

Ontario Sewer and Watermain Construction Association



OSWCA Submission on the Ministry of Labour's *Changing Workplaces Review*

September 18, 2015

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Submitted via e-mail: (CWR.SpecialAdvisors@ontario.ca)

Changing Workplaces Review, ELCPB
400 University Ave., 12 Floor
Toronto, ON
M7A 1T7

Dear Messrs. C. Michael Mitchell and John C. Murray,

Re: Ministry of Labour's *Changing Workplaces Review*

On behalf of our members, the Ontario Sewer and Watermain Construction Association (OSWCA) would like to submit the below comments to the Ministry of Labour's *Changing Workplaces Review: Guide to Consultations* (Consultation Guide). In an effort to remain succinct in our comments, OSWCA has chosen to provide a general response to the consultation process by responding through question 16 only.

About the OSWCA

The OSWCA has been representing the sewer and watermain construction industry across the province since 1971. We currently serve over 750 member companies, including contractors, manufacturers, and distributors who build, supply, and service the sewer and watermain construction sector. Our membership is made up of ten local Heavy Construction Associations, two Pipe Producers, and one Independent Association.

We maintain a number of organizational goals, but our central objective is to enhance and protect the interests and welfare of the sewers and watermains sector of the construction industry. We work towards this objective through different avenues, including lobbying to improve the operating environment for our member companies, working to reduce the "red tape" burden on the construction industry, and addressing long-term labour force sustainability issues. It is for these reasons that we are providing our feedback into this review process.

As an affected stakeholder group working to maintain the integrity of our sector of the construction industry, we will provide a general response to the consultation process below for the *Changing Workplaces Review: Guide to Consultations* document.

Overall

Our comments are focussed around two key points:

1. While it is noted at the outset of the Consultation Guide that the construction industry provisions of the *Labour Relations Act, 1995* (LRA) will *not* be considered in this review, OSWCA feels it necessary to stress this significant point; and,
2. Ontario Regulations 285/01: Exemptions, Special Rules and Establishment of Minimum Wage (O.Reg 285/01) of the *Employment Standards Act, 2000* (ESA) establishes certain work practices in the sewers and watermains sector of the construction industry that are necessary to maintain in order to address the unique nature of work within our industry.

We are providing input into this process in order to ensure that the MOL understands why, from our industry's perspective, maintaining the current working environment is important. In particular, the special rules for our industry protected under the ESA have been painstakingly established through years of practice, collective bargaining, and project agreements, and are necessary given our truncated work season each year. We are looking to ensure that the recommendations made at the conclusion of this review do not unwittingly impact the balance that has been created in our industry by understanding why these rules were created in the first place.

Exemptions and Special Rules under the ESA

The sewer and watermain sector of the construction industry is a highly unique corner of the provincial labour market, given the project-based and seasonal nature of the work being performed. Construction work in the province operates in peak and off-season, with significant swings occurring in the number of employed persons during these two seasons. In the sewer and watermain sector these swings are somewhat more pronounced when compared to residential or industrial, commercial & institutional (ICI) construction, as the work occurs outdoors and is therefore dependent on the weather. The majority of our industry's work occurs sub-grade and, therefore, the vast majority of work in the industry cannot be conducted when the ground is frozen in the winter months. As such, a typical work season in our industry begins in mid-April and ends in November (approximately 7 months in length on average).

As a result of the limited number of working months that are available to our sector each year, we have been afforded a small number of exemptions or special rules under the ESA. The chart below details the special rules and exemptions for workers in the sewers and watermains sector of the construction industry under the ESA:

ESA Provision	Application to "Sewer & Watermain Construction Employees"
Hours of Work and Eating Periods	Sewer and Watermain Construction employees are exempt from the hours of work provisions of the <i>ESA</i> but are not exempt from the eating period provisions. <i>O. Reg. 285/01, s. 4(1)(d)</i>

ESA Provision	Application to “Sewer & Watermain Construction Employees”
Overtime Pay (OT)	Construction employees in the sewer and watermain industry are entitled to receive overtime pay for all hours in excess of 50 in a work week. <i>O. Reg. 285/01, s. 16</i>
Public Holidays	Sewer and Watermain Construction employees are not entitled to public holidays or public holiday pay. They receive 7.7% or more of their hourly wages for vacation or holiday pay. <i>O. Reg. 285/01, s. 9(2)</i>
Termination, Notice and Severance Pay	Sewer and Watermain Construction employees are not entitled to notice of termination, termination pay or severance under the <i>ESA</i> . Termination Pay: <i>O. Reg. 288/01, s. 2(1) par. 9</i> Severance Pay: <i>O. Reg. 288/01, s. 9(1) par. 7</i>

Hours of Work and Eating Periods

Sewer and watermain construction employees are exempt from the hours of work provisions under the ESA for a number of reasons that are particularly related to the disruptive nature of this sector of the construction industry. Sewers and watermains are, more often than not, buried under the public right-of-way, typically running parallel beneath roadways and sidewalks. As a result, replacement and rehabilitation of existing sewers and watermains requires the closing of roads and pedestrian walkways, which is disruptive to those who utilize these areas for travel. Extended hours of work are therefore made conditions of contract in order to expedite projects and limit the disruption to the general public.

Additionally, given that the work occurs sub-grade, it is much more difficult and sometimes impossible to perform certain aspects of the work required once the ground freezes in the winter. Thus, the number of working days in a given year in our sector is limited based on the natural environment. Extended work hours were granted on this understanding as well, so that project close-outs are able to be completed before the weather turns and work has to be put on hold until the spring thaw occurs.

Finally, these exemptions also speak to the need to have employees on hand in order to address emergency situations involving sewers (e.g. clogs or overflows) and, more specifically, watermain breaks, which will result in people dealing without potable water in their homes or places of employ. As this is critical for daily functioning, it is necessary to be able to have work crews complete the work necessary to restore potable water to residents.

Overtime Pay

The special provisions for overtime pay (re: after 50 hours of work in a week) are related to the industry standard for a work week, which is 50 hours. Due to the short annual work season, 50-hour work weeks (five 10-hour days) has been the historical working norm. It is necessary in order to meet the required work schedules in such a short working season. This is agreed to in collective agreements governing work in our industry across the province and has been the past-practice standard for decades.

Public Holidays

Employers in the sewer and watermain sector pay an additional premium to their workers vacation/holiday pay (a minimum of 7.7% of their hourly wage as opposed to the typically paid 4%). As noted above, this is done in order to maximize the number of working days that are available to companies in our sector each year. Above-standard compensation is paid out for these days in order to accommodate both worker and employer in this instance.

Termination, Notice, and Severance Pay

Sewer and watermain construction employees are not entitled to notice of termination, termination pay or severance under the *ESA*. This special provision was designed to accommodate the transient nature of work in our sector.

Unlike residential or ICI construction companies which often operate in a single municipality or regional area, companies in our sector often operate on a per-project-basis and are therefore always moving and shifting resources around the province. The transient nature of work in our industry is particularly pronounced in rural and northern Ontario, where companies often bid on “one-off” projects in locations outside of their standard operating area. This is typical, as companies operating in our field are often not stationed in small, rural, or remote communities; nevertheless, all communities, regardless of size or location, inevitably require sewer and watermain construction work at one time or another. The notice of termination provision was included in the *ESA* for our industry as a result of these “one-off” projects, where companies hire local employees to fulfill the project requirements and to fill out their work crews where necessary.

Prior to this provision being in place, when projects were closing out and companies set to move out of an area to their next project, there was a noticeable spike in the number of workers compensation claims on the final day of a project, occasionally legitimate but many that were not. As this work often occurred in remote areas where employment prospects were not always plentiful, these false claims were often being used as a means to prolong an income stream for a worker who otherwise had limited options for employment. This provision was added to allow companies to conclude an employment relationship without notice to ensure that this type of claim was significantly limited. Similarly, termination/severance pay was added as a provision to account for project-based employment relationships which are common in our industry. It also limited claims

against an employer who was forced to shutter a company as a result of economic circumstances or as a result of a strike.

Conclusion

It is important to recognize how different the employment relationships are in the heavy civil construction industry when compared to the more traditional employment models that exist in most other industries. The seasonal and project-based nature of employment in our sector is one of the primary reasons why the construction industry is so unique and often treated differently, with separate provisions in provincial labour policy and workers compensation. This is especially true in the Employment Standards Act, where special provisions have been carved out over a number of years in order to accommodate and respond to the unique nature of work in our industry.

We would ask that the recommendations made at the conclusion of this review ensure that this unique employment model is accounted for, and as such, these special rules and exemptions made for the construction industry are left untouched.

OSWCA would like to thank the Ministry of Labour for the opportunity to provide feedback through this consultation process.

Please do not hesitate to contact me (905-629-8819 or patrick.mcmanus@oswca.org) if you have any questions or need information regarding OSWCA and its membership.