INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA

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July 3, 2015

To: **C. Michael Mitchell, Special Advisor**
Honourable John C. Murray, Special Advisor

Re: **The Changing Workplaces Review**

A. WHO WE ARE

The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada ("IATSE") was founded in 1893 when representatives of stagehands working in eleven cities met in New York and pledged to support each other's efforts to establish fair wages and working conditions for their members. Our union has evolved to embrace the development of new entertainment mediums, craft expansion, technological innovation and geographic growth.

Today, our members work in all forms of live theatre, motion picture and television production, trade shows and exhibitions, television broadcasting, and concerts as well as the equipment and construction shops that support all these areas of the entertainment industry. We represent virtually all the behind-the-scenes workers in crafts ranging from motion picture animator to theatre usher.

During a period when private sector union membership has been in sharp decline the IATSE has continued to grow. In 2015, our membership has reached nearly 122,000 in 377 local unions, making us the largest union in the entertainment industry in the world. In Canada, we have 17,000 members and 40 locals. This growth is attributable to our willingness to adapt our structure to protect our traditional jurisdiction and accommodate new crafts. But that alone is insufficient. The IATSE has maintained and enhanced its position in the vanguard of the entertainment industry through effective rank and file empowerment, political engagement, and our dedication to grass roots organizing. On both the International and local union levels, the motivating principle of the IATSE is to represent every worker employed in our crafts.

B. THE NEED FOR CHANGE

The workers represented by IATSE in the entertainment industry ("workers in the entertainment industry") face unique challenges at work. They are by necessity a transient workforce, moving from one project to the next. Workers in these industries need unique legislative solutions to ensure they have a rewarding and equitable work experience. In this context, IATSE has the following recommendations for legislative changes in Ontario:

1. Implement card-based certification under the *Ontario Labour Relations Act* for stage and motion picture industry workers;
2. Extend hours of work and rest period exemptions under the *Employment Standards Act, 2000* to stage workers, similar to the exemptions provided to motion picture industry workers;
3. Calculate statutory holiday pay under the *Employment Standards Act, 2000* on the basis of a minimum percentage to ensure it applies to part-time and transient workers.

C. CARD-BASED CERTIFICATION

IATSE proposes extending card-based certification to workers in the entertainment sector, especially given the similarities in labour relations between the entertainment industry and construction industry.

1. Background

The card-based certification system dates back to the *Labour Relations Act*, S.O. 1948, c.51. It remained in place, more or less unchanged, until Bill 7 was enacted in 1995. Prior to Bill 7, most certification applications were decided exclusively on the basis of documentary evidence of union membership tendered with the application – that is, cards signed by employees indicating that they had applied to become union members. Under the old system, 80% to 90% of certificates were granted on the basis of membership evidence alone. Representation votes were residual mechanisms that were used only where the

union's card count did not establish a clear majority (i.e. more than 55 percent) or where there were circumstances in the case that persuaded the Board to seek the additional confirmation of a secret ballot vote. Such circumstances included unreliable or defective documentary evidence, intimidation or misrepresentation in the collection of the union cards and, prior to 1993, the filing of additional documents from employees (usually in the form of a "petition") indicating that despite having signed cards they had changed their minds.

In most cases, though, certification was a largely administrative process that involved comparing an employee list and specimen signatures supplied by the employer with membership cards submitted by the union along with its application. The Board did that comparison, and then did a simple arithmetic calculation to determine the result. If the union had more than 55 percent employee support in the appropriate bargaining unit, it was "automatically" certified. If it had less than 40 per cent support, the application was dismissed. And if the level of support was somewhere in between 40% and 55%, the Board would order a representation vote. It was a mechanical process that reduced the opportunity for employer interference with employee choice (because the card signing was done in advance without the employers knowledge), and in most cases was relatively quick.

2. Why card-based certification makes sense

The case for card-based certification is a simple one: a card-based certification system minimizes employer interference. For that reason *and* because of the legislative requirement that the union sign up *more than 55%* of bargaining unit employees, card-based certification produces a more accurate test of employee wishes regarding union representation.

Under a document-based system, a certification application is not treated as a contest or adversarial matter. The card system approaches certification as akin to licencing a trade union to act as the employees' exclusive bargaining agent. The focus is on an efficient administrative procedure that will get the parties to the negotiating table as quickly as possible. Viewed in this way, a certification application is not treated as a competition

between a union and employer for the "hearts and minds" of the workers.[1] Thus, employers' ability to communicate with employees about union organizing is circumscribed and there is no explicitly recognized employer campaign period. **The card system emphasizes employee choice and assigns a minimal role for employers.**

The card system reduces the opportunity for employer interference in employee decision-making about union representation. That is because it is possible for an applicant union to obtain a sufficient number of signed cards to be entitled to certification without a vote and for the union to submit a certification application and supporting membership evidence before the employer becomes aware that a union is attempting to organize the employers workers. In such case, the employer learns of the organizing attempt when it receives notice of the certification application from the Labour Relations Board. At that point, the union will already be entitled to certification if it has demonstrated sufficient support to the Labour Relations Board and meets other legal requirements for certification.

This process contrasts with the mandatory vote system where, even if the employer does not learn of the union's organizing activities prior to the union filing an application with the Board, the employer will be notified by the Board as soon as the application is filed. Even under a so-called "quick vote" model, the employer has at least several days within which to take action to attempt to defeat the certification application. Thus, in every case where the union demonstrates that it has sufficient support to entitle it to a representation vote, the employer will have several days' notice to formulate and adopt an anti-union response if it is inclined to do so.

Under the card system, the union's level of support is assessed based on the number of employees in the bargaining unit. To be entitled to automatic certification, the union must demonstrate that more than 55% of employees in the entire bargaining unit have signed cards. In contrast, the calculation of support in a vote is based on the number of employees voting — not the entire bargaining unit. To succeed in a representation vote, the union must achieve more than 50% of the ballots cast — regardless of how many or how few

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[1] See Paul Weiler, "Promises to Keep: Securing Workers' Rights to Freedom to Self-Organization under the NLRA" (1983) 96 Harvard Law Review 1769 at 1809.

bargaining unit members participate in the vote. Accordingly, there is a strong argument to be made that the card system produces an empirically more reliable measure of employee wishes. Furthermore, the requirement of support in excess of 55% — that is, the requirement for a clear, rather than a bare, majority — lends extra legitimacy to the card-based certification system.

3. The negative impact of "a vote in every case" in Ontario

Experience demonstrates that employers engage in a variety of legal and illegal union avoidance activities in the context of union certification campaigns, whether the employer has learned of the certification attempt through notice from the board of a certification application, or has learned of an organizing attempt even before the application is filed: see, for example, Karen Bentham, "Employer Resistance to Union Certification."[2] Indeed, certain law firms and consultants provide a "five day plan" outlining steps an employer should take on each of the five days between the date a certification application is filed and the date of the vote, in order to remain union free. It is apparent that the few days between application and election is sufficient for employer anti-union conduct to take place, and may even invite employers to take advantage of the pre-election notice of the certification application in this way.

Statistics drawn from the Ontario Labour Relation Boards *Annual Reports,* set out below, clearly demonstrate that since the implementation of vote-based certification outside of the construction industry, (1) there has been a pronounced overall decline in the number of certifications filed each year, and (2) there has been an overall decrease in the proportion of applications granted each year.

[2] (2002) 57 Relations industrielles/Industrial Relations 159.

Ontario Certification Applications

	Applications		
Fiscal Year	Disposed of	Granted	Granted as proportion of cases disposed of %
2013-2014	337	223	66.2
2012-2013	298	207	69.5
2011-2012	292	215	73.6
1997-1998	664	424	63.9
1996-1997	656	387	59.0
1995-1996	759	510	67.2
1994-1995	987	762	77.2

Evident in the statistics above in particular is the sharp decline in applications filed and the percentage of applications granted between 1994 and 1996, after the card-based system was eliminated in Ontario in 1995. This is consistent with studies that have found, all else equal, that an application for certification after Bill 7 had approximately a 21 per cent lower likelihood of being certified than under card-based certification.[3] The dip in certifications granted since 1995 is alarming for workers in Ontario.

[3] Sara Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification" (2004) 11 Canadian Labour and Employment Law Journal, at page 301.

4. Card-based Certification in the Construction Industry

In 2005, *The Labour Relations Statute Amendment Act, 2005* restored card-based certification to the construction industry by adding section 128.1 to the *Ontario Labour Relations Act.*[4] Under section 128.1, the union must notify the employer in writing that it is choosing to proceed under that section.[5] Within 2 days of receiving this notice (excluding Saturdays, Sundays and holidays), the employer must provide the Board with the names of the employees in the proposed bargaining unit and the names of employees in a unit as proposed by the employer if it chooses.[6]

Once the Board has received the application for certification under this section, it must determine the bargaining unit and the percentage of employees in the bargaining unit who are members of the union.[7] If the number of employees who have signed membership cards is less than 40%, the Board must dismiss the application.[8] If the amount of employee support is between 40% and 55%, the Board must direct a representation vote.[9] If the amount of employee support is greater than 55%, the Board may either certify the union or direct a representation vote, as it chooses.[10]

If a representation vote is directed by the Board, it must be by secret ballot and it should take place within 5 days (excluding Saturdays, Sundays and holidays) of the direction.[11] If over 50% of the ballots are cast in favour of the union, the Board must certify the union.

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[4] *The Labour Relations Statute Amendment Act,* SO 2005, c. 15, s .8; *Labour Relations Act, 2995,* SO 1995, c. 1, Sched. A, s. 128.1 [*OLRA*].

[5] *OLRA,* s. 128.1(2).

[6] *OLRA,* s. 128.1(3).

[7] *OLRA,* s 128.1(4).

[8] *OLRA,* s 128.1(7).

[9] *OLRA,* s 128.1(12)

[10] *OLRA,* s. 128.1(13).

[11] *OLRA,* s 128.1(14).

5. Similarities between the entertainment industry and construction industry

The Ontario Labour Relations Board ("the Board") has consistently compared labour relations between the entertainment industry with the construction industry. Both industries have a high rate of transient staff, are seasonal in nature, and are typically represented in craft bargaining units. Given the similarities in labour relations in the two industries, it is only fair that card-based certification is extended to workers in the entertainment industry.

The Board has consistently compared the entertainment sector with the construction sector in terms of how work is performed. As the Board wrote in *Crocodile Labour Services,* "I am prepared to take judicial notice that this industry can be both seasonal and transitory in nature and as already noted more akin to the construction industry than the industrial sector [emphasis added]."[12] In fact, the Board already applies the same "bright line" test in both sectors in determining which employees are eligible to be counted in applications for certification. The Board has unwaveringly applied this test, meaning that only employees at work on the day the application for certification is filed are eligible to be counted. In *Canadian Stage Company,* the Board wrote the following:

> Fundamentally, many of the same reasons exist for using the "at work on the date of application" test to determine who is an employee on the date of application as pertain to employees in the construction industry. For example, the complement of employees may change rapidly and it may be difficult for a union to ascertain who is an employee for the purposes of organizing.[13]

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[12] *Crocodile Labour Services,* [1997] OLRD No. 3417 (OLRB), at para 22.

[13] *Canadian Stage Company,* [2003] OLRB Rep. May/June 397, at para 8. See also *Brantford (City),* [2003] OLRD No. 4530, at paras 19-21.

In *IATSE v GBSP Centre Corp.*, the Ontario Labour Relations Board Vice-Chair Marilyn Silverman again compared IATSE members with construction industry workers.[14] She quotes *Theatrecorp Ltd.*[15] as follows:

> For the purposes of "the count", the employee complement is that which exists on the application date. We fully recognize that the number of employees may well be different on that day from the day before or the day after. Nevertheless a bright line test which focuses on the application date (as is also the case in the construction industry) is certain, easy to understand and administers [*sic*] and avoids costly and time consuming litigation associated with other possible alternatives [emphasis added].[16]

The Board affirmed again and again that the "day-of" test is appropriate in both the construction and entertainment context due to the similarities in the type of work and pattern of work in those industries.

We submit that, if the two industries are similar enough to administer the same test to determine which employees are eligible to be counted in an application for certification, they are similar enough to warrant having access to the same overall certification procedure. Card-based certification should be extended to the entertainment sector.

C. HOURS OF WORK EXEMPTIONS SHOULD BE EXTENDED TO WORKERS IN THE STAGE INDUSTRY

IATSE proposes that the *Employment Standards Act, 2000* ("*ESA*") be amended to exempt workers in the industry producing live performances of theatre, dance, comedy, musical productions, concerts and opera, as well as producing trade shows and conventions

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[14] *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada Local 58 v GBSP Centre Corp* 2009 Canlii 37638 (ONLRB) [*GBSP*].

[15] [1992] O.L.R.D. No. 1011 [*Theatrecorp*].

[16] *Theatrecorp* at para 12.

("employees in the stage industry"), from provisions limiting their hours of work.[17] As the Guide to Consultations recognizes, while the traditional workplace is characterized by rigid work structures and standardized production methods, work in the entertainment industry is entirely different, and often requires employees to work intensive hours for short periods of time.[18]

It is the nature of the stage and convention centre industry that workers must take work when they can get it. Projects in these industries, like in the film industry, tend to be intensive and seasonal. In order to survive and thrive in this industry, workers want to be able to work long hours when the work is available, which allows them to save enough money to survive periods when projects are fewer and farther between. The limitation on hours of work and the requirement for time between shifts is crucial in industries where workers are in long-term employment relationships that are less project-based than in the stage or motion picture industry. However, in the entertainment industry, it does workers a disservice to prohibit them from working the hours they need to work when that work is available to them.

The *ESA* has many exemptions to deal with the unique realities of employment in different industries. In fact, so many exemptions exist that the Ministry of Labour has developed a "special rule tool" online, to find the exemptions easily.[19] Work relationships take many different forms and work in the entertainment industry cannot be considered stable or traditional. Instead, it requires a unique legislative basis to allow workers the flexibility they need to make a decent living. Allowing workers in the entertainment industry to work more hours is one way legislation can support entertainment workers in their relatively unique employment relationship.

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[17] *Employment Standards Act, 2000,* S.O. 2000, c. 41, ss. 17-19 [*ESA*]. The *ESA* sections 17 through 19 address hours of work, daily rest periods, weekly rest periods, and eating periods for employees. For example, the *ESA* limits shifts to eight hours per day, guarantees employees 11 consecutive hours free from work each day, and guarantees employees at least eight hours free between shifts.

[18] See Ministry of Labour, *Changing Workplaces Review: Guide to Consultations,* at page 11.

[19] See "Industries and Jobs with Exemptions or Special Rules", available online: < http://www.labour.gov.on.ca/english/es/tools/srt/index.php>

Workers in the film industry are already subject to exemptions to hours of work and rest periods, and given the similarity to workers in the stage industry, there is no reason to apply the exemption to one portion of the industry and not the other. This is important for industry consistency, and to allow workers the flexibility to earn a decent living in a field that lends itself to transient work.

D. PUBLIC HOLIDAY PAY SHOULD BE CALCULATED AS A PERCENTAGE OF EARNINGS

IATSE proposes that in the entertainment sector, public holiday pay be calculated as a percentage of earnings to reflect the transient nature of work for employees in the stage and motion picture industries. Under the *ESA*, employees are entitled to public holiday pay calculated as the total amount of wages and vacation pay earned in the four weeks before the work week in which the public holiday occurs, divided by 20.[20] This method of calculation chronically short-changes workers in the motion picture and stage industries. When workers move frequently between employers, they are rarely able to work at the same workplace for the four weeks before a public holiday, which undervalues their entitlement to public holiday pay.

To ensure the *ESA* applies to workers across the spectrum of employment contexts, IATSE recommends adopting a model of public holiday pay that is based on a percentage of earnings, much like vacation pay is calculated. This would allow stage and motion picture workers to collect public holiday pay when they would otherwise be given an unrealistically low amount.

We recommend implementing a calculation of 4% of earnings to be given to employees on each paycheque, similar to vacation pay, in the stage and motion picture industry. Vacation pay is measured as 4% of earnings, and can be paid to an employee in each paycheque.[21]

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[20] *ESA*, s. 24(1).

[21] *ESA*, s. 36(3)(a).

There are 10 public holidays in Ontario, representing two weeks of regular employment at five days per week. This is the same amount as vacation time guaranteed under the *ESA*. As such, we recommend that public holiday pay should be remitted to employees in the stage and motion picture industry as 4% of their total pay, and paid on each paycheque.

E. CONCLUSION

Workers in the entertainment industry face unique labour challenges, related to the transient, intensive, and project-based nature of their jobs. We recommend changes to the *OLRA* and *ESA* that reflect the realities of work in the entertainment sector, and that will support workers who have chosen to make a living in that industry. Specifically, we recommend implementing card-based certification to mirror the construction industry, where work is also transient and seasonal; we recommend exempting stage employees from hours of work and rest period legislation; and finally, we recommend paying public holiday pay to workers in these industries as 4% of their wages on each paycheque. These changes would create a more equitable legislative structure for workers in the entertainment sector in Ontario.

We appreciate the opportunity that has been provided to us to set out these submissions and we look forward to working with the Ministry to accomplish our shared objective.

Sincerely,

John Morgan Lewis
International Vice President
Director of Canadian Affairs