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ONTARIO'S PROFESSIONAL EMPLOYEES

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Changing Workplaces Review
ELCPB 400 University Avenue, 12th Floor
Toronto, Ontario M7A 1T7

RE: Response to Interim Report

It was with interest that we at AMAPCEO read the Changing Workplaces Review Special Advisors' Interim Report. We would like to thank the Special Advisors, Justice John Murray and Michael Mitchell, for their diligence in undertaking this important project. Though the Changing Workplaces Review deals with a whole host of issues related to both the *Employment Standards Act, 2000* an the *Labour Relations Act, 1995*, AMAPCEO is choosing to limit its focus in our response to the Interim Report to the issue of exclusions from collective bargaining.

Among the recommendations made by AMAPCEO in our original submission to the *Changing Workplaces Review* was:

> **Recommendation #10**
>
> Remove the managerial and confidential exclusions. Consider the introduction of new provisions to facilitate the entry of managerial staff into collective bargaining relationships with their employer, while addressing potential conflict of interest concerns that may result.

In this follow-up submission, we will focus on this recommendation, particularly on exclusions of lower-level managers and supervisors. In this discussion we will cover: exclusions in Ontario, management exclusions in particular, and conclude with a brief word on the merits of removing management exclusions.

Exclusions in Ontario

Only Alberta matches Ontario in terms of the breadth of those excluded from access to collective bargaining. As Michael Lynk notes, across Canada there are thirteen distinct occupational groups that are, in one jurisdiction or another, expressly excluded from access to collective bargaining. Of those thirteen, both Alberta and Ontario exclude eleven of the groups. Those excluded by Ontario are: managers, employees employed in a confidential capacity related to industrial relations, agricultural workers, domestic workers, medical

professionals, dentists, lawyers, architects, land surveyors, hunters and trappers, and horticultural workers.[1]

Perhaps not surprisingly, there are a host of exceptions to the statutory exclusions listed above. Consider land surveyors, who are clearly excluded from collective bargaining by the *Labour Relations Act* [*OLRA*].[2] However, this *ORLA* exclusion does not extend to land surveyors employed by the government of Ontario. Though it incorporates much of the *ORLA*, the *Crown Employees Collective Bargaining Act* [*CECBA*] (an act which regulates labour relations within the Ontario Public Service) specifically states that "subsections 1 (3), (4) and (5)" of the *OLRA* do not form part of *CECBA*.[3] The upshot of this is that land surveyors are not excluded from collective bargaining if they happen to be employed by the government of Ontario. Accordingly, such land surveyors are represented by the Professional Engineers Government of Ontario (PEGO).

Another exception we can find relates to so-called Framework Agreements which the government of Ontario enters into with professionals who work directly for the government. For instance, the Association of Law Officers of the Crown (ALOC) represents civil legal counsel and articling students, and the Ontario Crown Attorneys Association (OCAA) represents Assistant Crown Attorneys and Crown Attorneys. Despite being denied collective bargaining rights by *CECBA*,[4] the government of Ontario has negotiated a Framework Agreement with both ALOC and OCAA which sets out matters including dues deductions, scope of bargaining, and the dispute resolution mechanism. This Framework Agreement is slated to continue until June 30, 2057, with a potential to roll-over to an end date of June 30, 2065.[5]

Indeed, Framework Agreements for lawyers are beginning to spread beyond the direct employment of the government of Ontario. Recently, after more than three years of campaigning, lawyers working for Legal Aid Ontario recently reached an agreement with their employer which begins the process of establishing a Framework Agreement for their collective bargaining.[6] It is, perhaps, worth noting that the ALOC/OCAA Framework Agreement and the move towards a Framework Agreement at Legal Aid Ontario were both concluded in the shadow of looming constitutional challenges to the exclusion of lawyers.

A similar status is afforded doctors and dentists in the direct employ of the government of Ontario, who are represented by the Association of Ontario Physicians and Dentists in Public Service (AOPDPS). In 1980, these medical professionals signed an initial framework agreement which "provided for negotiations about salaries as well as consideration of

[1] Michael Lynk, "A Review of the Employee Occupational Exclusions under the Ontario *Labour Relations Act, 1995*" Prepared for the Ontario Ministry of Labour, to support the Changing Workplaces Review of 2015, at 5-6.
[2] *Labour Relations Act, 1995*, R.S.O. 1995 c. 1, s. 1(3)(a) [*OLRA*].
[3] *Crown Employees Collective Bargaining Act 1993*, R.S.O. 1993, c. 38, s. 3(1) [*CECBA*].
[4] *CECBA*, s. 1.1(3).
[5] See "Public Sector Compensation Framework Agreement between Association of Law Officers of the Crown and Ontario Crown Attorneys Association and The Crown in Right of Ontario," Appendix A: Framework Agreement, August 18, 2010.
[6] See << http://laolawyers.ca/updates/another-major-breakthrough-in-our-campaign-for-collective-bargaining-rights/>>

vacation and other benefits."[7] Beyond doctors employed by the Government of Ontario, doctors in private practice are represented by the Ontario Medical Association (OMA). The OMA and the government of Ontario are parties to a framework agreement which sets out a negotiation, as well as dispute resolution, framework. Within this framework, the province and the OMA are able to negotiate Physician Services Agreements which determine, among other matters, compensation for physicians.

Thus we have seen that, by statute, Ontario (matched by Alberta) excludes the most occupational groups of the Canadian jurisdictions. We have also seen that there are several exceptions to those exclusions. Land surveyors are excluded from collective bargaining with all employers except the government of Ontario; land surveyors employed the government have full collective bargaining rights. We find that lawyers and doctors employed the government of Ontario have framework agreements which allow them to collectively bargain. As well, doctors in private practice also enjoy collective bargaining rights.

In short, this is a confused terrain, an area in which one would search in vain for any sort of guiding principle. With that in mind, we turn now to management exclusions, and the treatment of this occupational group in other jurisdictions.

Management Exclusions – Ontario and Beyond

An employee "who, in the opinion of the [Ontario Labour Relations] Board, exercises managerial functions" is excluded from collective bargaining in Ontario.[8] When considering managerial exclusions, Lynk notes that the Ontario Labour Relations Board [OLRB] has "gone to the narrow question of whether a lower-end manager or supervisor exercises 'effective control' or makes 'effective recommendations' over the economic lives of other employees."[9]

Similar language can be found in labour relations statutes across the country. That said, there are Canadian jurisdictions which do not bar all those with supervisory-type manager roles from collective bargaining. Michael Lynk notes that the Federal jurisdiction as well as the provinces of British Columbia, Manitoba, and Saskatchewan "permit lower level managers to form and join separate managerial employee bargaining units and unions in order to access collective bargaining."[10]

In this instance, it is useful to recite specific statutory language used in the *Canada Labour Code*, which states:

> **27. (5)** Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other

[7] Paul C. Weiler "The Professional Employee in Government: A Report to the Honorable Murray Elston, Chairman, Management Board of Cabinet on the Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario," January 1988, at 9.
[8] *OLRA*, s. 1(3)(b); Employees exercising managerial functions are excluded from *CECBA* at s. 1.1(3).
[9] Lynk, *supra* note 1 at 55.
[10] Lynk, *supra* note 1 at 5.

> employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining.[11]

This language provides guidance to the Federal Board in how to craft a bargaining unit. More importantly, though, it serves as a legislative signal to the Board that such employees are not to be excluded from collective bargaining.

This signal works in tandem with the definition of employee in the *Canada Labour Code*:

> ***employee*** means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations.[12]

Notably, the wording around management functions is very similar to that found in the *LRA*: "exercises managerial functions" in the *OLRA* versus "performs management functions" in the *Canada Labour Code.*

Despite this similarity in part of the language in the legislation, Lynk instructs us that when the OLRB finds that a

> supervisor exercises 'effective control' or makes 'effective recommendations' over the economic lives of other employees, such that they are functioning as true managers in the interests of the enterprise … the Board would determine that they are not "employees" for the purposes of the *OLRA*, and they are excluded from the general employee bargaining unit.[13]

While it may well make sense to exclude such lower-level managers and supervisors from the general employee bargaining unit, there is another question to be answered, namely, whether or not such supervisors should be excluded from collective bargaining entirely? In Ontario, Lynk tells us, this question "has been traditionally answered in a restrictive manner."[14] As a consequence, "in Ontario, managerial employees who effectively perform supervisory duties over other employees are entirely excluded from access to collective bargaining, whereas they are entitled to participate in joining unions and engaging in collective bargaining in other Canadian jurisdictions."[15]

Lynk goes on to note reports, the first of which was issued in 1968, that conclude that statutes excluding supervisors from collective bargaining are "unjust." Summing up these reports, Lynk writes:

> The essence of these arguments is that there is a stratum of employees who perform vital managerial and supervisory duties for the enterprise, and for whom inclusion within a bargaining unit of employees whom they overview would undermine the necessary demarcation of interests, but who also experience the same general

[11] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 27(5).
[12] *Ibid.*, s. 3(1).
[13] Lynk, *supra* note 1 at 55.
[14] *Ibid.*
[15] *Ibid.*, at 55-56.

> vulnerability and inequality of bargaining power with their employer that is the premise for the establishment of the collective bargaining system.[16]

AMAPCEO wholly endorses this position.

AMAPCEO recommends that the *OLRA* (and by extension *CECBA*) be amended to incorporate wording specifically contemplating supervisory units, such as that seen in section 27(5) of the *Canada Labour Code*. Such an action would give the OLRB guidance it requires in order to move towards widening the spectrum of those that can collectively bargain to include those in lower-level management positions.

On the Merits of Collective Bargaining for Supervisors

The merits of allowing lower-level managers and supervisors to collectively bargain are the same as those afforded to other occupational types: the protections of a collective agreement, clarity of rules, dismissals only for cause, an opportunity to negotiate wages on a more level playing field, etc.

We can know that the merits of collective bargaining for all sorts of occupational types are not lost on the government of Ontario by virtue of the fact that the government chooses to bargain with professionals such as lawyers and doctors.

It simply makes sense for Ontario to follow the federal jurisdiction, British Columbia, Saskatchewan, and Manitoba in allowing units of lower-level managers and supervisory employees to form bargaining units.

Yours truly,

Dave Bulmer
President

[16] *Ibid.*, at 56-57.