LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL

SUBMISSIONS to the CHANGING WORKPLACE REVIEW

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INTRODUCTION

Labourers' International Union of North America, Ontario Provincial District Council ("OPDC") represents over 85,000 workers in the Province of Ontario through our eleven affiliated Local Unions including over 10,000 employees engaged in non-construction work. Most of our non-construction members are employed in industries that are particularly vulnerable to the precarious working conditions this review seeks to address, including the health care and building services industries.

Precarious working conditions are a critical problem facing workers in Ontario. They undermine the ability of vulnerable individuals to participate meaningfully in democratic society as they struggle to earn enough to simply survive. The OPDC believes that improvements to the working conditions of all workers in Ontario are urgently needed. Our recommendations focus on two broad themes. First, it is imperative that working conditions be improved to create a basic level of stability for vulnerable workers, particularly part-time and temporary workers. Second, we strongly endorse measures to facilitate the ability of workers to unionize and engage in collective bargaining. The Ontario Federation of Labour states that a job should be a pathway out of poverty. The OPDC believes that a unionized job goes further, and places workers on the road to prosperity.

The OPDC thanks the Special Advisors for the opportunity to make these submissions. We have had an opportunity to review the submissions made by our affiliated Local Unions, Local 183 and Local 1059 and we adopt and endorse their submissions in their entirety. In addition, we have reviewed the submissions made by other prominent labour advocates including the Ontario Federation of Labour and Unifor. In order to avoid unnecessary repetition, we have elected to set out an Executive Summary of our recommendations with brief commentary. In support of our recommendations, we refer you to the able and compelling submissions made by our affiliated Local Unions and our colleagues in the labour movement.

A) RE-FOCUSING THE PURPOSE OF LABOUR & EMPLOYMENT LEGISLATION ON WORKERS' RIGHTS

Recommendation #1: Amend the purpose provision (section 2) of *The Labour Relations Act, 1995* ("*LRA*") to emphasize Ontario's commitment to facilitating and promoting the maintenance and acquisition of collective bargaining rights, encouraging constructive settlement of disputes, and enhancing working conditions through sound and balanced labour-management relations in Ontario.

Specifically, restoring the pre-1995 provisions of the purpose clause that recognize the rights of workers to "**freely exercise the right to organize by protecting the right of employees to choose, join, and participate in the lawful activities of the union**" would re-focus the purpose of the *LRA* on the rights of workers. Moreover, the importance of restoring the pre-1995 phrase: "**fair, effective**" to the purpose of "expeditious resolution of workplace disputes" is self-evident. Simply resolving disputes quickly is pointless if the resolution is not also fair and effective.

Similarly, a purpose provision to the *Employment Standards Act, 2000* ("*ESA")* should be added to clearly enunciate that the purpose of the *ESA* is to protect workers' rights by ensuring minimum standards and working conditions.

B) AMENDMENTS TO CLARIFY "WHO IS THE EMPLOYER?"

The use of temporary employment agencies and labour supply companies obfuscates the true nature of employment relationships in the workplace, increasing workers' vulnerability and impeding workers' right to join a union.

Similarly, attempts by employers to mischaracterize their employees as "independent contractors" or "consultants" should be subjected to greater scrutiny and control by instituting threshold requirements for such status to protect vulnerable workers from exploitation.

Recommendation #2: Amend the *LRA* and the *ESA* to deem that the entity that benefits from an individual's labour is the employer of that individual for the purposes of the *LRA* and the *ESA*.

Recommendation #3: Amend the *LRA* and the *ESA* to deem temporary employment agencies and their employer clients jointly and severally liable for violations of the *LRA* or the *ESA*, for the failure to make statutory contributions and remittances, or for any other claims made under the *LRA* or *ESA*, with no ceiling placed on claims and a five-year limit for filing claims.

Recommendation #4: Amend the *LRA* and the *ESA* to deem anyone engaged to perform work for the benefit of an entity to be the "employee" of that entity for the purposes of the *ESA* and *LRA*, regardless of the contractual form of the relationship, unless the individual earns more than $150,000 per year from that entity.

C) END DISCRIMINATION AGAINST TEMPORARY AND PART-TIME LABOUR

Labour and employment legislation tacitly sanctions the exploitation of temporary and part-time workers. Employers currently have no incentive to create more full-time and stable employment because it is cheaper to employ part-time and temporary employees at lower wages, with reduced or non-existent benefits and more flexibility and control over their hours of work. This discriminatory treatment of vulnerable workers must stop.

Recommendation #5: Amend the *ESA* to require that temporary and part-time employees be paid the same rate as permanent employees performing similar work, and be provided with equivalent benefits, or be compensated for the proportionate value of the benefits based on the their hours worked.

Recommendation #6: Amend the *ESA* to require that temporary and part-time employees be given at least two weeks' notice of their scheduled hours of work, and be paid a minimum of four hours pay on any day they perform work for an employer.

Recommendation #7: Amend the *ESA* to require employers to combine hours of work to create full time positions.

D) RESTORE PRE-1995 PROTECTIONS FOR BUILDING SERVICE EMPLOYEES

Collective bargaining rights in the building services industry are illusory as a result of the elimination of successor rights for this sector in the mid-1990s. In addition, job security is non-existent because an employer that secures a contract for building services is under no obligation to employ the workers from the predecessor employer that formerly held the contract.

Recommendation #8: Re-enact the pre-1995 successor provisions of the *ESA* and the *LRA* to maintain bargaining rights and job security for workers employed by building service contractors.

E) ENHANCE ENFORCEMENT OF THE ESA

The rights of vulnerable workers under the *ESA*, including existing provisions and those set out in the forgoing recommendations, are only meaningful if workers are protected by effective enforcement mechanisms.

Recommendation #9: Allocate resources to permit investigators to engage in a proactive approach to *ESA* compliance through spot checks, audits and inspections of workplaces.

Recommendation #10: Amend the *ESA* to provide for a simplified, low-cost "collective complaint" procedure to be heard by the Ontario Labour Relations Board. The procedure should incorporate the following features:

a) the use of a representative plaintiff or applicant who need not be an employee with respect to common complaints for a single employer;

b) a low threshold for commonality;

c) allow unions, labour advocacy groups, or other qualified third parties to advance claims;

d) allow legal representation on a contingency basis;

e) allow discretion for cost awards and legal fees to be ordered against defendant/responding party employers that violate the *ESA*. (In order to avoid deterring valid complaints, cost should never be awarded against plaintiff/applicant employees.)

f) Institute additional fines and penalties to assist in the funding of the enforcement of the *ESA*.

F) ELIMINATE BARRIERS TO UNIONIZATION – CARD-BASED CERTIFICATION

As a council of trade unions and an Employee Bargaining Agency in the construction sector, the OPDC is keenly aware of the importance of card-based certification in protecting workers' right to unionize free from employer interference. The continuing and unnecessary requirement for a vote in the non-construction context undermines workers' rights and provides employers an opportunity to interfere with the rights workers are afforded under the *LRA*.

Recommendation #11: Amend the *LRA* to allow for card-based certification in non-construction sectors.

Where votes are required, steps need to be taken to ensure that the true wishes of employees are expressed by minimizing employer interference in the voting process.

Recommendation #12: Amend the *LRA* and adopt procedures to allow for electronic and telephone voting where votes are required.

Recommendation #13: Amend the *LRA* to allow for electronic based signing of union membership/representation cards.

Recommendation #14: Amend the *LRA* to require employers to provide unions with a list of employees and contact information once a threshold for support in an organizing campaign is established.

Recommendation #15: Enhance and increase penalties for employer interference with employees and unions exercising rights under the *LRA*, particularly in the context of seeking representation rights.

Further, given the undue influence employers have in the workplace, added protections are needed to ensure that applications terminating bargaining rights are truly voluntary.

Recommendation #16: In decertification applications, the onus should be on the applicant employee to prove that the application is voluntary.

Finally, once bargaining rights are acquired, barriers to concluding a collective agreement must be removed.

Recommendation #17: Amend the *LRA* to provide greater access to first contract arbitration.

Recommendation #18: Amend the *LRA* to allow parties access to final and binding interest arbitration if bargaining exceeds 180 days.

G) ENHANCE POWERS OF THE ONTARIO LABOUR RELATIONS BOARD AND ARBITRATORS

The Ontario Labour Relations Board (OLRB) and private arbitrators are critical to the adjudication of labour relations disputes, which can have a dramatic impact on the economy of Ontario and the livelihood of individual workers. As a frequent litigant in labour relations disputes, it is clear to the OPDC that the OLRB lacks adequate resources to attract and retain the number of adjudicators needed to fulfill its mandate. Despite the best efforts of OLRB staff and adjudicators, delay is an all too common feature of labour relations disputes. This needs to be addressed through additional resources.

Recommendation #19: The Province must provide the OLRB with the resources to fulfill its mandate and deal with labour relations disputes in a fair, equitable and expeditious manner.

In addition, the ability of the OLRB and arbitrators to adjudicate would be enhanced if the *LRA* did not unnecessarily fetter their discretion in certain areas.

Recommendation #20: Amend the *LRA* to grant arbitrators the discretion to extend time limits in a collective agreement to refer matters to arbitration so that important disputes are not dismissed for technical reasons.

Recommendation #21: Enhance the OLRB and arbitrators' ability to make interim orders beyond procedural matters or reinstatement in certification applications. In addition, lower the threshold for obtaining interim relief from requiring a union to demonstrate irreparable harm to a standard of "balancing of harm".

H) ELIMINATE UNWARRANTED INTRUSIONS INTO WORKERS' PRIVACY

Intrusions into workers' privacy that have no connection to the workplace must be prohibited. We have observed an increase in employers insisting on drug testing and criminal background checks that have no meaningful connection to the workplace. Such intrusions into the personal privacy of employees only exacerbates the power imbalance between employers and workers and unnecessarily restricts the ability of qualified and competent individuals to earn a livelihood.

Recommendation #22: Amend the *ESA* to prohibit an employer's unilateral drug testing of individual employees unless all three of the following apply:

a) The employee is in a safety sensitive position;

b) There is reasonable cause to believe that the employee is:

   a. Impaired while on duty;

   b. Has been directly involved in a workplace accident or a significant incident, or

   c. Is returning to work after treatment for substance abuse; and,

c) The method for drug testing reveals impairment at the relevant time. Unless the employer proves otherwise, urinalysis and buccal swabs are presumed not to provide evidence of present impairment.

Recommendation #23: Amend the *ESA* to prohibit random drug testing in the workplace without an Order from the OLRB permitting it to be done. The amendments should specify that random drug testing is impermissible unless all three of the following criteria apply:

a) The employees are in a safety-sensitive workplace;

b) There is evidence of a general problem with substance abuse in the workplace, in a manner that impacts on the employees' ability to safety perform their duties; and,

c) There is overall proportionality between the "benefit" to the employer gained through the testing and the harm occasioned to employee privacy. There should be a presumption that where the method of drug testing used is unable to demonstrate impairment at work, the criterion of proportionality will not be met.

In the case of non-unionized workplaces, a Ministry-appointed lawyer should represent employees' interests in such OLRB proceedings, in the capacity of a

special advocate. In the unionized context, unions would represent employees' interests. Intervenors should also be permitted to participate in the OLRB proceeding

Recommendation #24: Amend the *ESA* and the *LRA* to prohibit criminal record checks except for positions that meet certain enumerated attributes. Before any screening may be undertaken, the employer should obtain a clearance certificate issued by the Ministry of Labour. The Ministry would only provide such clearance if the employer sets out a clear rationale for why the position proposed for screening meets the attributes enumerated in the legislation, consistent with the factors discussed below.

Recommendation #25: Amend the *ESA* and the *LRA* to require that any police record checks be delayed until after a conditional offer of employment has been made, and that employees must be provided written reasons for any proposed revocation of an offer due to their criminal record, and the opportunity to respond.

Recommendation #26: Outside of individuals working in positions that require clearance as a result of legislation, or who work in ongoing, unsupervised positions of trust or power over vulnerable individuals, police checks should not be permitted during the course of employment.

Recommendation #27: Amend the *ESA* and the *LRA* to prohibit employers from requesting (and police forces from disclosing) police records dating back further than five years (outside of the vulnerable sector).

Recommendation #28: Amend the *ESA* and the *LRA* to require that employers bear the costs of any police screening.

CONCLUSION

The OPDC respectfully submits that its recommendations will enhance protection for Ontario's most vulnerable workers, namely temporary and part-time employees. Moreover, we sincerely believe that our recommendations will affirm the fundamental right of employees to belong to a union and engage in collective bargaining with their employers. By affording workers greater protection and access to their rights, the government of Ontario will ensure that those who are currently engaged in precarious work begin the journey down the road to stability and prosperity.