SUBMISSION TO THE MINISTRY OF LABOUR

"*Changing Workplaces Review*"

Provincial Building and Construction Trades Council of Ontario

September 18, 2015

➢ INTRODUCTION

The Provincial Building and Construction Trades Council of Ontario is an umbrella organization that represents 13 construction craft unions with a total of over 150,000 construction workers from throughout the province. The Council's mission is to give construction workers a collective voice, to help ensure that workers are well-trained to meet industry needs, and to promote healthy and safe work conditions with decent wages, pensions and benefits.

Part of the Council's success stems from the effective partnerships that have been established with signatory contractors and owner-clients who work with affiliates to achieve public and private infrastructure needs in all seven bargaining sectors of construction. The Council also works with provincial government ministries and agencies to ensure that the construction industry is effectively regulated, competitive, well-resourced, and safe.

Our recommendations here are intended to improve the employment and financial circumstances all workers, so that Ontario's workplaces are the most equitable and safest in the world.

We appreciate the opportunity to present our views and look forward to ongoing dialogue with the Ministry of Labour and the Government.

➢ NEW ECONOMY

The so-called "new economy" has failed to deliver its promise of clean work and huge leaps in productivity. What's really happened is an intensification of economic pressures on both traditional and marginal workers.

The effects on employment include:

- ✓ increasing income disparities;
- ✓ fewer jobs that lead to viable career tracks;
- ✓ less secure employment;
- ✓ longer working hours;
- ✓ higher risk of uncompensated unemployment.

Workers who are either newly entering the workforce or who do not have the right training or skills to secure steady employment are at high risk of finding themselves in a lower-income situation which is likely to keep them in a state of economic and psychological despair, diminishing their prospect for entering the middle class.

Their opportunities are increasingly limited, whether by seeking better-paying jobs with other employers or moving up the now-shortened ladder at one employer. They face a

declining choice of employment opportunities that tend to be concentrated in residual dangerous work in manufacturing or service sub-sectors that are often small or economically marginal.

These forces are pushing workers into accepting jobs in the diminishing, but still substantial, world of dangerous and precarious employment. Workers who are forced into these dangerous jobs will once again most likely be the poorly prepared, the newly-entering, the recent immigrants, and those who are illiterate. This class of worker has been described as "vulnerable."

However, this does not mean that "vulnerable" workers are only those who find themselves in the above-noted situations. Even represented workers, who enjoy steadier and presumably more secure terms of work are often placed in vulnerable situations when they express legitimate employment and safety concerns on the job.

The threshold between vulnerable and non-vulnerable workers is extremely thin, and is often determined at the whim of employers, in the absence of the type of workplace employment standards and effective safety regime that we are striving to achieve in the province of Ontario.

Therefore, "vulnerable workers" may include:

- ✓ young workers;
- ✓ recent immigrants;
- ✓ Aboriginal peoples;
- ✓ older workers;
- ✓ those new to their jobs or working for new businesses;
- ✓ temporary foreign and seasonal workers;
- ✓ workers holding multiple, part-time or low-paying jobs;
- ✓ workers who raise safety concerns on the job, and are reprimanded by employers (sometimes to the point of termination)
- ✓ workers involved in temporary employment[1].

Factors contributing to worker vulnerability may include:

- ✓ an employer who is not committed to safety;
- ✓ an employer who uses intimidation to exert control over the workforce;
- ✓ individuals not knowing their rights under the *Occupational Health and Safety Act;*
- ✓ a lack of job or hazard-specific experience or training;
- ✓ worker fear of reprisals, including job loss, for exercising their rights or raising occupational health and safety concerns;
- ✓ fear of deportation[2].

1.Discussion Paper *"An Integrated Occupational Health and Safety Strategy For Ontario"*[1] Page 10

[2] Ibid.,

The new economy is clearly not only affecting low skilled workers, but is also impacting traditional, more stable workers. The new economy has transformed all workers into the vulnerable class. This includes highly skilled unionized workers and all white collar workers.

The very nature of the employment relationship is authoritarian and exploitive and thus conducive to insecurity and distrust. The level to which these underlying conflicts manifest themselves in the workplace is uneven, but combined with broader social inequalities and precarious labour market opportunities, employers will always hold the upper hand, with or without Employment Standard Legislation.

Future amendments to the Employment Standards and all other workplace legislation need's to accept that all workers are vulnerable and that they have no real empowerment.

Flexibility (What it really means)

"Flexibility" in labour relations is a contested term and has different meaning for workers and employers. Both employers and employees want more predictability but also want more flexibility. Paradoxically, flexibility for one party may jeopardize predictability for the other.

This is why government legislation aimed at reducing taxes and deregulating labour markets has often been euphemistically re-branded as legislation that makes the economy "open for business".

In turn, this investment-fuelled growth should theoretically translate into greater demand for labour, and thus into better jobs with greater job security and improved benefits.

In practice, however, the opposite has been true. Not only is there little evidence to suggest that neo-liberal labour market policies have stimulated economic growth, there is cogent evidence suggesting that they have failed to occasion the promised increased prosperity for workers. In fact, neo-liberal 'flexibility' has only resulted in reduced or stagnating wages, benefits, and job security for the middle-to low-income families.[3]

Flexible labour markets involve a minimum of government regulations. Flexible labour markets imply that wages and conditions are determined by market forces and not governments or trades unions. Flexible labour markets have the following features:

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[3] Thomas, Mark P. 2009. Regulating Flexibility: The Political Economy of Employment Standards. McGill Queens Univ. http://books.google.ca/books?hl=en&lr=&id=72J0ohopt7QC&oi=fnd&pg=PR5&dq=%22Employment+standards%22+AND+enforcement+AND+Canada&ots=9tfG0iZJFl&sig=3Liogx6qph3I2sfPVVjvcic5rYY.

- Easier to hire and fire workers
- Limited if any regulations

Disadvantages of Flexible Labour Markets

1. Part time and temporary staff may not get sufficient training from firms because they only have short term contracts. Therefore many low skilled workers will remain under-skilled because they never gain job stability and the training this encourages

2. Flexible labour markets create greater job insecurity and stress. Job security is often as important to workers as the level of wages. This insecurity could lead to lower morale and lower productivity for the firm in the long-run.

3. Rising inequality as non-unionized part-time workers get smaller pay increases. Arguably flexible labour markets have created a bigger gap between those 'insiders' with secure job contracts, and those 'outsiders' without job contracts.

4. Higher search costs for workers needing to find new jobs. Also firms may have higher replacement costs for hiring more workers. Firms may end up paying a premium to employment agencies to help fill gaps in their workforce.

We, acknowledge that we are living in a new economic environment, and with new social realities. However, it does not mean that these new circumstances should force government to make brutal, choices to help employers implement "flexible" work arrangements at the expense of workers.

➢ EMPOWERMENT OF WORKERS NEEDS BE THE CORNER STONE OF ONTRAIO'S UPDATED EMPLOYMENT STANDARD ACT

An updated Employment Standards Act needs to have as its key underpinning, the concept of worker empowerment. The current legislation/policy has done little to create a supportive culture to empower workers.

In Fairness at Work, Arthurs observed:

> the best prospects for securing compliance with labour standards involve programs to educate workers and employers concerning their rights and responsibilities[4]

[4] Harry W. Arthurs, Fairness at Work: Federal Labour Standards for the 21st Century (Gatineau: Human Resources Skills Development Canada, 2006), 232. Online: http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/final_report.pdf (53)

The Ontario Building Trades Council Recommends that:

The Ministry of Labour:

a) Launch a public awareness campaign on Employment Standards Act rights and responsibilities;

➢ ENFORCEMENT of the ESA

Any updates to the Employment Standard Act needs to create a robust enforcement regime. The current ESA enforcement mechanism is lacking and has not adequately protected workers.

Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* perceives the success of any existing model as highly dependent upon its ability to ensure compliance.

> *Labour standards ultimately succeed or fail on the issue of compliance. Widespread noncompliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law.*[5]

The Law Reform Commission of Ontario, *Vulnerable Workers and Precarious Work: Final Report – December 2012* described that Ontario's Ministry of Labour promotes a "soft law" approach of voluntary compliance:

> Through its Education, Outreach and Partnership strategy. The Ministry's website outlines the goals of the strategy:
>
> - To create an environment where employers and employees understand their rights and obligations under the Employment Standards Act, 2000 ('ESA').
> - To increase employer awareness of responsibilities under the ESA by providing employers with the resources and tools to help them comply.
> - To encourage compliance with the ESA[6].

The current approach doesn't work and has allowed employers to game the system. Employers simply weigh the costs of compliance against the relatively low probability of being found in non-compliance. In our view voluntary compliance doesn't work and has

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[5] Arthurs, note 4, 189

[6] The Law Reform Commission of Ontario, *Vulnerable Workers and Precarious Work: Final Report – December 2012* Online: http://www.lcocdo.org/ III. Employment Standards Policy and Legislative Reform: The Employment Standards Act and Related Legislation. (54)

created an environment where certain employers can violate a workers rights with no fear of being caught.

Complicating matters is that currently the Ministry of Labour has a team of just 180 enforcement officers to look into employment standards violations across the entire province — less than half the number devoted to Occupational Health and Safety inspections.

In fact, the lack enforcement mechanisms currently provide employers with an incentive to violate. This is because most complaints are eventually settled informally or during mediation processes, and the worst consequence of an informal or mediated settlement for an employer is that it will have to pay all outstanding back pay; i.e. at most, the employer will have to pay what it should have paid in the first place. In some cases, employers may even payless.

The consequences of an in effective enforcement regime have been dire for Ontario workers:

- In 2009-2010, for example, Ontario employers withheld over $62 million from their employees, mostly vulnerable workers, who were subsequently only able to recover a mere $14.8 million through Ontario's employment standards enforcement mechanisms.[7]

- In Ontario in 2009-2010, though 20,762 complaints were filed and over $64 million was found to be owed to workers, only 298 tickets and 86 fines were issued, and just 13 prosecutions were carried out.[8]

- In 2013-2014 2,258 orders to pay were issued.[9]

- 2013-2014 1,443 **orders to pay still uncollected 37% success rate.**[10]

- In 2014 out of Ontario's 442,000 workplaces, just 2,694 were inspected.[11]

- There are only 35 enforcement officers dedicated to this proactive enforcement, and employers are given notice that their workplace will be inspected.[12]

- In 2014 there 15,485 complaints and 2,768 proactive workplace inspections. **Only 8 in prosecutions with serious financial penalties.**[13]

- 321 tickets of less than $360 were issued for violations from failure to give regular pay, to denying overtime pay and not paying minimum wage.[14]

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[7] Vosko et al. 2011.
[8] Ibid
[9] Toronto Star July 21st, 2015 "Frustration, exasperation mark Woman's lengthy fight for wages
[10] Ibid
[11] Ibid
[12] Ibid
[13] Ibid
[14] Ibid

And this is only the tip of the iceberg. These figures only represent violations actually discovered by employment standards officers (ESOs) in Ontario, and do not include the multitude of violations that go unreported every day.

The lack of employment standards enforcement doesn't just affect individuals; it is equally harmful for Canadian society as a whole. Firstly, lack of enforcement means that the minority of employers who repeatedly violate employment standards gain an unfair competitive advantage over the majority of employers who comply, which ultimately pressures compliant employers to reduce compensation and cut hours to stay in business.

Secondly, lack of enforcement means that vulnerable workers must increasingly rely on social programs to make up for their unpaid wages, placing an additional unnecessary burden on scarce government resources that would be better spent in ways other than subsidizing payrolls. Lastly, low levels of enforcement increase income inequality and poverty as well as all of the social ills that go with it.[15]

Proactive Inspections

The Auditor General of Ontario (2004) reported that proactive inspections turn up a violation rate for employees of 40% to 90%[16].

The Law Commission of Ontario 2012 reported that:

> In fiscal 2008-2009, 2,135 proactive inspections in Ontario generated 2,883 compliance orders amounting to $1.9 million dollars in unpaid wages from a pool of 60,000 employees affected by the inspections. Given that so few employees complain while still employed, it is likely that the preponderance of these violations would never have been discovered but for the proactive inspections[17].

It is also important to mention the vast majority of complaints come from employees after the employment relationship has ended and so employment standards enforcement mechanisms are failing to protect people while they are working[18].

Complicating matters is the fact that, by law, workers are supposed to confront their employer about possible mistreatment before filing a complaint with the Ministry of Labour. When a complaint is lodged, employers are immediately notified and are given the employee's name, often leading to immediate dismissal. The employment act offers no protection against unjust dismissal. "

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[15] Thomas, note, 131.

[16] Law Commission of Ontario 2012, note 3, 62.

[17] Ibid.,

[18] Thomas, note 6, 132.

The current Ontario model is premised on the self-enforcement model, and self-enforcement is often not an option for people from marginalized social positions. The imbalance of power is too great.

Essentially, when it comes to enforcing ESA it is workers -not the government -doing the heavy lifting. Recognizing that relying on vulnerable workers to enforce their own rights makes little sense, many jurisdictions have moved to a more proactive model of enforcement.

Vulnerable workers are often victimized by veiled forms of discriminatory conduct on the part of their employers such as the allocation of desirable schedules or easier tasks on the basis of racist and gendered decision-making processes[19].

Approaching such employers about unpaid wages is a risk for vulnerable employees as they could be reprimanded in covert, difficult to document ways such as losing hours or being assigned difficult tasks. Or they could be laid off altogether. These are risks that vulnerable employees are least likely to be in a position to take.

Increasing the number of proactive inspections in high risk industries has been widely recommended by numerous scholars and public reports in Canada, the U.S., and Australia as a key part of improving compliance.

Indeed, several provinces already conduct proactive inspections to varying degrees, including Manitoba, Alberta, Ontario, Saskatchewan, and Quebec.

There are a number of reasons why proactive inspections are desirable from an enforcement perspective.

- Firstly, proactive inspections are far more likely to unearth instances of exploitation of vulnerable workers, especially while they are still employed.
- This is because proactive inspections sidestep the problem of the employer-vulnerable worker power imbalance that prevents vulnerable workers from coming forward or negotiating a fair settlement.
- Secondly, proactive inspections take advantage of economies of scale. In Quebec, for example, an employee complaint relating to pay may trigger an audit of the employer's entire payroll, which not only increases the likelihood of identifying more violations, but also saves ESOs time as they may investigate and deal with multiple violations in the course of a single inspection.
- Taking advantage of economies of scale is key to the efficient use of limited agency resources in any regulatory context[20].

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[19] Gellatly, Mary, John Grundy, Kiran Mirchandani, J. Adam Perry, Mark P. Thomas, and Leah F. Vosko. 2011 "Modernizing 'Employment Standards? Administrative Efficiency and the Production of the Illegitimate Claimant in Ontario, Canada." The Economic and Labour Relations Review 22 (2): 81–106.

[20] Sparrow, Malcom K. 2000. The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance. Brookings Institution Press.

Proactive inspections also result in workers recovering a much greater percentage of wages than is typically the case through the complaints mechanisms. In Ontario, proactive inspections have permitted workers to recover between 90 and 99% of wages owing, whereas the complaints process has resulted in recovery of roughly half that percentage.[21]

Move to Randomized Proactive Inspections

It is submitted that the MOL should not only conduct more proactive enforcement the inspection program should be randomized. The current model is predicated on targeting employers that are likely to offend or have been caught offending already. The MOL should dedicate a small number of yearly inspections entirely too random employers in sectors considered unlikely to offend.

These randomized inspections are important to test the validity of the agencies' risk assessments against a comparator. Otherwise, the agencies will tend to target sectors they already considered to be a problem without recognizing the possibility that the risks may change or sectors thought mostly compliant may not be.[22]

We acknowledge that increasing proactive inspections will require additional resources at a time when government budgets are under pressure. However, these additional costs may be partly offset by reductions in social spending as lower-income workers become less reliant on social programs.

Even where increases to employment standards budgets are not forthcoming, it may still be worth it to allocate a greater share of resources from complaint response to proactive inspection, even if it means increases to processing times. Though complaining employees will to wait longer, proactive inspections are likely to discover more violations, resulting in better overall compliance.

Other Enforcement Tools/Collection

Introduce Debtor Examinations

To improve collection activities the MOL should introduce "debtor examinations." This is the first enforcement tool creditors use to get their money back. The process requires that the creditor fills out a 2 page form and serve it to the debtor, who must then appear in court in front of a judge to disclose their assets. The MOL and its collection

[21] Vosko, note 4

[22] Sparrow, note 11.

agents can then determine where the money is, and pursue it on behalf of the workers. Debtor examinations can be issued to both companies and their directors, to ensure someone is held to account.

Introduce Mandatory Orders against Director(s)

The current mechanism allows "Director Orders" at the discretion of the Director of the ESA and are generally used if a company still hasn't paid a worker 30 days after an initial order to pay from the MOL. Orders against a director ensure the owner of the company can be held personally responsible for worker's unpaid wages. This way even if the company goes under, the MOL can still pursue the owner's assets. These orders must be filled within two years of a worker filling a claim.

The Ontario Building Trades Recommends:

The Ministry of Labour:

a) **Develop an expanded, proactive and randomized system of enforcement to improve compliance**
b) **Conduct expanded investigation when violations are detected**
c) **Ensure enforcement activities include follow up on previous violations**
d) **Introduce amendments to permit orders requiring employers found in violation to cover the costs of investigations and inspections**
e) **Increase enforcement team staffing**
f) **Remove the Mandatory Requirement for workers to attempt self-enforcement by contacting their employers about the violation**
g) **Authorize the Director of Employment Standards to place holds on employers' property when a complaint is filed for unpaid wages**
h) **Increase fines to double or triple the amount of wages owed**
i) **Establish set fines for all offences, even when employers voluntarily agree to pay worker wages owed**
j) **<u>Introduce Debtor Examinations</u>**
k) **The Director of Employment Standards in all cases where an order to pay has been issued by the MOL must issue an "Order against Director/s."**

➢ LIMITATION PERIODS AND MONETARY CAP

Increase 6 month Limitation Period from current 6 months to 2 years

Section 111 of the ESA sets out a six month limitation period for bringing claims related to wages. The limitation period for recovery of wages is twelve months for cases where there is more than one violation with respect to wages of the same employee as long as one of the violations occurred within the six month period.

Vacation pay also has a twelve month recovery period. For contraventions where reinstatement/compensation is sought as a remedy, the general limitation period is two years under section 96(3). The mandatory time limits may be extended in exceptional cases of fraudulent concealment, where the employee has been misled.

The shorter limitation period for recovery of wages was enacted in 1996. It was justified by the government at the time of its introduction as a means of improving administrative efficiency, improving the likelihood of successful investigation and enforcement, better use of tax dollars, introducing flexibility and, as a result, an improvement for workers and employers. However, these changes were controversial at the time and worker stakeholders felt were aimed at decreasing worker complaints in the interest of employers.

It is our position that the ESA should be amended and allow a two year limitation period that was in place prior to 1996. Alternatively, if the two year limitation period is deemed to be out of step with other jurisdictions at minimum the ESA should be amended to provide a discretionary time extension for wages in special circumstances.

Increase Monetary Cap from $10,000 to $25,000

The current ESA also imposes a monetary cap of $10,000 on recovering money owing. Recent increases in minimum wages along with the fact that almost all ESA claimants have left their job supports expanding the ESA's limitation period for recovery of wages and increasing the monetary cap to $25,000. Providing for a higher monetary penalty would bring the ESA cap in line with the Small Claims Court cap.

The Ontario Building Trades Recommends that:

The Ontario Government Amend the Employment Standards Act to:

a) **Provide for a 2 year limitation period or alternatively a discretionary time extension for claims for wages in special circumstances; and**
b) **Raise the ESA monetary cap to $25,000.**

➢ ESA HANDOUT AT OUTSET OF WORKING RELATIONSHIP

A simple, virtually no cost strategy for increasing ESA knowledge and supporting compliance in the workplace could be achieved through a handout provided to employees at the outset of the working relationship. Currently, s. 2(3) of the Employment Standards Act requires employers to display an informational poster in the workplace that outlines ESA rights and responsibilities and provides the Ministry of Labour contact information.

The Ontario Building Trades Recommends that:

The Ontario Government Amend the Employment Standards Act to:

> **Require employers to provide the ESA poster in document format to all new employees in English and, to the extent possible, in the language of the employee.**

➢ PART-TIME EMPLOYEES (EQUAL PAY)

In recent years there has been a move for employers to hire exclusively part-time employees. While we acknowledge at times there legitimate business reasons to hire part-time employees, some employers appear to use part-time employment to hire workers at a lower rate.

Arthurs argues that unless there is a justification for the difference based on skill levels, experience or job description, such discrepancies are unfair to part-timers and, ultimately, will reduce the standards of full-time workers as well[23].

The negative impacts of this situation are exacerbated by the fact that part-time work is highly gendered and that, among part-time workers, women are more likely to be low-paid.

The phenomenon of hiring strictly part time workers is not limited to the private sector. Government has also been employing the same practice. For example in our community colleges, we are seeing part-time faculty and support staff who earn much less than their full-time colleagues doing the same work. In the case of part-time faculty, they can easily be earning as little as one-tenth the income per course of a unionized permanent faculty member.

[23] Arthurs, note 4, 238

Another example is the LCBO, where there has been a reduction of "full-time" shifts for casual workers from eight hours to five in order to be able to transfer more work to other casuals who are lower on the pay grid.

When an employer can create a class of workers and then pay them less than the established rate of pay and benefits for regular staff, there can only be one outcome – the employer will do everything in its power to drive work to the lowest-paid class of workers.

This distorts the internal labour market of every organization that uses it. Rather than structuring work based on the requirements of the work, the employer structures it on the basis of cost. And workers pay the price.

The Ontario Building Trades Recommends that:

The Ontario Government Amend the Employment Standards Act to:

To require all workers in equivalent positions to be paid at least at the same rate as their permanent full-time equivalents.

- **EXPEDITING AND FACILITATING ESA CLAIMS**

Person-to-person assistance for workers preparing their claims has been promoted as a means of increasing ESA accessibility and potentially expediting the claims-making process, thereby counteracting the effects of lack of internet access and/or language barriers. Appropriate claims information may ultimately assist adjudicators in the decision-making process.

The Ontario Building Trades Recommends that:

The Ontario Government Amend the Employment Standards Act to:

a. **The MOL facilitate expedite the ESA claims-making process, by providing a mechanism for workers and employers to obtain person-to-person assistance in the claims process through additional support services such as Legal Aid Ontario clinics, Office of the Employment Standards Advisor and/or other types of worker and employer support services.**

- **THE NEW GIG/UBER ECONOMY: MISCLASSIFICATION OF WORKERS**

The Ontario Building Trades has for years argued that companies in many industries and especially construction have sought to hold down labor costs by calling workers independent contractors. By employers styling workers as independent contractors they aren't eligible for overtime pay, unemployment insurance or in some cases workers compensation.

In recent years-app-based businesses like Uber, Lyft and Insta car have grown rapidly, in part because they have signed up tens of thousands of people to on their services as independent contractors. Uber the most successful business in this sector, has signed up more than a 160,000 of what it calls "driver partners." There is no question that the companies in what has been called the "gig economy" would not have been able to grow so fast if they had hired all these people as employees.

Borrowed from the music industry, the word "gig" has been applied to all sorts of flexible employment (otherwise referred to as "contingent labor," "temp labor," or the "precarious"). In the Gig Economy workers no longer hold a regular "job" with a long-term connection to a particular business. Instead, they work "gigs" where they are employed on a particular task or for a defined time, with little more connection to their employer than a consumer has with a particular brand of chips.

The growth in non-standard work or alternative contractual arrangements has increased the blurring of the employment relationship and has created a large cohort of workers with no protection. Moreover, some of the employees in the "gig economy" may be wrongly misclassified as independent operators/contractors when in reality they may be workers and therefore not aware of their rights under Employment Standards or other remedial social legislation (Health and Safety, Workers Compensation, EI)

The Law Commission of Ontario 2012 reported that:

> t]he misclassification of employees as something else, such as independent contractors, presents a serious problem because these employees are often denied access to critical benefits and protections – such as family and medical leave, overtime compensation, minimum wage pay and Unemployment Insurance – to which they are entitled. In addition, misclassification can create economic pressure for law-abiding business owners, who often find it difficult to compete with those who are skirting the law. Employee misclassification also generates substantial losses for state Unemployment Insurance and workers' compensation funds[24].

In this convoluted world of "employment arrangements" the most pressing issue is how to identify and remedy the situation of workers erroneously misclassified as self-employed when an employment relationship actually exists.

The most straightforward approach would be to target the actual issue, the practice of misclassifying employees, through improved enforcement procedures, policy development, ESO training and public awareness. This would protect the most

[24] Law Commission of Ontario 2012, note 3, 92.

vulnerable without negatively impacting those who benefit from self-employment. The advantages of compliance and enforcement practices such as proactive inspections and expanded investigations outlined earlier are equally applicable to the situation of identifying cases of misclassification.

The most effective enforcement activities would be those directed at industries known to be at high-risk for practices of misclassification such as construction, trucking, cleaning and catering, as well as identification and proactive monitoring of industries populated by workers known to be disproportionately affected.

The Ontario Building Trades Recommends that:

The Ontario Government Amend the Employment Standards Act to include:

a Proactive enforcement and compliance efforts in industries with known incidences of misclassification.

b. Require employers to provide all employees with written notice of their employment status and terms of their employment contract.

The Ontario Building Trades Recommends that:

The Ministry of Labour:

a) Launch a public education campaign to raise awareness of the issue of misclassification of employees under the ESA.
b) Prepare policy guidance and training for employment standards officers on the definition of employees and the common law test. This would include self-employed workers in dependent working relationships (i.e., low-wage workers with only one client), while allowing for other self-employed persons to benefit from flexibility and choice in self-determination of working conditions.

CHANGES TO THE ONTARIO LABOUR RELATIONS ACT

- **REMOVE BARRIERS FOR UNIONIZATION TO PROMOTE REAL SELF ENFORCEMENT**

Card based Certification- Same principles for all Unions

One of the most effective means of reducing worker vulnerability and enforcing workers' rights is through unionization. Unionization's benefits have been described as important social values, related to workers' well-being and providing a forum for airing grievances.

The Supreme Court of Canada has noted that:

> It is widely accepted that labour relations laws function not only to provide a forum for airing specific grievances, but for fostering dialogue in an otherwise adversarial workplace. As P. Weiler has written, unionization introduces a form of political democracy into the workplace, subjecting employer and employee alike to the "rule of law".[25]

It is fundamental to any meaningful labour law reform to restore what was a key feature of the Ontario labour relations system for over forty years –card-based certification and eliminate mandatory certification votes.

Presently in Ontario there are two sets of rules for union certification card based certification for the construction industry and certification votes for all other sectors.

What is Card Based Certification?

Simply put, the Unions' purpose through the organizing drive is to garner support among those that it seeks to represent. They demonstrate this support, most typically, through signed membership cards. In a card based certification system, the cards are submitted to the appropriate labour relations board, along with the application for certification and, if the number of cards exceed a specified threshold, the union is certified as the exclusive bargaining agent for the employees in the bargaining unit. Of course, the employer can contest various issues (such as the appropriateness of the bargaining unit, who is included in the unit, and whether the union has met the membership threshold). But, in a card-based system, the cards are a demonstration of the signatories desire to have the union represent him or her as his or her bargaining agent. The card-based system for selection of a union is prevalent in most Canadian jurisdictions and ensures effective freedom of association.

Mandatory Vote System

The certification vote process, in Ontario is as follows:

- The union signs up members (it wants 40% or more support (signed membership cards) of those employees in its proposed bargaining unit as I will discuss in a moment)
- The Union then serves on the employer and files with the Ontario Labour Relations Board its application for certification

[25] Dunmore v. Ontario (Attorney General), 2001 SCC 94, para 46

- The Ontario Labour Relations Board will review the evidence submitted by the Union to confirm that they have 40% or more support
- The employer has two (2) days to respond to the application (and can make submissions on a variety of issues including the bargaining unit description, the number of employees in the proposed bargaining unit, who is (or should be) included or excluded from the bargaining unit, and whether the Union has 40% or more support)
- If on the Union's information, it has 40% or more support, the Board will order a mandatory secret ballot representation (certification) vote among the employees
- The vote itself will take place on the fifth day after the application was filed with the Board (excluding weekends and days on which the Board is closed)
- An officer from the Board supervises the vote
- Any issues between the Union and the Company are resolved after the vote, through the Board's "mediation" processes or, depending on the issues, a hearing or written submissions

The mandatory vote system by its nature, leaves employees vulnerable to employer coercion and unfair labour practices so they cannot fully and freely express their true wishes.

The argument for the return of "card-based" certification is premised on the belief that the employer will engage in unlawful conduct and commit unfair labour practices to prevent workers from voting to certify the union. To force such workers to go through a vote, with its likely companion employer interference, is to deny many workers access to collective bargaining.

As mentioned currently, in Ontario card based certification is only available to the construction sector simple fairness requires that all Ontario workers be governed by a return to a card-based system. By providing workers greater opportunity to collectively organize and bargain will enhance protection and employer compliance.

The Ontario Building Trades Recommends:

The Ontario Government Amend:

c) The Ontario Labour Relations Act, 1995 to remove barriers for unionization to promote Real Self Enforcement and introduce Card based Certification for all sectors.

- **MAKE CHANGES TO THE LABOUR RELATIONS ACT PROHIBITING"REPLACEMENT WORKERS" DURING A STRIKE**

In 1992 the government of the day (NDP) introduced Bill 40 and Ontario became the second province in Canada (Québec being the 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. A law banning the use of temporary replacement workers has existed in Quebec since 1978 and in British Columbia since 1993. In 1996 the Mike Harris Conservatives gutted the province's Labour Relations Act and revoked Bill 40.

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.

The Ontario Building Trades Recommends that

The Ontario Government Amend:

a) The Ontario Labour Relations Act, 1995 to remove ban all replacement workers in legal strikes and lockouts.

UPDATING AND EXPANDING THE PROVINCIAL FAIR WAGE POLICY

At the present time, Ontario's Fair Wage policy is nominally in effect but wage rates have not been updated since 1995 because the Harris government, through Order in Council (OIC) 1796/95 repealed Section 1(4) of Order in Council 773/95 which originally required the Ministry of Labour to update the Fair Wage rates.

Although the 1995 Fair Wage rates are said to still be referred to in government tendering documents, the current rates in the wage schedules are effectively meaningless as a result of inflation, the increased cost of living, and other economic variables that have impacted Ontario's economy since 1995. The 20 year status quo of not updating Fair Wage schedules (let alone expanding them to cover more government-funded entities) is a lost opportunity which, after careful consideration of evidence-based arguments, can and should be addressed through corrective action.

Therefore, the Council calls on the Government of Ontario to update and expand the provincial Fair Wage policy in accordance with the most identifiable, best-documented prevailing rates in various regional areas of the province. Recognizing that purchasing power is a key strength of government policy, in addition to government's ability to define terms of employment on publicly-funded construction work, updating the policy will benefit Ontario's economy and help strengthen the middle class as infrastructure needs in urban and rural communities are met.

By having an updated, expanded, and well-enforced Fair Wage policy, the Government of Ontario can help make sure that public monies are not spent in a way that is exploitative of the very workers who contribute as taxpayers and otherwise, to public investments and the community at large. Moreover, evidence suggests that such a progressive policy change will lead to:

- Better Worker Health and Safety;
- A weaker underground economy;
- Fair and balanced Labour Relations;
- Protection of vulnerable workers (represented and unrepresented alike);
- Productivity gains in the workplace, which benefit legitimate employers and workers alike.

The Council is of the view that the Fair Wage not merely cover provincial Ministries, Boards, Agencies and Commissions, but also is expanded to apply to all entities (including Municipalities, Universities, Schools, Hospitals as well as Infrastructure Ontario and others) that are in receipt of provincial government funds. This would include grants, subsidies, loans or other financial support that comes from the province.

The Ontario Building Trades Council Recommends That:

-That the Ministry of Labour establishes Fair Wages for the industrial commercial and institutional (ICI), sewer and watermain and road and heavy construction sectors of the construction industry in Ontario in accordance with the most identifiable, best-documented prevailing rates for those sectors in the various regional areas of the province;

-That "Fair Wages" be determined by such periodic surveys by the MOL as are required of the most identifiable, best-documented prevailing rates in the various regional areas of the province in the four sectors described above, and that such comparable remuneration take into account not only the wage rates but all accompanying benefits; (i.e. a Fair Wage policy should reflect the full wage package of the most identifiable, best-documented wage rate including benefits, and not just straight wages);

-That the Fair Wage rates established by the MOL be applicable to both employees and independent contractors engaged by contractors and sub-contractors in the four sectors by all government ministries, all government boards, agencies and commissions and all entities (including Universities, Schools, Hospitals and others) in receipt of provincial government grants, subsidies, loans or other provincial financial support;

-That the OIC require bidding contractors and sub-contractors to comply with all applicable Federal, Provincial and Municipal laws relating to employment, including the Employment Standards Act, the Occupational Health and Safety Act, the Workplace Health, Safety and Insurance Act, the Ontario College of Trades and Apprenticeship Act and the Access for Ontarians with Disabilities Act;

-That the OIC provide for adequate enforcement proceedings similar to those found in the U.S. Davis-Bacon Act and in the Fair Wage By-Law of the City of Toronto, including provisions for regular reporting by contractors and sub-contractors, periodic inspections and audits by the MOL and penalties for non-compliance;

-That the MOL reserve the right to evaluate the past-performance of contractors and sub-contractors in assessing their bids, including the right to disqualify those that have a history of non-compliance with the provisions of the OIC.

Taken together, these measures will have a lasting impact on the working men and women who build Ontario's infrastructure, and yet are not compensated in a way that is fair and commensurate with the costs of living and raising a family in the year 2015.
When wage inequality is substantially removed from the picture, higher wages reduce turnover, which is in the interest of the employer as much as it is in the interest of the worker but also the labour relations climate in the province of Ontario.

Addressing Critics

Anti-Fair Wage lobbyists who tend to come from the Merit/Open Shop employer community, which does not speak on behalf of workers, have claimed that implementing a Fair Wage policy leads to higher contracting costs to government. This assumption is faulty on several counts, which a study entitled *"Prevailing Wages and Government Contracting Costs: A review of the research"* by Nooshin Mahalia sums up with the following reasons:

> **-**worker wages are only *one* variable affecting contractors' efforts to win project bids, and can therefore be offset by other variables;
> **-**improved productivity offsets higher wages. Better-skilled workers attracted by the higher wage can complete the job in less time;
> **-**firms looking to reduce higher labour costs may utilize labour-saving technologies;
> **-**'factor substitution' may lead to more expensive technologies replacing more expensive labour;
> **-**contractors might absorb the higher wage costs and pay for them out of their profits rather than pass them on to government.

Moreover, the Council is of the view that because of the competitive nature of Ontario's construction industry, contractors bidding on government work will continue to compete with each other if and when a Fair Wage policy is implemented; the only difference is that they will not be able to do so on the backs of the workers they employ, by paying them low wages or by discarding worker training. In other words, a Fair Wage policy will force employers to compete on the basis of other factors like productivity, innovation, and the ability to negotiate better financing terms when they plan their bids and execute construction projects.

More importantly, and in addition to purely financial considerations, the human impact of better health and safety performance is paramount, which critics of Fair Wage policies tend to ignore. Better safety performance translates into lower WSIB premiums for employers which offsets the up-front cost of doing business. In the U.S., those States which do not have a Fair Wage have injury rates that are 6.5% higher than States with the Fair Wage, while on average, in States where the Fair Wage has been repealed, injury rates have gone up by 13.8%, according to a study by Nooshin Mahalia of the Economic Policy Institute in the United States.

Critics of the Fair Wage policy who are oriented against organized labour may claim that an updated and expanded Fair Wage policy benefits unionized workers at the cost of taxpayers. Yet, unionized workers already enjoy higher wages and benefits compared to non-unionized workers through collective agreements that are negotiated through collective bargaining and are the product of labour relations that unfold independently of statutory floors like a minimum wage, a living wage, and even a fair wage. Therefore, an updated and expanded Fair Wage policy would have zero impact on

workers who are already represented by unions but would hugely benefit unrepresented workers who currently have no formal voice in dealing with their respective employers. In that sense, a Fair Wage policy has the potential to address chronic problems in today's workplaces that are dominated by precariousness and vulnerability.

Finally, contractors not subject to Fair Wage laws might retain money they save in wages as higher profits, rather than pass on the savings to government, so there is no guarantee that the status quo is necessarily a more cost-effective scenario compared to an update in the Fair Wage. This is a point which the Merit/Open Shop employers do not recognize in their attempts to prevent and destroy Fair Wage policies from emerging at all levels of government.