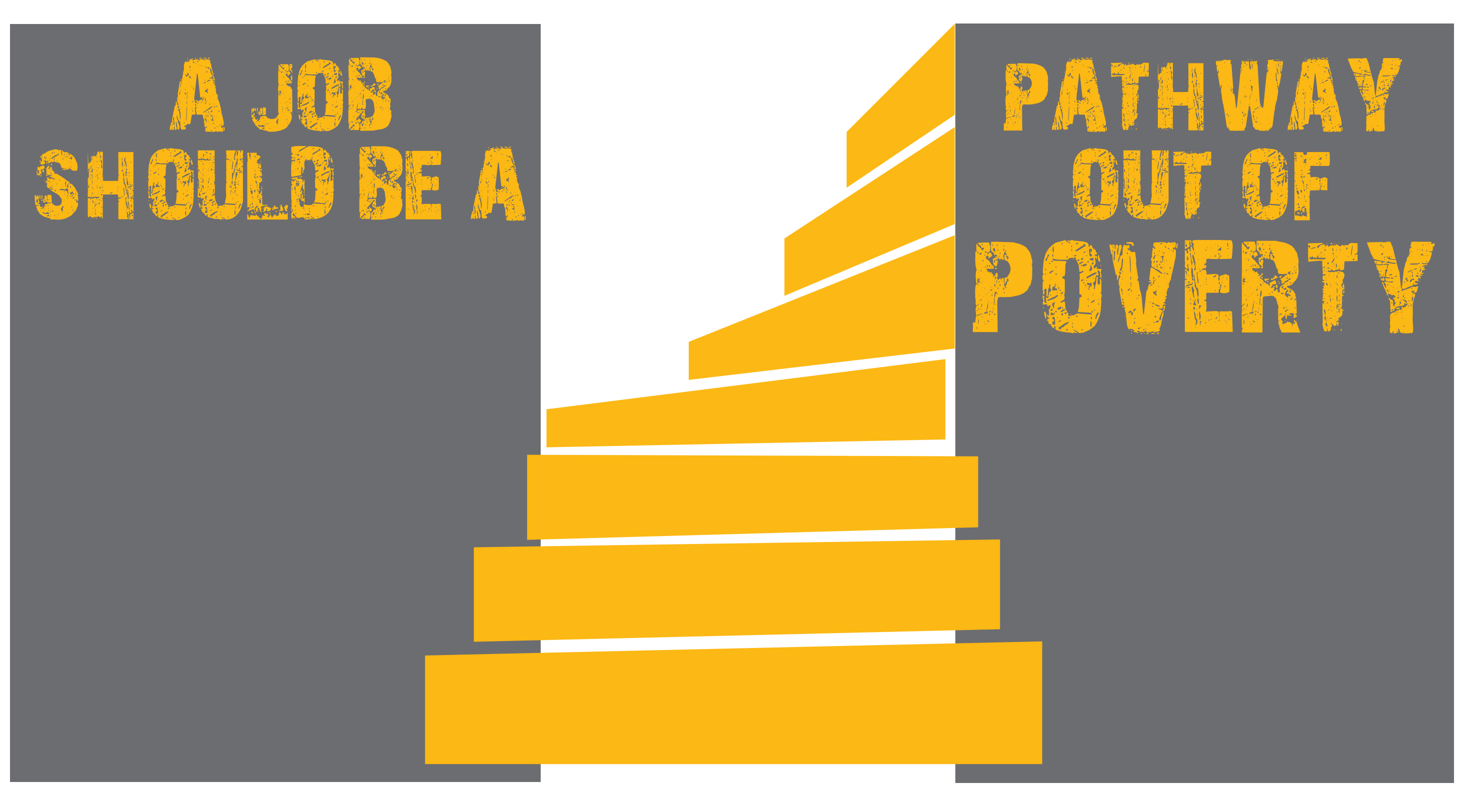

OFL Submission to Ontario's "Changing Workplaces Review"
September 2015

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Submission to the Ontario Government's "Changing Workplaces Review"

Produced by: Ontario Federation of Labour

The Ontario Federation of Labour (OFL) represents 54 unions and one million workers. It is Canada's largest provincial labour federation.

15 Gervais Drive, Suite 202, Toronto, Ontario M3C 1Y8
416-441-2731 • 1-800-668-9138 • info@ofl.ca
TDD: 416-443-6305 • FAX: 416-441-1893

www.OFL.ca OFLabour @SidRyan_OFL @OFLabour

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Introduction

When the Liberal government announced the much-anticipated review of Ontario's employment standards and labour law on February 17, 2015, the OFL called the news "a once in a generation opportunity to modernize Ontario's out-dated labour laws."

For the nearly one million Ontarians earning at or around the minimum wage, who do precarious work and lack union representation, an improved and enforced *Employment Standards Act*, could raise the floor for every worker, improve job security and provide dignity in their work.

Meanwhile, overhauling *Ontario's Labour Relations Act*, has the potential to extend union protection to more workers and provide a clear pathway out of poverty and provide the much needed authentic voice for employees in the workplace that can only come through independent trade union representation.

The labour movement has been calling for such a review for over a decade and Premier Wynne made known her intentions to respond earlier this winter when she posted her mandate letter to the Minister of Labour, Kevin Flynn, on the government's website. However, the outcome of the review is anything but certain and it is up to labour activists – unionized and non-unionized – to work together to push a progressive agenda of reform past the aggressive opposition from the business community.

The Premier's mandate letter to her Labour Minister said that this review needs to address the realities of the modern economy, such as the rise of nonstandard employment – or what we would call "precarious work." This lens provides an important opportunity to address reform for both the *Employment Standards Act* and the *Labour Relations Act*. The decline in manufacturing in Ontario over the past 20 years has seen many good, unionized jobs replaced by low-paying and part-time jobs in the ever-expanding retail and service sectors.

The task facing the labour movement is to present a dual solution to this problem; advocating for improved protections for vulnerable workers and expanding opportunities for them to benefit from union security.

As a result, the labour movement has not limited its attention to labour laws, but we have also been working with the Workers' Action Centre and the Campaign to Raise the Minimum Wage to champion changes to employment standards that would raise the floor for every worker in Ontario.

Under the banner of "Fight for $15 and Fairness," we have advocated for paid sick days, an end to split shifts, and preventing employers from classifying employees as contract workers in order to escape their obligations for fair treatment. While minimum wage and equal pay issues have been explicitly excluded from the review, we continue to advocate strongly for a $15 an hour minimum wage and gender pay equity, so that no worker is forced to toil for sub-poverty or inequitable wages.

Context: Changing workplaces

From the Guide to Consultations:

Q 1: How has work changed for you?

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

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

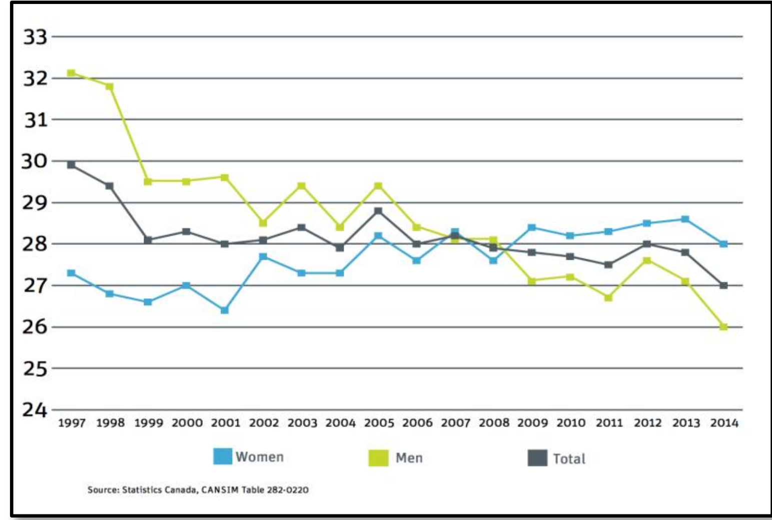
Q 4: Are these the key objectives or are there others? How do we balance these objectives or others where they may conflict? What are the goals and values regarding work that should guide reform of employment and labour laws? What should the goals of this review be?

OFL response:

Inequality and precarious work are on the rise, and joining a union is a key path out of poverty for Ontario workers. Unions tend to improve working conditions and wages and thus help to turn poorly paid jobs into decent jobs. Consequently, workers must be able to assert their right to join a union.

But the changing economy and unfair government policies have resulted in a growing power imbalance between management and organized workers, while leaving millions more workers labouring without the power of a union to represent them. For non-unionized workers, they must rely on inadequate and poorly enforced employment standards to protect their interests.

Figure 1: Ontario Union Density As Percentage of Total Workforce, 1997-2014[1]



[1] Sheila Block, "A Higher Standard: The case of holding low-wage employers in Ontario to a higher standard" (June 2015). Canadian Centre for Policy Alternatives, p. 16.

Figure 1 above shows declining union density in Ontario from 1997 to 2014. Overall, union density in Ontario decreased by three percentage points between 1997 and 2014. However, this drop masks very different patterns in union density between men and women, as well as between private sector workers and public sector workers. Union density for men dropped from 32 percent to 26 percent over this period. Union density for women rose slightly and then stabilized at around 28 percent over this period. The bigger decline in union density happened in the private sector – it fell from about 19 percent in 1997 to about 14 percent in 2014. Public sector union density stayed relatively stable, rising from about 70 to 71 percent.[2]

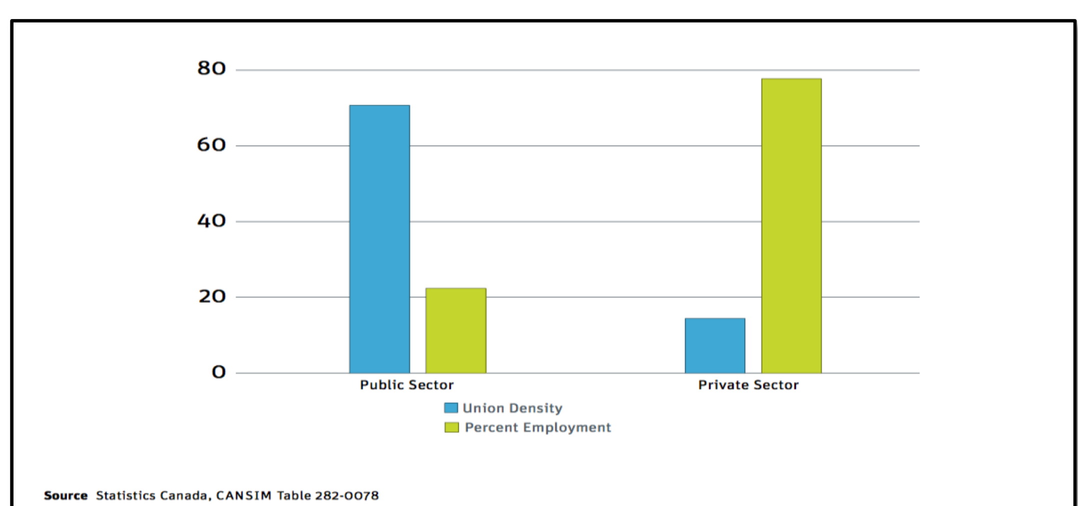
Longitudinal studies of union density in Canada informs that the rate of unionization has fallen from a rate of 42.1 percent in 1981, to a rate of 30.4 percent in 2014. While historically, a smaller proportion of women were unionized, by 2006, this trend had shifted and now a greater proportion of women than men are unionized.

In 2014, 31.9 percent of unionized workers were women, compared to 28.9 percent who were men. This phenomenon is a product both of the high levels of unionization within the public sector, especially in health care and education where women are concentrated, and the loss of manufacturing and forestry sector jobs that tended to be dominated by men.

In 2014, Ontario had the second lowest rate of union density among provinces at 27.0 percent. Only Alberta ranked lower, with a unionization rate of 22.1 percent. At 39.3 percent, Quebec had the highest rate of union density.

While Ontario's unionization rate was 27.0 percent, the rate of private sector unionization has fallen to 14.4 percent, much of it during the first decade of the new millennium as Ontario was hard hit by manufacturing and forestry sector job losses. The 2008 global economic crisis took an even sharper toll on unionized workers in the private sector.

Figure 2: Union Density, Private & Public Sector (%), Ontario, 2014[3]



[2] Statistics Canada. Cansim table 282-0078. Accessed August 23, 2015.

[3] Sheila Block, "A Higher Standard: The case of holding low-wage employers in Ontario to a higher standard" (June 2015). Canadian Centre for Policy Alternatives, p. 17.

Figure 2 above, shows that while union density is much higher in the public sector than it is in the private sector, most of the jobs in Ontario – about 78 percent – are in the private sector, so a drop in unionization in that sector has a major impact on the labour market landscape.[4]

Table 1: Union Density, Private & Public Sector (% Change), Ontario, 2010 - 2014

Ontario Union Workers:	2000	2014	% Change
Public & Private Sector	1,391,100	1,572,400	+ 13
Private Sector	711,100	650,300	- 8.6
Public Sector	680,000	922,000	+ 35.6

Table 1 above shows that as recently as the year 2000, private sector union members outnumbered public sector union members by over 30,000. However, by 2014, public sector union members outnumbered private sector members by over 250,000.

It would be a mistake to assume that union density is a concern only for private sector unions.

In a 2009 report on pensions, the Ontario government noted that in 1985 almost 40 percent of Ontario workers had a pension plan, including 32 percent of private sector workers. By 2005, the proportion of private sector workers with a workplace pension dropped to 25 percent, while for public sector workers, the proportion was 78 percent.

This trend helps explain both employers' confidence in attacking pensions—especially in the public sector—and the challenges in maintaining existing pensions, especially defined benefit plans. (It also speaks to the need for building community labour partnerships to strengthen the Canada Pension Plan.)

Falling union density has created the conditions in which right wing politicians and employers feel more confident in attempting to pit non-union workers against union members in everything from wages and benefits to pensions.

Yet evidence is overwhelming that Ontario's rising inequality is a product of declining levels of unionization, and the lack of decent jobs. Indeed, the greater the number of people forced to work for low wages with few benefits, the greater the downward pressure on workers who belong to unions to accept cuts in wages, benefits and pensions.

The changing labour market

Evidence shows that the labour market has changed over the past 20 years, and the proportion of workers who do not work in large, single site workplaces are growing. Since the 1970s, there has been a documented shift away from what has been considered standard work to non-standard work.

Many Canadians engage in non-standard work – that is, employment situations that differ from the traditional model of a stable, full-time job. Under the standard employment model, a worker has one employer, works full year, full time on the employer's premises, enjoys extensive statutory benefits and entitlements and expects to be employed indefinitely.[5]

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[4] Ibid, p. 5.

[5] Vosko, Leah; Zukewich, Nancy; and Cranford, Cynthia. Statistics Canada, Perspectives on Labour and Income, "Precarious jobs: A new typology of employment." October 2003. See: http://www.statcan.gc.ca/pub/75-001-x/01003/6642-eng.html.

Non-standard work can be considered as temporary, part-time, low-wage, less protected by regulation and where workers themselves have less control or influence over their circumstances. By 2008, fewer than two-thirds of the Canadian workforce could be considered to be in standard employment.[6]

Figure 3. Change in Precarious Employment, 2008-2014

Source: Statistics Canada microdata, 2014

The experience of the global recession is telling. Part-time and temporary workers were the first to be laid off. While this resulted in a dramatic drop in the proportion of part-time and temporary workers in the labour market, such a phenomenon is not a sign of health. It merely demonstrates the precarious nature of these kinds of jobs. However, as the effects of the recession ebbed, employment growth tended toward part-time, temporary, and self-employment.

These trends suggest that even where new employment has taken the form of full-time employment, many of these new jobs pay less than previously held jobs and are based in smaller and more disparate workplaces where it is more difficult for workers to cooperate to effect change without inviting reprisals from employers.

These trends underscore the need to ensure that workers can freely exercise their rights to form unions as a critical pathway out of poverty. Traditionally, the bigger workplaces with large and homogenous workforces, where employees share similar working conditions, similar shifts and where workers had much more interaction with their co-workers, have lent themselves to better cooperation among workers. Even when Ontario's workforce in the resource and industrial sectors was expanding, those people in more precarious, non-standard jobs were often at a disadvantage. Working at multiple job sites creates a more disparate workforce, resulting in less interaction among employees, and the potential for reprisals against workers who contemplate collective workplace action. The structure of existing legislation fails to adequately curtail these implicit or explicit threats.

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[6] CAW Fact Sheet 2009, Sources Statistics Canada, Labour Force Survey 2008, chart supplied by Professor Leah Vosko, York University. See: http://www.caw.ca/en/7688.htm.

While most will take for granted the reality that the employer holds the ultimate power and authority in the workplace, this reality is felt far more acutely in smaller workplaces where many of the employees already face labour market barriers to employment. They are objectively far more vulnerable than others to the implicit or explicit threat of job loss or other reprisals merely for asking that existing laws be enforced.

Modernizing labour law reform is long overdue. It is time to bring in measures that better reflect the realities of today's workplaces. Workers need better access to unionization as a means of making Ontario fair for everyone.

From the minimum wage to the union wage

Between 2002 and 2013, the proportion of workers earning minimum wage in Ontario increased from 3.9 percent to 8.9 percent respectively. While this can be partially explained by an increase in the minimum wage implemented by this government in response to collective action by union and non-union workers, it remains the case that nearly one in ten workers still subsist on a wage that is well below the Low Income Cut Off (LICO).[7]

In Ontario, the proportion of workers earning $12.10 per hour or less (the minimum wage plus 10 percent) has reached more than 19 percent of the workforce. In 2015, the Canadian Centre for Policy Alternatives estimated that a living wage for a Toronto family with two children and two adults working full-time would be $18.52 per hour.[8]

Across Canada, the incidence of employees earning minimum wage increased for three consecutive years between 2007 and 2009, with the highest jump taking place between 2008 and 2009. According to Statistics Canada:

> Women are more likely to work for minimum wage than men. In 2009, they represented just over 60 percent of minimum-wage workers, although they made up one-half of employees.
>
> The overrepresentation of women in this category of workers earning minimum wage is observable among all age groups, but more significantly for women 25 years of age and over, whose rate was twice as high as that of men the same age.[9]

The situation facing newcomer workers has also been more difficult since the onset of the global recession:

> In 2008, the proportion of immigrants earning less than $10 per hour was 1.8 times higher than the Canadian-born. At the other end of the spectrum, there was a lower share of immigrants earning $35 or more per hour than the Canadian-born.

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[7] Statistics Canada, Perspectives on Labour and Income, "Minimum Wage." March 2010. See: http://www.statcan.gc.ca/pub/75-001-x/topics-sujets/pdf/topics-sujets/minimumwage-salaireminimum-2009-eng.pdf.

[8] Mackenzie, Hugh and Stanford, Jim. Canadian Centre for Policy Alternatives, A Living Wage for Toronto. November 2008. See: https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario_Office_Pubs/2008/A_Living_Wage_for_Toronto.pdf.

[9] Statistics Canada, The Daily, "Inside the labour market downturn." February 23, 2011. See: http://www.statcan.gc.ca/daily-quotidien/110223/dq110223b-eng.htm.

> In 2008, for example, the share of these immigrants earning less than $10 per hour was nearly three times higher than Canadian-born employees, and the share of these immigrant employees who landed more recently earning $35 or more per hour was much lower than the Canadian-born.
>
> In 2008, even the shares of immigrant employees who landed in Canada more than 10 years earlier and were earning less than $10 per hour was greater than the Canadian-born, and the share earning $35 or more per hour was less than Canadian-born employees.

It should be noted that between 2008 and 2009, the proportion of minimum wage earners who were between the ages of 25 and 54 grew from 29 percent across Canada to 32 percent across Canada.[10]

Union membership: a pathway out of poverty

Workers' ability to join unions and organize to improve pay and benefits is a critical pathway out of poverty. According to the Canadian Labour Congress, union members in Ontario earn nearly $7.00 more per hour than non-union workers ($6.57 for 2014).

For women, the union advantage is nearly $8.00 per hour ($7.96 for women in Ontario). The Ontario office of the Canadian Centre for Policy Alternatives reports that using average annual earnings of Ontario men and women, we find the gap has grown to 31.5% — on average, women made 68.5 cents for every man's dollar in 2011. Women having access to a union is a key tool to close the gender wage gap.

In addition, the process of collective action and collective bargaining serves to mitigate wage and benefit differentials among workers. For instance, more than half of all non-union women workers earn less than $13.33 per hour. By contrast, just over 6 percent of unionized women workers earn less than $13.33 per hour (about one in 20). Workers of Colour who are union members receive nearly 30 percent more in wages than non-union members.

There is nothing mysterious about why union jobs generally pay better. When workers form a union, they are better able to fight together to win better pay and benefits for themselves and for all those who come into the workplace after them. By joining unions, women and workers of colour have united with other workers to challenge pay differentials and fight for pay and employment equity in the workplace. This kind of union organizing has helped increase the proportion of women and men who receive work-related benefits such as drug and dental plans, and pensions. In fact, nearly 90 percent (88.5) of workers who belong to a union have succeeded in winning these kinds of benefits.

Beyond wages and benefits, collective bargaining has led to break-through provisions that make life better for workers, their families and society as a whole. For instance, before employers were legally compelled to extend benefits to same-sex couples, unionized workers challenged homophobia and forced employers to provide same sex benefits via workplace contracts.

Provisions for emergency leave in situations of domestic violence, anti-harassment measures and other workplace provisions that make life better for women workers, were typically won first by union members and then extended more broadly to non-union workers via legislation or industry practice.

[10] Statistics Canada, The Daily, "Inside the labour market downturn." February 23, 2011. See: http://www.statcan.gc.ca/daily-quotidien/110223/dq110223b-eng.htm.

Perhaps the best example is paid parental leave. While commonplace today, it wasn't in the 1970s and early 1980s when public sector workers in Quebec and then postal workers across Canada had to take strike action to win paid maternity leave for women union members. As a result of these victories for women, the provisions were extended to men and today paid parental leave is an industry standard for both men and women.

Workplace health and safety – and by extension safer communities and a better environment – has been a key issue for the labour movement. Being organized in the workplace means demanding better health and safety standards in collective agreements. For example, union members have exposed and protected themselves against the unsafe use of toxic chemicals, resisted the use of unsafe equipment and pushed to accommodate all workers in the workplace. Of course, union members cannot eliminate all workplace hazards, but by insisting upon high quality health and safety training, and by forcing employers to abide by their legal health and safety obligations, our workplaces and our communities are safer and healthier. In fact, government has acknowledged that because union members enforce existing contracts, they reduce the burden on general taxpayers of the cost of enforcing the minimum standards set out in provincial regulations.

In response to the questions: *What are the goals and values regarding work that should guide reform of employment and labour laws? What should the goals of this review be?*

A review of relevant academic literature suggests that inherent in the employment relationship, there are three conflicting objectives that must be balanced: efficiency, equity, and voice. Efficiency is the "common economic standard of the effective use of scarce resources" (Budd, 2004, p. 7), and is typically thought to be the main objective of employers. Equity covers both material outcomes and personal treatment. Voice is the ability to have meaningful input into decisions which affect oneself.[11] The OFL acknowledges that equity and voice are usually a primary concern to employees, however, the OFL encourages the Changing Workplaces Review to balance all three of these objectives when undertaking this important review process.

[11] Budd, J.W. (2004). Employment with a human face: Balancing efficiency, equity, and voice. Ithaca, NY: ILR Press.

The Employment Standards Act, 2000 (ESA)

From the Guide to Consultations:

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

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

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

Q 8: In the context of the changing nature of employment, what do you think about who is and is not covered by the ESA? What specific changes would you like to see? Are there changes to definitions of employees and employers or to existing exclusions and exemptions that should be considered? Are there new exemptions that should be considered?

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

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

OFL response:

Gaps in the ESA

Gaps in the ESA have enabled employers to develop strategies for work organization that evade core standards and that have pushed workers beyond the protection of the *ESA*. Employers are increasingly able to shift their responsibilities as employers onto contractors, sub-contractors, temporary agencies and, through misclassification, onto workers.

Recommendation 1: *Make employers liable for wages and ESA entitlements, even when they use subcontractors and other intermediaries. A more inclusive definition of an "employee" should be applied within the ESA.*

Temporary agencies

On the heels of the last recession, the temporary staffing industry is developing new practices that promise, as one firm boasts, “Just-in-time staffing [that] enables you to produce maximum results without the overhead of a full-time employee.”[12]

For instance, an agency classifies an employee as an independent contractor and assigns her to work at a group home. The agency deducts 7 percent from her $11 hourly wage. Because she is misclassified as an independent contractor, she receives no employment standards entitlements from the agency. She works 48 hours in 3 days.

Industry sources say contract staffing is lucrative because the contracts offer a recurring revenue stream. Demand for this kind of staffing is projected to grow.

According to Statistics Canada, the temporary staffing industry generates $11.5 billion in revenue in 2012, up from $8.3 billion in 2009. Over 50 percent of revenues are generated in Ontario.

Recommendation 2: *Changes to the ESA should ensure that temporary agency workers receive the same wages, benefits, and working conditions as permanent workers doing the same work as temporary workers.*

Misclassification

More workers are being misclassified as independent contractors. Misclassification practices dominate sectors such as cleaning, trucking, food delivery, construction, courier, and other business services. Misclassification also reaches into many other sectors, such as information technology, copy editing, and nail salons.[13]

When workers are misclassified, they get cheated out of vital benefits and protections. Workers lose out on decent wages, overtime pay, paid leave, employer-provided benefits, and pensions. Workers face problems trying to enforce their rights under the *ESA* when they have been misclassified, or in accessing workers’ compensation when necessary.

Certain employers are motivated to misclassify workers to save on payroll deductions, avoid complying with the *ESA* and other labour laws, and to shift liability and risk onto workers.

Recommendation 3: *A more inclusive definition of an “employee” should be applied within the ESA to prevent the misclassification of workers. The ESA should establish a reverse onus on employee status; a worker must be presumed to be an employee unless the employer demonstrates otherwise.*

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[12] Gellatly, M. Still Working on the Edge: Rebuilding Decent Jobs from the Ground Up. Workers’ Action Centre. March, 2015. See: http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf.

[13] Ibid.

Hours of work, vacation and sick leave

Hours of Work

The *ESA* gives employers substantial control over hours of work and scheduling. Some people work too many hours and some workers do not get enough hours. Violations of overtime and hours of work standards cut a wide swath across many industries.[14]

According to Statistics Canada, over one million Ontario workers worked overtime in 2014 and 59 percent of these workers did so without overtime pay.

Ontario's hours of work standards allow for longer work days and work weeks than many other jurisdictions and need to be updated to support job development. There is also a confusing myriad of industry and occupational exemptions and special rules for hours of work and overtime – there is no real ceiling on maximum work hours.

Recommendation 4: *The ESA should provide for an 8-hour day and a 40-hour workweek. Employees should have the right to refuse work beyond 40 hours. Overtime at time-and-a-half should be paid (or taken as paid time off in lieu) after 40 hours. No overtime exemptions or special rules.*

There is no real floor on work hours under the *ESA*. There are no minimum hours of work per day. Nor does the *ESA* require employers to guarantee minimum hours of work in a week either. Service workers may be expected to be available for five days but will only be scheduled to work for two or three days. This "just-in-time" scheduling leads to underemployment, stress and lowered incomes.

Recommendation 5: *Require two weeks' posting of work schedules. Establish minimum three hour shifts. Workers shall be able to ask employers to chance schedules without penalty.*

The *ESA* has failed to regulate the growing predominance of part-time, temporary, and self-employed work. Without such regulation, employers have been allowed to discriminate against workers who do the same work but for fewer hours or on a temporary basis. This has created huge wage gaps between full-time and other workers.

Recommendation 6: *There should be no differential in treatment in pay, benefits and working conditions for workers doing the same work but classified differently, such as part-time, contract, temporary, or causal.*

Vacation

The International Labour Organization recommends that the period of paid vacation should not be less than three weeks. Only Ontario and Yukon limit vacation to two weeks of paid vacation, while all other jurisdictions have access to three weeks.

Recommendation 7: *Increase paid vacation to three weeks per year. After five years of service, increase vacation to four weeks of paid vacation per year.*

[14] Ibid.

Sick leave

The *ESA* only requires employers with 50 or more workers to provide up to 10 days unpaid sick leave. That leaves 1.6 million workers without the right to take a day off when sick. Not only do workers need the right to take time off when sick, but workers need to have paid sick leave to make time off a viable option.

***Recommendation 8**: Repeal the exemption for employers of 49 or less workers from providing personal emergency leave (sick leave). Provide up to seven days of paid sick leave per year.*

Exemptions and special rules

Exemptions and special rules have eroded the floor of minimum standards. Some workers are exempted because of age—students under 18 are paid a lower minimum wage than all other workers. Some workers are exempted because of occupation. For example, farm workers are exempt from minimum wage, hours of work, daily rest periods, time-off between shifts, weekly/bi-weekly rest periods, eating periods, overtime, public holidays, and vacation with pay.[15]

Another type of exemption is based on a worker's status in their workplace (for example, managers who are not covered by hours of work and overtime provisions). Exemptions are also based on how long you work for a company.

Workers employed for less than five years are not able to get severance pay. A final type of exemption is based on the size of employer. Workers are only entitled to ten days of personal emergency leave (sick leave) if the company has 50 or more employees.

***Recommendation 9:** The ESA should have all exemptions removed.*

Domestic violence and work

According to the Canadian Labour Congress, Canadian employers lose $77.9 million annually due to the direct and indirect impacts of domestic violence, and the costs, to individuals, families and society, go far beyond that. However, we know very little about the scope and impacts of this problem in Canada.[16]

The Canadian Labour Congress partnered with researchers at the University of Western Ontario and conducted the first-ever Canadian survey on domestic violence in the workplace. There is almost no data on this issue in Canada and we know that women with a history of being victims of domestic violence have a more disrupted work history, are consequently on lower personal incomes, have had to change jobs more often, and more often work in casual and part time roles than women without experiences of domestic violence.

The Employer shall put together a plan that includes the following principles:

1. Confidentiality of employee details;
2. Workplace safety planning strategies to ensure protection of employees;

[15] Ibid.

[16] Canadian Labour Congress. Domestic Violence at Work. February, 2015. See: http://canadianlabour.ca/issues-research/domestic-violence-work.

3. Referral of employees to appropriate domestic violence support services (including workplace representative/union resources where available);
4. Provision of appropriate training and paid time off work for designated support roles (including union delegates of health and safety representatives if necessary);
5. Access flexible work arrangements where appropriate, and
6. Protection against adverse action or discrimination on the basis of an employee's disclosure of, experience of, or perceived experience of, domestic violence.

Recommendation 10: *Workers dealing with situations of domestic abuse and violence shall be entitled to five days paid leave, with the right to extended unpaid leave as needed (with right to return to their jobs without retribution). These leaves shall be contingent on adequate verification from a recognized professional (i.e. doctor, lawyer, professional counselor, intake worker from a women's shelter).*

Migrant workers

Many migrant workers who find themselves working in Canada encounter a new and unfamiliar country, where they don't know the laws and often don't speak the language. In many cases, they have travelled from some of the world's most economically depressed conditions to strive for a better life for their families.

The Office of the Parliamentary Budget Officer found that between 2002 and 2012, the number of foreign workers in Canada increased more than three-fold from just over 100,000 to 338,000, with a pause only in 2009 during the recession.[17]

The circumstances that make migrant workers so deserving of protection, also make them vulnerable to exploitation.

While major changes to the Temporary Foreign Worker Program fall to the federal government, the Ontario government should pursue comprehensive reforms to ensure migrant workers are protected from exploitation, including a Migrant Workers' Bill of Rights.[18]

Recommendation 11: *The Ontario government should introduce an Ontario Migrant Workers' Bill of Rights and legislative changes that would establish a registration and licensing system for employers and recruiters, provide the financial and human resources needed for proactive enforcement, and ensure that human and labour rights are protected.*

Fair wages

Many Ontario workers are struggling to get by. More and more decent jobs are being replaced by low-wage work. The fastest growing jobs in Ontario are in the service sector, where wages are the lowest.

[17] Lemieux, T and Nadeau, J. Temporary Foreign Workers in Canada: A look at regions and occupational skill. Office of the Parliamentary Budget Officer. March, 2015. See: http://www.pbo-dpb.gc.ca/files/files/TFW_EN.pdf.

[18] OFL. Labour Without Borders: Towards A Migrant Workers' Bill of Rights. Ontario Federation of Labour. 2013. See: http://ofl.ca/wp-content/uploads/2013.08-MigrantWorkers-Report.pdf.

Even before the recession, our economy was shifting to lower-wage work. In 2014, 33 percent of workers had low wages, compared to only 22 percent in 2004, the *Toronto Star* reports.[19]

In 2014, the Ontario government took the encouraging step of increasing the provincial minimum wage to $11 an hour and introducing the province's first annual inflation adjustments. However, the fact remains that any worker earning less than $15 an hour is living below the poverty line. Employment and hard work should lift people out of poverty, not entrench them in it. Studies show that when workers can provide for their families, they also contribute to the local economy and have a net positive impact on the economy.

Recommendation 12: *The Ontario government should raise the provincial minimum wage to $15 an hour, adjusted annually for inflation.*

Improve enforcement

Closing the gaps and raising the floor of minimum standards will do little if these rights are not enforced. Ontario's system of enforcement relies on workers to enforce rights once violations occur. Without active enforcement of minimum standards, workers have little protection when their employers violate employment standards. There is little risk of employers in violation being detected, relatively no cost to violation and, as a consequence, little incentive for employers to comply.

Recommendation 13: *Increase the risk of detection of ESA violations by improving proactive enforcement; moving enforcement up the chain of subcontracting; and, enforce liability among multiple employers that are responsible for violations. Increase the cost of violation by establishing set costs for employer violations and provide damages for victims of violations. Develop an anonymous and third party complaint program with the goal of remedying unpaid wages and other ESA entitlements for employees while they are still in the workplace. Protect workers from unjust dismissal.*

[19] Gellatly, M. Still Working on the Edge: Rebuilding Decent Jobs from the Ground Up. Workers' Action Centre. March, 2015. See: http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf.

The Labour Relations Act, 1995 (LRA)

From the Guide to Consultations:

Q 11: In the context of the changing nature of employment, what do you think about who is and is not covered by the LRA? What specific changes would you like to see?

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

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

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

Q 15: Are there changes that could be made to the LRA that would enable the parties to deal with the challenges of the modern economy?

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

OFL response:

Card-based union certification (card-check)

It is fundamental to any meaningful labour law reform to restore what was a key feature of the Ontario labour relations system for over 40 years – card-based certification —and to eliminate mandatory certification votes. The card-based system for selection of a union is prevalent in most Canadian jurisdictions and ensures effective freedom of association. The mandatory vote system, which replaced it, by its nature, leaves employees vulnerable to employer coercion and unfair labour practices so they cannot fully and freely express their true wishes.

While the OFL has welcomed the Government's return to card-based certification to the construction sector, simple fairness requires that all Ontario workers be governed by a return to a card-based system. The OFL believes that the rules as established in the construction sector, should be applied equally to all sectors. The defects of the vote system do not apply only in the construction industry, but rather in all sectors of the economy. They can only be remedied by a return to the card-based system. Further, while there may be problems of transience which make the vote system especially difficult for the construction industry, transient workforces do not exist only in construction. There are numerous sectors where employers rely upon temporary workers. Further, unique problems in organizing the retail and financial sector can only be rectified if employees are granted the right to select a bargaining agent free of any potential employer interference. Indeed, if freedom of association is to be meaningful for workers in sectors with large numbers of immigrant workers, who are particularly vulnerable to employer intimidation, a return to card-based certification must be seen as a priority.

The card-based system was in effect for decades in Ontario and endorsed under Conservative, Liberal and NDP governments. Where a clear majority of employees (55 percent) indicated that they wished to be represented by a union by signing a membership card, the Ontario Labour Relations Board (OLRB) would certify the union as the bargaining agent without a vote.

The former Conservative government, with no independent study and no meaningful consultation, abolished this cornerstone of our labour relations system. A legislative measure with profound consequences for Ontario workers was eliminated with a mere four hours of debate and no public hearings.

Contrary to the views of its proponents, the introduction of mandatory representation votes does not ensure democracy and "freedom of choice" for workers. Instead the use of representation votes creates an opportunity for an employer to engage in both subtle and not so subtle intimidation and coercion, such that any vote will not constitute an accurate reflection of employee wishes. Mandatory representation votes give employers significant opportunities to frustrate and interfere with the democratic decisions taken by workers to unionize, as Karen Bentham's research on eight Canadian jurisdictions documents.[20]

It is vital to understand that a vote at an employer's workplace cannot be equated with a democratic parliamentary style vote. Courts, labour boards and labour relations specialists have all recognized the overwhelming imbalance of power which is the hallmark of the employment relationship. Given that employers' literally hold the economic life of employees in their hands, their ability to influence the results of a vote cannot be overestimated. Any indication of employer preference, where an employer exercises complete control over an employee's economic future, cannot help but skew the results of a vote.

Compared to the employer's unlimited access, the union has only a fleeting ability to make its case to workers. Representation votes take place on employer property where the employer has a daily opportunity to influence employees while, at the same time, union organizers are barred from the employer's property. Employers have complete and up-to-date information about their employees, including addresses and telephone numbers. Unions do not have access to this information.

Imagine a parliamentary election where one of the political parties had the power to fire, layoff or reduce the wages of the voters; where the same party had total access to the voters and the other parties were barred from communicating with employees at vital locations and, where only one party had a complete voters' list.

More often than the public realizes, employers have used the time prior to voting to exert unfair pressure on their employees, often engaging in anti-union campaigns and using a variety of legal and illegal tactics to influence workers and thereby inhibit their choice. When votes are mandatory, the legal structure gives the employer both the opportunity and the incentive to use illegal tactics. In both Canada and the United States, where mandatory representation votes have been permitted, there has been a corresponding increase in the number of unfair labour practices committed by employers during certification drives. In British Columbia, after the mandatory votes were introduced, the rate of unfair

[20] Bentham, Karen, "Employer Resistance to Union Certification," (2002), Relations Industrielles / Industrial Relations, 57-1, p.159.

labour practices committed by employers per certification tripled.[21] It is well known that statistics indicate that in the United States, where representation votes are used in every case, the number of unfair labour practice complaints has reached unprecedented levels.

In a 1991 study on the effect of both card-based and mandatory vote systems, the former BC Board Chair Stan Lanyon, and Robert Edwards concluded:

> *"The use of representation votes as a condition of certification does not further democratic rights but instead serves the interests of the employer who would wish to influence his employee's decision on the question of union representation."*

Additional academic research has been conducted by Professor Chris Riddell of Cornel University's ILR School, while he was at the Centre for Labour and Empirical Economic Research, Department of Economics at the University of British Columbia, and also demonstrates that mandatory vote campaigns provide employers with the opportunity to engage in aggressive anti-union campaigns and other conduct in the lead up to a representation vote, which affects vote results and has reduced the success rate of union applications.[22]

Riddell's research finds that mandatory elections reduce certification success. A key factor believed to underlie the effect of voting is management opposition to the certification bid. In particular, it has been hypothesized that the incidence and effectiveness of management opposition tactics are greater when workers' preferences are expressed via a secret ballot vote.[23]

Similarly, at the federal level after an extensive independent review of the Canada Labour Code in 1995, the Simms Commission, chaired by Andrew Simms, Q.C., concluded:

> *"The card-based system has proven to be an effective way of gauging employee wishes and we are not convinced that it is unsound or inherently convincing to employers. It requires a majority of all workers, not just those who vote. It reduces the opportunities for inappropriate employer interference with the employee's choice".*[24]

Our labour relations system ensures that unions have majority support since unions can only mount effective strikes if a majority of the bargaining unit support the union's actions.

The 1980 analysis and conclusions reached by Paul Weiler, one of Canada's and North America's most pre-eminent and respected labour relations scholars, are even more applicable today, particularly given the increasing vulnerability and precariousness of workers. As he wrote:

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[21] Riddell, Chris. (2004). "Union Certification Success Under Voting versus Card. Check procedures: Evidence from British Columbia, 1978-1998, Industrial & Labor Relations Review", vol. 57, no. 4, p. 493-517.

[22] Riddell, Chris. (2004), "Union Certification Success Under Voting versus Card. Check procedures: Evidence from British Columbia, 1978-1998, Industrial & Labor Relations Review", vol. 57, no.4, p. 509.

[23] Ibid. p. 493-517.

[24] Andrew Sims, Rodrigue Blouin and Paula Knopf, Seeking a Balance, Review of Part I of the Canada Labour Code, 1995. Report for the Federal Minister of Labour, p.62.

> *"… the case for representation election rest[s] on a thoroughly romantic view of the representation campaign… the labour relations version of the Marquess of Queensbury Rules tends to be ignored by employers…the technique for beating unions in representation campaign has been developed almost into an art form…*
>
> *…reliance on membership cards…. facilitate[s] the employee's choice of collective bargaining, minimize[s] conflict and damage from the employer wielding…economic power during the representation campaign, and safeguard[s] the future relationship of employer and union (difficult as it is in first contract negotiations) from being poisoned with charges and countercharges made during the heat of any such campaigns…*
>
> *In making up their minds about union representation, the employees are really choosing how they will deal with their employer, how they will participate in settling and improving their terms and conditions of employment. The employer and the employees have an inherent conflict of interest in that topic. Clearly the employer is affected by the employees' judgment about whether they will be represented by a trade union. Yet surely that collective employee choice should be off limits to an employer as the employer's choice of a vice-president of industrial relations is off limits to the employees.*
>
> *Is the employer-union campaign really analogous to a Liberal-Conservative [and we would add NDP] or Republican-Democrat contest for government office? Not at all. Political campaigns produce a verdict about who is going to govern the citizens who participate in that election. The employer is not governed by the trade union chosen by employees. That is why the employer has no rightful role to play in the process by which the employees make up their minds about how they will deal with their employer…"*[25]

Further, to the extent a majority of employees are dissatisfied with their union, they are entitled to select a new union or terminate the union's bargaining rights.

Ontario's experience has also confirmed the failure of a mandatory vote system to allow for effective freedom of association. Since the elimination of the card-based system, the number of employees who have been able to exercise their right to join trade unions has fallen significantly with fewer applications for certification being filed, a substantial reduction in success rates in certification applications and a consequent decline in the number of employees unionized.

It is for these reasons that independent studies have affirmed the fairness and effectiveness of the card-based system. As Professor Sara Slinn has found based on the empirical data, not only is the overall proportion of certification applications lower under the vote system than under the card system, it is particularly in the largely low-wage service and contingent worker sector that one finds a significant decline in certification activity. As Slinn reports, the shift from a card-based certification system "*has had a disparately negative effect on relatively weaker employees, such that employees who may most benefit from unionization are less able to access union representation."*

[25] Weiler, Paul. Reconcilable Differences (Toronto: Carswell Company Limited, 1980), p. 37-49.

According to Professor Sara Slinn:

> *"A survey of managers at Canadian workplaces where union organizing had recently occurred found 94 percent used anti-union tactics, and 12 percent admitted to using what they believed to be illegal, unfair labour practices to discourage employees from unionizing."*[26]

Professor Slinn's evidence corroborates the experience of workers trying to join a union:

> *"Ignacio is a hotel worker who has been organizing for a union in his workplace. He was reprimanded for distributing information about unionizing, even though he was on break. Ignacio explained: "I feel like management is targeting me. My co-workers feel the same way. It makes people very afraid to participate in union activities. Many of my co-workers are too afraid to express their support for the union openly. This isn't right."*

As Slinn's research demonstrates, without card-based certification, the current means of union certification in Ontario simply cannot avoid undue employer intimidation (some would argue is an incentive for it) and effectively bars unionization of many workers who need it most and otherwise would achieve it. Indeed, as a result of the reduced chances of success, unions with finite resources have been less able and willing to initiate organizing drives.

Given that a key mandate of this review process is to redress the situation facing lower-wage marginalized, vulnerable and contingent workers, the failure to remove the barrier that mandatory votes and the attendant reality of employer interference would be highly regrettable.

The card-based system which worked well in Ontario for over 40 years must be restored. It is the only system which allows employees to select their bargaining agent freely and minimize conflict over union recognition. The card-based system effectively reduces the temptation of employers to use coercive tactics. Without such a system, workers are left open and vulnerable to employer influence and pressure. In the workplace environment, it is vital that the law fulfil its obligation to protect and safeguard the right of freedom of choice with respect to collective bargaining.

As Paul Weiler, one of Canada's and North America's most respected labour scholars and arbitrators recognized 35 years ago, the introduction of an additional mandatory vote creates unnecessary delay, presents procedural barriers and, allows opportunities for employer interference. This barrier was discussed by Professor Weiler as follows:

> *... we force unions to win the support of the majority of employees (in an officially approved bargaining unit) and then to demonstrate that majority status in formal labour board proceedings. In that endeavour, trade unions are always swimming upstream against natural, inertial employee sentiments in favour of the status quo. Suppose a union does persuade a majority of the employees to sign up as members. Should it have to face a second electoral campaign against the employer, in which the latter marshals all its resources to keep its business free of any collective action by its employees?* [27]

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[26] Slinn, Sara. "Anti-union intimidation is real," National Post. December 7, 2007. See: http://www.labourwatch.com/docs/press/pdf/anti-union_intimidation_is_real.pdf.

[27] Weiler, Paul. Reconcilable Differences (Toronto Carswell Company Limited, 1980), p. 48.

Recommendation 14: *The Labour Relations Act should be reformed so that workers vote only once to join a union by signing a union card. When a majority of workers have done so, the union should be certified.*

Early disclosure of employee lists

As the *Labour Relations Act* currently stands, when workers want to bargain collectively, they face an increasingly difficult task of communicating with and even identifying the members of a potential bargaining unit. This barrier to employee self-organization has become even more acute given the increasingly fragmented and decentralized contemporary workplace arrangements. Indeed, in many cases there is no common geographic location where employees work together.

We believe that, in keeping with democratic principles that apply to voting procedures in other spheres of society, such as municipal, provincial, and federal elections, genuine democracy must be predicated on a real dialogue with those affected by and participating in the determination of the outcome. Similar principles should be applied to the workforce in giving a voice to workers. It cannot be that only the employer knows the identity of employees and is therefore able to contact and communicate with them at will, while the union is left in the dark.

Even in the United States, recent changes to election rules enacted in April 2015 by the National Labour Relations Board provide, in the context of certification votes, that:

> *"The employer must include available personal email addresses and phone numbers of voters on the voter list in order to permit non-employer parties to communicate with prospective voters about the upcoming election using modern forms of communication."*

In municipal elections in Ontario, voters' lists – including names, addresses and the school board they support – are published in advance. Any legitimate candidate may request the relevant voters' lists so that she has ample time to engage voters in a meaningful dialogue during a provincial election. Any qualified candidate, having filed and received official acceptance of the appropriate nomination papers and fees, may request and receive access to the voters list without a list of nominators. Provincially, if a candidate is running with a registered political party, then a mere 25 signatures of the many thousands who live in an electoral district is a sufficient threshold for the release of the voters list for that riding. Again, the political party and its candidates are responsible for the appropriate use of the lists in accordance with all relevant legislation.[28]

Recommendation 15: *Where a union demonstrates it is engaged in a bona fide organizing drive, the employer should be required to disclose employee lists to the union, together with work and home emails, if available, and telephone numbers.*

Expedited and extended power to reinstate workers prior to first agreement

In order to capture workers' genuine desires, there must be meaningful and free deliberation between employees on workplace issues — both at work and away from work, though not on work time. Such communication should not be penalized or punished by employers, but should rightly be facilitated without undue influence.

[28] Elections Ontario, Candidate's Guide, 2011. Provincial General Election. 2011. See: http://www.elections.on.ca/NR/rdonlyres/32508606-E4AE-4BFC-9FB9-41EA94CECC09/0/CandidateGuideF0405ENG072011.pdf.

We believe that when a critical threshold of employees have expressed a desire to work collectively to improve their working conditions, they should be allowed, without retribution, to freely discuss their working conditions with their co-workers, including union representatives. Certainly, the employer already has this ability, but while workers may have this right in law, they do not always have it in practice.

Studies show that employers who learn their employees may be discussing collective workplace activities undertake significant measures to dissuade employees from doing so, up to and including measures that push the limits – or – in too many cases – break statutory limitations.

While employers are free to utilize legal and strategic advice to intervene in the workplace debate, employees who seek similar advice and expertise are at permanent risk of reprisals. For workers who are already employed in precarious work, and for workers who already face labour market barriers to employment more generally, this implicit employer threat is ominous and ever present. Employees in precarious employment, who face labour market barriers, are extremely vulnerable to employer intimidation and threats of job loss because of their financial situation and need for continued employment.

When a person disappears from the workplace who was known to support, or thought to support collective bargaining, the chill on other workers inside and outside the workplace is obvious. Protection under the law cannot be delayed in these circumstances. For many workers living on the edge, merely the suggestion of reprisals such as reduced hours or termination is enough to undermine their confidence in taking action. Few people today – in whatever occupations they hold – can afford to lose hours, shifts or even a single pay cheque, never mind the cost in time and energy to engage in protracted legal disputes. To freely exercise their rights, workers need to see not only that the law exists, but also that it will protect them quickly and effectively. Under existing legislation, this is all too often not the case.

Advocates for labour law reform agree that workers who are disciplined, discharged or discriminated against during an organizing drive, must be immediately reinstated to their original terms and conditions pending the outcome of a hearing on the legality of the discipline imposed on such workers, as requested by the union, unless the employer can establish true irreparable harm.

This is especially needed in workplaces during an organizing drive when employers are actively resisting union organization and the dismissal of an employee inevitably chills the exercise of employee's freedom of association.

As is often stated, *"justice delayed is justice denied"*. Even if workers are reinstated to the workplace after a hearing that may have involved days, weeks, or months, many workers simply cannot even contemplate the consequences for themselves and their families of any reduction of already modest pay or any delay in receiving their pay. Unless workers are absolutely confident that they can exercise their rights without worsening their own and their families' material well-being, too many will be forced to forgo their basic legal rights.

Furthermore, under existing legislation, the Board's interim powers to reinstate only apply during an organizing drive. Thus, an employer would be free to terminate union supporters on the day certification was granted as a means of reprisal and the Board is powerless to remedy the situation by means of an interim order. Given that employer interference often continues at least through negotiation of the first collective agreement, at the very least this power should continue until a collective agreement is entered into. This is particularly the case since, prior to ratification of the first collective agreement, there is no right to grieve, and so employees have no access to quick administrative justice. A discharged union activist should not lose access to interim reinstatement on the day the certificate is issued. Access to interim relief should be maintained at least until ratification of the collective agreement allows grievances to be filed, or until a strike or lockout.

Simple fairness demands that the *Act* be amended to provide for a MORE effective interim order power which would include the power to reinstate employees terminated prior to a collective agreement being entered into.

Recommendation 16: *Workers who are disciplined, discharged or discriminated against during an organizing drive AND before a FIRST collective agreement is concluded, must be immediately reinstated to their original terms and conditions pending the outcome of a hearing on the legality of the discipline imposed on such workers, UNLESS THE EMPLOYER CAN ESTABLISH THAT REINSTATEMENT WOULD CAUSE IT IRREPARABLE HARM.*

Reinstate the Board Full Power to Make Interim Decisions
Every administrative tribunal in Ontario governed by the *Statutory Powers Procedure Act (SPPA)*, except the Ontario Labour Relations Board, presently has the power to issue both procedural and substantive interim decisions, in the following terms:

Interim decisions and orders
16.1 (1) A tribunal may make interim decisions and orders.

Conditions
(2) A tribunal may impose conditions on an interim decision or order.

Reasons
(3) An interim decision or order need not be accompanied by reasons.

Indeed, the Labour Relations Board was granted the specific power in 1993 to issue interim orders as it considered appropriate.

In 1995, the Conservative government removed the power of the Board to make interim orders except as they relate to procedural matters and specifically denied the Board the power to reinstate employees on an interim basis, one of its most effective weapons in preventing unfair labour practices and ensuring employees felt protected during an organizing campaign. The removal of the power to reinstate sent the not so subtle message to employers that they can use whatever means are necessary to destroy a union's organizing drive and drag out any litigation relating to alleged violations of the *Act*, including but not limited to unfair labour practices.

To make matters worse, in 1998, in an unparalleled case of discriminatory treatment, the Government removed the power to issue interim orders under the *SPPA*, a power which every other tribunal governed by that *Act* possessed.

As a result, by 1998, the tribunal which history and experience has demonstrated most needs the power to act quickly to respond to ensure the effectiveness of its governing legislation was stripped of the power to do so.

There is simply no basis for handcuffing the capacity of the OLRB to exercise the authority to grant interim relief broadly, in such circumstances as it deems it to be appropriate.

Recommendation 17: *The OFL proposes that the Labour Relations Act be amended to grant the Labour Board a plenary power to issue injunctive relief on procedural and substantive grounds wherever it is just and convenient to do so.*

Unfair labour practice certification

Given the potential for employer interference in an organizing, particularly in a vote-based system, it is critical that the existing incentive for an employer to interfere with employee free choice be eliminated. Employers must know that if they act unlawfully in an effort to subvert a union's organizing campaign, they are at serious risk of the Board issuing a remedial certification order.

However, the current requirements that unions have an adequate degree of membership and that the Board find that no other remedy is sufficient, fail to deter an employer from engaging in unlawful conduct early in an organizing, and implies that a second vote could somehow cure employer misconduct which will inevitably erode the union's support

Recommendation 18: *As a result, the OFL proposes that the Act be amended to empower the Board to certify a union, where it considers that the true wishes of the employees respecting representation by a trade union are not likely to be ascertained because the employer has contravened this Act.*

Neutral and off-site voting, including telephone and electronic voting

Under existing legislation, a representation vote is required of workers before becoming a formally certified bargaining unit. Proponents of union certification via representation votes place significant emphasis on the notion of a "secret ballot" as imagined in liberal democratic election processes. But as noted above, such processes are fundamentally different.

Even if there were to continue to be votes in some circumstances, the fact is that in municipal, provincial or federal elections, the voting booths are situated in convenient sites, in neutral locations, and are not controlled by any particular candidate.

By contrast, the vast majority of union representation votes take place in workplaces that are, by definition, controlled by the employer.

The mere fact that a given workforce is smaller than the populations engaged in liberal democratic processes reduces the anonymity and secrecy that come when large numbers of people cast ballots.

A ballot box placed outside a supervisor's office, or in a location that is not sufficiently neutral, can have the effect of discouraging employees from freely expressing their will. More generally, but particularly in smaller workplaces, it is quite possible for the employer to deduce – or believe themselves to have deduced – who is sympathetic to collective bargaining and who is not and treat such employees accordingly. This leads to perceived exposure and increased vulnerability.

If we are to agree we want a representation mechanism that best reflects workers' genuine choices, it is self-evident that if a vote is to take place, then it should take place in a manner that maximizes participation. This must mean voting stations are as conveniently located as possible — even among a workforce that may be disbursed geographically — and that ballots are cast in as neutral a fashion as possible.

In the OFL's view, there will always be many nearby locations such as churches or schools that could be used without significant administrative difficulties. Further, unions have already widely used electronic voting for ratification votes. There does not appear to be any reason why these techniques could not be adapted to certification votes, given the importance of the decision at stake and the need to ensure that workers can freely make the choice to unionize.

Recommendation 19: *The Labour Relations Act should help achieve these goals by ensuring where possible that any required vote takes place in neutral locations and that there is a legal right to use telephone or online voting.*

Interest arbitration for a first contract

When workers have democratically decided for collective representation to improve their working conditions, they should rightly expect such a process to end with a contract, not another hurdle to overcome. Far too often, workers who have finally certified with a union find themselves bargaining with an employer who is still resisting the process. Delay tactics in contract negotiations that push the statutory limits cause unnecessary delays in concluding a contract for workers who already had to overcome enormous obstacles just to secure the right to bargain collectively.

Measures exist in other jurisdictions where either party may apply for arbitration if, after a set period of time, a collective agreement has not been settled. This equally protects employers and employees from bargaining tactics that do not comply with the spirit of good-faith bargaining. It helps to send a message to workers and employers that, once a collective bargaining unit has been certified, both parties are expected to conclude a contract in a timely and efficient manner.

A recent survey of the impact of first contract arbitration in a variety of Canadian provinces concluded that first contract arbitration (FCA) "reduces the incidence of work stoppages associated with the negotiation of first agreements by a substantial, statistically significant amount." It also noted:

> *"… there is no evidence to suggest that the parties involved in the negotiation of a first agreement rely on arbitration to settle their differences — application rates and imposition rates are low across all jurisdictions. It appears the presence of first contract arbitration legislation creates an incentive for the parties to reach agreement without resorting to work stoppages or arbitration."* [29]

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[29] Johnson, Susan J. T. (July 2010) "First Contract Arbitration: Effects on Bargaining and Work Stoppages," Industrial and Labor Relations Review 63 (4), p. 602-603.

Finally, the study stated: *"Concern that FCA undermines the collective bargaining process seems to be unwarranted; on the contrary, FCA appears to support and encourage collective bargaining."*[30]

Additional academic studies by Professor Chris Riddell show that the automatic access and mediation-intensive models are the most successful at fostering bargaining relationships. A recent study examined the effects of Ontario's first contract arbitration models from 1991 to 1998, comparing the likelihood of success of reaching a first contract under the no-fault system (the system that existed from prior to 1993 and after 1995) versus the automatic access model which was in force from 1993 to 1995. Professor Riddell found that the odds of reaching a first agreement under 1993-1995 regime was 1.7 times greater than under the 1995-1998 regime.[31] Further, he submits that the automatic access model was associated with an increase of 8 to 14 percentage points in achieving a first agreement than the non-automatic model.[32]

While in principle, most workers in Ontario have the right to associate for the purposes of collective bargaining, this is not always the case in practice due to barriers to reaching a first agreement. Across Canadian jurisdictions, first contract arbitration has been shown to create an incentive for the parties to reach a first agreement without resorting to work stoppages. Although existing legislation in Ontario provides for the settlement of a first contract through a process of arbitration, the threshold for accessing this route is still too high and workers can find themselves locked out or on strike because the employer has fulfilled only the most minimal technical requirements of the law, having not complied with the spirit of it – which is to bargain fairly and in good faith.

Recommendation 20: *Ontario should adopt measures that provide automatic access to binding first agreement arbitration.*

Successor rights where contracts are retendered

Currently, legislation provides successor rights when a business is sold or transferred. Since the 1950s, Ontario legislation has recognized that employees who have democratically decided to form a union should not lose their collective bargaining rights – and employers should not be able to circumvent their obligations – when a business is sold or transferred. Such provisions were strengthened in the 1960s. In the early 1990s these provisions were extended, not just to the sale or transfer of a business, but also to the contract services sector. Unfortunately, during the previous Conservative government, these and other critical improvements to the *Labour Relations Act* were dismantled, including those provisions that protected some of the most vulnerable workers in society.

While we applaud the current Liberal government for restoring some measures of fairness for workers – and we acknowledge that restoring successor rights for public sector workers has been a crucial improvement – we note that workers employed in some of the most precarious employment like food services, cleaning, security, home care and personal support services were excluded from such protection, even though these are workers most in need of supportive legislation.

Today, as it stands, businesses or companies that use contractors for the provision of services, like security, cleaning, homecare and personal support work, have little obligation to the employees of those contractors. During the competitive bidding process – when the company puts its service requirements

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[30] Ibid.

[31] Chris Riddell, "Labor Law and Reaching a First Collective Agreement: Evidence from a Quasi-Experimental Set of Reforms in Ontario", (July 2013) *Industrial Relations*, vol. 52, no. 3, p. 732.

[32] Ibid. p. 704.

out to tender – those contractors who pay their employees fairly and responsibly may lose contracts simply because their non-union competitors pay their employees much less. The result in many cases is that the very same employees who worked for the unionized company are called back to work for a new company. They do the same job, but for less pay and security.

In the current environment then, responsible contractors are at a disadvantage in the market place. Employers and employees both lose out in this race to the bottom.

The loophole that allows contract workers to suddenly lose their modest improvements in wages and working conditions to a non-union competitor on the basis of under-paying its employees is a legislative gap that must be corrected in the interests of both responsible employers and their employees. Simply put, the *Labour Relations Act* must be modernized to protect the rights of the growing number of workers employed by subcontractors.

The *Act* should extend the same successor rights that exist for other private and public sector employees, to those in the contract services sector. By doing so, it will ensure that when a collective agreement has been established, the provisions of this agreement are not lost just because the uniform changes.

This measure will have a threefold positive impact:

- It will ensure that if a different contractor employer wins the contract, it must honour the existing collective agreement and allow the workers to keep their modest improvements in pay and benefits.
- It will help ensure that competition takes place – not on the backs of the lowest paid workers – but on other meaningful factors like quality. It will help create a floor on wages and benefits in the contract services sector.
- It will level the playing field between employers who treat their employees fairly and those who do not.

In 2003, Premier Dalton McGuinty made an important promise to public sector employees stating:

> *Public employees should have the same rights as employees in the private sector, and, as Premier, I will restore successor rights for Ontario government employees.*[33]

In 2007, the McGuinty government implemented these changes for Crown employees. We applauded those measures and we applauded the motivation for them. Fairness for all employees is an important principle. Extending successor rights to the contract services sector must be seen as the logical extension of the government's own aspiration to ensure that all employees are treated fairly, whether in the private sector, the public sector, or the contract sector.

[33] National Union of Public and General Employees, "OPSEU says McGuinty must honour successor rights pledge." April 26, 2006. http://www.nupge.ca/news_2006/n26ap06a.htm.

***Recommendation 21:** The Labour Relations Act should be modernized to extend successor rights to the growing number of vulnerable workers in the services sector who are at risk of losing all collective agreement protections when contracts are retendered. THIS WOULD INCLUDE EMPLOYEES EMPLOYED BY CONTACTORS WHO PROVIDE SECURITY, cleaning, housekeeping, food SERVICES, homecare and personal support services, as well as any other employees who in the opinion of the Board work for contractors in similar occupations or industries.*

Anti-scab rules

Back in 1992 when the NDP government's labour law reforms were passed, commonly referred to as Bill 40, Ontario became the second province in Canada, Quebec being first, to implement what is known as "anti-scab legislation". This legislation was aimed at limiting the number and type of replacement workers that an employer can use to maintain operations during a legal strike or lockout.

The purpose of such legislation is to avoid the bitter and sometimes violent confrontations that are often associated with the use of scab labour by placing legal restrictions on its use, and to attempt to promote a more level playing field in the collective bargaining process.

Most recently, Over 120 members of USW Local 9176 in Toronto were forced on strike over 21 months ago because they would not accept a demand by Crown Holdings, one of the largest can manufacturers in the world, that new workers be paid up to 42% less for doing the same job. Crown responded by bussing in replacement workers, who waved their pay cheques and taunted striking workers on picket lines.

Just a few months before the employees were pushed out on the street, the company doubled its profits and gave these workers an award for having the best plant in North America. Now Crown has said that even if all the workers take wage cuts of up to 33%, most of them won't even get their jobs back.

Backed by some of labour's most prominent figures, the striking Crown workers held a press conference at Queen's Park on Monday to demand that Ontario Premier Kathleen Wynne and Minister of Labour Kevin Flynn enact binding arbitration legislation to settle the dispute.

As the Crown Holdings case demonstrates the government's permissiveness when it comes to employers' use of replacement workers (or "scabs") increases the likelihood that strikes and lockouts may occur more frequently and last longer.

But no matter the facts, the Harris Conservative government repealed the anti-scab reforms along with numerous other reforms for short-sighted political reasons. We maintain that it is time to move beyond such ideological blinkers and examine the merits of the case.

An anti-scab provision, contrary to the belief of some employer representatives, does not cripple industrial relations. Over 95% of all collective agreements are settled without a strike or lockout. Less than 5% of collective agreements end in a dispute and most of these do not involve scab labour. The only employers who are affected, therefore, are that very small minority who make a deliberate decision to be confrontational.

If the right to resort to economic sanctions forms an integral part of the collective bargaining process in a democratic society, and the Supreme Court of Canada has found that it does, then the pros and cons of anti-scab provisions must be viewed from this perspective. We suggest that a union's primary economic sanction, the strike, is effectively negated by allowing employers to use scab labour. To render more equality in the alleged "balance of power" between employers and employees, it is vital that employers be prohibited from using replacement workers during a legal strike or lockout.

Further, anti-scab legislation focuses the efforts of both parties on the real bargaining issues that divide them as opposed to picket line instances that can only embitter the situation and inhibit settlement.

Recommendation 22: *Prohibit the use of replacement workers during work stoppages.*

Protection for employees who have exercised right to strike

Section 80 of the *Labour Relations Act* allow employees who make an unconditional offer to return to work during the first six months of a strike a right to return to work. There is no sound labour relations reason to restrict the right to return to six months. If as the Supreme Court of Canada has held the right to strike is constitutionally protected, there can be no justification for penalizing employees for exercising that right. Further, the existing provision may act as an incentive for employers to prolong a strike to deprive employees of their right to return.

Recommendation 23: *The OFL recommends that employees who exercise their lawful right to strike have an unrestricted right to return to their former position without penalty.*

Exclusion of agricultural and other workers from coverage under the Act

Agriculture is the second largest industry in Ontario. It is estimated that between 80,000 and 100,000 people in Ontario make their living in agriculture. Yet, the Conservative government in Ontario, under Premier Mike Harris, repealed the *Agricultural Labour Relations Act* enacted by the previous government which enabled agricultural workers to unionize. Agricultural workers were thereby stripped of their union and bargained rights and the applications for certification that were in progress were terminated. Currently, agricultural workers remain excluded from the *Labour Relations Act* legally unable to exercise any democratic right of freedom of association for purposes of collectively bargaining to improve the quality of their work life.

In 1995, the United Food and Commercial Workers Union (UFCW) initiated a legal challenge regarding the exclusion of agricultural workers from the *Ontario Labour Relations Act,* the case of Dunmore v. Ontario (Attorney General), [2001] 3 S. C. R. 1016, taking the challenge all the way to the Supreme Court of Canada. In December 2001, the Supreme Court of Canada found that excluding agricultural workers from the *Labour Relations Act*, violated their freedom of association guaranteed under the Charter of Rights and Freedoms. The Court gave the Ontario Conservative government 18 months to draft appropriate legislation.

In response to the Dunmore decision and direction, the Eves-Conservative government enacted the *Agricultural Employees Protection Act, 2002*. Under this new *Act* and the *Labour Relations Act (1995)*, agricultural workers continued to be excluded from key workplace rights such as collective bargaining which acts to protect freedom of association.

As opposed to other workers in Ontario, agricultural workers:

- have no mechanism to democratically choose, on the basis of majority support, an independent trade union to represent them;
- face employers in this sector that are not bound by law to recognize and bargain in good faith with the unions that enjoy majority support among their employees;
- are confronted with a situation wherein there is no obligation to negotiate an enforceable collective agreement nor any right to grievance arbitration;
- unlike under the *Ontario Labour Relations Act* where there is a Labour Relations Board (OLRB) of experts in labour relations, the *Agricultural Employees Protection Act* is enforced by the Agricultural, Food and Rural Affairs Appeal Tribunal which lacks adjudication expertise and lacks the labour/management representation of the OLRB.

While this legislation was upheld by the Supreme Court of Canada in the 2011 Fraser case, the Court did so in large measure on the basis that it was premature to determine that the legislation would not be effective in bringing about collective bargaining for farmworkers. Subsequent experience over the last five years demonstrates the extent to which the *AEPA* has been an abject failure. Moreover, the Court's more recent decision in MPAO and SFL, which respectively struck down as unconstitutional the exclusion of RCMP members from federal collective bargaining legislation, and recognized that it is the right to strike or arbitration and not good faith bargaining alone which is essential to meaningful collective bargaining, strongly suggest that the ongoing exclusion of agricultural workers from coverage under the *LRA* is both unconstitutional and unjustified.

The current Government of Ontario needs to ensure that new legislation is drafted enabling agricultural workers to unionize under the *Labour Relations Act,* and thereby enjoy the same rights as other workers in Ontario, rights which agricultural workers in many other provinces already enjoy.

Indeed, agricultural workers in all other provinces, territories and the federal sector, except Alberta, have extended agricultural workers bargaining rights and protections in their basic labour relations legislation (although New Brunswick and Quebec exclude agricultural workers on farms with fewer than five or three employees respectively).

It is equally the case that the antiquated exclusion of both domestic workers and professionals from access to collective bargaining legislation cannot be justified.

Recommendation 24: *Remove the exclusion of agricultural, silviculture, horticulture professional and domestic workers from the LRA.*

Conclusion

This brief, prepared by the Ontario Federation of Labour for The Changing Workplaces Review, offers modest but necessary steps to modernize the *Labour Relations Act* to better reflect the realities of today's labour force and workplaces. It offers paths to better engage workers and assess their genuine aspirations when it comes to collective bargaining. Most importantly, it offers modest protection for those who begin the process of improving their wages and working conditions.

This latter point is critical. For Ontario's economy and communities to thrive, workers need to be able to exercise all aspects of their rights under the law. They must be allowed to work together to help raise the wages of all workers both union and non-union. Collective action has always been a critical pathway out of poverty for working people, which is why the right to join a union is fundamental and meaningful. In today's challenging economic climate, legislators have a special responsibility to ensure that these pathways remain open to all workers, especially those in precarious employment.

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