CLAC
better together

CLAC SUBMISSION FOR ONTARIO CHANGING WORKPLACES REVIEW

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EXECUTIVE SUMMARY

Formed in 1952, CLAC is one of Canada's fastest-growing unions. Operating through 15 member centres, it is the country's largest national, independent, multi-sector union representing over 60,000 workers in almost every sector.

A review of Ontario's labour legislation is both welcome and needed. Twenty years have passed since the province last overhauled the *Labour Relations Act*, and it was fifteen years ago that the Ontario government made substantive changes to the *Employment Standards Act*. CLAC is pleased that the government is conducting a review of this legislation.

This submission applies CLAC's cooperative model of labour relations to the Ontario government's Changing Workplaces review. Based on CLAC's 63 years of experience and specific evidence, CLAC offers 11 recommendations for changes to Ontario's *Employment Standards Act* and *Labour Relations Act*. These recommendations include

1. increased protection for workers in transition,
2. greater influence for workers in workplace restructuring, and
3. better enforcement of minimum employment standards.

The character of CLAC's recommended changes reflects our longstanding commitment to legislative frameworks that foster meaningful working partnerships between labour, business, and government; healthy competition between unions; and labour relations innovation. Above all, based on values of respect, dignity, and fairness, CLAC is committed to building better workplaces, better communities, and better lives for its members and the common good.

CLAC'S RECOMMENDATIONS

EMPLOYMENT STANDARDS

Recommendation 1: CLAC recommends that out-dated exemptions be removed from the *Employment Standards Act* (ESA). Furthermore, regarding special rules for certain work sectors or types of work, particularly in respect to overtime, we recommend that the government conduct a thorough review to ensure that such special rules exemptions are current and relevant. (Page 9)

Recommendation 2: CLAC recommends that the enforcement mechanisms in the ESA be improved by allowing a worker or a third party to submit an anonymous claim against an employer. These complaints would be investigated by the Ministry of Labour. (Page 10)

Recommendation 3: CLAC recommends that steps be taken to enable more flexibility with caregiver leave. This could be done by incenting employers (e.g., tax credit) to create compassionate policies for caregiver leave and by following the Canadian Human Rights Commission suggestion to permit flexible leave solutions that are not confined to the blocks of time specified in the ESA. Moving forward with both of these recommendations would enable employer flexibility in continuity of staffing while allowing caregivers to fulfill both work and family responsibilities. (Page 12)

LABOUR RELATIONS

Recommendation 4: CLAC recommends that "just cause" be made the standard for termination of employment during a workplace transition. This standard is already in the *Canada Labour Code*, Section 36.1, and it should also be in the *Ontario Labour Relations Act* (OLRA). (Page 13)

Recommendation 5: CLAC recommends that the lack of worker protection in a transition period be remedied by allowing the successor union to inherit all of the rights, duties, and privileges of the previous union. Also, the provisions of the most recent collective agreement should remain in force until the provisions of the new collective agreement commence. (Page 14)

Recommendation 6: CLAC recommends a three-part test to determine whether existing bargaining units should be amalgamated or accreted. First, there must be no risk of intermingling of work in the locations under consideration. Second, there must be a geographical separation that includes the crossing of a municipal or regional boundary. Finally, the work in question must not be transferable from one site to another. In cases where these three criteria are met, the existing bargaining unit and bargaining rights remain intact and will not be amalgamated or accreted. (Page 15)

Recommendation 7: CLAC recommends that a definition of "community of interest" be added to the OLRA. The definition should consider factors including the composition and history of the bargaining unit; the geographical proximity or isolation of the employees; the functions, duties, and skills of the entire workforce; and the administrative territories for subdivisions of the employer. (Page 15)

Recommendation 8: CLAC recommends that the list of exemptions related to collective bargaining in the OLRA be updated and revised. The recent Supreme Court decision granting the RCMP the right to collective bargaining means that groups previously excluded from this right, such as agricultural workers, should be granted that right. (Page 16)

Recommendation 9: CLAC recommends that the OLRA require membership evidence to identify the employer that is the subject of a certification application. (Page 17)

Recommendation 10: CLAC recommends that the OLRA be modernized to allow for the use of electronic signatures and electronic filing of labour relations documents. (Page 17)

Recommendation 11: CLAC recommends that in the area of successor rights, the legislative framework should bring back the "vested rights" contained in earlier versions of the OLRA for employees of building service providers. Specifically, CLAC recommends that when one employer replaces another employer, the collective agreement carries forward to the new employer, and the existing union retains its certification and bargaining rights. In the alternate, we recommend that the bargaining agent's bargaining rights be retained. (Page 18)

THE CONTEXT: ONTARIO'S LABOUR MARKET AND LABOUR RELATIONS ENVIRONMENT

CHANGES IN ONTARIO'S LABOUR MARKET

Since the 1980s, Ontario's labour market has experienced profound changes. The globalization of competition, technological advances, and changing workforce demographics have contributed to a redefinition of work and the workplace and the reshaping of Ontario's labour landscape. The list of labour market challenges experienced in Ontario is long. The loss of manufacturing jobs, skills mismatches, youth unemployment that is higher than the national average, an increase in the amount of precarious forms of work, a trend toward longer hours of work, and restructuring and downsizing have become long-standing characteristics of Ontario's labour market.[1]

CHANGES IN ONTARIO'S LABOUR RELATIONS ENVIRONMENT

Ontario's labour relations environment has also experienced its share of changes. While the level of union density in Ontario has remained relatively flat in recent years, in 2012, Ontario had the second lowest provincial level of union density at 28.2 percent.[2] A number of studies have shown that declining union density has a negative effect on wages. In a recent Canadian study, Hugh Mackenzie and Richard Shillington argue that past studies have shown convincingly that "workers in a position to bargain collectively for their wages and working conditions are able to negotiate earnings 5–10% higher than those of other workers."[3] Mackenzie and Shillington's core contention is that the rapid drop in private sector union density from 21 percent to 14 percent between 1997 and 2011 "had a big impact on workers' ability to stay in the upper income deciles."[4] To prove this assertion, Mackenzie and Shillington present the following evidence.

> Overall, private sector union density in Canada dropped from 21% to 14% between 1997 and 2011. The average, however, masks a dramatic change within the distribution. Figure 6 shows union density among private sector workers in the middle to the upper-middle income ranges (deciles 5 through 8) shrunk from 23%, 28%, 31%, and 41% to 14%, 22%, 19%, and 21%, respectively. During a 14-year time frame, union-represented employment in those income ranges was virtually cut in half.

Essentially, what this means is that the decline in the weight of full-time unionized private sector workers in

[1] These labour market characteristics are well-documented in studies by Mattias Oschinski and Katherine Chan, "Ontario Made: Rethinking Manufacturing in the 21st Century"; Rick Miner, "People Without Jobs, Jobs Without People"; Government of Canada, Labour Market and Socio-economic Information Directorate, "Client Segment Profile, Youth Aged 15–29, Ontario"; Andrea M. Noack and Leah F. Vosko, "Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context"; and Tom Zizys, "Working Better: Creating a High-Performing Labour Market in Ontario."
[2] Government of Canada, Employment and Social Development Canada, "Unionization Rates (percent of employees), 2012."
[3] Hugh Mackenzie and Richard Shillington, "The Union Card: A Ticket Into Middle Class Stability," 8.
[4] Mackenzie and Shillington, "The Union Card," 2.

> the middle to upper-middle income range is associated with a dramatic reduction in well-paid, private sector, unionized jobs, and that reduction took place over a very short span of time.[5]

In sum, Mackenzie and Shillington find that the sharp decline of union density in the private sector did significant damage to the incomes of middle class Canadian workers.

Another important labour relations reality is the trend toward union consolidation. Canada's labour program has noted that "46.2% of all unionized workers belonged to only eight major unions, all of which are national or international unions. Each of these unions covers over 100,000 workers with an average size of 273,710 workers."[6] The merger of CEP and CAW into Unifor is the most recent example of this trend. A recent Cardus study noted that "typically, the rationale for this trend has focused on the need for increased power in a global marketplace. The argument for union consolidation can be reduced to the mantra: 'more people, more power.' Usually this has meant using the union's power to influence politics."[7] The obsession with power that often characterizes those who favour consolidation ignores the downside of this trend. Consolidation means less diversity, choice, and competition in the labour relations marketplace. CLAC believes that a vibrant and healthy labour relations environment supports such characteristics instead of diminishing them through consolidation.

Finally, there are two predominant views of labour reform in Canada today. On the one hand, there are those who argue that increased power will save unions. Proponents of this view argue that bigger is better, consolidation is the way forward, and more political power will cause workers to join unions. On the other hand, there are those who advocate for right-to-work policies that make individual worker protection and choice paramount in the workplace. Proponents of this perspective support far-reaching financial disclosure by unions and the ability of the individual worker to opt out of paying union dues.

CLAC brings an alternative view of labour relations to the discussion. In our view, unions have a vital role to play in representing and protecting workers' interests by creating workplaces that are based on the principles of fairness, partnership, and cooperation. We are also convinced that a significant number of Canadians still value the role of unions. A 2013 Harris-Decima survey commissioned by the Canadian Association of University Teachers, for example, found that 56 percent of Canadians had favourable views of unions, and 70 percent said that unions are still needed today. By contrast, just 28 percent of Canadians held negative views of unions, and a similar number said they are no longer needed.[8] For CLAC, a new cooperative model of labour relations that values work, dignifies the worker, and uses partnership to improve the workplace is the path to a revitalization of the union movement. This view is more fully articulated in CLAC's labour policy and goals.

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[5] Mackenzie and Shillington, "The Union Card," 15.
[6] Government of Canada, Labour Program, "Union Coverage, 2013."
[7] Brian Dijkema, "Competition and Cooperation: Small Steps Towards Reforming Canadian Labour Relations," 6.
[8] This information is taken from a summary report of the Harris-Decima survey by *CAUT Bulletin*, "Poll Results Show that a majority of Canadians Hold Favourable View of Unions."

CLAC'S LABOUR POLICY AND GOALS

Based on values of respect, dignity, and fairness, CLAC is committed to building better workplaces, better communities, and better lives. We believe that work is not only a means to make a living, but, more importantly, it is a social activity, an avenue of service and social interaction that leads to a real sense of achievement and fulfillment.

CLAC organizes workers to promote their interests and to establish justice in the workplace, primarily through collective bargaining. We are concerned about not only what workers want but also what they need and deserve: to be recognized and fairly compensated for the hard work they do, to be treated fairly and with dignity and respect, and to feel like a whole person. We focus primarily on the most pressing workplace issues: fair wages, reasonable work hours, good benefits for workers and their families, dependable retirement savings plans, job security, career services, health and safety, and training.

Our approach to labour relations stresses membership advocacy, cooperation, and the interests of the workplace community while striving to balance individual and collective rights. We reject the idea that the purpose of economic activity is to maximize profits and wages, which devalues the importance of work and the worth of workers. We believe that workers must be recognized as partners in the enterprise who have an important say in how it should be run. Workers are part of work communities, but they are also individuals who bear responsibility for each other, their employer, and their work.

CLAC's modern, cooperative model of labour relations stands in sharp contrast to the historic, adversarial model. In the adversarial model, labour and management are considered to have irreconcilable differences, and the workplace is viewed as a battleground for power and control—with workers often getting caught in between.

CLAC was founded on the belief that all workers should be free to join the union of their choice—without fear of harassment, intimidation, or job loss. Our cooperative model offers workers all the benefits of belonging to a union without the negative aspects of forced union membership, restrictive hiring practices, or workplace hostility.

Based on values of respect, dignity, and fairness, CLAC is committed to building better workplaces, better communities, and better lives.

We reject the idea that a labour monopoly is good for workers. We believe that healthy competition among unions makes them more accountable to their members, because it offers workers meaningful choices. Competition enables workers to demand better service, better representation, and the style and form of advocacy that best suits their culture, values, and needs.

CLAC'S RECOMMENDED CHANGES TO THE EMPLOYMENT STANDARDS ACT

Amendments to the *Employment Standards Act* (ESA) are needed to provide appropriate and modernized minimum employment standards. CLAC recommends that improvements be made in two general areas: clarity, rationalization, and modernization and leave provisions.

CLARITY, RATIONALIZATION, AND MODERNIZATION

In this section, CLAC suggests improvements based on research and the observations and experiences of CLAC members and staff. Our recommendations are intended to make the ESA more accessible and understandable, more inclusive, and more relevant to today's working conditions.

THE NEED FOR MODERNIZATION

One area of concern is the myriad of exemptions in the ESA and the resulting inconsistencies that violate the ESA's original spirit and intent. As Mark Thomas et al. have noted,

> Ontario's ESA was designed to provide minimum employment standards for the majority of workers in the province, in particular for those with limited bargaining power. In addition, the ESA was initially characterized by the Ontario Ministry of Labour as an attempt to promote the adoption of "socially desirable" conditions of employment (Thomas 2009). Thus, minimum employment standards legislation was conceived as a form of workplace protection for those most vulnerable to the exploitation of the unregulated market and by so doing to raise standards in the labour market more generally.[9]

Unfortunately, as it stands today, the ESA falls short of achieving the desired universal employment standard outcomes, because it contains too many exemptions and special rules. Thomas et al. stress this point.

> In practice, however, built into the ESA are ways in which the legislated standards may be avoided, including through a system of exemptions that excludes specified employee groups from some or many of the ESA's standards. At the time of the enactment of the ESA, while the government claimed that the legislation was intended to provide protection against exploitation, it simultaneously constructed the Act to account for variations in types of work, by industry and by sector through exemptions and special rules. This intervention responded, in part, to employer resistance to a universal approach to the regulation of minimum employment standards.[10]

[9] Mark Thomas et al., "The Employment Standards Enforcement Gap and the Overtime Pay Exemption in Ontario," 2.
[10] Thomas et al., "The Employment Standards Enforcement Gap," 2.

"Approximately one out of every 33 non-unionized, Ontario employees report working overtime that is not fully remunerated because of the ESA's overtime pay exemptions."

The current legislative review presents the government with an opportunity to address these long-standing flaws by eliminating arcane exceptions and rules and modernizing the ESA to reflect current minimum employment standards and better protect vulnerable workers.

THE EXAMPLE OF OVERTIME PROVISIONS

A prime example of an area in the act that requires modernization is found in Part VIII – Exemptions Re Overtime Pay section of the ESA. For example, no rationale is provided for why workers employed "as a landscape gardener" or in "the growing of mushrooms" are exempt from the overtime provisions given in Part VIII of the ESA.[11] Furthermore, the overtime provisions in the ESA amount to a patchwork of regulations. Thomas et al. conclude that the costs to workers are extensive.

> Overall, it is clear that these unprincipled overtime pay exemptions have a substantial effect on workers in Ontario. Approximately one out of every 33 non-unionized, Ontario employees report working overtime that is not fully remunerated because of the ESA's overtime pay exemptions. When the total loss to Ontario workers is summed, this source of exemption translates into more than 690,000 hours a week and more than 32 million hours each year that workers are not being fully remunerated for, representing a net gain for businesses and a clear loss to workers. Workers are collectively shorted more than $366 million annually in lost wages in their main jobs because of ESA exemptions for overtime pay. What this demonstrates is that, as stated, rather than a universal minimum protection, the ESA overtime pay rules are an unevenly distributed patchwork that contributes to both a significant loss of income for affected workers and a more general erosion of the overtime pay provision of the ESA.[12]

This quotation highlights the need for a minimum overtime standard that applies to all workers and other changes that make the legislation more coherent and relevant. CLAC understands that the functional realities of a particular sector may require special rules or an exemption, but there must be a reasonable justification for such rules and exemptions.

Recommendation 1: CLAC recommends that out-dated exemptions be removed from the ESA. Furthermore, regarding special rules for certain work sectors or types of work, particularly in respect to overtime, we recommend that the government conduct a thorough review to ensure that such special rules exemptions are current and relevant.

[11] Robert S. Greenfield ed., *Consolidated Ontario Employment Statutes and Regulations 2015*, 274.
[12] Thomas et al., "The Employment Standards Enforcement Gap," 13.

BETTER ENFORCEMENT MECHANISMS

Another issue is the adversarial nature and inadequacy of the enforcement mechanisms in the ESA. The current system pits the individual worker against the employer, invites employer retaliation, lacks criteria for the application of sanctions and penalties, applies only to those workers who qualify, and places obstacles in the way of the individual worker who wishes to file a complaint with the Ministry of Labour. In her 2013 study " 'Rights without Remedies,' " Leah Vosko underscored the present deficiencies and gaps in the enforcement mechanisms in the ESA and offered a number of useful suggestions for reform. Vosko argues that the present claims-making process discourages workers from filing complaints.

> The individual claims-making process inhibits workers who remain on the job (and aim to maintain their present job) from making claims because there is no provision for anonymous or confidential complaints, or for complaints filed by third parties. Nor is interim reinstatement pending investigation available to fired workers, even though it is available to unionized workers under the Ontario *Labour Relations Act* in certain circumstances. For workers who opt to complain while they are still on the job, anti-reprisal provisions apply. Yet even though such provisions place the burden of proof on the employer, this burden only applies to a finite set of circumstances despite the wide-ranging forms retaliation may take. Given such barriers, nine out of ten workers file ES claims after they have left the job.[13]

To move Ontario to better, more effective enforcement mechanisms, Vosko looks at the enforcement processes and policies that have worked well in other jurisdictions. She favours the anonymous complaints approach adopted by Saskatchewan.

> Anonymous complaints are desirable since they provide the most protection for workers still on the job. Through administrative means, the province of Saskatchewan allows "the employee or a third party such as a parent, friend or a member of the community" to submit a written claim against an employer, which the Compliance and Review Unit then investigates.[14]

This information points to the need for better enforcement mechanisms within Ontario's ESA.

Recommendation 2: CLAC recommends that the enforcement mechanisms in the ESA be improved by allowing a worker or a third party to submit an anonymous claim against an employer. These complaints would be investigated by the Ministry of Labour.

LEAVE PROVISIONS

Ontario is a leader in the area of family leave. The three family leaves that came into effect within the ESA on October 29, 2014, have provided Ontario's caregivers

[13] Leah Vosko, " 'Rights without Remedies': Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs," 856–858.
[14] Vosko, " 'Rights without Remedies,' " 860.

with leave provisions that enable them to take blocks of time off work to address a family crisis. CLAC commends the government for creating these provisions.

However, the recent national discussion about end-of-life care and the role of family caregivers in the delivery of informal care to a dying family member points to the need for governments to create more flexible provisions for family caregivers who are involved in providing and managing the end-of-life care for a family member.

The need for such an approach is driven by a couple of factors. First, the current level of caregiver strain is a major factor. Boomers who are part of the sandwich generation are faced with the challenge of juggling the competing demands of providing care for a dying relative, caring for children, and performing well on the job. Many are suffering from the strain of these demands.[15] In particular, the caregiving demands related to aging parents alone are already at a high level. In a study entitled "Portrait of Caregivers, 2012," Maire Sinha underscored the size and scope of caregiving provided to older Canadians. In particular, Sinha noted that "age-related needs were identified as the single most common problem requiring help from caregivers (28%)."[16] Furthermore, "most often, parents were the recipients of caregiving activities. About half (48%) of caregivers reported caring for their own parents or parents in-law over the past year."[17]

Another factor is the result of Canada's demographics. According to estimates from Employment and Social Development Canada, "in 2011, an estimated 5.0 million Canadians were 65 years of age or older, a number that is expected to double in the next 25 years to reach 10.4 million seniors by 2036. By 2051, about one in four Canadians is expected to be 65 or over."[18] While the number of those who need care is large today, the need for care will grow as baby boomers age. The children of boomers, the far smaller generation X, will be expected to care for their aging and dying parents. The growing need to care for sick and dying family members combined with the prospect of a shrinking supply of available family caregivers will require creative, flexible, and practical solutions that make it possible for family caregivers to respond.

Research has surfaced the desire of many Canadians to have end-of-life care and to experience death at home. But the existing evidence shows that the distance between desire and reality is great. A 2013 Harris-Decima survey found that while 75 percent of Canadians would prefer to die at home, only 52 percent expected this to happen. A recent Cardus study by Ray Pennings noted that a Canadian Institute for Health Information study found in 2011 that almost 70 percent of Canadians actually die in hospital.[19] Pennings argues persuasively that "we need to build a social system that supports the desire of Canadians for a natural death, which we understand to mean dying of natural causes in

[15] For a thorough analysis of the sandwich generation and caregiver strain, see Linda Duxbury, Christopher Higgins, and Bonnie Schroeder, "Balancing Paid Work and Caregiving Responsibilities: A Closer Look at Family Caregivers in Canada," 31–45, 59–82.
[16] Government of Canada, Statistics Canada, Social and Aboriginal Statistics Division, Maire Sinha, "Portrait of Caregivers, 2012," 3.
[17] Sinha, "Portrait of Caregivers, 2012," 3.
[18] Government of Canada, Employment and Social Development Canada, "Canadians in Context—Aging Population."
[19] The facts in the previous two sentences are taken from Ray Pennings, "Death is Natural: Reframing the End-Of-Life Conversation in Canada," 6.

our natural environment surrounded by our natural caregivers."[20] But by and large, the existing social system does not align with Canadian desires.

> "We need to build a social system that supports the desire of Canadians for a natural death, which we understand to mean dying of natural causes in our natural environment surrounded by our natural caregivers."

Some Canadian examples of leave suggestions and programs have sought to address the specific needs of informal caregivers involved in end-of-life care. For example, in its 2011 report, the Canadian Institute for Health Information noted that "the Caregiver Benefit Program in Nova Scotia uses the resident assessment instrument (MDS-HC) as part of its assessment process to inform allocation of $400 monthly to informal caregivers of qualified recipients."[21]

The Canadian Human Rights Commission has suggested a three-step process for accommodating caregiver leaves. First, there must be open communication and information sharing. Second, solutions should be flexible and creative. Finally, follow up and adjustments should happen as required.[22] This process addresses the practical realities associated with end-of-life care, and it makes sense for both employers and workers.

Recommendation 3: CLAC recommends that steps be taken to enable more flexibility with caregiver leave. This could be done by incenting employers (e.g., tax credit) to create compassionate policies for caregiver leave and by following the Canadian Human Rights Commission suggestion to permit flexible leave solutions that are not confined to the blocks of time specified in the ESA. Moving forward with both of these recommendations would enable employer flexibility in continuity of staffing while allowing caregivers to fulfill both work and family responsibilities.

CLAC is convinced that, if adopted, the recommendations offered here would modernize and improve employment standards for Ontario's workforce. CLAC calls on the government to accept and adopt these recommendations.

THE CANADIAN HUMAN RIGHTS COMMISSION SUGGESTED THREE-STEP PROCESS FOR ACCOMMODATING CAREGIVER LEAVES

1. There must be open communication and information sharing.
2. Solutions should be flexible and creative.
3. Follow up and adjustments should happen as required.

[20] Pennings, "Death is Natural," 31.
[21] Canadian Institute for Health Information, "Health Care in Canada, 2011: A Focus on Seniors and Aging," 78.
[22] Government of Canada, Canadian Human Rights Commission, "A Guide to Balancing Work and Caregiving Obligations: Collaborative approaches for a supportive and well-performing workplace," 6–9.

CLAC'S RECOMMENDED CHANGES TO THE ONTARIO LABOUR RELATIONS ACT

Like the ESA, the *Ontario Labour Relations Act* (OLRA) currently has gaps that need to be addressed. In keeping with CLAC's goal to have a labour relations environment that is fair, open, and competitive, the following section proposes a number of changes in three key areas: accountability and choice, democracy and modernization, and clarity.

ACCOUNTABILITY AND CHOICE

CLAC maintains that the right of workers to choose their form of workplace organization and to have protection in times of workplace transition are essential elements of a healthy labour relations environment. There is a need to clarify and enhance the OLRA freeze of terms and conditions related to transition in workplace organization (non-union to union, union to union). Currently, workers have little protection during a transition. This reality makes workers vulnerable, and sometimes this reality deters workers from exercising their right to choose the form of workplace organization they prefer. This situation must be remedied.

Recommendation 4: CLAC recommends that "just cause" be made the standard for termination of employment during a workplace transition. This standard is already in the *Canada Labour Code*, Section 36.1, and it should also be in the OLRA.

In cases where workers are transitioning from one union to another, workers should retain their hard won union rights, such as access to collective agreement grievance and arbitration. Currently, workers are left unprotected in such a transition period. As Cardus has noted, "Workers in a union displacement situation receive only a freeze of 'terms and conditions' rather than a freeze of all provisions of current contracts. The lack of this clause opens the door to the potential dropping of existing grievances by the employer without recourse by the employee or the union."[23] Es-

CLAC has experienced situations where the choice of its members was ignored by a legislative bigger-is-better philosophy of labour relations. One example was when Hamilton Health Sciences Corporation (represented by CUPE and other unions) and West Lincoln Memorial Hospital in Niagara (represented by CLAC and other unions) were amalgamated into a single hospital network. As a result, a single union became responsible for all of the employees at the two separate institutions, regardless of the pre-existing choice of workers. Other than a change in the agency with administrative control, there was no change to the way work was performed or the geographic location of the work or the workers. In our view, the community of interest was not altered.

[23] Dijkema, "Competition and Cooperation," 17.

sentially, this means that workers have limited access to due process during a transition.

Recommendation 5: CLAC recommends that the lack of worker protection in a transition period be remedied by allowing the successor union to inherit all of the rights, duties, and privileges of the previous union. Also, the provisions of the most recent collective agreement should remain in force until the provisions of the new collective agreement commence.

The choice of unionized workers should be paramount in any decision to alter an existing community of interest. Government decisions to amalgamate bargaining units, overriding the employee's own choice of union, should not be permitted. Such decisions override and undermine freedom of association and employees' choices regarding their bargaining agent.

CLAC has experienced situations where the choice of its members was ignored by a legislative bigger-is-better philosophy of labour relations. One example was when Hamilton Health Sciences Corporation (represented by CUPE and other unions) and West Lincoln Memorial Hospital in Niagara (represented by CLAC and other unions) were amalgamated into a single hospital network. As a result, a single union became responsible for all of the employees at the two separate institutions, regardless of the pre-existing choice of workers. Other than a change in the agency with administrative control, there was no change to the way work was performed or the geographic location of the work or the workers. In our view, the community of interest was not altered.

In this circumstance, restructuring of the bargaining units was guided by the *Public Sector Labour Relations Transition Act* (PSLRTA). This legislation allows only one bargaining agent to represent each bargaining unit as determined by the OLRB. Since the labour board determined that all service staff across all sites were a single bargaining unit, the PSLRTA required a vote because two bargaining agents held overlapping bargaining rights for the amalgamated employer.

For the 391 staff at West Lincoln Memorial Hospital, a vote of the approximately 11,000 members of the newly formed bargaining unit effectively drowned out their voice.[24] In our view, West Lincoln staff (including CLAC members) should have been permitted to maintain their bargaining agent, as workers should have the right to decide who represents them, not employers or government.

Some Canadian precedent applies the principles of fairness, respect, and democracy to situations of accretion and/or amalgamation. Section 18.1 of the *Canada Labour Code* permits an application to be brought before the Canada Labour Relations Board that allows the board to review, amend, or determine the appropriate bargaining unit(s). In *Canadian Overseas Telecommunications Union v. Teleglobe Canada*, the principles of section 18.1 were used as the procedural vehicle to review and amend a bargaining unit description in an accretion situation.[25] In doing so, the board applied its discretion and set out a two-tiered test that examined both the overall unit comprised of all employees, as well

[24] For information about the amalgamation, see Marlene Bergsma, "Grimsby Hospital Joins Hamilton Health Sciences," *St. Catharines Standard*. The figure cited is from the HHS website (http://www.hamiltonhealthsciences.ca/, 1).
[25] Canada L.R.B.R. 86 (Can.), *Canadian Overseas Telecommunications Union v. Teleglobe Canada*, [1979]3.

In *Canadian Overseas Telecommunications Union v. Teleglobe Canada*, the principles of section 18.1 were used as the procedural vehicle to review and amend a bargaining unit description in an accretion situation. In doing so, the board applied its discretion and set out a two-tiered test that examined both the overall unit comprised of all employees, as well as any new units created by the accretion. In doing so, the board found that any new units where the addition of employees represented a change in the essential or fundamental nature of the original unit would maintain their own bargaining rights and would not be added into the overall unit. In this way, the existing rights of employees accreted into a larger bargaining unit were protected if those rights were essentially or fundamentally distinct from the larger unit.

as any new units created by the accretion. The board found that any new units where the addition of employees represented a change in the essential or fundamental nature of the original unit would maintain their own bargaining rights and would not be added into the overall unit. In this way, the existing rights of employees accreted into a larger bargaining unit were protected if those rights were essentially or fundamentally distinct from the larger unit.[26]

In our view, the employees of West Lincoln Memorial Hospital constituted a community of interest in which the essential or fundamental nature of its existing bargaining units were distinct from the larger amalgamated bargaining unit. However, these rights (including the employee's choice of bargaining agent) were not respected or protected. To remedy this situation, CLAC offers a two-part solution.

Recommendation 6: CLAC recommends a three-part test to determine whether existing bargaining units should be amalgamated or accreted. First, there must be no risk of intermingling of work in the locations under consideration. Second, there must be a geographical separation that includes the crossing of a municipal or regional boundary. Finally, the work in question must not be transferable from one site to another. In cases where these three criteria are met, the existing bargaining unit and bargaining rights remain intact and will not be amalgamated or accreted.

Recommendation 7: CLAC recommends that a definition of "community of interest" be added to the OLRA. The definition should consider factors including the composition and history of the bargaining unit; the geographical proximity or isolation of the employees; the functions, duties, and skills of the entire workforce; and the administrative territories for subdivisions of the employer.

CLAC also has one other recommendation related to Section 1 of the OLRA.

[26] The summary given in this paragraph is based on George W. Adams, Canadian Labour Law, Second Edition, vol. 1, chapter 7, "Acquisition of Bargaining Rights," section 6, "Bargaining Unit Accretion, Consolidation and Fragmentation," (i) "Accretion," 7.780, 7.790.

Recommendation 8: CLAC recommends that the list of exemptions related to collective bargaining in the OLRA be updated and revised. The recent Supreme Court decision granting the RCMP the right to collective bargaining should mean that groups previously excluded from this right, such as agricultural workers, should be granted that right.[27]

DEMOCRACY

CLAC believes that lawful decisions of workers must be protected. The OLRA must ensure that a decision to join a union is truly representative of the collective wishes of the workforce and then protect that decision.

Currently, some specific and testable membership evidence is provided in support of certification applications. However, some key information is missing, such as the name of the employer. This information gap should be addressed. CLAC is not alone in its concern about the consequences of this gap. In the 2012 case of the *Labourers' International Union of North America, Ontario Provincial District Council v. L & M Haulage Inc.*, the employer directly challenged a certification application on the following basis.

> The responding party submits that the Board ought to dismiss the application because the membership evidence relied upon by the applicant herein was relied upon by the applicant in support of the certification of a third party employer. . . . Nowhere on the card does the name of an employer appear. A union is entitled to rely on membership evidence acquired at a time when the individual was employed by a different employer and previously relied upon by the union in order to certify another employer. Accordingly, assuming the responding party's assertions to be true, they are not a basis upon which the Board would disregard the membership evidence.[28]

CLAC is convinced that the present system is flawed, because it fails to require enough current, specific, and testable membership evidence, and it allows third-party employer information to be submitted in support of a certification application.

CLAC believes that lawful decisions of workers must be protected. The OLRA must ensure that a decision to join a union is truly representative of the collective wishes of the workforce and then protect that decision.

Currently, some specific and testable membership evidence is provided in support of certification applications. However, some key information is missing, such as the name of the employer. This information gap should be addressed.

[27] Supreme Court of Canada, *Mounted Police Association of Ontario v. Canada* (Attorney General), 2015 SCC 1. For a summary and comment on this decision, see Lancaster House, "Workers right to choose their bargaining agent free from management influence protected by freedom of association in Charter, Supreme Court rules." eAlert No. 255, April 9, 2015.
[28] Ontario Labour Relations Board, 2012 CarswellOnt 5440, *Labourers' International Union of North America, Ontario Provincial District Council v. L & M Haulage Inc.*, 7–8.

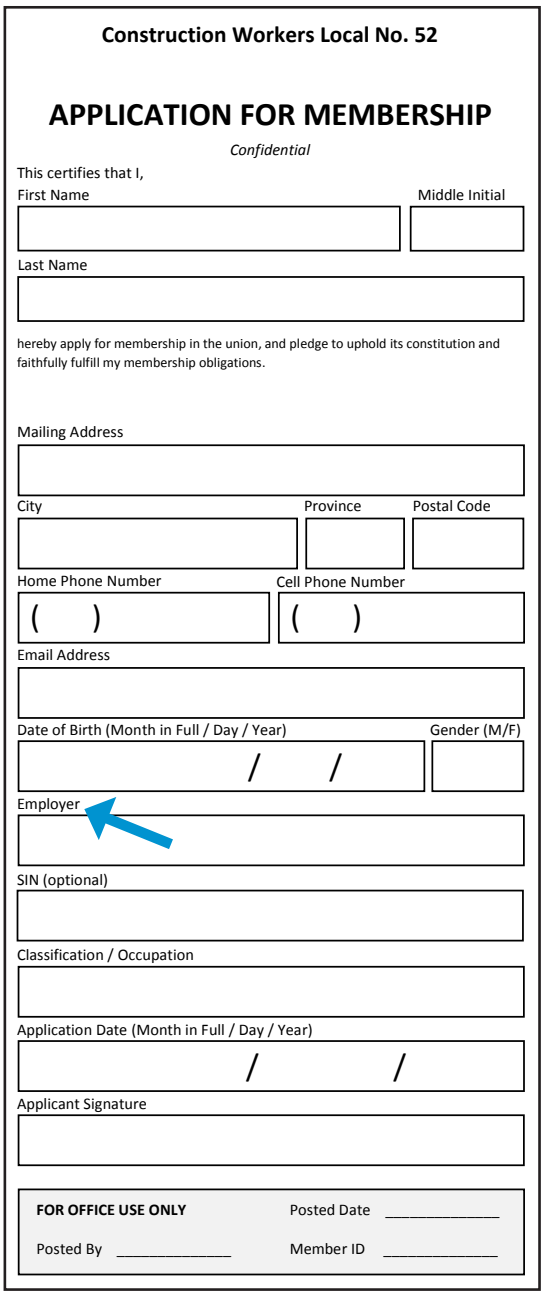
Recommendation 9: CLAC recommends that the OLRA require membership evidence to identify the employer that is the subject of a certification application.

MODERNIZATION AND CLARITY

In a couple of areas, modernization and clarity would improve how the OLRA functions in the labour relations environment. The application of new technology to some of the procedures stipulated in the OLRA would modernize and streamline how its functional requirements are carried out. For example, in Alberta, the parties are permitted to use electronic responses and signatures as legally binding means for dealing with a variety of labour relations matters provided that the principle of "functional equivalency," as defined under Alberta's *Electronic Transactions Act, 2003,* is applied correctly, and good processes, practices, and protocols are in place. In Ontario, as of July 1, 2015, the Real Estate Board accepts electronic signatures as legally binding on an offer to purchase.[29]

Recommendation 10: CLAC recommends that the OLRA be modernized to allow for the use of electronic signatures and electronic filing of labour relations documents.

There is also a need to change and clarify successor rights in the contract services sector. Currently, subcontracting is unrestricted and causes considerable workplace instability. Subcontracting is often a tactic used by employers to de-unionize, employ non-union workers, and pay lower wages. These issues came to light in



Construction Workers Local No. 52

APPLICATION FOR MEMBERSHIP

Confidential

This certifies that I,

First Name | Middle Initial

Last Name

hereby apply for membership in the union, and pledge to uphold its constitution and faithfully fulfill my membership obligations.

Mailing Address

City | Province | Postal Code

Home Phone Number ( ) | Cell Phone Number ( )

Email Address

Date of Birth (Month in Full / Day / Year) | Gender (M/F)

Employer

SIN (optional)

Classification / Occupation

Application Date (Month in Full / Day / Year)

Applicant Signature

FOR OFFICE USE ONLY Posted Date _____

Posted By _____ Member ID _____

the response of the Security and Service Workers Union, CLAC Local 503. These workers took the time to answer the questions posed by the "Changing Workplaces Review," and they clearly articulated significant challenges faced by unionized workers in the contract services sector

[29] Canadian Press, "Electronic signatures to be accepted in Ontario real estate deals," June 29, 2015.

and proposed changes to address these challenges.

> Building services and other contracted services cannot bargain for significantly higher wages without causing their employer to lose the contract. When they [the workers] unionize, the union contract needs to stay with the service at that location, effectively making the contract with the building or business owner, and not with the subcontractor. (The owner can still keep their wages down with effective bargaining, but a business should not be able to avoid unions simply by contracting the service out to another provider that isn't unionized. All employees who had union security can simply be let go with severance at that point.)[30]

The proposals put forward by the workers from Local 503 should be adopted. Employers should not be allowed to arbitrarily and unilaterally displace a union through the use of subcontracting. In the past, the OLRA treated subcontracting situations in a more consistent and equitable manner. For example, OLRA section 64.2 (3) and (4), which came into force on June 4, 1992, deemed subcontracting situations as a "sale of the business." This meant that the successor provisions given in section 64 (now s. 69) also applied to subcontracting situations.

> **Successor employer bound**
> (2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise. 1992, c.21, s.29(1), part.
>
> **Trade union continues**
> (3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.[31]

Effectively, these provisions preserved the status quo when a subcontractor became the new employer. CLAC would like to see a return to this more consistent and equitable policy.

Recommendation 11: CLAC recommends that in the area of successor rights, the legislative framework should bring back the "vested rights" contained in earlier versions of the OLRA for employees of building service providers. Specifically, CLAC recommends that when one employer replaces another employer, the collective agreement carries forward to the new employer, and the existing union retains its certification and bargaining rights. In the alternate, we recommend that the bargaining agent's bargaining rights be retained.

[30] Security and Service Workers Union, CLAC Local 503, "Response to Changing Workplaces Review," July 2015.
[31] Government of Ontario. *Labour Relations Act*, RSO 1990, c L.2. For a legal memo that summarizes the building services provider provisions in the applicable legislation, see Randall Boessenkool, "Building Services Provider Provisions in Employment Standards Legislation."

CONCLUSION

In conclusion, based on extensive research, 63 years of experience in labour relations, and member and staff input, CLAC offers recommendations for changes to the ESA and OLRA. The changes proposed in this document modernize and clarify the existing legislation. These proposals are indicative of CLAC's ongoing commitment to work with government to see that workers' rights are protected and that a balanced, fair, and competitive labour relations environment exists in Ontario. Furthermore, CLAC will continue to promote its cooperative model of labour relations and positive changes to the province's labour legislation that works both in principle and practice.

CLAC commends the government for undertaking this review process. We thank the special advisors for their diligence, and we look forward to reading the report on Ontario's changing workplaces.

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