Labourers' International Union of North America, Local 183

Submissions to the Changing Workplace Review

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LSUC No. 18568A

September 11, 2015

INTRODUCTION

Labourers' International Union of North America, Local 183 ("Local 183") is the largest construction local union in North America, representing more than 40,000 construction workers and their families in the Greater Toronto Area. Local 183 also represents approximately 8,500 members working in the industrial sector, including members working for employers contracted to provide cleaning and maintenance services to building owners. Our members toil in adverse environments and under severe circumstances. Local 183 has a long history of advocating for better working conditions and legal protections to decrease the vulnerability of workers.

The problem of precarious work has reached a critical point in Ontario. Too many are working with no job security, are subject to unpredictable and irregular hours of work, are not given appropriate overtime pay or benefits, and may not know who is their real employer. They are also subject to invasions of privacy at the whim of the employer, whether through drug testing or security checks, that are not justified by the nature of their job duties. Furthermore, to the extent employees have legal rights in theory, they face significant barriers to enforcing them. Employers are well aware of their disproportionate bargaining power over their employees, reinforced by current gaps in the law, and they exploit this power to their economic advantage.

None of the current problems of precarious workers are natural or inevitable. They are a result of weak laws, weak enforcement, and opportunism by employers. Instead of saving money through innovation, efficiency and investment in technology, employers accomplish savings through poor treatment of their employees. This is not good for the economy and not good for people. Rights at work and broader economic prosperity are not mutually exclusive. In fact, Ontario's economy expanded in periods when workers had more robust workplace rights. As a Union, we know that when workers' standard of living improves, the economy improves.

Local 183's interest in the Changing Workplace Review is twofold: First, our interest is to improve working conditions for all workers in Ontario, whether unionized or not. Second, we know that unionization is the single most significant measure to counter the

vulnerability of workers; however, the factors today that create precarious working conditions for workers also make it difficult to organize workers. Challenges in identifying who is the employer, the fact that employees are subject to inconsistent and unpredictable hours of work, and lack meaningful protection when they assert their workplace rights are just some examples of the pervasive features of modern work in Ontario. These factors also make it difficult for unions to gain a foothold in many sectors.

Local 183 welcomes this opportunity to draw on our wealth of experience in organizing and representing some of the most vulnerable workers in Ontario in order to recommend legislative changes that will help to ensure that workers throughout Ontario can enjoy basic, decent working conditions and a reasonable standard of living. This cannot be accomplished without clear and robust legislation, which we trust this review process will recognize and recommend.

A. AMENDMENTS NEEDED TO CLARIFY "WHO IS THE EMPLOYER"?

Local 183's Experience: *Companies are increasingly using labour supply companies to staff their workplaces and projects. After their brief visit to the labour supply company's placement office, workers have little connection to that entity, and their day-to-day employment experience is entirely determined by the "client" company. Every time we try to organize these workers, we are dragged into a prolonged, expensive fight at the labour board about who is the "true" employer. We need clear, consistent rules identifying the employer in these situations. The logical, true nature of these tripartite relationships is that the "client" has meaningful control over the employee's work and should be the employer in law.*

Recommendation #1: *Amend the LRA to include a rebuttable presumption that the entity an individual is directly benefiting through that individual's labour is the employer of that individual for the purposes of the LRA.*

Recommendation #2: *Amend the ESA to provide that the "employer" for the purposes of the ESA is the "client" of the temporary help agency, and not the agency, when the employee is directed to work for the client by the agency. The agency would remain jointly and severally liable for all statutory contributions and remittances (CPP, EI etc).*

Recommendation #3: *Amend the ESA and LRA to deem anyone engaged to perform work for the benefit of an entity the "employee" of that entity for the purposes of the ESA and the LRA, regardless of the form of the relationship and unless the individual earns more than $150,000 per year from that entity.*

The Client Company Should Be Deemed to be the "True Employer"

Contractors often use labour supply companies to hire employees for work on a project or short-term assignment. Every time there is a certification application in this "tripartite"

context, unions are required to argue the issue of who is the "true" employer (i.e., the contractor or the labour supply company) for the purpose of the *LRA*.[1]

For many years, the OLRB applied seven factors enumerated in *York Condominium Corporation No. 46* to make this determination,[2] though in recent years the Board has departed somewhat from the seven-part test, taking a more "contextual" approach. As the Board stated recently in *Labourers' International Union of North America, Ontario Provincial District Council v Rochon Building Corporation*:[3]

> In simple terms this means that the analysis is contextual. There is no single factor that is determinative and no exhaustive list of factors that must be mechanically applied. Rather, the question to be asked is, having regard to all of the facts of the specific case, which entity should the union be required to bargain with and represent the employees with so that collective bargaining can be as effective and stable as possible?

The complexity and lack of certainty in the law leads to many wasted days of litigation, significant expense, and delay in achieving meaningful rights for employees. It has now been close to two decades since the Supreme Court of Canada, in *Pointe-Claire (City) v. Quebec (Labour Court)*,[4] noted the inadequacy of labour legislation when applied to tripartite relationships, and suggested that these gaps must be remedied through legislative amendments. As stated by then Chief Justice Lamer:

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[1] See, e.g., *Thorium Contracting Limited,* 2010 CanLII 8403 (OLRB); *Westendorp Demolition and John Westendorp Enterprises Inc.,* 2011 CanLII 57532 (OLRB); *LIUNA, OPDC v. Mettko Construction,* 2013 CanLII 77073 (OLRB); *Mackie Moving Systems Corporation,* [2004] OLRB Rep. Jan/Feb 94; *Sysco Fine Meats of Toronto,* [2013] OLRB Rep. Jan/Feb 160 (OLRB); *Viewmark Homes,* [2005] OLRB Rep. Jan/Feb 161 (OLRB); *Kylemore Homes,* 2010 CanLII 67916 (OLRB).

[2] [1977] OLRB Rep. Oc. 645. The factors are: (a) the party exercising direction and control over the employees performing the work; (b) the party bearing the burden of remuneration; (c) the party imposing discipline; (d) the party hiring employees; (e) the party with authority to dismiss the employees; (f) the party perceived to be the employer by the employees; and (g)the existence of an intention to create the relationship of employer and employee.

[3] 2015 CanLII 4680 (ON LRB) at para. 60.

[4] [1997] 1 SCR 1015, 1997 CanLII 390 (SCC) at para. 63.

> ...The case at bar shows that situations involving tripartite relationships can cause problems when it comes to identifying the real employer if the labour legislation is incomplete in this regard. The tripartite relationship does not fit very easily into the classic pattern of bilateral relationships. The Labour Code was essentially designed for bipartite relationships involving an employee and an employer. It is not very helpful when a tripartite relationship like the one at issue here must be analysed. The traditional characteristics of an employer are shared by two separate entities—the personnel agency and its client—that both have a certain relationship with the temporary employee. When faced with such legislative gaps, tribunals have used their expertise to interpret the often terse provisions of the statute. In the final analysis, however, it is up to the legislature to remedy those gaps. The Court cannot encroach upon an area where it does not belong.

The *LRA* should be amended to include a rebuttable presumption that the entity employees are directly benefitting through their labour is the employer for the purpose of the *LRA*.

Similarly, the problem of identifying "who is the employer" arises for the purpose of the *ESA* where temporary help agencies supply employees to client companies.

As of November 20, 2015, new provisions of the *ESA* will come into effect making a temporary help agency and client of the temporary help agency jointly and severally liable with respect to certain wages owed to an employee assigned to work for the client by the temporary help agency.[5] The client may be jointly and severally liable for regular wages, overtime pay, public holiday pay and premium pay.[6] For the purposes of enforcing liability against a client, the client is "deemed" to be an employer of the assignment employee.[7]

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[5] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 74.18 (*"ESA"*).

[6] ESA, *supra* note 5, s. 74.18(3).

[7] *Ibid*, s. 74.18(5).

However, outside of these exceptions, where employees are sent to work for a client company through a temporary help agency, and in the course of that work, their rights under the *ESA* are breached (for example, because they are not given appropriate leaves or vacation), the agency is considered to be the "employer" for the purposes of the *ESA* and remedies may not be sought against the "client." This allows companies to benefit from the illegal practices of the agencies they retain through lower labour costs as they shirk their responsibilities to ensure that the individuals enriching their own enterprise are adequately protected.

Furthermore, even where wages may be sought against a client by virtue of the new provisions allowing joint and several liability with the agency, the sharing of responsibility between these two parties still maintains an incentive for clients to use temporary help agencies for the purpose of sharing the risk of non-compliance (i.e., avoiding their full liability) under the *ESA*.

The solution to these repetitive and exploitive relationships need not be complex; statutory amendments should simply deem the client of temporary agencies the employer for all purposes under the *ESA* and the *LRA*. As an added disincentive to the agency should remain jointly and severally liable for all statutory contributions and remittances (CPP, EI etc).

B. AMENDMENTS NEEDED TO CLARIFY WHO IS AN "EMPLOYEE"

A similar but distinct problem that diminishes the job security, pension and employment insurance status of too many workers is the attempt by employers to turn employees into "contractors" or "consultants" and thereby make these individuals liable for their own tax deductions, pension and employment insurance contributions, thereby transferring the employment burden from employer to the employee for no appreciable increase in compensation. Employers also misclassify their employees as "independent contractors" (and improperly fail to classify themselves as "employees") to avoid their obligations under the *ESA* and *LRA.* This practice is endemic in many industries and most workers, especially low-income workers, do not have leverage to negotiate their status with their employer. It is common place and exploitive in the extreme to have, for example, early childhood educators or labourers, who wind up with next to minimum compensation, considered to be self-employed contractors.

The problem of deliberate employee misclassification is exacerbated by the fact that the law regarding employee status is complex and nuanced. These are not good ingredients when it comes to remedial legislation such as the *ESA*, which is meant to create the basic floor of rights for employees.

As the OLRB has stated:

> "The determination of whether an individual is an employee or independent contractor can be one of the most difficult in employment and labour law."[8]

Wherever possible, labour employment standards legislation must be clear and easy for unsophisticated employers and employees to apply. Adjudicators, when determining an employee's status under the *ESA* or *LRA,* apply a multi-factor analysis (sometimes

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[8] *1022239 Ontario Inc. o/a Seventy-Five Hundred Taxi Inc., v. Director of Employment Standards,* [2011] O.E.S.A.D. No. 925, [2011] OLRB Rep. July/August 472, No. 0264-10-ES (July 20, 2011), at para. 46.

referred to as a "fourfold test," a "control test" or the "integration" or "business organization" test) [9].

As stated by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc,*[10] there is no "universal test" to determine if a person is an employee or independent contractor and the central question is whether the individual is performing services as a person in business on his or her own account. The Court held:

> In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

Adjudicators have also held that the intention of the parties is a relevant factor, for example, as evidence by an agreement between the parties.[11]

This complexity in the law allows misclassification to thrive. The fact that it is difficult to predict with any certainty whether an employee will be judged to be an "employee" or not is a further disincentive to non-unionized vulnerable workers to access their rights; they are less likely to challenge their employer when the outcome is so uncertain. Even in the unionized context, unions must spend significant time and resources before the OLRB arguing about a worker's status.[12]

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[9] *Montreal v. Montreal Locomotive Works Limited*, [1947] 1 D.L.R. 161 (P.C.); *Grenvilla Development Group Inc.*, 2006 CanLII 3604 (OLRB), at para. 21; *Condominium Corporation*, [1977] OLRB Rep. Oct. 645 at para 10; *533670 Ontario Ltd. (c.o.b. Best Personnel Services)*, [1997] OLRB Rep. September/October 849; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538 at para 43;

[10] [2001] 2 SCR 983, 2001 SCC 59 (CanLII) at para. 47.

[11] *Greypoint Properties Inc.* [2000] OLRB Rep. May/June 479 at para. 15.

[12] See, e.g., *Universal Workers Union, Labourers' International Union of North America Local 183 v. Greenvilla Development Group Inc.*, 2006 CanLII 3604 (OLRB); *Allied Construction Employees, Local 1030 v 1639942 Ontario Ltd (Studd Construction)*, 2014 CanLII 38335 (ON LRB).

Our proposed solution is to end this endless controversy and adopt a simple standard. If an individual is providing the benefit of his or her labour to an entity, that individual should be deemed by statute to be an employee of the entity regardless of any "contractual" forms adopted by the entity.

To protect low-and middle-income earners from this practice, a simple level of income from that entity must be reached before it is possible to be a contractor or consultant. We recommend that that standard be a high one: $150,000 per year, to discourage disingenuous attempts to make employees into the self-employed. What this means in practice is that the entity that gets the benefit of the labour of the individual must pay that individual, deduct taxes, pay CPP and EI contributions and other employment taxes.

C. INSTITUTE PRE-1995 PROTECTIONS FOR BUILDING SERVICES WORKERS

Local 183's Experience: *Building owners award contracts to building services companies on a competitive bid basis and generally award contracts to the lowest bidder. Because successor rights in this industry were eliminated in the mid-1990's, as soon as we are able to negotiate reasonable rights for the building services workers we represent, the employer loses its contract through the tendering process. Any gains in rights we have made for these workers are lost and we have to start the organizing process again, from scratch. Compounding the vulnerability of these workers is the fact that they have no security of tenure. If their employer loses the building services contract, the successful bidder has no obligation to hire the former contractor's workers. The lack of successor rights and job security for building services workers contributes to their already vulnerable status.*

Recommendation #4: *The pre-1995 provisions in the ESA and LRA respecting building services workers should be re-enacted to maintain bargaining rights and job security for workers employed by building services contractors.*

Protections in the *LRA* and *ESA* pre-1995

Prior to 1995, the *LRA* provided successor rights to unions when a building service contractor lost a contract (usually as a result of the tendering process). The *ESA* required that a new contractor offer the same or similar work to employees of the previous contractor, where available, pursuant to the same or comparable terms and conditions of employment.

However, these rights were eliminated through Bill 7, the *Labour Relations and Employment Statute Law Amendment Act, 1995.* As a result, now successor rights do not pass on when a building owner awards a contract to a new service provider. Where a union is able to organize contract services workers and bargain a first contract, their bargaining rights, negotiated benefits and job security are jeopardized every time the contract comes to an end and is put up for tender. If their employer (the contract services provider) does not win the contract, successor rights do not flow to the new

service provider performing work on site. In most cases, when there is a change of building services provider, the same workers are hired by the new contractor, but without their union and for less pay and benefits.

As reported by the Workers Action Centre, the removal of successor rights has led to a "growth in fly by night operators that bid for contracts that cannot meet minimum labour standards..."[13]

[13] Deputation of the Workers' Action Centre and Parkdale Community Legal Services (7 June 2012) re: Bill 77 – Fairness for Employees Act, submitted to the Standing Committee on Regulations and Private Bills. Online: <http://www.workersactioncentre.org/wp-content/uploads/downloads/2012/06/June-7-2012-PCLS-Deputation-Bill-77-.pdf>.

D. END DISCRIMINATION AGAINST TEMPORARY AND PART-TIME LABOUR

Local 183's Experience: *The vulnerability of workers who are unable to find permanent, full-time work, has been well documented. Workers are forced to work multiple jobs, for low wages, without benefits, and to the detriment of their well-being. The current explosion in employers' use of part-time and temporary labour needs a legislative solution. It is too inexpensive for employers to have a ready supply of near-slaves. The only way to increase the supply of decent, full-time, permanent jobs is to eliminate the incentives for employers to create these precarious positions. The cost of temporary and part-time labour must be proportional to the cost of full-time, permanent employees.*

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 2 weeks' notice of their scheduled hours of work, and be paid a minimum of four hours pay on any day they perform any work for an employer.*

The Cost of Temporary Labour Should Be Equivalent to Permanent Labour

Temporary work is thriving because it is cheap. Employers can exploit the vulnerability of workers unable to find permanent work by offering them temporary or part time assignments with lower pay and no benefits. Steps must be taken to eliminate the incentive to create precarious work.

Decrease the "Flexibility" of Temporary Labour

One element of what makes work precarious from an employee's perspective is a lack of control, predictability and minimum guarantee in terms of their hours of work and income. This endless flexibility makes the use of temporary employees attractive for employers, but makes it impossible for employees to have a decent standard of living. It deprives them of a reasonable family and social life, creates untenable childcare

challenges, and compromises their ability to plan for the two or three part-time jobs they may be working in order to get by.

Our recommendations change the rules fundamentally. But there is no point in this review if it merely notes the problems and fails to offer fundamental improvements. The meaning of "flexible" workforce is an exploited workforce that is paid less for the same work, has less work, has unpredictable work, no benefits and no hope for benefits. The "market" has no incentive to change this situation; legislation is the only possible agent of change and it ought to be clear and unambiguous.

more likely to comply with employment standards owing to their employees having the means to access support to enforce their rights.[14]

Given the high costs of legal fees, and relatively small sums at issue in individual cases, it will not be economical in the vast majority of cases for workers to hire legal counsel to assist in bringing their claims forward.

These same considerations are what make the possibility of class actions, under the *Class Proceedings Act,* 1992, SO 1992, c 6, (the "*CPA*"), a compelling option to address *ESA* violations. That is, the *CPA* was designed to enhance access to justice by allowing the advancement of many, similar, modest claims together, and by providing an incentive to legal counsel to take on such cases on a contingency fee basis (through the possibility of a court awarding costs on a multiplier basis).

However, proceeding by way of a class action under the *CPA* is expensive and, as such, law firms will generally be hesitant to take on cases on a contingency fee basis that are not valued in the millions of dollars, due to the costs of litigation and the risks of the case being unsuccessful (and the firm getting nothing for its efforts). This means that for employees who work in smaller workplaces, it will be more difficult to advance a class action, even where there are widespread, and consistent violations of the *ESA*.

Likewise, the substantive legal requirements for certification of a claim under the *CPA* pose barriers to the advancement of class actions for *ESA* violations. In particular, under the 5-part test for certification under s. 5(1),[15] the requirement that the claims of

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[14] Leah F. Vosko, "'Rights without Remedies': Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs" (2013) 50 OHLJ 845 (online: <http://digitalcommons.osgoode.yorku.ca>).

[15] *Class Proceedings Act,* 1992, SO 1992, c 6 ["*CPA*"]. Section 5(1) of the *CPA* provides:

The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

> (a) the pleadings or the notice of application discloses a cause of action;(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;(c) the claims or defences of the class members raise common issues;(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and(e) there is a representative plaintiff or defendant who,(i) would fairly and adequately represent the interests of the class,(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class

the class raise "common issues" may preclude class actions for *ESA* violations in cases involving precarious workers.

The *CPA* defines common issues as: "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts."[16] While the Court of Appeal has said that the "common issues" requirement is a "low bar"[17] an issue must be a "substantial ingredient" of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[18]

This element of commonality has proven to be a barrier in the context of managerial misclassification cases. In *McCracken v. Canadian National Railway Company* (which was brought under the *Canada Labour Code,* the plaintiff brought a proposed class action alleging that CN had misclassified class members as managers with the effect of illegally excluding them from a right to overtime pay.[19] Chief Justice Winkler overturned the certification of the claim, finding that there was insufficient commonality in the claims and that to resolve the claim would require an individualized assessment of job duties and functions, noting that the class encompassed 70 distinct job classifications.[20]

While courts have certified misclassification cases,[21] the high bar posed by *McCracken* (i.e., requiring that determination of the proposed common issues resolve the misclassification issue without the need to consider individual circumstances) continues

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members of the proceeding, and(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

[16] *CPA*, section 1.

[17] *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ON CA) at paras 51-53.

[18] *Hollick v. Toronto* (City), 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158 at para. 18; *De Wolf v. Bell ExpressVu Inc.*, 2008 CanLII 5963 (ON SC) at para. 27.

[19] *McCracken v. Canadian National Railway Company*, 2012 ONCA 445 (CanLII).

[20] *Ibid* at para 66.

[21] See eg, *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 7762.

to be influential law in Ontario and can be a hurdle to certification of these types of class actions.[22]

The commonality elements also may provide a barrier to certification for low-income workers in overtime cases. Overtime cases have been certified where there is evidence of policies and systemic uniform practices of overtime denial. In cases of smaller, less sophisticated employers, it may be difficult to prove the commonality element.

The *ESA* Should Be Amended to Provide for a Group-Based *ESA* Complaint Process

The *ESA* should be amended to provide for a simplified, low-cost "collective complaint" procedure to be heard by the Ontario Labour Relations Board. Such a measure would go some way to addressing some of the issues identified above with respect to class proceedings, and should allow greater access to meaningful enforcement of *ESA* rights to low-wage workers.

We submit that there would be additional benefits to such a process. The complaints-based model leaves individual employees vulnerable to employer reprisals, which explains why most ESA claims are filed by employees after they are no longer working for the employer.[23] Specifically allowing a union or advocacy organization to play a role in non-unionized workplaces will have additional benefits of giving employees access to

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[22] Courts have found ways to distinguish *McCracken*. In *Baroch v. Canada Cartage*, 2015 ONSC 40 (CanLII), the action was certified and the motion judge rejected the employer's arguments that this was a misclassification case (per *McCracken*). Leave to appeal was denied: 2015 ONSC 3227 (CanLII). Baroch proposed an alternative way of framing the common issues in what might otherwise be an overtime misclassification case. In that matter, Justice Belobaba began by asking "When is an overtime misclassification case not a misclassification case?" to which he then answered, "When it is framed as a complaint about the systemic policies or practices of the defendant employer." On the other hand, in *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677 (CanLII), the plaintiffs sought to certify a class action for overtime pay. The motion judge dismissed the motion for certification, and the Divisional Court dismissed the appeal on the basis of *McCracken*. The appeal was dismissed at the Court of Appeal based on "the legal landscape described in McCracken" (para 6).

[23] Workers' Action Centre, "Still Working on the Edge: Building Decent Jobs from the Ground Up" (March 2015) online: <http://www.workersactioncentre.org> at 38.

individuals who can inform them of their rights and monitor the workplace for evidence of employer reprisals.

There is some precedent for an alternative group-enforcement procedure of employment standards. In the United States, for example, the *Fair Labor Standards Act* (the "*FLSA*") incorporates a mechanism for "collective actions." The *FLSA* incorporates standards for minimum wage, overtime pay and youth employment standards for employees in the private sector and in Federal, State and local governments. Section 216(b) of the *FLSA* provides,[24] in part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215 (a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. ...[emphasis added]

While we do not recommend this procedure being implemented in Ontario, there are features of the *FSLA* collective complaint process that ought to be adopted.

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[24] 29 US Code § 216, online: <https://www.law.cornell.edu/uscode/text/29/216>.

For example, the "similarly situated" test employed by US courts is generally understood to be less stringent test than the commonality test applied under the class action procedure under the Federal Rules of Civil Procedure. As one court described it:

> Although the "similarly situated" requirement is more stringent at the second stage [note the counts apply a two-stage test for certifications], it remains less stringent than the requirement that common questions predominate in certifying class actions under Rule 23, Fed. R. Civ. P. "All that need be shown is that some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the *FLSA*."[25]

It is submitted that the standard of an "identifiable factual or legal nexus" binding claims together is an appropriate standard for the "similarly situated" test.

In terms of costs, the language of the *FLSA* mandates that fees be awarded to plaintiffs, and makes no mention of fees being awarded to successful defendants.[26] We suggest that the Ontario amendments should allow for cost awards to be made against the employer only.

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[25] *Plaintiffs, v. Autozone, Inc. et al., Defendants.* Case No: CV-10-8125-PCT-FJM. United States District Court, D. Arizona. June 10, 2011.

[26] However, it appears that courts will award fees to the defendant in some circumstances. See e.g.: *Kuznyetsov v. West Penn Allegheny Health System, Inc. et al*, Case No: 10-948, 2014 WL 5393182 (W.D. Pa 2014).

F. OBVIOUS AMENDMENTS NEEDED TO THE *LRA*

Local 183's Experience: *There are a number of obvious amendments that should be part of any reform of the LRA. The fact that arbitrators do not currently have the authority to grant relief from arbitration deadlines has terminated otherwise meritorious grievances on purely technical grounds. As the Court of Appeal stated 40 years ago in the case of Re: Blouin Drywall Contractors*[27]*, labour cases should not be won or lost on technicalities.*

Card-based certification should be allowed in the industrial sector. It has worked well in the construction industry and has led to a higher rate of unionization, allowing workers to earn a living wage and benefits. Unionization rates are dropping outside of the construction sector because in order to be unionized a majority of employees must vote in circumstances fraught with personal risk. Employees in precarious work arrangements are faced with voting against the interests of their own employer.

In decertification applications, the onus should be on the person bringing the application to prove it is voluntary. Currently, employers are able to get rid of bargaining rights by influencing its weakest employees. This must stop.

Recommendation #8: *Allow arbitrators to extend the time limits in a collective agreement to refer a matter to arbitration. Courts have held that the current language in the LRA denies arbitrators discretion to relieve against breaches of time limits, Legislative remedies are now required.*

Recommendation #9: *Allow for card-based certification in non-construction sectors.*

Recommendation #10: *In decertification, the onus should switch back to the applicant employee to prove that the application is voluntary.*

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[27] *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486,* 1975 CanLII 707 (ON CA).

Recommendation 11: *The Province must either provide the OLRB with the resources to actually do the work for which it was devised, or develop an alternative funding mechanism to make the Board self-sufficient.*

G. DRUG TESTING

Local 183's Experience: *We are observing constant growth in the number of employers who - seemingly influenced by practices south of the border - are forcing employees to submit to drug tests that have no benefit or bearing on an employee's ability to perform his or her job. The impact is severe. Drug tests discourage qualified individuals from working and expose them to needless anxiety and invasions of their privacy.*

Workers can fail drug tests because of marijuana use long before they attended the workplace, and long after any effects of drug use have worn off. Further, these drug tests can reveal all manner of private information unrelated to drug use – like use of medications for treatment of depression or blood sugar levels that may point towards certain physical diseases.

In all but exceptional cases, drug tests should be prohibited, in the same way that amendments to the ESA in the early 1980's banned the use of lie detectors by employers. The consensus approach of the courts and arbitrators should be codified for all employees under the ESA and with clear limitations imposed on employers, consistent with these authorities.

Recommendation #12: *Amend the ESA to prohibit an employer's unilateral drug testing of individual employees unless all three of the following apply:*

1. The employee is in a safety-sensitive position;

2. 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 significant incident, or

c) is returning to work after treatment for substance abuse[28]; and

3. The method of 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 #13: *Amend the ESA to prohibit random drug testing in the workplace without an Order from the OLRB permitting such testing to be done. The amendments should specify that random drug testing is impermissible unless all three of the following criteria apply:*

1. The employees are in a safety-sensitive workplace;

2. 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

3. 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, employees' interests in such OLRB proceedings should be represented by a Ministry-appointed lawyer, 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.

Codify the Test for Individual Drug Testing

Courts and arbitrators have recognized that requiring employees to undergo drug testing constitutes a serious intrusion on their privacy rights.[29] Most drug testing is done

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[28] Note that testing for these reasons has been referred to as "for cause" testing in arbitral jurisprudence. See eg, *Suncor Energy Inc. and Unifor, Local 707A (Random Alcohol and Drug Testing Policy), Re*, 2014 CarswellAlta 457, [2014] A.W.L.D. 2168 at para 154.

[29] As stated by Arbitrator Picher in *Imperial Oil Ltd. v. CEP, Local 900)*, [2006] OLAA No1 721 at para 92: "a drug test is an extraordinary and intrusive measure, justified only by the touchstone condition of reasonable cause."

through blood and urine analysis. The Supreme Court has recognized that the seizure of bodily samples for the purpose of drug and alcohol testing is "highly intrusive."[30] Compared to breathalyser testing for alcohol impairment, seizure of bodily fluids is a greater invasion of an individual's privacy and dignity.[31]

There is general consensus in the law that employers may not subject individual employees to drug testing unless these individuals occupy safety-sensitive[32] positions and 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 significant incident, or c) is returning to work after treatment for substance abuse.[33] Furthermore, while a breathalyzer test can determine current impairment, current tests for drugs, like urinalysis, can reveal only past use and are thus unhelpful in determining whether the employee is impaired on the job.[34]

As stated by the Canadian Human Rights Commission, drug and alcohol testing that do not have a rational relationship to job safety and performance will violate an employee's human rights. Such testing may, for example, lead to discrimination against an employee on the basis of disability or perceived disability (i.e., addiction).[35] Further, unless an employer can demonstrate that its interests are adversely impacted by an

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[30] *R. v. Shoker*, [2006] 2 SCR 399, 2006 SCC 44 (CanLII) at para. 23.

[31] In terms of urinalysis, for the most accurate results someone, whether on-site or in a medical setting, must watch the employee actually micturate. See *Fording Coal Ltd*, (2002) 112 LAC (4th) 141. As well, if drug use is uncovered, there could be criminal or child custody consequences for the employee, which further heightens privacy concerns.

[32] A safety-sensitive position is one in which incapacity due to drug or alcohol impairment could result in "direct and significant risk of injury to the employee, others or the environment": Canadian Human Rights Commission, *Policy on Alcohol and Drug Testing* (revised October 2009) at 3.

[33] See *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 SCR 458, 2013 SCC 34 (CanLII); *Mechanical Contractors Association Sarnia v United Association of Journeymen and Apprentices Of The Plumbing & Pipefitting Industry of the United States and Canada*, Local 663, 2013 CanLII 54951 (ON LA) at para. 102.

[34] *Imperial Oil Limited v. CEP, Local 900*, 2009 ONCA 420 (CanLII) at para 10.

[35] Canadian Human Rights Commission, *Policy on Alcohol and Drug Testing* (revised October 2009) at 2. Regarding discrimination after addiction is revealed through testing, see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City); Québec (Commission des droits de la personne) v Boisbriand* (2000) 1 S.C.R. 665.

employee's off-duty activities, it has no right to information about what an employee does in his or her own personal life.[36] To the extent that drug testing reveals an employee's off-duty recreational use, this is a serious invasion of an employee's privacy.

Despite the relative consensus in the law surrounding individual drug testing, employers continue to improperly target individual employees for drug testing, as is evidenced by the steady stream of arbitration decisions on the issue.[37] As a result, the current test for individual employee drug testing that has emerged in case law should be codified in the *ESA*.

Random Drug Testing Should Be Presumptively Illegal

Additional considerations come into play where an employer wishes to conduct random drug testing in the workplace. By definition, random drug testing is not targeted, and will in most cases involve the testing of individuals for whom the employer has no reasonable cause to suspect drug use that poses any legitimate issue for the workplace.

Again, some principles have emerged from case law in relation to random drug testing that ought to be formalized for the protection of vulnerable workers.

In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*,[38] the majority of the Supreme Court of Canada endorsed the requirement for proportionality in assessing an employer's unilateral policy of random drug and alcohol testing in a safety-sensitive workplace. The employer must demonstrate

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[36] The Supreme Court of Canada has held that information about an individual's personal life, including his or her specific interests, likes and propensities, is highly private personal information in which employees have a reasonable expectation of privacy: see *R. v. Morelli*, [2010] 1 SCR 253, 2010 SCC 8 (CanLII) at para 105; *R. v. Cole*, [2012] 3 SCR 34, 2012 SCC 53 (CanLII) at paras 3, 47 and 125.

[37] See eg, *Mechanical Contractors Association Sarnia v United Association of Journeymen and Apprentices Of The Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2013 CanLII 54951 (ON LA); *Bombardier Transportation v Teamsters Canada Rail Conference – Division 660*, 2014 CanLII 5318 (CA LA).

[38] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 SCR 458, 2013 SCC 34 (CanLII) ["Irving"].

evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace, and that the "benefit" (i.e. in terms of expected safety gains) to the employer of the random testing is proportional to the harm to employee privacy.[39]

Once again, part of this proportionality analysis is the effectiveness of the testing methodology in meeting the legitimate safety interests of the employer.[40] Where a method of testing, like urinalysis, is used and is unable to detect whether an employee is under the influence of drugs while at work, a company will generally fail to demonstrate that the testing serves its legitimate safety interests.[41],[42]

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[39] *Ibid* at paras. 4 and 43. See also para. 37.

While *Irving* was a case applicable to employees in a unionized environment, and was justified in part on the basis of the collective agreement requirement for "just cause" prior to any imposition of discipline, we submit that the same restrictions on testing ought to apply to non-unionized workplaces. As Justice Abella noted in *Irving*, at para. 20:

> ... even in a non-unionized workplace, an employer must justify the intrusion on privacy resulting from random testing by reference to the particular risks in a particular workplace. There are different analytic steps involved, but both essentially require attentive consideration and balancing of the safety and privacy interests.

[40] *Trimac Transportation Services — Bulk Systems and T.C.U. (Re) (1999)*, 88 L.A.C. (4th) 237.

[41] See eg, *Unifor, Local 707A v Suncor Energy Inc*, 2014 CanLII 23034 (AB GAA) at para 312. As stated by Arbitrator Surdykowski in *Mechanical Contractors Association Sarnia v United Association of Journeymen and Apprentices Of The Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2013 CanLII 54951 (ON LA):

> 127. The employer must establish that the rule or policy will probably improve workplace health and safety. Uncertain or speculative health and safety gains do not justify a significant invasion of employee privacy. The resulting threshold may be a high one, but the Supreme Court of Canada in *Irving Pulp and Paper, Ltd.* has made it clear that is the way it should be, particularly when fundamental individual privacy rights are in the balance.
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> ...
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> 151. ...Even in safety-sensitive workplaces the employer cannot impose speculative alcohol or drug testing, which encroaches on employee privacy in the interests of deterrence which is not demonstrably necessary

[42] See also *Suncor Energy Inc. and Unifor, Local 707A (Random Alcohol and Drug Testing Policy)*, Re (2014), 118 CLAS 138, 242 LAC (4th) 1; *Agrium Vanscoy Potash Operations and USW, Local 7552 (16-10), Re* (2015), 121 CLAS 139, 249 LAC (4th) 185. See also *Gillies (Litigation guardian of) v. Toronto District School Board*, 2015 ONSC 1038, 125 OR (3d) 17, where the Ontario Superior Court cited Irving for the proposition that "the seizures of bodily fluid samples is highly intrusive and, as this court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements," notably drawing no distinction between drug and alcohol testing by urine, blood or breath sample (at para 143). In this case, a principal required that all students submit to a

Given the potential for abuse and serious intrusion into employees' private lives, random drug testing in the workplace should be presumptively illegal.

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mandatory breathalyzer test prior to being admitted to their high school prom. The finding that the breathalyzer was not minimally intrusive was crucial to a finding that the policy was unreasonable and a violation of the students' s. 8 Charter rights against unreasonable search and seizure.

H. CRIMINAL RECORDS CHECKS

Local 183's Experience: *The increasingly common requirement for criminal records checks as a condition of employment has deprived worthy employees of jobs, and resulted in unjustified intrusions into workers' privacy. The problems with criminal record checks are manifold: First, employers are requiring criminal records checks for positions that are not associated with any particular sensitivity or danger that could justify this type of intrusion. Second, the results of these checks unduly prejudice employers against employees, even where any criminal convictions are long in the past and/or are in respect of conduct that could not reasonably impact on their ability to faithfully perform their duties. Third, there are inconsistent practices around police disclosure of information in response to criminal record checks, and private, non-conviction information, such being "known to police", or even past mental health issues may be released pursuant to a check. Finally, workers are also being required to pay for the checks, which are expensive.*

Recommendation #14: *Amend the ESA and LRA to prohibit criminal record checks in all but positions that meet certain enumerated attributes. Before any screening may be undertaken, the employer should need a clearance certificate issued by the Ministry. 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 #15: *Amend the ESA and LRA to require that any police records 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 #16: *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 #17: *Amend the ESA and LRA to prohibit employers from requesting (and police forces from disclosing) police records dating back further than 5 years (outside of the vulnerable sector).*

Recommendation #18: *Amend the ESA and LRA to require that employers bear the costs of any police screening.*

Current Gaps in Legislation Governing Employer Demands for Criminal Records Checks

While social science research demonstrates that a record of past criminal convictions is generally a poor predictor of future work-related misconduct,[43] the requirement for police record checks as a condition of employment has proliferated in recent years, particularly since the terrorist attacks of 9/11.[44] The CCLA reports that since at least 2003, police stations in Canada have seen annual growth in requests for record checks ranging from 2% to 439% per year.[45]

Not only is the use of police record screening generally ineffective in reducing risks of workplace misconduct, but the continued, systematic stigmatization and social and economic exclusion of individuals who have paid their debt to society undermines public safety.[46] As noted by the CCLA in its report "*False Promises, Hidden Costs,*" stable employment and income, housing, and social networks are all protective factors against future reoffending.[47]

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[43] Canadian Civil Liberties Association, "False Promises, Hidden Costs: The case for reframing employment and volunteer police record check practices in Canada" (May 2014) online: <http://www.ccla.org> at 6.

[44] Office of the Information and Privacy Commissioner for British Columbia, "Use of Employment-Related Criminal Record Checks: Government of British Columbia" (Investigation Report F12-03, 25 July 2012) online: <https://www.oipc.bc.ca/investigation-reports/1247> at 7; CCLA, *supra* note 43 at 33-34; John Howard Society of Ontario, "Help Wanted: Youth with Police Records Need Not Apply" (May 2014) online: <http://www.johnhoward.on.ca> at 15.

[45] CCLA, *supra* note 43 at 33-34.

[46] CCLA, *supra* note 43 at 61.

[47] CCLA, supra note 43 at 11.

While workers must apply for a criminal record check and, therefore, employers may argue that these checks are consensual, the reality is that at the point where employers ask workers for criminal record checks, the workers are in a vulnerable position. Refusing to submit to a criminal record check means they will be screened out of employment opportunities, or fired for insubordination. In this sense, where employers demand criminal records checks, workers cannot be seen to have a true "choice" in whether or not they will comply.

Moreover, employers do not have a presumptive right of access to the criminal history of their employees.[48] Such information is private personal information and the requirement for individuals to submit to police records checks for employment purposes is "highly invasive of the[ir] privacy."[49], [50]

The potential for unjustified intrusions on personal privacy is heightened due to the fact that the information police forces will disclose in response to a police record check is highly variable, and may include both conviction and non-conviction related information. Non-conviction information may include sensitive information including all manner of past contacts with police, including suicide attempts and other medical incidents, incidents where no charges were laid, acquittals, and even information about incidents of victimization or where an individual has been a witness to a crime.[51] There can be no justification for this level of intrusion on an employee's privacy. Note also that the Ontario *Human Rights Code* does not protect against discrimination on the basis of non-conviction related information in criminal records.

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[48] *Re Ottawa (City) and Ottawa Professional Firefighters Association*, (2007), 169 L.A.C. (4th) 84, p. 21.

[49] Office of the Information and Privacy Commissioner for British Columbia, "Use of Employment-Related Criminal Record Checks: Government of British Columbia" (Investigation Report F12-03, 25 July 2012) online: <https://www.oipc.bc.ca/investigation-reports/1247> at p. 7

[50] The Supreme Court of Canada has recognized the importance of privacy in relation to one's personal information, based on the notion of the dignity and integrity of the individual: *R. v. Dyment*, [1988] 2 SCR 417, 1988 CanLII 10 (SCC) at para 22.

[51] See eg, Ann Cavoukian, "Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC" (special investigative report, 14 April 2014) online: <http://www.ipc.on.ca>.

New Ontario legislation, *Bill 113,* the *Police Record Checks Reform Act, 2015,* was introduced in the legislature in the spring of 2015, and at the time of writing, has passed first reading.[52] This legislation, if passed, will go some distance in addressing some of the well-documented issues in terms of the release of non-conviction information, and will add some precision to the currently murky practices surrounding criminal records checks.

The legislation is modeled on the Ontario Association of Chiefs of Police ("OACP") guideline for police record checks, first published in March 2011.[53] OACP, in its revised June 2014 guideline, notes the potential for misuse of non-conviction records by, *inter alia,* employers:

> There is an increasing demand for police records checks, both in the private and voluntary sectors. Canadian academics researching the impacts of releasing police contact and non-conviction records have found that the disclosure of these records is serving as a barrier in areas as diverse as employment, volunteer and educational opportunities, housing, public assistance, insurance, and immigration. This occurs because employers, volunteer co-ordinators, educators, and others, who are receiving and making decisions based on non-conviction entries, frequently do not understand what a police contact or non-conviction record is, and have little or no guidance as to how this information should factor into their decision-making process. The result is that many organizations adopt the most risk-averse position, automatically disqualifying a wide range of individuals solely on the basis of these records.[54]

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[52] On June 3, 2015.

[53] Media Release: "Ontario Police Leaders Welcome New Police Record Checks Legislation" (June 3, 2015) online: < http://www.oacp.on.ca/Userfiles/Files/2015%20Police%20Record%20Checks%20Legislation%20NR_FINAL.pdf>.

[54] Ontario Association of Chiefs of Police, "Guideline for Criminal Record Checks" (March 28, 2011, Updated June 2014). Online: < http://www.oacp.on.ca/Userfiles/Files/NewAndEvents/PublicResourceDocuments/GUIDELINES%20FOR%20POLICE%20RECORD%20CHECKS%20%20_%20June%202014_FINAL.pdf>, p. 7.

The legislation, which will apply to all persons who require a search of any police database maintained by a police service in Canada, defines three types of police record checks (in order of the extent of information disclosed): 1) criminal record checks, 2) criminal record and judicial matters checks, and 3) vulnerable sector checks. A schedule to the Act sets out the type of information that police may disclose in connection with each type of record and prohibits unauthorized information from being disclosed (ss. 8,9). Of note, is that non-conviction information cannot be disclosed except in exceptional circumstances in relation to a vulnerable sector check. Even then, the definition of "non-conviction information" limits the scope of the information that may be disclosed to information concerning the fact that an individual was charged with a criminal offence in certain circumstances. Consequently, other information regarding police contact would presumably be illegal to disclose.

While this legislation places constraints on what information may be disclosed by a police force in response to various types of police record checks, it does not regulate the circumstances in which an employer may subject a prospective or current employee to a police record check. The circumstances in which an organization may obtain a vulnerable sector check is partially regulated by the *Criminal Records Act,* R.S.C., 1985, c. C-47. The Act indicates that vulnerable sector checks may be performed in respect of a job applicant on request of a person or organization responsible for the well-being of a child or vulnerable person and if the position is one of trust or authority towards that child or vulnerable person and the applicant has consented in writing to the verification.[55]

Overall, therefore, the circumstances in which employers may demand criminal record checks has largely been left unregulated and/or left to case-by-case adjudicative determinations. We suggest that the *ESA* and *LRA* should be amended to provide statutory guidance to employers in respect of:

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[55] The CCLA recommends that vulnerable sector checks should be reserved for individuals who are in ongoing, unsupervised positions of trust or power over vulnerable individuals – which is narrower than the CRA: CCLA, *supra* note 43 at 8 (recommendation 3.1).

a) what positions a criminal record check may be required,

b) what stage of employment checks may be required;

c) what information may be obtained by employers; and

d) who should bear the costs of screening.

We address each of these considerations in turn.

Criminal Record Checks Only Where a *Bona Fide* Requirement of Job

Due to the privacy issues at stake, and potential for discrimination, the OHRC's Human Rights at Work report recommended that police record checks should only be requested if a check constitutes a *bona fide* requirement because of the nature of the job.[56] Some human rights legislation in Canada prohibits discrimination in relation to employment because a person has been convicted of a criminal offence that is unrelated to their employment or intended employment.[57] Local 183 supports the requirement for criminal record checks only where they constitute a *bona fide* requirement of a job.

Local 183 agrees with the Canadian Civil Liberties Association, which recommends that basic criminal record checks should be reserved for positions that, while not engaging

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[56] As stated by Arbitrator Stout in *Rouge Valley Health System v Ontario Nurses' Association*, 2015 CanLII 24422 (ON LA)(Stout):

> 218. In my view, any inquiry into the reasonableness of an employer criminal background check policy must include an inquiry into risk and the balancing of the various interests shifts depending on the level of risk. The greater the risk to the employer's interest in safety and security, the more likely that more intrusive policies will be found to be reasonable. On the other hand, if the risk to safety and security is low, then only less intrusive means will be justified. It is the degree of risk, which may be supported by evidence of a problem in the work place, which determines the extent of the intrusion that is found to be reasonable. In other words reasonableness is intrinsically linked to a proportionate response.

[57] See, for example, the British Columbia *Human Rights Code*, RSBC 1996, c 210 s. 13(1) and the Yukon *Human Rights Act*, RSY 2002, c 116 ss. 7 and 10. In Ontario, discrimination on the basis of "record of offences" is prohibited, except where the record of offences is a reasonable and *bona fide* requirement of the job: ss. 5(1), s. 24. However, the definition of "record of offences" is defined as an offence in respect of which a pardon has been granted under the Criminal Records Act (Canada) and has not been revoked, or an offence in respect of any provincial enactment." Therefore, the *Code* effectively provides no protection against discrimination based on an unpardoned criminal conviction in Ontario.

the vulnerable sector, "unavoidably involve significant amount of risk and low levels of employee oversight." As examples, the CCLA refers to "high-security environments," including airports, nuclear facilities, and circumstances where individuals exercise independent control over large amounts of an organization's assets and where ongoing oversight and audit is not feasible.[58] This standard is also supported by case law.[59]

Criminal Record Checks Should Be Delayed in the Hiring Process

In the context of the hiring process, where a the nature of an individual's position can justify the requirement of a police record check, the actual check should be delayed until after a conditional offer of employment has been made to the candidate.

"Ban-the-box" is an international movement that aims to eliminate the "check box" on job applications asking candidates if they have a criminal record. But "ban-the-box" legislation has taken on a broader meaning to refer to legislation that reduces barriers to employment experienced by ex-offenders. This movement has taken hold especially in the United States where, at the time of writing, 18 states have legislation banning questions regarding criminal history for state government jobs, and more than 50 cities have similar legislation. In a number of these cities (including Buffalo, New York, San Francisco), these laws apply to private employers as well.[60]

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[58] CCLA, *supra* note 44 at 26-27, 32 and 73.

[59] See e.g., *Re Ottawa (City) and Ottawa Professional Firefighters Association*, (2007), 169 L.A.C. (4th) 84 (Picher), at para. 43, where Arbitrator Picher noted a number positions that may warrant disclosure of an employee's criminal record, including airport security employees, civilians employed with police forces (who have access to sensitive law enforcement information), security guards (who handle and transport large sums of money and valuables), and teachers (who require clearance as a result of specific and extraordinary legislation).

In the BC Information and Privacy Commissioner's report (*supra* note 51 at 18), the Commissioner examined the government's policy and specifically analyzed which positions the employer could justify subjecting to pre-employment criminal records checks. Features of the government positions for which screening was found to be justifiable included positions with "access to, control and/or custody of significant asset" where damage to those assets could cause "harm to the Province," certain types of law enforcement positions, and positions with significant expense and/or revenue authority.

[60] "Ban the Box Legislation" (June 11 2015) online: Truescreen <http://www.truescreen.com>; Michelle Natividad Rodriguez, "'Ban the Box' Fair Hiring Policies Take Hold Around the Nation" (18 February 2014), online: Huffington Post <http://www.huffingtonpost.com>.

As of October 2015, a new ordinance in New York City will come into effect, which will prevent employers from inquiring into an applicant's criminal record until after a conditional offer of employment has been made, and then if an employer intends to revoke that offer, it must give the employee written notification and the opportunity for that employee to respond.

This same procedure should be adopted in Ontario.

Criminal Record Checks During Employment Should Generally Be Prohibited

Local 183 proposes that criminal record checks during employment should generally be prohibited.

As noted by Arbitrator Picher in his decision in the *Re Ottawa (City) and Ottawa Professional Firefighters Association*,[61] which was upheld on judicial review,[62] the considerations at play in terms of record checks are different when considering the hiring process versus current employees. Whereas the "person who presents himself or herself at the door of a business or other institution to be hired does so as a stranger," the employment relationship "presupposes a degree of ongoing, and arguably increasing, familiarity with the qualities and personality of the individual employee." As such, "the extraordinary waiver of privacy" that may be justified in the hiring process is "substantially less compelling" when applied to an employee.

Outside of individuals working in positions (like teachers) who require clearance as a result of legislation, or in ongoing, unsupervised positions of trust or power over vulnerable individuals, police record checks should not be permitted during the course of employment.

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[61] *Re Ottawa (City) and Ottawa Professional Firefighters Association*, (2007), 169 L.A.C. (4th) 84 (Picher), at para. 43.

[62] *Ottawa (City) v. Ottawa Professional Fire Fighters Assn.*, 2009 CarswellOnt 9157 (ON Div Ct).

Criminal Records Disclosed Should be Limited to Past Five Years

As the predictive value of a criminal conviction on future misconduct diminishes with time,[63] it becomes increasingly difficult to justify disclosure of past convictions the further they are in an individual's past.

Therefore, we propose that (outside of individuals working directly, without oversight, with vulnerable individuals) the *ESA* and *LRA* be amended to prohibit employers from requesting (and police forces from disclosing) police records dating back further than 5 years.

Employers Must Bear Costs of Police Record Checks

There is generally a fee associated with obtaining a criminal record check. For example, the RCMP currently charges a $25 fee for a record check where the individual is applying for a job with a private business or the municipal/provincial government.[64] The Toronto Police charge $20 for a "clearance letter," and a hefty $65 for an individual applying for employment and requiring a vulnerable sector search.

Employers should bear the costs of any police screening.

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[63] CCLA, *supra* note 43 at 57. See also Alfred Blumstein and Kiminori Nakamura, "'Redemption' in an Era of Widespread Criminal Background Checks", (2009) 263 NIJ Journal. (online: <http://www.jiv.gov>); See also MD Maltz, Recidivism (Orlando: Academic Press, 1984); AJ Beck and BE Shipley, "Recidivism of Prisoners Released in 1983, Special Report" (Special Report, April 1989) Bureau of Justice Statistics (NCJ 116261); PA Langan and DJ Levin, "Recidivism of Prisoners Released in 1994" (Special Report, June 2002) Bureau of Justice Statistics (NCJ 193427).

[64] "Processing fees for Criminal Record and Vulnerable Sector checks" (updated 14 November 2014) Royal Canadian Mounted Police, online: <http://rcmp.grc.gc.ca>.