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Changing Workplaces Review
Employment Labour and Corporate Policy Branch,
Ministry of Labour
400 University Ave., 12th Floor
Toronto, ON M7A 1T7

Dear Mr. Michael Mitchell and the Honourable John Murray:

Re: Changing Workplaces Review

We congratulate the government on confronting the changes that are taking place in Ontario's workplaces, and particularly for demonstrating concern about the precarious circumstances of those whose positions in the workforce are the most desperate and perilous.

Work is the means through which their basic needs are necessarily to be addressed, although due attention must be paid to the relationship between work and social and health programs provided by the state to safeguard those who are outside the workforce and trying to find a way in.

Four Lawyers

We are four private bar lawyers who have chosen to represent individual workers. We do not speak for employers. You will hear from the Ontario Bar Association and employer organizations about their needs. We do not speak for unions, although we recognize the important role unions can and should play in addressing issues within your mandate.

We are writing to introduce you to the needs of those who are the most vulnerable in today's changing workplaces. We are writing to explain why and how we are unable to meet the needs of vulnerable workers and to offer suggestions about how those needs can best be addressed. Our vantage point comes from our failure to provide access to justice for vulnerable workers with whom we speak on a daily basis.

Your personal backgrounds are impressive and well known, but suggest to us that you may wish to seek additional guidance concerning issues not governed by collective bargaining agreements.

Mandate

We are familiar with the quote from the 2014 Throne Speech set out in your Terms of Reference. We note that there are other issues in the Throne Speech which also fall within your mandate, including "creat[ing] good jobs", "building a fair and inclusive society", "Breaking the Cycle" by establishing a "poverty reduction strategy", creating a "Fairer and Healthier Ontario" and "build[ing] a fully accessible Ontario by 2025".

We are also familiar with the two bullet points cited in your Terms of Reference from the Ministry of Labour's 2014 Mandate Letter, and are responding in particular to your mandate "to protect workers" and reverse the "reduction in the prevalence of employer benefits and training". The Mandate Letter also requires the Minister to address issues falling under your mandate, including the "changing workplace", "wage gap strategy", "vulnerable workers", "promoting occupational health and safety", "working with the WSIB", and "supporting mental health in the workplace".

You have been directed to 'consider the broader issues affecting the workplace and assess how the current labour and employment law framework addresses those trends…. And determine what changes, if any, should be made to the legislation…".

We hope that your assigned "focus on the LRA and the ESA" does not blind you to areas which can best be addressed through related legislation and enforcement mechanisms.

You have been directed not to consider the minimum wage. This is an unfortunate "carve out" of an issue that is inextricably linked to your mandate. Had this not have occurred we would have recommended that you advise the government to: **(1) Retain overtime protections and introduce $15 minimum wage.** People should not have to work 90 hours weeks and jobs should be distributed broadly. We are aware that employer representatives are proposing repeal of these safeguards because people feel compelled to work multiple jobs to make ends meet. Repeal of these protections will deepen the disadvantage of vulnerable workers and should only be considered in the context of addressing the minimum wage. Developments south of the border demonstrate that this is a live issue. Addressing overtime in isolation saves employers money, limits the distribution of job opportunities and accelerates movement towards sweat shop conditions you have been appointed to reverse.

Recommendations

2. Cover drug, basic dental and extended health: Every full or part-time employee [and former employees on EI or during their notice periods]and their families should be provided with the same basic level benefits coverage provided at public expense through OWA/ODSP to individuals and families. Avoidance of paying for benefits is a major reason why employers hire on temporary or part-time contracts and have third parties "employ" their workers. Many workers must work two or more jobs or take on additional employment for the sole purpose of gaining eligibility to such benefits. These benefits should be fully portable for all Ontario residents. They could be provided through public or mixed public-private mechanisms and could be administered through existing mechanisms such as MCSS or the WSIB. All or a portion of the cost should be based on a basic hourly assessment for every of employees [and many "independent contractors"]. This would ensure part-time employees receive full coverage but not provide employers to substitute part-time employment for full-time employment. Reference should be made to the proven savings to be realized by introducing a public pharmacare program based on bulk buying of drugs. This would reduce the drain of legal fees and other administration costs on good employers and smooth the transition [incentives] for persons leaving social assistance to enter the workforce.

3. Universal disability insurance: This has been studied repeatedly over the years and foundered on the inability to achieve federal-provincial agreement. The feds are involved

because of the disability provisions under EI [sickness] and CPP [CPP D]. The provincial government took unilateral action to address the inadequacies of the CPP. Many of the rehabilitation and return to work transition programs recognized as essential for WSIB and LTD recipients are just as essential for those who currently have neither. All the same arguments raised in support of providing other basic benefits have equal application here.

4. Job protection: In its wisdom, the SCC began in to address how the common law doctrine of frustration was altered by the paramount obligations to accommodate disabled employees under human rights legislation [see generally Wade Poziomka, "The Doctrine of Frustration and Human Rights: When Can an Employer Terminate and Employee Due to Absenteeism?" [LSUC May 2015]. The Court's preliminary effort needs to be supplemented to ensure employees engaged in rehabilitation, and under active treatment, including addiction treatment, are not terminated. If they lose their right to return to their jobs, their prospects of finding other employment range from scant to nil. The WSIB duty to accommodate is statutory recognition of the importance of retaining this connection. Unfortunately injured workers get second class protection of their human rights due to the lack of training and effective enforcement within the WSIB. These workers are faced with res judicata or s. 41.1 rulings when they seek to actively assert their rights before the HRTO or boards of arbitration. Treating injured workers as second class persons with disabilities is a cruel irony that requires redress. The SCC implied that unions and employers have an obligation to secure evidence from the employee that clearly demonstrates that the employee will not be able to return to work before terminating the employee. This obligation should be clearly set out in law.

5. Wrongful Dismissal: Wrongful dismissal law is not rocket science and does not require anything like the amount of legal and judicial resources currently dedicated to it. We estimate that in many cases the total cost to employers of terminating an employee is comprised 50% of damages for wrongful dismissal and 50% legal fees for the lawyers on either side of the case. Clear guidelines for wrongful damage awards [clearly distinct from ESA termination allowances] could easily be established. The class division between those who are stuck with ESA damages v. the elites receiving wrongful damages cannot be justified. We recommend that employers not be permitted to negotiate away an employees right to compensation for wrongful dismissal. We further recommend reviewing the 2008 *Report of the Newman Task Force on Wrongful Dismissal*, enhancing its recommendations to take wrongful cases out of courts and removing the need for lawyers in all but the most complex cases. Income interruption causes hardship for families and compels wrongfully terminated employees to accept unjust and inadequate severance packages. Wrongful damages should be payable from the time of termination unless cause is alleged. Groundless assertions of cause should be punished with double damages. Mitigation can easily be addressed by imposing obligations on former employee to report other income/mitigation efforts with stiff financial penalties for failure to do so. The ability to combine human rights and wrongful cases pursuant to s. 46.1 of the Human Rights Code was not thought through prior to enactment and needs review. If evidence is required just check out a June 23, 2013 decision of Justice Firestone in *Le Blanc v. TTC*, Court File No. CV-11-00440852.

6. Access to Justice: The SCC talks a good game about access to justice, but the *Mowat* decision is a clear example of where the Court could and should have done something and opted not to. One way costs continue in Canada Labour Board adjudications, where costs are awarded

against employees who litigate in bad faith or vexatious manner. One way cost awards are essential in HRTO, ESA and WSIB cases to address access to justice issues where lawyers are required by employees because of employer actions. Costs should only be payable where cases substantiated. As the *Report of the Human Rights Review 2012* [Pinto Report] noted, employers in HRTO proceedings are uniformly represented by lawyers and most applicants are not. This is true notwithstanding the existence of the HRLSC. Pinto recommended further study. No study has been done, nor is one required. Action is required. Workers are being deprived of their employment, workers comp, LTD and human rights for lack of counsel. As occurred in human rights cases prior to Mowat, costs need not be awarded in cases where a lawyer's involvement was not warranted.

7. Rights Without Effective Remedies: The Federal Court of Appeal in the *Johnstone* and *Seeley* decisions have confirmed that family status applications can oblige employers to provide meaningful accommodations to employees with unmanageable care obligations. The Occupational Health and Safety Act s. 37.0.1-7 fail to create obligations enforceable by employees with respect to workplace harassment. In *Ljuboja* 2013 Can LII 76529 (OLRB) the Board provided a minimal right against reprisal for attempting to enforce harassment rights while discussing the extent to which the law was all process and no substance: a virtual "hollow right to workers". There are no effective remedies for enforcing rights to a harassment free workplace and in particular there is no right to refuse work in a workplace where the danger is due to harassment. In most cases an obligation to obey and grieve or litigate later makes sense. In cases of serious harassment and urgent unmet care obligations, grieve later doesn't cut it. Vulnerable workers are particularly prone to sacrificing their employment in these situations. Effective interim remedies, including a right to "refuse first" in specified emergency circumstances would preserve the employment of many persons who are currently relinquishing their jobs through no fault of their own and for reasons that are to be encouraged not punished.

8. Barrier Free by 2025: The government will not meet its self-imposed 20 year deadline, reiterated in the 2014 Throne Speech, of creating a barrier free Ontario by 2025. This was confirmed once again in the *Second Legislative Review of the Accessibility for Ontarians with Disabilities Act, 2005* [Moran Report]. The government must accelerate the introduction and updating or regulations under the Act and create an effective enforcement mechanism if it is truly concerned about equitable employment for Ontario workers with disabilities. Mental health in the workplace requires particular attention through the AODA.

9. Employment Equity: A New Democratic government introduced an Employment Equity Act designed to systemically address barriers to employment for 4 target groups of vulnerable workers, including persons with disabilities. The first order of business for an incoming Progressive Conservative government was to repeal it. Justice Abella wrote the report upon which the Act was based, eloquently explaining people should not be obliged to bring individual human rights applications in order to remove these barriers. The federal Employment Equity Act is much weaker than the repealed Ontario legislation and lacks many attributes recommended by Justice Abella, but nevertheless has had a significant impact on the employment of members of the target groups. In Europe there are much stronger employment programs in place for workers with disabilities than would have been provided under the repealed legislation. Because of these programs the position of disabled workers, particularly those with more severe disabilities, in the employment market is much stronger than it is in North America. If Ontario were concerned

about building a "fair and inclusive society" and protecting "vulnerable workers", it would reintroduce employment equity legislation.

10. Severance Employers: In *Paquette v. Quadraspec Inc.,* 121 O.R. (3d) the Ontario Superior Court found that section 64 of the *Employment Standards Act, 2000* is not restricted to the employer's operations solely within the Province of Ontario. Specifically, in determining whether an employer was a severance employer, the Court took a holistic view of the company's operations, including those in other provinces, thus holding the employer to be a severance employer. The Court stated at paragraph 67:

The Ontario legislature holds the legislative authority to adopt the measure which will be used in applying the law in Ontario, specifically, which employers operating in Ontario have the obligation to provide severance pay. The application is provided in s. 64 according to employer size, number of employees or payroll. The measure and applicability of the obligation are established by "total wages earned by all of the employer's employees". The Act is worded clearly. The measure relates to wages paid by the employer in and outside of Ontario. There is no legal justification or authority to interpret these sections so as to insert restrictions that are not to be found in the Act.

Given the changing, and global/international nature of employers operating within Ontario, we would propose that section 64 of the ESA be amended to clearly state that the severance provisions are to be applied by looking at the company's operations as a whole, both inter-provincially and internationally. The purpose of the severance provision, at least in part, are to provide additional security to an employee where the employer is large enough to sustain severance payments. Whether the operations are solely in Ontario or elsewhere does not impact the employer's ability to sustain these payments and thus it should clearly state that the assessment involves the employer's (and related companies – i.e. subsidiary companies) operations as a whole.

11. Temporary Foreign Workers: Ontario is also lacking in protections for temporary foreign workers (TFWs). Ontario takes in over one third of the total TFWs in Canada, however, it does not have a system in place to protect these workers. Despite the fact that the TFW program is federally operated, the province is not powerless in improving the wellbeing of these workers. Ontario should take a number of steps to ensure greater protection of migrant workers in the province, including registering TFW employers and recruiters and taking steps to ensure that employers and recruiters comply with workplace legislation, including the Employment Standards Act and the Employment Protection for Foreign Nationals Act.

In Manitoba, the provincial government has implemented legislation to regulate recruitment practices and protect workers against abusive recruiters and employers. For example, Manitoba has implemented the Special Investigation Unit of Employment Standards, which investigates possible violations of employment laws including the Employment Standards Code and The Worker Recruitment and Protection Act. The Unit's goal is to improve compliance with these laws, and has the authority to issue warning letters, fines, or prosecute non-complaint employers. Further, businesses in Manitoba must register with the province when they employ any TFWs, allowing the province to keep track of the working conditions of TFWs specifically.

In Ontario, the majority of workplace law is complaint driven. It is widely known that TFWs, whose status in Canada is dependent on their employer, are often unwilling to risk their immigration status by bringing complaints against their employers. A front-end, investigative body could ensure employers of TFWs are held accountable for workplace abuses, where the TFW system itself interferes with workers' ability to access complaint-driven rights protections. The Worker's Action Centre has also pointed out that, with the delay in hearings at the ESA and the HRTO, often temporary workers are never able to have their "day in court" (tribunal). They have recommended an expedited hearing process for TFWs. We recommend that the province develop a strategy to ensure that employers of TFWs comply with workplace legislation, and to ensure that the specific barriers facing TFWs in the course of protecting their workplace rights are reduced.

TFWs, many of whom engage in strenuous physical labour, are also vulnerable to injury at work. However, these employees are only entitled to OHIP coverage for the duration of their work permit, even where their injuries require longer treatment. In the recent case of *Ontario (General Manager, Ontario Health Insurance Plan) v. Clarke*, 2014 ONSC 2009, the Ontario Superior Court overturned the decision of the Health Services Appeal and Review Board, which required the government to provide health insurance to two injured employees, who had been in a serious car accident at work, after their work permits expired. The Court held that the plain wording of s. 1.3(2) of Regulation 552 under the Health Insurance Act provided that, once an employee's work permit expired, they were no longer entitled to coverage, despite being injured in the course of their employment in Canada. However, the Court emphasized that this gap in health care should be filled:

Before leaving this issue, I will say that, if there is a gap in the parameters of the SAWP that do not ensure health care coverage for seasonal workers who are required to remain in Ontario for legitimate medical reasons after the expiration of their work permit, then that gap should be filled, either by requiring the employers to obtain supplemental health insurance or through an agreement negotiated between the Federal and Provincial governments. It cannot be filled by a contrived interpretation of an existing regulation. (para 27).

We recommend that the province take steps to fill this gap and ensure that migrant workers living in Canada are not left without the medical care they need.

Finally, we recommend that the Ontario *Labour Relations Act* remove its prohibition on collective bargaining of agricultural workers, as this is a large barrier facing TFWs in Ontario who seek to access union representation and lobby collectively for improved workplace standards.

12. Employment: "Employment" is not an obsolete concept. The effectiveness and value of the "gig economy" would not be curtailed by extending the protections of employment and the right to collectively bargain to Uber drivers. Trends in the US recognizing the joint and several responsibilities of related/common employers engaged in "conversions" of employees into independent contractors or employees of ephemeral third-party agency employers should

immediately be adopted in Ontario through legislative action. As suggested by Professor Harry Arthurs, the test for the employee-employer relationship should be the existence of "economic subordination and resistance". A series of administrative and judicial decisions generally point in this direction, but achieving the right outcome should not depend on incremental and prohibitively expensive litigation. There is no serious danger that such a move would push affected jobs with Uber, McDonald's franchises and in the financial sector offshore. Any negative consequences for such employers would be more than offset by the benefits to Ontario workers and the leveling of the playing field for "good employers" who create "good jobs".

All of which is respectfully submitted this 20th day of October, 2015

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