to make it easier for the reader, midwives can be male and transgendered.

The Employment Standards Act

> *Question 8: In the context of the changing nature of employment, what do you think about who is and is not covered by the ESA? What specific changes would you like to see? Are there changes to definitions of employees and employers or to existing exclusions and exemptions that should be considered? Are there new exemptions that should be considered?*

The midwifery model of care combined with the unpredictable nature of labour and birth make it essentially impossible for midwives to comply with the ESA as it is now. Granting midwives an exemption to certain aspects, as has been done for other regulated professionals such as veterinarians and physicians, would be the most effective solution to this conflict.

A new exemption should be considered for Registered Midwives from the following aspects of the ESA: minimum wage; time off between shifts; hours of work; eating periods; daily rest period; weekly/biweekly; rest periods; overtime; public holidays and vacation with pay. These are the same exemptions as are currently granted to other regulated, client-focused professions such as engineers, physicians, lawyers, veterinarians and architects. (10) Midwives would still be entitled to severance pay and termination notice.

Common among these professions is an ultimate responsibility to clients need rather than standard scheduling. This responsibility is outlined in regulatory standards. For example, professional engineers "have a clearly defined duty to society, which is to regard the duty to public welfare as paramount." (11) Physicians have a fundamental responsibility to "consider first the well-being of the patient." (12) Similarly, the Code of Ethics of the CMO describes a requirement that "each midwife shall act, at all times, in such a manner as to …serve the interest of society, and above all to safeguard the interest of individual clients." It is considered an ethical breach for a midwife to leave a labouring client. (13) Members of these professions will at times be unable to simultaneously meet their professional obligations and the requirements of the ESA. Considering the similar ethical and professional responsibilities held by midwives, as autonomous primary care providers, it would be appropriate to extend the exemption to the midwifery profession.

In addition to the ethical responsibility that a midwife has to her clients, the unique aspects of the midwifery model of care as defined and regulated by the MOHLTC and the CMO increase the conflict with certain requirements under the ESA. Providing a client with access to a known midwife at all times, including throughout her entire labour, does not allow for predictable scheduling. A full-time midwife may attend one to two births per week on average; due to the unpredictability of births, she may attend more than 7 in one week. The length of labour varies widely and the time commitment required by a midwife on any given day can not be estimated. This unpredictability makes the scheduling of time off between births, rest periods, eating periods, overtime and public holidays impossible.

For midwives to meet the needs of their clients and fulfill their professional and regulatory requirements to the College, they cannot comply with certain ESA requirements. Granting an exemption to the same aspects of the ESA that other regulated professionals have been exempted from is the most appropriate way to ensure that midwives are not in breach of a regulation. The MOHLTC and the Ministry of Labour recognized the need for an exemption in 1997 and 2008 following submissions from the midwifery sector. Both times other legislative priorities took precedence. With the growing interest in including midwives in new, innovative interprofessional care models, this exemption will also facilitate midwives to work in a variety of settings and in a variety of employment models, while maintaining the essence of what Ontarians seek in midwifery care.

We ask that you consider granting midwives an exemption to minimum wage, hours of work, daily rest period, time off between shifts, weekly/biweekly rest periods, eating periods, overtime, public holidays and vacation with pay in order to eliminate the conflict between the ESA and regulatory requirements under the CMO, and support the midwifery model of care.

The Labour Relations Act

> *Question 11: In the context of the changing nature of employment, what do you think about who is and is not covered by the LRA? What specific changes would you like to see?*

Midwives are excluded from the LRA because they are formally classified as independent contractors. Functionally, however, their relationship with the Ontario government bears many of the hallmarks of an employee-employer relationship—including the power imbalance that the right to bargain collectively serves to redress. Given the nature of this relationship, excluding midwives from the LRA and the collective bargaining regime it establishes violates their rights under section 2(d) of the Charter.

In Ontario, midwifery services are entirely funded and levels of compensation set by the MOHLTC. The provincial government thus acts, in effect, as midwives' only employer. To practice and be compensated by the MOHLTC, midwives form midwifery practice groups. The practice groups then enter into contracts with transfer payment agencies funded by the MOHLTC. The Ministry sets the terms of those contracts. While the AOM and the MOHLTC have entered into discussions with respect to the terms and conditions of service delivery and compensation rates, the Ministry insists it does not negotiate contracts with the AOM. Instead, it characterizes these discussions as mere "consultations" or "discussions". (14)

In its landmark *Health Services* decision, the Supreme Court reversed its earlier jurisprudence and held that section 2(d) of the Charter protects employees' right to engage in collective bargaining, and imposes corresponding duties on employers to bargain in good faith. (15) Subsequently, in *Mounted Police Association*, the Supreme Court affirmed that the section 2(d) guarantee of freedom of association protects the right to "a meaningful process of collective

bargaining." (16) A process of collective bargaining "will not be meaningful if it denies employees the power to pursue their goals" (16). State action that "disrupt[s] the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining" is inconsistent with the guarantee of freedom of association. (16) The Court went on to hold that excluding a class of workers—namely members of the RCMP—from the labour relations regime governing the federal public service constituted substantial interference with meaningful collective bargaining and therefore violated their rights under section 2(d).

Although the exclusion of midwives from the provincial labour relations regime flows from their classification as independent contractors rather than their explicit identification as a class of employees to whom the regime does not apply, the effect of the exclusion is the same. Midwives are denied access to a meaningful collective bargaining process in which they have sufficient bargaining power to pursue their goals, and in which their *de facto* employer is obliged to engage and to do so in good faith. The under-inclusive nature of the existing LRA thus violates midwives' section 2(d) rights. This is particularly egregious since the sole reason why midwives were set up as independent contractors was support a model of care that assures clients' continuity of care by a midwife would be protected. That is, the independent contractor model is for the benefit of the recipient of midwifery care, and not the midwife. When midwives agreed to this employment model, they did not agree to give away their charter rights to bargain working conditions with the MOHLTC.

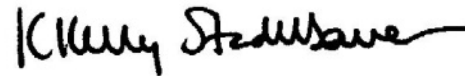
The AOM submits that the LRA should be amended to include midwives as a class of workers to whom the labour relations regime applies, notwithstanding their status as independent contractors. This could take the form of a provision in the LRA itself, or could be included in a regulation. In order to protect workers—including midwives—effectively, the LRA must reflect workplace realities. Formal distinctions among categories of workers, divorced from the actual context in which work is performed, must not be permitted to defeat Charter rights.

Conclusion

Midwives provide excellent, comprehensive care to childbearing families across Ontario, putting the needs of their clients above all else. The ESA strives to protect workers, but does not accurately reflect the context of midwifery as a regulated health profession. It would be most appropriate to provide an exemption for midwives from the components of the ESA that conflict with the midwifery model of care, as has been granted to other regulated professions, in order to support them to fulfill their professional obligations. The more appropriate forum for protection of the rights of the midwife is through collective bargaining; an amendment to the LRA to include midwives would ensure that the working conditions of midwives are fair and that their rights are protected.

Thank you very much for considering this submission to the Changing Workplaces Review. As the midwifery profession continues to grow in Ontario, the time has come for the institution of an ESA exemption and LRA amendment for midwives. We look forward to learning the outcomes of this important review.

Sincerely,



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