# The Changing Workplaces Review

## Ministry of Labour

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# Canadian Union of Public Employees Ontario

The Canadian Union of Public Employees (CUPE) Ontario is the largest union in the province with over 250,000 members in virtually every community and every riding in Ontario. CUPE members provide services that help make Ontario a great place to live. CUPE members are employed in five basic sectors of our economy to deliver public services: health care, including hospitals, long-term care and home care; municipalities; school boards in both the separate and public systems; social services; and postsecondary education. CUPE members are your neighbours. They provide care at your hospital and long-term care home. They deliver home care for your elderly parents. They collect your recyclables and garbage from the curb. They plough your streets and cut the grass in your parks and playgrounds. They produce and transmit your electricity, and when the storm hits in the middle of the night, they restore your power. CUPE members teach at your university and keep your neighbourhood schools safe and clean. They take care of your youngest children in the child care centre and make life better for developmentally challenged adults. They protect at-risk children as well as those struggling with emotional and mental health issues.

Our members do this work every day, and as a collective experience it equips us to make a positive and informed contribution to the discussions regarding the labour law review. We support the development of vibrant, healthy communities and strong local economies.

CUPE Ontario's experience in a variety of sectors helps to inform our answers to some of the most pressing questions of this review. CUPE National conducted its first-ever comprehensive survey of its membership in 2014 to give our union a better understanding of the union's demographics and diversity, as well as the degree to which its members face precarious work[1]. The average CUPE member earns $40,000 to $45,000. Using the Poverty and Employment Precarity in Southern Ontario (PEPSO) classification of precarious employment our members are: 18% secure; 27% stable; 30% vulnerable; and 25% precarious employment. The membership survey data also shows that CUPE's membership is: 68% Women; 14.3% permanent part-time employees; and 12.5% have more than one employer.

***Q 1: How has work changed for you?***

***Q 2: What type of workplace changes do we need to both improve economic security for workers, especially vulnerable workers, and to succeed and prosper in the 21st Century?***

***Q 3: As workplaces change, new types of employment relationships emerge, and if the long term decline in union representation continues, are new models of worker representation, including potentially other forms of union representation, needed beyond what is currently provided in the LRA?***

***Q 4: Are these the 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?***

[1] http://cupe.ca/sites/cupe/files/survey_eng_final.pdf (CUPE Membership Survey Results for Equality)

**The Changing Nature of Work**

The stated goal of this review is to "improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians in 2015."[2] While this is an important goal, the process is one that we approach with trepidation.

An evaluation of the outcomes of the past few decades of changes in labour law and the nature of work in Ontario is mixed. The Ontario workplace has changed in a variety of ways over the years. Some of this change has occurred due to external forces such as globalization, trade agreements, and technological advancement. Other changes have occurred due to homegrown policies. Unfortunately changes that occurred at the hands of the Ontario government have ranged from the very positive on one end to self-inflicted wounds on the other. Policy choices were made which sometimes allowed real improvement, and at other times resulted in hurting those whose very livelihoods were most in need of protection.

The politicization of the Ontario labour relations framework has meant that workers in Ontario have been used as political calculus for partisan gain. Success for this review requires clear intentions regarding the problems to be solved coupled with meaningful consultation throughout. Any process that is perceived to be a pro forma politicized endeavour undermines the needed buy-in from those parties ultimately subjected to the outcomes of this review.

The current labour landscape in Ontario is becoming ever more reliant on precarious low wage unemployment. According to the Canadian Centre for Policy Alternatives Ontario Office there are many faces to this precarity[3]: (1) minimum wage jobs have grown from "2.4% of all employees in 1997 to 11.9%in 2014"; (2) low-paying jobs grown from "19.8% in 1997 to 29.4% in 2014"; and (3) employees working less than 40 hours work weeks have grown from "42.5% in 1997 to 50.5% in 2014". A growing number of Ontarians are consigned to work that has unpredictable hours, decreased paid leave, no workplace benefits or pensions, and restricted access to union membership. These attributes of precarity are all magnified in marginalized communities of women, new immigrants, and racialized workers.

While the Ontario workplace may have changed, the needs of Ontario's workforce, like any workforce, have remained consistent and are encompassed in the components of decent work. As the International Labour Organization (ILO) notes, "work is central to people's well-being. In addition to providing income, work can pave the way for broader social and economic advancement, strengthening individuals, their families and communities. Such progress, however, hinges on work that is decent. Decent work sums up the aspirations of people in their working lives."[4]

These needs are contrasted against the backdrop of increasingly precarious work, growing inequality, and a decline in union density in both Ontario and Canada[5]. There are direct causal relations between

[2] http://www.labour.gov.on.ca/english/about/pdf/cwr_consultation.pdf (Changing Workplaces Review Guide to Consultations, 2015)

[3] https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2015/06/Higher_Standard.pdf (Block, 2015)

[4] http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm (Decent Work Agenda, n.d.)

[5] http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2820220 (Labour Force Survey estimates (LFS), employees by union status, sex and age group, Canada and provinces, n.d.)

these trends. This translates into real loses for Ontarians. Between 2006 and 2012 median employment income in Ontario decreased by 1.7%.[6] And while the workplace has seen a hollowing out of good working class jobs, business interests have been reaching heights rarely seen. Cash holdings of private non-financial corporations, once famously described by the Governor of the Bank of Canada as 'Dead Money'[7], have now reached a staggering $680 Billion.[8]

This speaks to the growing divide between productivity and pay in Canada. Real median hourly wages rose at an average annual rate of 0.01 per cent between 1980 and 2005, while labour productivity increased at an average annual rate of 1.27 per cent over the same period. The gap between real wages and labour productivity annual growth was 1.26 percentage points.[9] Historically a worker's pay paralleled productivity, however, as union density has decreased so has bargaining power for both union and non-unionized workers. This leads to a destabilized workforce which contributes to the growing inequality.

**The Decline of Union Density and New Models of Worker Representation**

While the guide correctly identifies new employment relationships that have emerged, it also questions what new structures would need to be created "if the long term decline in union representation continues". This is problematic framing for multiple reasons.

Though a decline in union density has been occurring in many countries it is certainly not a fait accompli. Between 1980 and 2010, five countries within the Organisation for Economic Co-operation and Development (OECD), specifically Belgium, Chile, Iceland, Norway and Spain have increased union membership as a percentage of their workforce.[10] Similarly, though other countries have exhibited a decline in union density, this has occurred in varying degrees. For example, the large differences in unionization rates between Canada and the United States are heavily attributable to differences in legal regimes and not structural economic differences.[11] Importantly, recent academic evidence has suggested that within Canada, "shifting every province's 2012 legal regime to the most union-friendly possible could raise the national union density by up to 7.6% in the long run." Within Ontario, moving to a fully pro-union labour regime would increase density by 14.8%, from the current 27% to 31%. Ryerson Public Policy Professor Timothy Bartkiw noted, Ontario "labour laws continue to matter despite shifts in economic internationalization and industrial structure."[12] Any acceptance of a further decline in union density wrongly discards evidence that density is largely a product of external factors; predominately

[6] http://www.broadbentinstitute.ca/9344/employment_income_since_2006_who_gained_and_who_lost (Employment income since 2006: who gained and who lost, n.d.)
[7] http://www.cbc.ca/news/business/carney-urges-firms-to-spend-cash-or-return-to-shareholders-1.1130766 (Press, 2012)
[8] http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=3780121&pattern=378-0119..378-0125&tabMode=dataTable&srchLan=-1&p1=-1&p2=31 (Canada, n.d.)
[9] http://www.csls.ca/notes/note2009-2.pdf (Median Wages and Productivity Growth in Canada and the United States. Peter Harrison. Centre for the Study of Living Standards)
[10] http://stats.oecd.org/ (OECD)
[11] http://www.economics.ubc.ca/files/2013/05/pdf_paper_craig-riddell-unionization-canada-unitedstates-NBER.pdf (Riddell, 1993)
[12] T. Bartkiw, "Manufacturing Descent? Labour Law and Union Organizing in the Province of Ontario" (2008), 39:1 Canadian Public Policy 111, at p. 120. (Bartkiw, 2008)

legislative regimes. The current labour framework within Ontario has diminished a worker's ability to unionize and have decent work.

Ontario currently has various models of bargaining and worker representation that have been established through historic dialogue and the exercising of collective bargaining rights. Public sector union representation has evolved and matured into a high functioning framework. Any new models of worker representation that the government is considering would need to respect the public sector working model.

Any exploration of a new form of worker representation would need to ask what a new model would attempt to accomplish. It would be an overly narrow interpretation to believe that unions only represent workers for higher wages and benefits. We also act as a countervailing power to business and to sustain and share prosperity.

> *Labor unions both sustained prosperity, and ensured that it was shared. The impact of all of this on wage or income inequality is a complex question (shaped by skill, occupation, education, and demographics) but the bottom line is clear: There is a demonstrable wage premium for union workers. In addition, this wage premium is more pronounced for lesser skilled workers, and even spills over and benefits non-union workers. The wage effect alone underestimates the union contribution to shared prosperity. Unions at mid-century also exerted considerable political clout, sustaining other political and economic choices (minimum wage, job-based health benefits, Social Security, high marginal tax rates, etc.) that dampened inequality. And unions not only raise the wage floor but can also lower the ceiling; union bargaining power has been shown to moderate the compensation of executives at unionized firms. – Economic Policy Institute*[13]

High union density has various positive effects not traditionally captured within wages and benefits. For example, a high school graduate whose workplace is not unionized but whose industry is 25% unionized is paid 5% more than similar workers in less unionized industries. A recent study released in September 2015, highlighted a positive relationship between high union density and intergenerational mobility.[14] Notably the decline in union density is attributable to a fifth to a third of the growth in inequality in the US.[15]

While new forms of worker representation may benefit some workers, it should not be lost on the committee that a primary goal of the review should be to capture more Ontario workers in the current model of union representation.

**Key Objectives**

Framing the key objectives of both the employment relationship and reform of labour laws inherently has a philosophical component to it. However, far too often the answers given from various

[13] http://www.epi.org/publication/unions-decline-and-the-rise-of-the-top-10-percents-share-of-income/ (Mishel, 2015)
(Richard Freeman, 2015)
[15] http://scholar.harvard.edu/files/brucewestern/files/american_sociological_review-2011-western-513-37.pdf (Rosenfeld, 2011)

stakeholders reflect parochial concerns. Perspectives are often informed by the narrow interests of an individual or organization and the situation that the actors find themselves in (c.f. The Ontario Chamber of Commerce[16]).

There are frameworks available to help assist in these types of key decisions. For example, the idea of the "original position" was famously expressed by John Rawls in his idea of justice as fairness[17]. It is designed to be a fair and impartial point of view that is to be adopted in reasoning about fundamental principles. Using his thought experiment, we could establish a just society that determine how key objectives are balanced. Specifically, Rawls suggests that when we attempt to deliberate we should insure impartiality of judgment, by depriving all knowledge of our personal characteristics, and social and historical circumstances. Without this information we would be forced to deliberate impartially and rationally resulting in policy that would maximize the prospects of the least well-off.

An example, in the context of labour law, would be to ask what regulatory changes someone would prefer if they did not know what their current ability or employment status was. This type of questioning might lead to impartial policy choices where a strong Employment Standards Act (ESA) floor was created. This review should weight its deliberations through perspective of the worst off and those most in need.

The tension articulated in the guide between “workers who are experiencing greater precariousness” and businesses that “may find that the regulatory framework that was designed for a different time is now cumbersome” is troublesome. This narrative artificially seeks to impose some veneer of balance between policy prescriptions. An arbitrary requirement of balance neglects to recognize the dire straits that workers in Ontario are facing, while falsely bolstering the case for business interests.

This point is illustrated by looking at the Ontario Chamber of Commerce’s recommendations to this review.[18] The majority of their specific recommendations (7 out of 13) suggest that the status quo is currently working for business. The majority of their other recommendations lobby for changes at the margin. Clearly, the current Labour Relations Act (LRA) and ESA regulations are working primarily for the interests of businesses.

Successful policy prescriptions and objectives will need to eschew milquetoast solutions for clear and effective ones. Political constraints should not burden this review.

It is with this in mind that it is disconcerting that a gender wage gap lens has been explicitly ruled out. While the rationale is that the government is conducting a separate review, this separation of efforts highlights the very extent of the problem itself. Gender equity should be a lens which touches all efforts of a government, and in particular the issues being dealt with in this review are greatly experienced by women, racialized, and immigrant workers. This review is worse off for having explicitly ruled a gender analysis outside of its mandate.

[16] http://www.occ.ca/wp-content/uploads/2013/05/Changing-Workplaces-Review-Submission.pdf (OCC, 2015)
[17] http://plato.stanford.edu/entries/original-position/ (Freeman, 2014)
[18] http://www.occ.ca/wp-content/uploads/2013/05/Changing-Workplaces-Review-Submission.pdf (OCC, 2015)

A goal of this labour law review should be to include the need to protect decent working jobs. Workers should be more secure, live happier lives, and share in prosperity. Unfortunately the current paradigm is wreaking havoc on many of our communities.

Based on the mandate of this review it is difficult not to conclude that this government takes, at best, an agnostic view towards collective bargaining. This is in stark contrast to the LRA which articulates that the purpose of the act is "to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees."[19]

The Supreme Court of Canada has come out in favour of this view[20]:

> *Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the Charter....All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(d) of the Charter…The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.*

Harvard Law Professor Paul C. Weiler similarly noted that[21]:

> *Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them.*

As will be shown below, the government has power over key levers in the labour landscape to increase union density in those areas of a changed workplace, where unionization, even under the current LRA has become a virtual impossibility. Any perception that pro-union labour law is a deviation from a natural state of affairs is inaccurate. Across countries it has been found that worker-protective labour laws have no correlation with unemployment, however laws relating to working time and employee representation are found to have positive effects on efficiency and distribution.[22] Within Canada the growth of unions helps increase average hourly earnings and decrease income inequality.[23]

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[19] http://www.ontario.ca/laws/statute/95l01 (Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A)

[20] Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 (Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007)

[21] Weiler, Paul C. Reconcilable Differences: new directions in Canadian Labour Law, (Toronto, Carswell, 1980), (Weiler, 1980)

[22] http://onlinelibrary.wiley.com/doi/10.1111/j.1564-913X.2014.00195.x/pdf (Simon DEAKIN, 2014)

[23] https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/04/the_creation_of_a_shared_prosperity_in_canada.pdf (Brennan, 2014)

***ESA***

***Q 5: In light of the changes in workplaces, how do you feel about the employment standards that are currently in the ESA? Can you recommend any changes to better protect workers? Do the particular concerns of part-time, casual and temporary workers need to be addressed, and if so, how?***

***Q 6: Are changes needed to support businesses in the modern economy? How could the Act be simplified while remaining fair and comprehensive? Are there standards in the ESA that you find too complex? If so, what are they and how could they be simplified?***

***Q 7: Should this leave be revised in any way? Should there be a number of job-protected sick days and personal emergency days for every employee? Are there other types of leaves that are not addressed that should be?***

***Q 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?***

***Q 9: Are there specific employment relationships (e.g., those arising from franchising or subcontracting or agencies) that may require special attention in the ESA?***

***Q 10: Do the current enforcement provisions of the Act work well? In your experience, what problems, if any, exist with the current system, and what changes, if any, should be made? In your experience, what changes could help increase compliance with the ESA?***

CUPE Ontario is a social justice union, and in that role we believe that it is important that all members of our society, union or otherwise, deserve to be treated fairly. A strong ESA is valuable for all workers. We have reviewed the Workers' Action Centre recommendations to this review and enthusiastically support their entire set of recommendations specific to the ESA. They articulate many strong recommendations, some of which are highlighted below and deserve special mention as foundational concerns.

The primary concern is regarding the employee/employer relationship. Employers have leveraged gaps in the ESA that are based on standard models of employment. These gaps, covering exclusions, misclassifications, and temporary agencies, have harmed workers. The solution, however, is as simple as it sounds; 'if you benefit from my work, have the ability to dictate my terms, and I receive pay, then I am your employee'. We should establish a reverse onus on employee status; a worker must be presumed to be an employee unless the employer demonstrates otherwise.

The second recommendation that deserves mention is with respect to the current sick leave provision in the ESA. The problems are twofold. First, the exemption of small businesses from providing sick leave is unconscionable. All workers deserve to take time off work and recuperate from illness without worry that they will be laid off. Most troublesome in this area is that this policy clearly has an effect on women in greater numbers as the more likely primary caregivers at home. The second issue is concerning paid sick time. Currently those who chose to come to work because they cannot afford to lose wages cause

exponential harm. They take longer to recover, possibly make others sick, increase overall healthcare costs, and drive down productivity. The ESA should repeal the exemption for small businesses and provide paid sick leave creating a more humane work environment.

The third recommendation is regarding vacation time. In a 2004 review of federal labour law, Commissioner Harry Arthurs laid out what he believes to be fundamental principles to guide labour law decisions. Embedded within those principals was the idea that "no worker should be required to work so many hours that he or she is effectively denied a personal or civic life."[24] Ontario is one of only two jurisdictions in Canada that limit vacation to two weeks paid vacation. This is unacceptable and should be increased to three weeks. After five years of service, that should be increased to four weeks of paid vacation per year.

The other recommendations in the Workers' Action Centre also deserve strong consideration. As the Arthurs commission noted, "given the disparities of power between employers and workers, and the potentially debilitating consequences of a 'race to the bottom' triggered by employers competing on the basis of cheap labour, Part III must continue to provide a floor of rights and protections, such as minimum wages and limits on maximum hours of work."[25]

**LRA**

***Q 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?**

In a similar fashion to the above mentioned abuses of the ESA, many employers have put a shell corporation between themselves and their workers in order to avoid paying decent wages and providing safe work conditions. When workers form unions it is because they want to bargain with their employers over improvements in the workplace. Hiring temporary employees or contract employees is a method being used by employers to manipulate the system.

A decision last month from the National Labor Relations Board (NLRB) in the United States attempted to rectify this issue. The Browning-Ferris decision refined its standard for determining joint-employer status.[26] Based on an analysis by the AFL-CIO, "the decision says that two or more companies are 'joint employers' of a worker if they share the ability to govern the worker's terms and conditions of employment. In other words, if more than one employer has sufficient authority to control things like salary and working conditions, they are considered that worker's employer, even if another company also qualifies as an employer of that same worker."[27] The previous law required that an employer not only possess power but that they also had to exercise it. This updated standard will make it more

[24] http://www.labour.gc.ca/eng/standards_equity/st/pubs_st/fls/pdf/final_report.pdf (Arthurs, 2006)
[25] http://www.labour.gc.ca/eng/standards_equity/st/pubs_st/fls/page03.shtml (Labour Program - Chapter 2 - The New Economy, A Changing Society and a Renewed Agenda for Labour Standards, n.d.)
[26] https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries (NLRB - Board Issues Decision in Browning-Ferris Industries, 2015)
[27] http://www.aflcio.org/Blog/Political-Action-Legislation/The-Browning-Ferris-NLRB-Decision-Explained (Quinnell, 2015)

difficult for employers to avoid treating workers as employees and instead hide behind a temp agency or claim that the workers are self-employed contractors. Legislation establishing a similar framework in Ontario would prove to be essential in the articulation of employee and employer and the nature of that relationship.

***Q 12: In the context of changing workplaces, are changes required to the manner in which workers choose union representation under the LRA? Are changes needed in the way that bargaining units are defined, both at the time of certification and afterwards? Are broader bargaining structures required either generally or for certain industries? Are changes needed in regard to protecting bargaining rights?***

**Card Check**

The evidence supporting the effectiveness of card check as a representation of the majority of workers wishes is unequivocal and overwhelming. Over the past few decades changes to labour law legislation regarding card check have occurred in a variety of jurisdictions in Canada and elsewhere, where both card check and mandatory vote systems have alternated. The results of these regulatory changes all point to higher rates of successful certification within a card check regime compared to a mandatory vote system.

From an Ontario lens we can compare two different time periods where different policies existed. Reviewing the eras of both Bill 40 (card check) and Bill 7 (mandatory vote) shows that certification success rate was reduced by 10.3%[28] under a mandatory vote system.

One study reviewed card check usage across nine different Canadian jurisdictions from 1978-1996. The results from the analysis indicate that a mandatory vote procedure reduced certification success rates by 9%.[29] In BC, a study found that moving between card check and mandatory vote created a decline by an average of 19% during the mandatory voting period and then increased by the same amount during the card check procedure period. In a 2008 affidavit to the Court of Queen's Bench for Saskatchewan, Professor Chris Riddell demonstrated that the mandatory vote legislative regime reduced the union certification success rate by approximately 16-20% for the private sector. This parallels his earlier research in BC that found during the time period of 1979-1998, card check increased success rates by 19% compared to mandatory vote.[30]

These are stark numbers that highlight the effectiveness of card check. However an equally forceful principle in support of card check is that like cases should be treated alike. It is difficult to find a rationale to explain why card check exists within the construction industry yet not more broadly. No specific feature occurs solely within the construction industry that would explain the need for card check and not apply to other sectors.

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28 Slinn, Sara, An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification (March 29, 2010). Canadian Labour and Employment Law Journal, Vol. 11, pp. 259-301, 2004. Available at SSRN: http://ssrn.com/abstract=723002 (Slinn, 2004)

29 Johnson, Susan J.T., Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success. Economic Journal, Vol. 112, pp. 344-361, 2002. Available at SSRN: http://ssrn.com/abstract=313277 (Johnson, 2002)

30 https://ideas.repec.org/a/ilr/articl/v57y2004i4p493-517.html (Riddell C. , n.d.)

Attempting to capture an employee's wishes to be represented by a union or not, is an important task. It must be free from coercion from all parties. The Ontario Chamber of Commerce believes that a "secret vote is an essential component of the union certification process. It provides workers with the opportunity to make decisions free of interference and external pressures."[31] This ignores the reality that votes occur in the workplace where all interested parties are present. Furthermore, results are made public which in smaller workplaces may allow for assumptions to be made on how employees voted. Often a secret vote is anything but secret. There is also a major concern regarding employer coercion between the time cards are submitted and the time an election occurs. According to Osgoode Law Professor Sara Slinn, "a survey of managers at Canadian workplaces where union organizing had recently occurred found 94% used anti-union tactics, and 12% admitted to using what they believed to be illegal, unfair labour practices to discourage employees from unionizing."[32] Without card check, the right to unionize is illusory for many working Ontarians.

The Ontario Chamber of Commerce goes further to argue that "the premise upon which proponents of major reforms to union certification rules base their recommendations is flawed. Many groups repeat a refrain that declining unionization rates in Ontario merit special rules for this province. This assertion is false; Ontario's unionization rate has remained largely static since the secret ballot was first introduced in the mid-1990s."[33] This is a specious argument which does not take into consideration a counter factual analysis. Suggesting that union density has not gone down in the backdrop of mandatory voting, ignores the fact the other changes may have played a role in keeping it up. It is an overly simplistic view to believe that other variables have not played a role in the rate of union density over that time period.

**Successor Rights**

The issue of successor rights also comes down to treating like cases alike which is in contrast to the current seemingly ad hoc structure. While this government has restored some measures for successor rights, it has not been universally applied to all sectors. In the absence of such protections, employers frequently dismantle fairly bargained collective agreements and bargaining commitments through variations in the corporate form of shell companies.

It is particularly egregious that sectors which the government has decided to exclude from successor rights, such as contract services, are those which often employ the most marginalized, and low paid workers who are most likely to be women, racialized, and/or immigrant workers.[34]

The difficulties of achieving gains through the collective bargaining process are tenuous for those who do not have successor rights. These employees may find themselves still working at the same plant, at the same machine, under the same working conditions, under the same supervision, doing exactly the same job, but for a different employer, and without their previously achieved bargaining rights. Successor rights must be expanded across the workforce and applied fairly to all workers.

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[31] http://www.occ.ca/wp-content/uploads/2013/05/Changing-Workplaces-Review-Submission.pdf (OCC, 2015)
[32] http://www.labourwatch.com/docs/press/pdf/anti-union_intimidation_is_real.pdf (Slinn, National Post - Anti-union intimidation is real, 2007)
[33] occ.ca/wp-content/uploads/2013/05/Changing-Workplaces-Review-Submission.pdf (OCC, 2015)
[34] https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2015/06/Higher_Standard.pdf (Block, 2015)

**Employee Lists and Voting Locations**

As noted above, we believe card check is most effective mechanism at ensuring the rights of workers are fulfilled. However under the current mandatory vote system basic knowledge of who is and is not an employee is sometimes difficult to ascertain. Employers have a wide variety of worker classifications and for unions attempting to organize a workplace, it proves to be a challenge when there is uncertainty as to who might fall within the bargaining unit. Early access to employee lists would help aid in that endeavor. Specifically, when it appears to the Ontario Labour Relations Board (OLRB) that 20% or more of the employees in a bargaining unit, an accurate list should be provided for the purposes of collective bargaining.

This would parallel the thinking that occurs regarding electoral voting. Voter lists are provided to candidates who meet a minimum threshold. The lists are used by candidates to engage with those eligible to vote and are governed by the existing freedom of information and protection of privacy regulations.

In December 2014, the NLRB enacted changes to its representation rules.[35] New changes include that "the employer must include available personal email addresses and phone numbers of voters on the voter list in order to permit non-employer parties to communicate with prospective voters about the upcoming election using modern forms of communication."[36] Rules such as this recent NLRB change would have a positive impact on organizing within Canada. Early disclosure of employee lists37 can, and must, play that role.

Additionally, reasonable accommodation should be made during the voting process to capture as many employee voices as possible. Employer intimidation coupled with an increasingly dispersed workforce is not compatible with historic voting models. A fair process could be facilitated with neutral and off-site voting, along with telephone and electronic voting. This would give employees an opportunity to voice their opinions free from any undue pressure.

**Merging of Bargaining Units**

The OLRB should allow for bargaining units of the same employer to be merged at the request of union. As Professor Harry Glasbeek has stated, "unions should be able to organize vis-a-vis their real employer."[38] Far too often bargaining units are separated for arbitrary reasons and consolidation of these units would facilitate stronger collective bargaining environment.

***Q 13:*** **Are changes required to the LRA with regard to the ground rules for collective bargaining? Are new tools needed in the LRA with respect to industrial disputes or to deal with protracted labour disputes?**

**Right to Strike**

[35] https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-representation-case-procedures-fact-sheet (NLRB Representation Case-Procedures Fact Sheet, n.d.)
[36] Ibid. (NLRB Representation Case-Procedures Fact Sheet, n.d.)
[37] http://www.cbc.ca/news/canada/kitchener-waterloo/unifor-push-to-unionize-ontario-toyota-workers-hits-snag-1.2597356 (Unifor push to unionize Ontario Toyota workers hits snag, 2014)
[38] http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1690&context=ohlj (Glasbeek, 1993)

The right to strike is a key lever in the collective bargaining process. Collective bargaining remains the best mechanism for resolving disputes between employers and employees and protecting a set of rights for workers. As the Report on the Taskforce on Labour Relations highlighted[39]:

> *Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society.*

The three recent decisions issued from the Supreme Court of Canada (SCC) have reaffirmed that unions are a cornerstone of Canadian democracy. Chief among those decisions was that the SCC confirmed that the right to strike is a constitutional right afforded to all workers in Canada.[40] This is a pillar of the labour movement and is a necessary part of allowing workers to collectively organize to demand shared prosperity. CUPE Ontario staunchly believes in the right to strike and would fight against any legislation that would limit that right. Any attempt to adjust or roll back that hard fought right would run counter to the Canadian Charter of Rights and Freedoms.

**Anti-Scab (Replacement Workers)**

In attempting to forge a workplace balance, it must be acknowledged that that the inherent nature of the employee/employer relationship is exploitative. The labour movement attempts to correct that imbalance through collective action and on occasion exercises its Charter protected right to strike. Yet this powerful and important tool to address the inherently imbalanced power relationship between workers and their employers is severely compromised when replacement workers are allowed operate in a workplace that is on strike or where the workers have been locked out.

While a strike is often threatened, it is rarely used. In Ontario 98% of settlements are achieved without a strike or lockout.[41]

It is telling that in both BC and Quebec, where anti-scab legislation is in place, it has remained in place even after changes in government and labour law reviews. Even in best case scenarios anti-scab laws are severely limited. Managers can still do the work of striking employees which compromises the power of collective action by workers.

Unions are not interested in negotiating an employer out of business. For that reason, economic conditions rather than the presence of anti-scab laws, continue to dictate the tone and content of negotiated agreement in provinces where such legislation exists.

**Interest Arbitration for a First Contract**

Labour strife is not common in Ontario. Over 98% of agreements settle without a strike or lockout which is evidence that the system does not cause unnecessary turmoil.[42] First contracts however are

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[39] Canada, Task Force on Labour Relations, and H. D. Woods, Canadian Industrial Relations: The Report of Task Force on Labour Relations (Woods, 1968)
[40] http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do (Saskatchewan Federation of Labour v. Saskatchewan, 2015)
[41] http://www.labour.gov.on.ca/english/about/pubs/rbp/2014/rbp_8.php (Labour, 2015)
[42] Ibid. (Labour, 2015)

historically even more challenging than achieving certification. Collective bargaining can be a new concept within a newly organized workplace and agreements can be difficult to achieve. Creating a stable bargaining relationship is an important goal and a preventative measure like interest arbitration for a first contract arbitration (FCA) is a key tool in achieving that goal. Studies have shown that the mere existence of FCA curbs work stoppage incidences by over 50%.[43]

The LRA recognizes and provides for FCA however the threshold for access remains too high. This creates barriers where they need not exist. Last year the OLRB had a case load of 19 FCA. By comparison, Manitoba which has simpler access to FCA, and a population that is one tenth the size of Ontario, had five cases last year.[44] A lower threshold to FCA would create decreased incidences of strikes and lockouts which would benefit both employee and employers.

A less restrictive model would allow greater access to FCA. Lower thresholds exist within other provinces and are successfully used by both employers and employees in creating a basic standard agreement which can be used as a framework for future rounds of bargaining.

**Benefits during a Strike**

During a strike or a lockout the loss of employer provided benefits can pose extreme hardship on members. Often unions attempt to purchase these benefits from the employer to provide stopgap coverage so no undue hardship occurs, yet employers stymie these efforts as a strike tactic. We believe legislation should allow for unions to pay for this coverage and not be denied from the employer.

***Q 14:*** **In light of the changing workplace and the needs of workers and employers in the modern economy, are changes needed regarding the unfair labour practices set out in the LRA, or to the OLRB's power to provide remedies in response to unfair labour practices?**

**Reinstatement**

The balance of power strongly favours employers in matters related to unfair labour practices. Employers are able to take advantage of the precarious position of their employees. These are the employees who cannot afford any disruption to their lives, who live paycheque to paycheque, and who often come from marginalized backgrounds. The landscape of union organizing is a challenging one. With 12% of employers admitting to using illegal practices, regulations should be put in place to help those who are most at risks.[45]

Workers who are disciplined during an organizing drive should be reinstated pending the results of a hearing to determine their guilt. Limits on this rule should apply to issues of alleged serious misconduct, however, these cases are few and far between. This would provide a safeguard for the vast majority of workers.

[43] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1687294 (Johnson, First Contract Arbitration: Effects on Bargaining and Work Stoppages, 2010)
[44] http://www.gov.mb.ca/labour/labbrd/pdf/2012-2013_mlb_annual_report.pdf (Robinson, 2013)
[45] http://www.labourwatch.com/docs/press/pdf/anti-union_intimidation_is_real.pdf (Slinn, National Post - Anti-union intimidation is real, 2007)

***Q 16:*** **Are there any other issues related to this topic that you feel need to be addressed? Are there additional changes, falling within the mandate of this review, that should be considered?**

CUPE Ontario is deeply concerned that the Ontario Liberal government may be contemplating changes to the "Purposes" section of the LRA.

A core premise of Ontario's industrial labour relations system is that for collective bargaining to succeed, any trade union seeking to bargain on behalf of a group of workers must be freely chosen by them.

This is such an important aspect of our system of labour relations in the province of Ontario that it is stated as one of the purposes of the LRA.

The Labour Relations Act, 1995, Section 3, states in part:

*Purposes*

*The following are the purposes of the Act:*

1. *To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.*

On May 28, 2015, the Ontario Minister of Labour introduced legislation which, if passed, will end the right currently guaranteed by statute for workers facing a workplace merger to "freely choose" which union, if any, will be their representative for the purposes of collective bargaining and which union, if any, they will be compelled to pay dues to.

This legislation, Bill 109, proposes to amend the Public Sector Labour Relations Transition Act (PSLRTA) to remove guaranteed representation votes in the case of workplace mergers.

If this legislation is passed into law, it will contradict the above referenced "purpose" section of the LRA, and indeed the same "purpose" language in PSLRTA. That would be a grave mistake and CUPE Ontario asks the Commission to be vigilant in recommending against any attempt to remove this "purpose" section of the LRA, an attempt that we fear may come about in order to bring the LRA in line with what may be the newly amended PSLRTA.

The importance of this current "purpose" section of the LRA (and PSLRTA) is that it goes a long way to ensure the legitimacy of whichever organization is to be the certified bargaining agent for a group of workers by requiring that the workers themselves must be the ones who choose it.

If Ontario were to remove this right to choose from the LRA, as they are currently attempting to do with PSLRTA, it would seriously damage the foundation of Ontario's labour relations system.

**Conclusion**

With our recommendations we hope that the government truly will create a regulatory framework that returns to a more balanced field for working people in our province.

This framework should truly address the plague of precarious work that is damaging our communities, as well as the economic future of our province. One that allows for shared prosperity by increasing the

unionized workforce so that wages are removed from competition. A framework that fully supports unions in their established role of advancing the rights of unionized workers, and in lifting standards for all working people in Ontario.

The review presents an historic opportunity to make foundational changes that will determine the path of future generations in our province. A path of shared prosperity and rights for all workers.

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