The Changing Workplaces Review

Submission of The Society of Energy Professionals

November 6, 2015

About The Society of Energy Professionals

The Society of Energy Professionals (The Society) is a union whose 8000 members are employed in the Ontario electricity sector. They are primarily employed in white collar or "professional" occupations, such as engineering, economics, auditing and accounting, front line management and supervision, applied science, information systems management, as well as many other professional, administrative, and associated occupations.

Society members work for 14 public and private sector employers in Ontario's electricity industry, including: Ontario Power Generation, Hydro One, Bruce Power, the Nuclear Waste Management Organization, the Independent Electricity System Operator, the Ontario Energy Board, Inergi and Kinectrics, among others.

Overview of Recommendations

The Changing Workplace Review provides a once in a generation opportunity to review, renew and update Ontario's laws governing employment and labour relations. Ontario's labour laws have not kept pace with a changing workforce, changing workplaces, changing employment relationships, and changing labour markets.

The growing gap between the legislation regulating Ontario's workplaces and the reality of the working lives of Ontarians has contributed greatly to the rise of precarious employment and the growing gap of income inequality.

The Ontario Employment Standards Act (ESA) no longer provides an effective floor for the terms and conditions of employment for Ontario workers. The rise of temporary and contract work, triangular employment relationships, misclassified "independent" contractors means more and more workers are falling outside the reach of the protections of the Employment Standards Act.

To help make the ESA more relevant and effective in offering protections to Ontario's non-unionized workers, The Society recommends the following:

- **Make employers liable for wages and ESA entitlements, even where there exists a triangular employment relationship through subcontractors and other intermediaries. The ESA should formulate more inclusive definitions of "employee" and "employers", which acknowledge the joint and several obligations and liabilities of all parties in a triangular employment relationship.**
- **Changes to the ESA should ensure that part-time and temporary agency workers receive the same wages, benefits, and working conditions as permanent full-time workers doing the same work.**
- **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.

- **The ESA should provide for an eight-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.**
- **Require two weeks' posting of work schedules. Establish minimum three hour shifts. Workers shall be able to ask employers to chance schedules without penalty.**
- **Increase paid vacation to three weeks per year. After five years of service, increase vacation to four weeks of paid vacation per year.**
- **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.**
- **The ESA should have all other exemptions based on age, occupation or industrial sector removed.**
- **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.**
- **The Ontario government should raise the provincial minimum wage to $15 an hour, adjusted annually for inflation.**

While improvements to the Employment Standards Act will raise the floor for all workers in Ontario and help reduce the growing income gap, the floor is not the level to which most workers aspire. History has proven that no institution in our society is more effective at improving the wages and working conditions than the trade union movement. Years of regressive legislation motivated by anti-union animus, coupled with the rise of more mobile, aggressive transnational employers have greatly impacted the ability of unions to set the bar for terms and conditions of employment. Additionally, the Ontario Labour Relations Act (OLRA) does not reflect the Supreme Court of Canada's recognition of free collective bargaining and associated activities as a Charter right and a societal good. In order to restore the balance and allow unions to better fulfil their societal role of economic, social and political empowerment, The Society recommends the following changes to the OLRA:

- **The Purpose Clause of the OLRA should be amended to make clear that the purpose of the Act is to encourage, facilitate and promote freedom of association and the ability of workers to pursue their economic goals through free collective bargaining.**

- **The OLRA should be amended to provide all workers, and not just those in the construction industry, with access to card based certification.**

- **Where a union demonstrates it is engaged in a bona fide organizing drive, and where it does not violate existing privacy laws, the employer should be required to disclose employee lists to the union, together with work and home emails, if available, and telephone numbers.**

- **The OLRA should provide that, wherever possible, certification votes should take place in neutral locations Further, the OLRB should investigate and consider the possibility of telephone or online voting as methods of better enabling workers to exercise their right to vote in certification elections.**

- **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.**

- **The OLRA should 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.**

- **Ontario should adopt measures that provide automatic access to binding first agreement arbitration.**

- **The OLRA 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 information technology and other business services, 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.**

- **The OLRA should be amended to prohibit the use of replacement workers during work stoppages.**

- **The OLRA should be amended such that employees who exercise their lawful right to strike have an unrestricted right to return to their former position without penalty.**

- **Amend the OLRA to allow access to interest arbitration to settle long labour disputes that last over 90 days.**

- **Remove all Section 1(3) and Section 3 exclusions from the Act where no alternative and equivalent process currently exists.**
- **The OLRA definition of "managerial functions" should be broadened and more clearly operationalized, so as not to exclude from union membership those supervisory and first-line "managerial" workers who do not make decisions with respect to policy and the overall operation of the organization.**

The Context for Ontario's Changing Workplaces Review

Rising Income Inequality

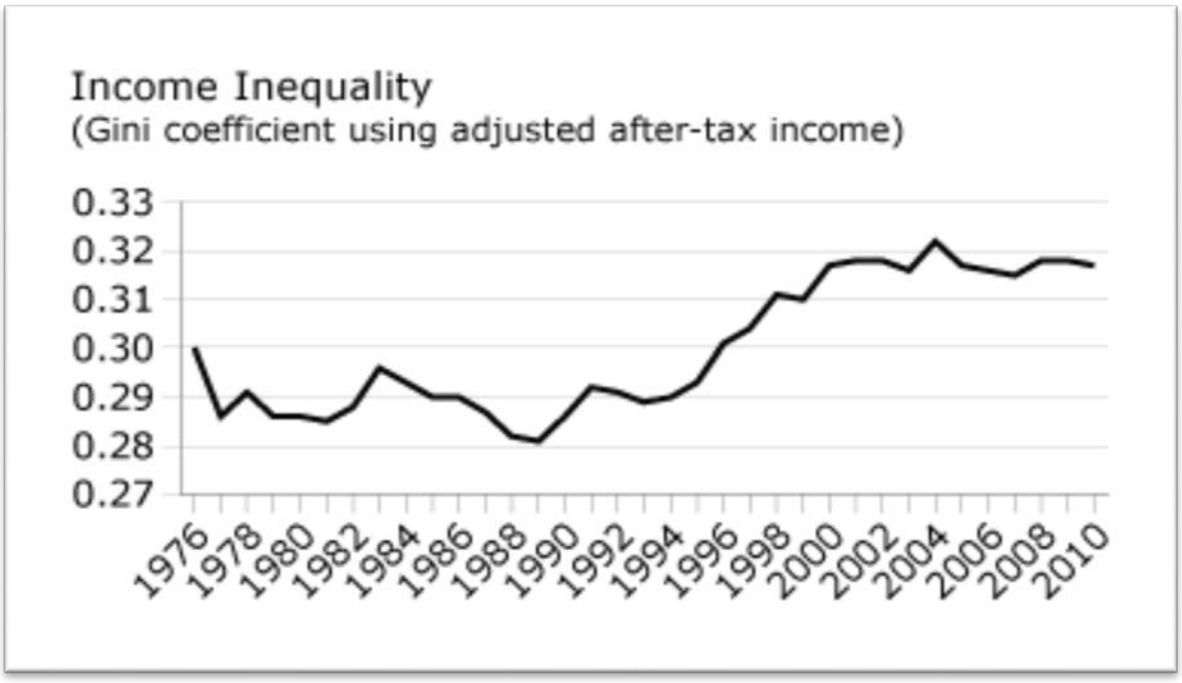
Income inequality is the extent to which income is distributed unevenly in a country. It is an important indicator of equity in an economy, and has implications for other social outcomes such as health outcomes, intergenerational mobility, civic participation, crime and life satisfaction. Large income gaps can also diminish economic growth if these gaps mean the country is not fully using the skills and capabilities of all its citizens or if they undermine social cohesion, leading to increased social tensions.

Income inequality in Canada is a real and growing problem, a fact which has been clearly recognized by civil society organizations such as trade unions, poverty reduction NGOs and public policy think tanks, as well as by financial and economic institutions such as the Organization for Economic Co-operation and Development, the Conference Board of Canada and TD Economics.

A 2014 OECD study identified Canada is among the worst countries in the developed world in terms of the widening income gap between top earners and others in society. The report showed that the top one per cent of Canadian pre-tax income earners captured 37 per cent of the overall income growth between 1981 and 2012, and controlled 12.2 per cent of the country's income pie, ranking only behind the United States (20 per cent), the United Kingdom (12.9 per cent), and Germany (12.7 per cent) in terms of income disparity among the 18 relatively rich countries compared.[1]

TD Economics ranked Canada 12th of 17 comparator countries with respect to income inequality, noting that since 1990, the richest group of Canadians has increased its share of total national income, while the poorest and middle-income groups has lost share. The richest income group (top quintile) had by far the largest share of Canada's economic pie—with 39.1 per cent of total national income. And this richest group was the only quintile that increased its share of national income over the past 20 years—from 36.5 per cent in 1990 to 39.1 per cent in 2010. All other quintile groups lost share, including middle-income groups.[2]

[1] OECD, Focus on Inequality and Growth - December 2014
[2] TD Economics, Income Inequality Report Card, 2013



TD Economics, 2013

Labour Market Regulation and Income Inequality

The causes of Canada's increased income inequality are many and complex. They include changes in patterns of international trade and production, skill-biased technological change, financial globalization and changes in foreign direct investment flows.[3] Most of these global and macro factors are beyond the ability of any one government to address in isolation, particularly a subnational government. However, many factors can be identified which should and can be addressed by government policy, given sufficient political will. There are many institutional forces such as stagnating minimum wage rates, erosion of employment standards, declines in unionization rates, as well as national and sub-national taxation policies that have become less progressive, and in many cases perversely redistribute income from lower to higher income Canadians.[4]

The Ontario labour market has shown a shift to an hourglass shape, with an occupational distribution concentrated at the high and low ends, and a disappearing middle.[5] Recent academic research supports these results, showing a reduction in mid-level occupations and increased wage inequality across occupations.[6] Wages at the top of the occupational distribution increased relative to those in the middle, wages in the middle grew relative to those at the bottom, and wages at the bottom declined in

[3] Sheila Block, The Wellesley Institute, Reducing Labour Market Inequality Three Steps at a Time, 2013.
[4] Armine Yalnizyan, Canadian Centre for Policy Alternatives, The Rise of Canada's Richest 1% , 2010.
[5] Toronto Workforce Innovation Group, Economy Out of Shape: Changing the Hourglass, 2010. Tom Zizys author
[6] Fortin, M. Green, D. et al "Canadian Inequality: Recent Development and Policy Options" Canadian Public Policy, Vol. 38, No. 2 pp. 121-145, 2012.

absolute and relative terms. Increasing numbers of workers and an increasing share of the total labour force are at the bottom of that hourglass and endure low incomes and increased insecurity.

Government policies which have contributed significantly to the growth in income inequality are the result of specific political choices made by political actors. This submission focuses on the degree to which policy choices with respect to labour market regulation, in particular through the Ontario Employment Standards Act and the Ontario Labour Relations Act have contributed to a weakening of the relative power of workers in Ontario's labour market and a worsening of income inequality. Looking forward, there are ways in which the regulatory regime can be improved and rebalanced for the betterment of working Ontarians and their families.

Changing Employment Relationships, Changing Workplaces

For those who watch labour markets closely, precarity has become the watchword of the day. Over the last 40 years, there has been a clear trend away from what was traditionally thought of as standard employment relationships: full-time, full year employment by one employer, with predictable schedules and hours of work which could be expected to last for long periods of time, often for the full duration of an employee's working life.[7] These stable employment relationships were protected and regulated by significant statutory rights and often featured enhanced non-wage benefits such as supplementary health insurance and pension, either collectively bargained or voluntarily provided by employers as a form of ancillary remuneration.

The province has experienced a multi-decade trend in which part-time, temporary and contract work, and self-employment have grown faster than permanent, full-time employment, accompanied by an attendant increase in multiple job holding. This transformation of labour markets has been catalyzed by economic downturns where full-time permanent jobs are shed during recessionary periods and increasingly replaced by non-standard, more precarious jobs during periods of economic recovery.

Recent academic research conducted by the Poverty and Employment Precarity in Southern Ontario (PEPSO) research group has provided an in-depth look at how this labour market transformation has impacted millions of workers in and around Ontario's most densely populated region. PEPSO surveyed more than 4000 workers in 2014 about the nature of their employment relationships and the ways in which this interacted with selected measures of personal well-being.

Among their chief findings:

- Only 48 per cent of workers in their sample were in permanent, full-time jobs that offered benefits beyond a basic wage; eight per cent were in permanent part-time jobs
- Fully 44 per cent of workers in their sample were in jobs that structurally displayed levels of precarity.
- 20.3 per cent of workers in their sample were in contract or temporary positions

[7] Vosko, Leah; Zukewich, Nancy; and Cranford, Cynthia. Statistics Canada, Perspectives on Labour and Income, "Precarious jobs: A new typology of employment." October 2003.

- 23.3 per cent of workers in their sample were in jobs that might be described as "secure", but displayed characteristics of precarity such as: uncertainty if the employment relationship would continue for at least a 12 month duration; fluctuating and unpredictable hours of work and income; and lack of access to any work related benefit beyond a wage
- The percentage of workers in the most precarious forms of employment (temporary, contract and own account self-employment) had increased by 60 per cent over the previous 25 years[8]

Updating the Employment Standards Act

The Ontario Employment Standards Act (ESA) is supposed to provide an effective floor for the terms and conditions of employment for Ontario workers. Ontario's ESA is meant to be the legislative expression of our collective values as they apply to the dignity and worth of workers. In 2015, it is clearer than ever that our ESA is not serving the purpose for which it was intended, as is evidenced by the deteriorating quality of jobs and the attendant growth in income inequality detailed earlier in this submission.

The current standards enshrined in the Act simply do not protect Ontario's workers, and in particular its most vulnerable workers, from exploitation in the workplace. Nor do they ensure that workers will reap an income from their labour which allows them to work with dignity and live outside of poverty.

The reasons for this are many. Some standards have simply failed to change with the times, such as the anachronistic exclusion of certain professional occupations from access to unionization or the failure to contemplate the type of triangular and indirect employment relationships that are now so common. Other standards, such as the definition of, and the payment for, overtime work have been eroded through the processes of brokerage politics in order to appease influential employer groups with provisions such as overtime averaging.

The Society believes it is the obligation of the government to fix the many exclusions, gaps and anachronisms that exist in the Act. No organization has done more to document the problems faced by workers in precarious employment situations than the Workers Action Centre. Its recent publication, Still Working on the Edge, provides the most complete and thorough documentation of Ontario ESA shortcomings and suggested solutions and The Society commends it to the Changing Workplaces Review.

The Society will briefly touch upon a few of the most crucial problems, and recommended solutions.

- There has been an increasing use of temporary employment services and other mediated arrangements for the subcontracting of labour, as well as a growing problem of misclassification of workers as independent contractors. These practices shift legal liabilities that employers have for their employees onto intermediaries, and, in the case of misclassified independent

[8] PEPSO, The Precarity Penalty: The impact of employment precarity on individuals, households and communities – and what to do about it. 2015

contractors, onto workers themselves. Employers are able to deprive workers of employment rights, benefits and protections because work arrangements do not conform to the standard employment model underlying employment standards, policies and practices. We need a universal approach to coverage under the ESA providing basic minimum standards for all workers. We also need to restore employer accountability for employment standards.

- **Make employers liable for wages and ESA entitlements, even where there exists a triangular employment relationship through subcontractors and other intermediaries. The ESA should formulate more inclusive definitions of "employee" and "employers", which acknowledge the joint and several obligations and liabilities of all parties in a triangular employment relationship.**

- Ontario workers employed through temporary agencies, on a contract basis, or on a part-time basis typically receive considerably less pay and few if any benefits, for performing the same work as full-time permanent workers. Most countries in the European Union (EU) have adopted the EU Directive on Part-Time Work and the EU Directive on Fixed-Term Work, which call for non-discrimination in the pay and conditions of work between part-time and full-time, and fixed-term and permanent workers. They also limit abuses arising from the use of successive fixed-term employment contracts and provide for pathways from part-time to full-time work, where desired.

  - **Changes to the ESA should ensure that part-time and temporary agency workers receive the same wages, benefits, and working conditions as permanent full-time workers doing the same work.**

- Misclassification of employees as independent contractors is increasingly widespread, particularly in industries such as construction and commercial cleaning. This misclassification has the two-pronged effect of denying workers protections under the ESA and allowing employers to shortchange not only Revenue Canada, but also the Workplace Safety and Insurance Board, Canada Pension Plan and Employment Insurance systems.

  - **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.**

- With respect to hours of work and overtime, the ESAs of the majority of Provinces and Territories provide for a premium payment of time and one half after eight hours per day, while Ontario allows for a longer "regular" work day without requiring premium pay. The ESAs of the majority of Provinces and Territories, as well as US *Fair Labor Standards Act*, provide for premium pay of time and one half after 40 hours per week, while Ontario does not pay an overtime premium until after 44 hours per week.

  Additionally, the *Act* has been eroded by the carve-outs of a number of specific occupational and industrial categories, such that farmworkers, information tech workers, and homemakers are exempted from maximum hours of work, overtime, breaks, and time off between shifts. Special permits and overtime averaging agreements have further extended the workweek and decreased worker access to premium pay for excess hours of work. Excessive hours of work

contribute to well-documented negative impacts on workplace safety, worker physical and mental health, family life and civic engagement. Except in cases of genuine emergency, overtime beyond 8 hours per day and 40 hours per week should be strictly voluntary.

Given a sea of workers involuntarily unemployed and underemployed, it makes no sense for the provisions of the ESA to so readily support and facilitate islands of damaging overwork, particularly when it is so often not compensated at an appropriate premium.

- **The ESA should provide for an eight-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.**

- While some are forced into too much work, many more struggle with the opposite problem. For those working in part-time or casual employment, particularly in the private service sector, the worry is how to get enough hours of work to sustain themselves and their families economically. The lack of guaranteed hours in many part-time jobs often leads to multiple job holding, however the inability to predict scheduling ahead of time in one or more part-time jobs can create great havoc and stress in the lives of multiple job-holders. The ESA is silent on the rights of part-timers to have advance notice of hours, minimum or guaranteed hours.
    - **Require two weeks' posting of work schedules. Establish minimum three hour shifts. Workers shall be able to ask employers to change schedules without penalty.**
- Access to paid vacation in order to physically and psychologically rest, spend time with family and friends and pursue individual interests is an essential component of good work. In a global comparison, Canada ranked lowest, alongside China, with respect to vacation entitlements.[9] Most major industrialized countries—including Sweden, Germany and the United Kingdom—all have legislation giving workers at least four weeks of paid vacation. The International Labour Organization recommends that the period of paid vacation should not be less than three weeks. Within Canada, only Ontario and Yukon limit vacation to two weeks of paid vacation, while all other jurisdictions have access to three weeks of vacation. Saskatchewan provides three weeks of paid vacation after one year of service, and four weeks of vacation after nine years. European countries average more than five weeks of annual paid vacation.
    - **Increase paid vacation to three weeks per year. After five years of service, increase vacation to four weeks of paid vacation per year.**
- Illness, accidents and personal emergencies occur regardless of the size of a workplace, yet access to unpaid leave for personal emergencies is restricted to workers who work in workplaces of 50 or more employees. This exemption for small businesses means almost one in three workers is without sick leave protection. Most of these workers work in retail, accommodation and food services, construction, health care and social services. Those sectors where workers are most in contact with the public are also the sectors with the highest number

[9] Mercer (nd) "Holiday entitlements– global comparison." http://www.totallyexpat.memberlodge.com/resources/Documents/Mercer_Holidayentitlements_Globalcomparisontable.pdf

of workers excluded from sick leave protection. From both a personal and a public health standpoint, this exemption makes no sense and should be repealed.

- **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.**

- There are a myriad other special exemptions from ESA standards such as lower minimum wages for students and liquor servers. Farmworkers, harvesters, fishers, residential care workers and building superintendents are not entitled to Ontario's minimum wage. The ESA fails to appropriately regulate hours of work for information technology workers, landscapers and farmworkers. Other Provinces and Territories have increasingly moved to remove these sorts of exemptions from their ESAs. Ontario is one of only 4 jurisdictions that retains differential minimum wages based on age or occupation.

  - **The ESA should have all other exemptions based on age, occupation or industrial sector removed.**

- 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. [10]

  The conditions under which migrant workers enter Canada and the conditions which they must meet to continue their stay make this group of workers extremely vulnerable to exploitation by unethical employers and others. Workers under the Temporary Foreign Workers Program (TFWP) are tied to one employer and are restricted from moving from one job to another when violations occur, because they are required to get a new work permit tied to another employer who has been approved under the TFWP. Recruiters target migrant workers and charge exorbitant fees, creating huge debt bondage for many workers, which act as a further disincentive to workers asserting their rights. When workers under the TFWP lose their jobs, they lose their residency status in Ontario and can be deported.

  While major changes to the TFWP 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. [11] Other Canadian provinces, such as Manitoba, Saskatchewan and Nova Scotia have made great strides in this regard and Ontario should use them as a model.

  - **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.**

[10] 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.

[11] 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.

- In any society that claims to value and respect the ethic of work, no one should work full-time, full-year and still remain in poverty. Yet for increasing numbers of Ontario workers, even if they overcome the barriers to obtaining full-time, full-year work, our inadequate minimum wage level means that this is their reality. The minimum wage should be a living wage, one which affords workers the basics for quality of life: decent food and shelter, utilities, transport, health care, minimal recreation, childcare and saving for retirement.

  Because the Ontario minimum wage was recently increased, making minimum wage levels beyond the formal scope of this review, current minimum wage levels do not meet the test of adequacy and should in fact be included in the recommendations of this review.

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

ENSURING CHARTER RIGHTS: UNIONIZATION AS A PUBLIC GOOD

A consequential power asymmetry between employers and employees is still recognized as inherent in the nature of contemporary markets and production systems, and is taken to be further exacerbated as markets and production systems become increasingly globalized — or, in the public sector, as the government assumes the roles of both employer and lawmaker. A central focus of labour relations policy has therefore been on functionally addressing that power imbalance through collective bargaining.

The right to freedom of association, and the right of Canadian workers to exercise that freedom through the vehicle of unionization and meaningful collective bargaining in order to improve their terms and conditions of employment, have been deemed by the Supreme Court of Canada (SCC) to be enshrined in Canada's Charter of Rights and Freedoms. Any lingering doubt with respect to this fact must now be laid to rest, given the strong and unequivocal decisions of the SCC in what has been referred to as the New Labour trilogy of cases:

> *The jurisprudence as a whole now unequivocally establishes that freedom of association under section 2(d) of the Charter in the labour context protects the right of employees:*
>
> *• to establish, belong to and maintain a trade union;*
>
> *• to join a trade union of their choosing that is independent from management;*
>
> *• to engage in a meaningful process of collective bargaining, including the right to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, and to have a means of recourse should the employer not bargain in good faith; and*

- *to strike.*[12]

In the recent *Mounted Police Association of Ontario v. Canada* decision, this evolution in the approach of the SCC was described as reflecting *"this Court's shift to a purposive and generous approach to labour relations".*[13]

As such, it is only appropriate that provincial regulation of unionization and collective bargaining, through the vehicle of the OLRA, should acknowledge and recognize unionization and collective bargaining as a public good. As an instrument through which workers may pursue and realize their Charter rights, the OLRA should be designed to explicitly encourage and facilitate the workers' voluntary acquisition of collective bargaining rights, and an efficient and fair process of collective bargaining, as opposed to agnostically regulating it as a practice that is merely allowable under a particular set of circumstances. In short, the Society believes that the Government of Ontario, in reviewing and revising the Ontario Labour Relations Act, should follow the SCC and similarly shift to a purposive and generous approach to labour relations.

This shift is not a new idea. Indeed, in 1968, the Woods Task Force on Labour Relations in Canada, the first review of the nascent Canada Labour Code, included the following in its recommendations:

> *In order to encourage and ensure recognition of the social purpose of collective bargaining legislation as an instrument for the advancement of fundamental freedoms in our industrial society, we recommend that the legislation contain a preamble that would replace the neutral tone of the present statute with a positive commitment to the collective bargaining system.*[14]

In response, the 1972 amendments to the Canada Labour Code included a new Preamble. The stated purpose of the Preamble was to promote, actively, free collective bargaining and freedom of association in Canada.

> *WHEREAS there is a long tradition in Canada of labour legislation and policy designed for the* ***promotion of the common well-being through the encouragement of free collective bargaining*** *[emphasis added] and the constructive settlement of disputes;*
>
> *AND WHEREAS Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;*
>
> *AND WHEREAS the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of*

[12] Cavalluzzo, Paul J.J., CASE LAW UPDATE: AN HISTORIC WIN FOR WORKERS' RIGHTS The Supreme Court Of Canada Releases New Labour Trilogy, January 30, 2015
[13] Mounted Police Association of Ontario *v.* Canada(Attorney General), 2015 SCC 1, [2015] 1 S.C.R. 3
[14] Task Force on Labour Relations H.D. Woods, Chair, 1968

the Right to Organize and has assumed international reporting responsibilities in this regard;

AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;

NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows…[15]

In Ontario, Bill 40 amended the Ontario Labour Relations Act to include a Purpose Clause which was much in line with the spirit of the Canada Labour Code Preamble.

2.1 The following are the purposes of this Act:

1. *To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.*
2. *To encourage the process of collective bargaining so as to enhance,*
    - *i. the ability of employees to negotiate terms and conditions of employment with their employer,*
    - *ii. the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and*
    - *iii. increased employee participation in the workplace.*
3. *To promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions.*
4. *To provide for effective, fair and expeditious methods of dispute resolution."*

The new purpose clause, like the rest of the Bill 40 amendments, were repealed in short order by the successor government's Bill 7, and the purposes of ensuring and protecting rights, encouraging collective bargaining, and enhancing the ability of employees to negotiate their terms and conditions of employment were replaced by a purpose clause that emphasized adaptation to change, flexibility, productivity and economic growth. None of the aforementioned values are without merit, but as the core of an interpretive frame, they would seem more appropriate in the pre-amble to a trade agreement rather than a labour relations act.

[15] Part V: Canada Labour Code, 1972

Leaning as we do to the frame of interpretation offered by the Canada Labour Code, we submit that each provision in the Act, and any subsequent evolution of those provisions, should be evaluated and, if necessary revised, with the following questions in mind:

1. Does this provision encourage and facilitate the freedom of association among workers in such a way as to allow them to democratically, and independently of employer influence, formulate their collective economic and social goals?
2. Does this provision promote and facilitate workers' ability to pursue those democratically determined collective goals through a process of *meaningful* collective bargaining?
3. Does this provision provide workers with effective recourse, resolution and redress in circumstances where employers seek to prevent workers from exercising their Charter rights to freely associate and collectively bargain?

- **The Purpose Clause of the OLRA should be amended to make clear that the purpose of the Act is to encourage, facilitate and promote freedom of association and the ability of workers to pursue their economic goals through free collective bargaining.**

Updating the Ontario Labour Relations Act

1. Card-based union certification (Card-Check)

   Some people talk as if this is the only bill that will ever be passed on labour relations and labour. That's not going to be the case. There is going to be more legislation coming. There will be more discussions. There will be more opportunities to take a step back and take a look at where we want to be with card certification. Let's remember that. [16]

   Dave Levac, MPP Brant

   It may have taken a decade for Speaker Levac's prediction to be vindicated, but this is indeed a moment for us to take a step back and take another look at returning to card-based certification for all Ontario workers seeking to certify and finishing the job that Bill 144 started.

   For more than 40 years, card-based certification (card-check) provided Ontario workers with an effective and efficient way to indicate their desire to become a member of a union. Where a clear majority of employees (55 per cent) 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. Card-check provided a mechanism which was pragmatically grounded in the recognition of worker-employer power imbalances and the recognition that a certain percentage of employers would use that that power to illegally coerce and intimidate their workforce in such a way that a mandatory vote system would not result in a true reflection of employees' wishes regarding unionization.

[16] Hansard, Ontario legislative Assembly, April 5, 2005

Card-check had been in place in Ontario for 50 years prior to the passage of the Harris government's Bill 7 in 1995. The Harris government touted the implementation of mandatory representation votes as a move toward greater workplace democracy. This is an assertion that makes a great deal of intuitive sense to many people on its face; the secret ballot vote is almost inextricably intertwined with the common public notion of democracy. However popular though, this notion is not informed by the reality of the vast difference between the circumstances of a workplace certification and the electoral process in federal, provincial or municipal elections.

The government recognized this, in part, when card-based certification was returned to the construction sector in 2005. At the time, the rationale for reintroducing card based certification in the construction industry only was that work in this sector was somehow quite exceptional as opposed to work in any other industrial sector.

> *"In fact, a construction company in many cases only consists of a few permanent key people. They rely on their knowledge and ability to bid and be awarded projects, and also on their ability to hire the right contractors at the right time and the right people for the job. So the work is generally project-based and typically occurs off-site, and that results in a highly mobile work force. The use of card-based certification really takes into account that mobility. The same tradesperson, in the course of a year, may work on many different projects, may work for different employers and may even work in different geographic zones throughout the province. The construction sector is distinctive in the way that it conducts its business, and the attempts that are made to organize that industry should be expected to be different."*[17]
>
> *Hon. Kevin Flynn*

The rise of precarious employment relationships, as outlined previously, gives lie to the exceptionality of the construction industry. The minister could easily have been speaking about contract cleaners, temp agency employees in manufacturing, or even contract faculty at one of Ontario's universities or colleges. Indeed, it is one of the hallmarks of our current labour market that a growing number of jobs are project based, time limited and rely on a labour force that is forced to "follow the work". As questionable as it was 10 years ago, the argument for the exceptionality of construction employment relationships (and the need for exceptional labour relations treatment) must now be seen to be almost entirely hollow given the current realities of so many workers outside the construction sector.

Data show that, not only is the overall proportion of certification applications lower under the vote system than under the card system, it is particularly so in the largely low-wage service and contingent worker sector. Slinn (2008) found that the shift from a card-based certification system "has had a disparately negative effect on relatively weaker employees, such that

[17] Transcript, Ontario Legislative Assembly, Standing Committee on Social Policy, April 26, 2005

employees who may most benefit from unionization are less able to access union representation."[18]

While employment precarity exacerbates negative impact of the use of representation votes, in any workplace a two-stage card/vote system creates an opportunity for an employer to engage in coercion, intimidation and retaliatory behaviour against union supporters. These sorts of employer behaviours in the week between an application for certification and a mandatory certification vote can significantly decrease the likelihood workers are able to make their true wishes with respect to certification known, as demonstrated through the negative relationship between employer unfair labour practices (ULPs) and mandatory certification vote success.

A secret ballot election is widely understood to be the sine qua non of democratic decision making in our society, and powerfully, it is a process with which most adults have familiarity and experience with through municipal, provincial or federal elections. It has been an uphill battle then, to convince elected officials, bureaucrats and the general public that in the context of a power imbalance of access to information, resources and control, a process which on its face may seem highly democratic can provide a very inaccurate picture of the actual wishes of workers. Labour boards, courts and industrial relations academics have long recognized the significant imbalance of power which is the hallmark of the employment relationship. Employers significantly control the economic well-being of workers and their families. Put most starkly, employers control access to the means by which workers put food on the table for themselves and their families, and this is a power that cannot be overstated.

To equate a secret ballot vote in the Canadian electoral process to a workplace certification election is an exercise in false analogies:

- No political party employs, at their pleasure, everyone on an election voters list. Employers have complete and up-to-date information about their employees, including addresses and telephone numbers. This information is often, in real terms, impossible to obtain by workers supportive of unionization or union organizers.
- In a governmental election, the complete voters list is made available to all parties, and votes are not conducted in premises under the physical control of just one of the parties.
- No party in a governmental election has the power to force the entire electorate to attend their captive audience campaign events.
- While there may be differences between parties in the resources at their disposal to reach the electorate via paid advertising and volunteer outreach, there are no structural differences in the avenues available to different parties to educate voters and get their message out. An employer has a daily opportunity to inform and influence employees while union organizers are barred from the employer's property

[18] No Right (to Organize) Without a Remedy: Evidence and Consequences of the Failure to Provide Compensatory Remedies for Unfair Labour Practices in British Columbia, Slinn, Sara. (2008) 53 McGill Law Journal 687

and workers supportive of unionization must operate under severe restrictions in terms of when and how they are able to communicate with their co-workers.

The Society believes that the current two-stage card/vote system unfairly requires workers seeking to unionize to demonstrate majority support not once but twice, creates unnecessary delays which allow for the possibility (and very often the eventuality) of employer coercion and interference, and significantly disempowers all workers, but in particular the most precariously employed, in their struggle to exercise their rights to freedom of association and access to free collective bargaining.

- **The OLRA should be amended to provide all workers, and not just those in the construction industry, with access to card based certification.**

2. Even during the 50 year period when card-check certification prevailed in Ontario, there was always an option to seek a Board supervised election with a lower threshold of membership evidence. This secondary mechanism opened up another avenue through which workers could pursue their rights and achieve greater workplace democracy, and as such it should be preserved. That being said, the certification election process, as currently established, is deeply flawed and requires a number of changes to redress structural imbalances of power, information and access that systematically disadvantage workers seeking to exercise their rights to free association and collective bargaining.

   In order to make a properly informed decision about whether or not to choose unionization, workers must have access to information that presents more than just their employer's perspectives on unionization. Given increasing levels of workforce mobility, decentralized and fragmented workplaces, and the relative inability of union supporters to communicate at the place of employment, unions require appropriate contact information in order to have a reasonable opportunity to communicate with potential union members outside of the workplace.

   Moreover, in order to be able to plan a successful application for certification, or a certification election, based on attaining a percentage of membership evidence indicating support, unions need to accurately know the total number of workers in a potential bargaining unit.

   - **Where a union demonstrates it is engaged in a bona fide organizing drive, and where it does not violate existing privacy laws, the employer should be required to disclose employee lists to the union, together with work and home emails, if available, and telephone numbers.**
   - **The OLRA should provide that, wherever possible, certification votes should take place in neutral locations. Further, the OLRB should investigate and consider the possibility of telephone or online voting as methods of better enabling workers to exercise their right to vote in certification elections.**

3. Of all forms of employer misconduct during a certification campaign, none has a greater negative impact on workers individually or collectively than a retaliatory termination of employment. While workers and unions can currently seek redress by filing ULP complaints at the Ontario Labour Relations Board (ORLB), that redress can only be effective if it is timely. Studies of ULPs during organizing drives have shown that termination of employment for union supporters has a significant negative impact on the likelihood of certification success through elections, even when that worker is eventually reinstated to their job. However, if an employee who has been terminated due to employer anti-union animus is returned to the workplace *before a vote is held*, the probability that workers will gain access to union certification is not decreased, it is marginally increased.[19] This is clearly a case where justice delayed is justice denied.

    - **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.**

4. The power of the Labour Board to grant remedial certification in the face of serious or persistent employer misconduct can serve as a powerful general deterrent to prevent unfair labour practices during organizing campaigns. However, currently the Board is only able to impose remedial certification where a union has already attained an adequate degree of membership and where the Board find that *no other remedy*, including a second certification vote, is sufficient to redress the ULPs. This means that the Board cannot access this remedy for ULPs committed in the earliest stages of campaigns, when employer coercion and intimidation is often at its most effective. It also requires the Board to make a highly subjective and situationally fluid judgment with respect to whether *any remedy* other than remedial certification would ensure that workers were allowed to express their true wishes with respect to certification.

    - **The OLRA should 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.**

5. The right to access collective bargaining through certification has no meaning if it can be successfully thwarted through continued employer resistance and a refusal to engage in

[19] Bronfenbrenner, K. L. (2001). Employer behavior in certification elections and first-contract campaigns: Implications for labor law reform [Electronic version]. In S. Friedman, R. Hurd, R. Oswald, & R. Seeber (Eds.), Restoring the promise of American labor law (pp. 75-89). Ithaca N.Y.: ILR Press.

meaningful good-faith bargaining. Across many 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. Existing legislation in Ontario providing for the settlement of a first contract through a process of arbitration is too difficult to access and workers may end up on strike or locked out by an employer who has superficially and minimally engaged in a façade of good faith bargaining.

- **Ontario should adopt measures that provide automatic access to binding first agreement arbitration.**

6. Among the most precariously employed workers in the labour market are those who are employed by companies providing contract based services to other business entities. Section 69 of the OLRA, which provides for successor rights in a sale of business, has been interpreted to not apply when a new contractor wins the bid through the tendering process. In practice, this means that the employees may lose their jobs and bargained rights if the service contract provider they are directly employed by is not successful in its bid for another contract.

   This model of contracting out work makes it difficult to maintain unionization. There is no requirement for the new service contract provider to hire the employees of the previous contract employer or to recognize and bargain with any trade union that represents those employees. New contract service providers can choose to re-hire only some of the employees, and at lower wages. In effect, the re-hired workers would be doing the same job but for a lower salary and fewer benefits, which further reinforces their precarity and vulnerability. The competitive tendering process, in the absence of successor rights, has resulted in decreased wages and increased job insecurity.

   - **The Ontario 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 information technology and other business services, 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.**

7. *" The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations… The right to strike is not merely derivative*

of collective bargaining, it is an indispensable component of that right. "[20]

The vast majority of collective bargaining agreements, generally over 95 percent in any given year in Ontario, are arrived at without recourse to strike or lockout – this is an example of our labour relations regime working as it should. The vast majority of strikes and lockouts, when they do occur, interrupt productivity and paid employment for only a relatively brief duration – this is an example of our labour relations regime working as it occasionally must. Increasingly though, we are beginning to see examples of strike/lockout situations where our labour relations regime is clearly not working.

In most strike or lockout situations, the goal is to achieve specific gains or to prevent specific takeaways, in a round of bargaining. In certain protracted strike and lock-out situations, the goals appear to be to permanently replace or utterly disempower an existing workforce through a long term war of attrition and/or to permanently rupture or disrupt the relationship between workers and their collective bargaining agents.

The recent Crown Metal Packaging strike in Ontario is a case in point.

For nearly two years, 120 workers at the Crown Metal Packaging's North York can factory were on strike. Crown had proposed to eliminate the cost-of-living wage increases, hire new workers at salaries up to 42 per cent lower than existing ones, and restrict workers' ability to file grievances. These drastic concessions were demanded despite the North York plant being named the Company's safest and most productive plant in North America in 2012, and Crown reporting a billion-dollar profit in 2013.[21]

Perhaps not surprisingly given the circumstances, Crown workers rejected the offer and exercised their right to strike on September 3, 2014. Production continued with replacement workers, which tipped the balance of collective bargaining in favour of the Company as it continued to profit while workers on the picket line suffered financially. As the strike passed the six months' mark, the Company took a harder line. At one point, it threatened to take back only 40 to 45 of the workers.[22] At another time, it threatened to block 34 workers who were considered to be the most active union members from being reinstated.[23]

[20] SFL v Saskatchewan, 2012 SCC 4
[21] Peter Kuitenbrouwer, 22-month-long strike at Ontario beer can maker a cautionary tale for factory workers, National Post (17 July 2015)
[22] Sara Mojtehedzadeh, "Bitterness remains as Crown Metal workers and 2-year strike", Toronto Star (20 July 2015)
[23] ibid

The Ministry of Labour finally intervened in March 2015, approximately 18 months after the strike began. The Company maintained its position that it would not reinstate some of the striking workers. Collective bargaining stalled for another three months until the Company finally withdrew its proposal and agreed to allow all striking workers the right to return to work. A new collective agreement was ratified on July 19, 2015, ending a 22-month long strike.

The threats made by the Company to block striking workers from being reinstated in their jobs were both immoral and, in the light of recent Saskatchewan Federation of Labour v. Saskatchewan Supreme Court of Canada decision, unconstitutional. The right to strike is embodied in Section 2 (d) of the Charter, which protects workers' right to collective bargaining. Workers should not be threatened with job loss for simply exercising their constitutional right. The Ontario Labour Relations Act in its current form restricts workers' ability to fully exercise their constitutional right by capping their right of reinstatement at six months.

Under the current Act, the OLRB cannot compel parties to resolve their disputes by way of interest arbitration except in the narrow case of a first collective agreement direction. Even mature bargaining relationships can produce intractable impasses. In order to avoid the financial and human costs of lengthy disputes, The Society proposes the Labour Relations Act, 1995, be amended to permit access to interest arbitration to resolve lengthy disputes, regardless of the point at which the dispute occurs in a bargaining relationship.

This mechanism would be similar to Section 87.1 of Manitoba's Labour Relations Act, which currently provides a mechanism to have the Manitoba Labour Relations Board settle the provisions of a collective agreement where a dispute has been ongoing for at least 60 days and the parties have worked with a conciliation officer or mediator to settle the terms of a collective agreement for at least thirty days.

- **The OLRA should be amended to prohibit the use of replacement workers during work stoppages.**
- **The OLRA should be amended such that employees who exercise their lawful right to strike have an unrestricted right to return to their former position without penalty.**
- **Amend the OLRA to allow access to interest arbitration to settle long labour disputes that last over 90 days.**

8. Sections 1 and 3 of the Ontario Labour Relations Act prohibit certain classes of workers from access to unionization on the basis of their employment in certain industries or their membership in particular occupational categories.

Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,

(a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity; or

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations. 1995, c. 1, Sched. A, s. 1 (3).[24]

This Act does not apply,

(a) to a domestic employed in a private home;

(b) to a person employed in hunting or trapping;

(b.1) to an employee within the meaning of the Agricultural Employees Protection Act, 2002;

(c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture;

(d) to a member of a police force within the meaning of the Police Services Act;

(e) except as provided in Part IX of the Fire Protection and Prevention Act, 1997, to a person who is a firefighter within the meaning of subsection 41 (1) of that Act;

(f) to a member of a teachers' bargaining unit within the meaning of the School Boards Collective Bargaining Act, 2014, except as provided by that Act and by the Protecting the School Year Act, 2015, or to a supervisory officer, a principal or a vice-principal within the meaning of the Education Act;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 3 (f) of the Act is repealed and the following substituted: (See: 2015, c. 11, s. 20 (2))

(f) to a member of a teachers' bargaining unit within the meaning of the School Boards Collective Bargaining Act, 2014, except as provided by that Act, or to a supervisory officer, a principal or a vice-principal within the meaning of the Education Act;

(g) Repealed: 2006, c. 35, Sched. C, s. 57 (2).

(h) to an employee of a college of applied arts and technology;

(i) to a provincial judge; or

(j) to a person employed as a labour mediator or labour conciliator.[25]

[24] Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, S1(3)

[25] Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, S3

Many of these sectoral and the occupational exclusions are unwarranted and, in the opinion of the Society, many of these exclusions fly in the face of recent Supreme Court of Canada interpretations of Section 2 (d) of the Charter.

In some cases, alternative and equivalent ways of establishing representation are available, as is true for with teachers, firefighters, physicians and police. In other cases however, such as those employed in the agricultural or domestic service industries, or those employed in the occupations of lawyer, architect, dentist, or land surveyor, these exclusions from the act effectively cut workers off from any avenue of meaningful their right to freedom of association.

Case study: Legal Aid Ontario lawyers

In 2012, a group of Legal Aid Ontario (LAO) staff lawyers were seeking a collective voice and a vehicle to collectively bargain with Legal Aid Ontario with respect to a number of widely shared workplace concerns:

- LAO was in the process of implementing a Lawyer Workforce Strategy, which required lawyers to participate in mandatory rotations of legal practice area and geographic relocations at the pleasure of the employer.
- Fairness and transparency in compensation: LAO lawyers are the most poorly compensated of all comparable groups of lawyers employed directly by the Government of Ontario and its agencies.
- A lack of meaningful input into their working conditions: LAO lawyers were concerned about a variety of working conditions which they believed were detrimental to their ability to best serve their clients.

The LAO lawyers approached The Society, understanding The Society was accustomed to representing professional employees, with sufficient resources to properly represent them, and a strong track record of collaborative labour relations approaches and good relationships with employers.

The Society is aware that lawyers are specifically excluded from the definition of "employee" in Section 1 of the OLRA; however, pursuant to Section 2 (d) of the Charter, the LAO lawyers have the right to choose their own democratically chosen and independent bargaining agent and to enter into meaningful negotiations with their employer. The Ontario government has entered into voluntary recognition agreements and had established bargaining frameworks with other groups of public service lawyers such as the Crown Attorneys and lawyers employed in various government ministries.

Within six months more than 80 per cent of LAO staff lawyers had indicated their desire to join The Society. But for the OLRA exclusion deeming practising lawyers not to be employees for the purposes of the Act, this group of lawyers would have secured union representation more than two years ago.

In April of 2013, counsel for The Society notified LAO CEO Bob Ward The Society was engaged in an organizing campaign with a significant level of support and requested a meeting, but never received a response or acknowledgement. Over the subsequent two years, The Society and the LAO lawyers exhausted every available means of attempting to obtain voluntary recognition on behalf of the lawyers.

LAO took the position that, given the OLRA Section 1 exclusion, it was under no obligation to recognize The Society as the lawyers chosen bargaining agent and would resolve workplace issues as it saw fit, with its own internal HR processes. Eventually, LAO allowed that it would be willing to discuss entering into a framework agreement with an association consisting solely of LAO lawyers, but not if that association of lawyers was represented by The Society.

Politically, the government took the position that LAO was an arms-length agency, and as such, the government had no ability to direct its approach to labour relations issues. Respectfully, the Society notes at present its members work in several other "arms-length" government institutions where the government has shown no similar compunction in directing the labour relations strategies.

LAO lawyers are in the majority female and are the most highly racialized group of government lawyers. They are also the most poorly paid, with the least attractive working conditions. The other groups of government lawyers, to whom the government *has* historically granted voluntary recognition and engaged in bargaining, are mostly male and much less racially diverse. Studies have shown that both racialized lawyers and female lawyers face unique challenges in their careers.

Unions and collective bargaining have a very strong track record of achieving more equitable outcomes in a wide variety of workplaces. However, where employers are allowed to act as gatekeepers for their employees' access to Charter rights, we should not be surprised to see traditionally disadvantaged groups fare more poorly in accessing those rights.

Having exhausted all other avenues to secure collective bargaining rights for this group of lawyers, The Society has made a legal application at the Superior Court pursuant to Section 2(d) of the Charter. Following the case of Mounted Police Association of Ontario v Canada (Attorney General) 2015 SCC 1, The Society argues staff lawyers at LAO have the right to choose their own democratically selected and independent bargaining representative, and to engage in meaningful collective bargaining through that democratically chosen and independent bargaining agent.

The Society is confident that it will prevail in this legal challenge, but sees an opportunity in the context of this review for the government to voluntarily right an historic wrong.

- **Remove all Section 1(3) and Section 3 exclusions from the Act where no alternative and equivalent process currently exists.**

9. Private sector front line and middle managers and their government counterparts have been harshly affected by pay restraints for the last six to eight years while executive pay and bonuses have skyrocketed. Salary compression with managers' subordinates has worsened. The inability of middle managers to unionize has contributed to a growing gap in wages, with increasing executive salaries and lower workers' wages. In unionized workplaces, where middle managers cannot bargain collectively, they are the first group facing wage freezes, layoffs, cuts to pensions and benefits.

There is no good reason to exclude employees from bargaining on the basis that they have some responsibility for hiring and firing. This is especially true in large private or public institutions where most human resources decisions must be made in accordance with established procedures and policies. In any case, any real conflicts between union membership and the exercise of decision making authority with respect to the working conditions of other employees can be easily addressed through means including separate bargaining units. When these kinds of protections are in place there is simply no justification for denying those managers the right to bargain collectively.

Ontario Labour Relations Act managerial exclusions:

Definitions
(1) In this Act,

(3) Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,

…

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations. 1995, c. 1, Sched. A, s. 1 (3).

The OLRB has interpreted the "managerial functions" exclusion to have two parts, both of which are based on the potential for a conflict of interest. The discretion of the Board under section 1(3) operates on two levels as follows:

It operates FIRST to exclude persons who can affect the terms and conditions of employment and/or the employment relationship of those in the employ of the organization and SECONDLY it operates to exclude those who make decisions with respect to policy and the overall operation of the organization [emphasis added in upper case text]. (Inglis Limited, [1976] OLRB Rep. June 270 at 271)

In the case of "first line" managerial employees, the question has been the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them.

In THE CORPORATION OF THE TOWNSHIP OF LIMERICK, [1993] OLRB Rep. July 683, the Board stated:

> *Generally speaking, and in furtherance of the conflict of interest rationale that underlies this provision, individuals will be found to exercise* ***managerial functions*** *if they fall into either or both of two broad categories. First are those persons whose work impacts only indirectly on the terms and conditions of employment of their fellow employees. Individuals falling within this category will be found to exercise* ***managerial functions*** *IF THEY MAKE INDEPENDENT DECISIONS ON IMPORTANT MATTERS OF POLICY OR THE RUNNING OF THE ORGANIZATION. Effective recommendations, independent situations circumscribed within predetermined limits set by others, or technical or procedural determinations based upon expertise in a limited field will not be sufficient to exclude an individual from the definition of "employee" under the Act. Second are those individuals whose decisions have a more direct and immediate impact upon the day-to-day working lives of their colleagues. The test for managerial status here is WHETHER THE INDIVIDUALS MAKE "EFFECTIVE RECOMMENDATIONS", I.E. RECOMMENDATIONS THAT ARE "SO CONSISTENTLY AND FREQUENTLY FOLLOWED THAT IT COULD BE SAID THAT THROUGH THE RECOMMENDATIONS THE [INDIVIDUAL IS] EFFECTIVELY CONTROLLING OR DETERMINING THE DECISIONS": ETOBICOKE HYDRO-ELECTRIC COMMISSION, [1981] OLRB Rep. Jan. 38. The onus of establishing that an individual is managerial because he or she falls within either or both of these categories rests with the party seeking the* ***exclusion.*** [emphasis added]

However, the power to make effective recommendations regarding the working conditions of other employees does not have to be a basis on which to deny an employee the right to bargaining collectively. This is particularly true in large workplaces, where most such decisions are made within the bounds of human resources policies and procedures.

Not all jurisdictions deny supervisors the right to bargain collectively, even if they have the power to make decisions concerning the terms and conditions of work of other employees.

The statute governing public sector labor relations in the state, the New Jersey Employer-Employee Relations Act (NJSA 34:13) is much more inclusive. Employees are defined as any public employee "except elected officials, members of boards and commissions, managerial executives and confidential employees" (NJSA 34:13A-3(d)). The term managerial executive is defined in this way: "Managerial executives" of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district. (Chap. 123, Sect 2; NJSA 34:13A-3(e)

In New Jersey labour relations legislation, supervisors, defined as those "having the power to hire, discharge, discipline, or to effectively recommend the same," are explicitly given the right to

representation. However, they are required to be placed in separate bargaining units from the employees they supervise.

In practice, bargaining units in the New Jersey public service do include supervisory and non-supervisory employees.

> *In state government outside the prisons and state institutions, there are four major bargaining units, all represented by locals of the Communications Workers of America (CWA): Administrative and Clerical (approximately 8,500 persons), Professional (12,000), Primary Level Supervisor (12,000), and Higher Level Supervisor (2,400). The eight separate CWA locals to which these workers belong are organized, not by bargaining unit, but geographically or by department. In some state departments, like Community Affairs, Education, Environmental Protection, Labor, or Transportation, a single union represents the vast majority of workers in the agency, supervisory or not.' It is not clear that separate units, and separate contracts, matter much in practice—pattern bargaining is strong for all state workers and the four separate contracts contain only minute differences.*[26]

Since it was first voluntarily recognized, The Society has represented certain individuals who could potentially be considered managerial. In 1992, The Society was voluntarily recognized as the union representing administrative, scientific and professional engineering employees of Ontario Hydro. The Society had already been representing this group as a voluntarily recognized association for 15 years, but Ontario Hydro challenged The Society's certification on the basis that some of the employees represented by The Society were managers who should be excluded from the bargaining unit. Ontario Hydro claimed that The Society was ineligible on the basis of s.13 of the OLRA which provides, in part, that:

> *The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it...*

The OLRB certified The Society in any case, finding that the involvement of these managerial employees in the group did not render The Society ineligible to represent the bargaining unit (*Ontario Hydro* [1989] OLRB Rep. February 185).

The OLRB found that, even if some of the individuals represented by The Society were not "employees" within the meaning of the Act because they exercised managerial functions, those managers were not associating with The Society as representatives of "the employer" but were pursuing their own economic interests.

[26] Eaton, Adrienne E., and Paula B. Voos. "Wearing Two Hats: The Unionization of Public Sector Supervisors." Going Public: The Role of Labor-Management Relations in Delivering Quality Government Service. Ed. Joathan Brock and David B. Lipsky. Champaign, Ill.: Industrial Relations Research Association, 2003.

Something to be drawn from this decision is that employees who exercise supervisory duties, even to the extent that they could be found to be managers excluded by the OLRA, have motivations for wishing to bargain collectively which do not jeopardize the integrity of the bargaining unit or compromise its independence from the employer.

As a result of this decision, The Society became a union with a membership including some employees who may normally have been excluded from the bargaining unit on the basis that they exercised managerial functions. There have been ongoing disputes over the years to determine where exactly the line between management and Society-represented employees should be drawn. The Society has, at times, had to make concessions during collective agreement negotiations in order to bargaining the inclusion of employees whose management functions put them in a "grey area."

The Society represents front line managers who are responsible for supervising other employees in the bargaining unit. We are not aware of complaints to the ORLB since the 1989 certification application, alleging that representation of supervisory employees has compromised The Society's ability to fairly represent other employees in the bargaining units.

The Society has included clauses in the collective agreement to clarify situations which could potentially result in conflicts of interest for supervisory staff.

For example:

2.4 Supervisory Employees - Code of Ethics

OPG agrees to include supervisory employees in the bargaining unit on the condition that the parties recognize that supervisory employees will continue to exercise key functions in the control and operation of OPG. As members of OPG managerial staff, supervisors use judgment to express and make operative the decisions of Management. They are responsible for fostering a healthy work environment. The parties recognize the responsibility of supervisors to discharge their supervisory duties in good faith. The Society and OPG will identify, minimize and/or avoid the conflicts/perceived conflicts of interest that may arise concerning the relationship between supervisors, The Society and OPG.

It is recognized that supervisory employees may be disciplined for failure to act in good faith as a representative of Management and fulfilling their responsibilities including abuse of supervisory position and breach of trust.[27]

[27] Collective Agreement between Ontario Power Generation and the Society of Energy Professionals, 2016-2019

The Society believes that both the supervisory employees that we represent and the employers for whom they work are well served by unionization, unusual though it may be.

- **The OLRA definition of "managerial functions" should be broadened and more clearly operationalized, so as not to exclude from union membership those supervisory and first-line "managerial" workers who do not make decisions with respect to policy and the overall operation of the organization.**

Summary

The government's commitment to modernizing Ontario's labour statutes is to be commended. Both The Employment Standards Act and the Ontario Labour Relations Act need revision and updates to more appropriately reflect the realities confronting workers in Ontario today.

The Society strongly believes the Employment Standards Act will be significantly improved by revisions that create fair benchmarks for terms and working conditions for Ontario workers, and address Ontario's contemporary realities, including the rise of temporary and contract work, triangular employment relationships, misclassified "independent" contractors.

Similarly, the government has an opportunity to correct the damage done by years of anti-union animus, including the impact of mobile, aggressive transnational employers on the ability of unions to set the bar for terms and conditions of employment.

The Society looks forward to further contributing to the process of updating and improving the Employment Standards Act and Ontario Labour Relations Act as this process moves forward.