Canadian Vehicle
Manufacturers' Association
Association canadienne
des constructeurs de véhicules

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November 8, 2016

Hon. John C. Murray, Co-Chair
Changing Workplaces Review
Employment, Labour and Corporate
Policy Branch
Ontario Ministry of Labour
400 University Avenue, 12th Floor
Toronto, ON M7A 1T7

C. Michael Mitchell, Co-Chair
Changing Workplaces Review
Employment, Labour and Corporate
Policy Branch
Ontario Ministry of Labour
400 University Avenue, 12th Floor
Toronto, ON M7A 1T7

Re: Ministry of Labour – Changing Workplaces Review – Special Advisors Interim Report

Dear Sirs:

Further to our October 14, 2016 letter, the Canadian Vehicle Manufacturers' Association (CVMA), representing FCA Canada Inc., Ford Motor Company of Canada, Limited, and General Motors of Canada Company, are pleased to provide our detailed comments on the issues of interest noted in the aforementioned letter related to the Changing Workplaces Review - Interim Report.

Ontario's auto industry is a large contributor to the province's economy (22 percent of Ontario's GDP), generates millions of dollars in tax revenue and accounts for over 40,000 people in automotive assembly and over 83,000 in automotive parts manufacturing[1].The industry operates globally and our member companies compete within their respective organizations not only to secure new investments globally but to maintain current production. Further, the industry continues to seek technological improvements to become more productive and competitive.

CVMA members provide extensive benefits through their negotiated Collective Agreements and continue to operate with regular work hours and days of work. The existing Ontario legislative framework and negotiated Collective Agreements provide a robust and comprehensive framework to protect our members' workforce and any recommended changes to the workplace framework need to be assessed from a competitiveness perspective and the imposition of additional costs for operating in Ontario.

CVMA recognizes and supports the government's desire to address the changing workplaces and its objective to better serve vulnerable workers. However, care should be taken in addressing issues or concerns related to changing workplaces by undertaking specific, targeted actions directed at those sectors where vulnerable workers exist rather than broad, wide-sweeping changes to the existing Ontario workplace framework to ensure that any recommendations made do not result in unintended consequences that negatively impact CVMA members' ability to manage their respective operations in an efficient and flexible manner and to maintain and improve Ontario's competitive landscape.

There are multiple pieces of legislation which provide protections for workers with regard to the changing workplaces. Duplication or additions of new requirements may create conflicting statutory

[1] *APRC Canadian Automotive Manufacturing Industry Profile 2014, page 3*

requirements and an unnecessary administrative burden and again impact the competitiveness of our members.

Our comments on some of the specific items in the Interim Report are as follows.

- **Temporary Help Agencies**

Maintaining the current provisions will provide the needed clarity and certainty required for industry.

Temporary help agency employees utilized by CVMA members would generally not fit within the description of "lower skilled and lower wage workers" contained in the Interim Report. CVMA members use temporary agency workers, primarily in administration and engineering positions, for specific projects or expertise. Options outlined in the Interim Report would restrict CVMA members' ability to effectively and efficiently manage their operations, including temporary help agency workers replacing those on leaves.

In terms of the specific options presented, our recommendation is to maintain the status quo. Expanding termination and severance pay will have a direct impact on competitiveness.

Not all temporary/contract/agency employees are vulnerable workers. While the report outlines data available regarding growth of the industry in Ontario and Canada, it acknowledges that there is limited data on assignment workers in Canada, and the assignment worker profile is based on 2004 statistics. Other data provided is either anecdotal, or based on surveys/studies in other jurisdictions. More analysis should be undertaken in the Ontario and Canada context to determine the extent of the issue, and where the key stressors are located.

- **Related and Joint Employers (Franchisee and Franchisor)**

The Status Quo should be maintained under both the Labour Relations Act, 1995 (LRA) and the Employment Standards Act, 2000 (ESA) with respect to the definition of employer and the scope of employer responsibility and liability.

We do not support any recommendation that broadly extends the liabilities associated with the franchisor/franchisee or contractor relationship. Any recommendations should be targeted to those industries and/or sectors where abuses are known and vulnerable workers exist. Further, extending employer obligations as described in the Interim Report could conflict with existing and established franchisor/franchisee or other contractor arrangements.

Our member companies operate as manufacturers and distributors with a network of authorized and independently owned and operated dealerships. Independently owned and operated dealerships are sophisticated businesses employing individuals with specific skills and expertise within the automotive service and sales sector. These dealerships are responsible for their day to day operations including hiring and firing of employees, setting hours of work and scheduling, training, etc. The same applies for contractors who often provide specialized expertise. We submit that it is not reasonable to conclude that dealership employees are "vulnerable workers", as that term has been defined in these consultations. Any recommendations that would extend franchisor/contractor obligations and liabilities to our member companies would have a material adverse impact on our member companies' operations, the established relationship between dealerships and our member companies, and the cost of conducting business in Ontario.

A broad based recommendation extending the legal obligations and liabilities of franchisors and/or contractors would likely result in unintended consequences for numerous businesses in Ontario that could not reasonably be viewed as employing vulnerable workers, including those of our member companies. There are existing and established laws that determine when "multiple employers" should be found to be "common employers". Any recommendation extending legal obligations and liabilities should be targeted to those sectors where abuses are prevalent and should clearly and

objectively set out the criteria by which a franchisor/contractor should assume such responsibilities and liabilities, namely, the criteria to determine whether the franchisor or contractor exerts a significant measure of control or direct involvement in the employment relationship between the franchisee and its employees.

- **Exemptions, Special Rules and General Process**

The Interim Report proposes a new 'approach' or process for existing exemptions with 3 categories.

Category 1 lists 'managers and supervisors' as an area for potential elimination or variation. We submit that the manager/ supervisor exemption should be maintained, in its current form.

The manager / supervisor role is critical to operating a business and those individuals are generally compensated differently from non-managerial workers. Placing further requirements around managers and supervisors will impact industry's competitiveness.

Category 2, exemptions that do not warrant review and should be maintained, including automobile manufacturing (2006). This category refers to various exemptions, or variances, developed post-2005 as Special Industry Rules (SIR). We are of the strong view that the automobile manufacturing exemption should be maintained with no further review.

CVMA members support the recommendation that it is not in the public interest to recommend a wholesale elimination of all the exemptions without further review and submit that the current exemptions should not be eliminated, modified or amended without further careful assessment and consultation. Any process that is developed to review exemptions must be open and transparent; provide for submissions from employers; include an economic assessment; and remove or minimize onerous administrative tasks.

- **Definition of Employee (Misclassification of Employees)**

We submit that the status quo be maintained. CVMA members support the recommendation directed at the education of employers and employees so that the parties have a clear understanding of their rights and obligations. Increased awareness and education will likely address the majority of the concerns that have been identified.

- **Employee leaves (including paid sick leaves and doctors notes)**

CVMA members have extensive benefits and provide flexibility related to leaves, including those offered through their Collective Agreements. As indicated in our August 30, 2016 letter on personal emergency leaves, our members remain challenged with the administration of the various leaves. Currently employers face difficulty in effectively managing sick leaves given privacy and other concerns. An examination of all the leaves in a more holistic fashion is needed with the aim to consolidate them.

A comprehensive and holistic review will assist with removing existing confusion and overlaps with regards how the numerous leaves apply and will assist with providing clarity about the leaves for both employers and employees. CVMA members submit it is essential that the greater right or benefit remains in force to provide CVMA members the ability to manage their respective workforces in an efficient and effective manner.

With regard to paid sick leave, the status quo should be maintained. Provisions are already in place for Employment Insurance sick leave, company S&A programs, etc. Introducing mandatory paid sick leave options will result in additional costs to CVMA members and will adversely affect competitiveness.

On the issue of medical (doctor) notes, employers should still retain the ability to request medical notes as required. This is essential to ensure that there are controls in place with regard to potential abuse of the ESA provisions.

- **Part-Time and Temporary Work – Wages and Benefits including vacation**

We submit that the status quo needs to be maintained. We strongly recommend a targeted approach be taken and note that the Interim Report references that attention may be focused on specific sectors.

This is of critical importance to our member companies and other businesses which have a regular full-time workforce and have Labour Agreements which address part-time or temporary work. As indicated previously, CVMA member companies utilize a temporary part time program that provides favorable wages and benefits to temporary part-time individuals. The temporary part time program is negotiated with the union and forms part of our member companies' respective Collective Agreements. Any broad based recommendation could negatively impact these beneficial programs.

- **Administrative Penalties and Remedies**

We submit that the status quo should be maintained. The Interim Report outlines the various enforcement tools available, ranging from voluntary compliance to the Provincial Offences Act prosecution; the available tools provide officers appropriate enforcement mechanisms to ensure compliance. The focus should be on increasing compliance through inspection and education and focusing specifically on vulnerable workers and high risk sectors.

- **Greater Right or Benefit**

The greater right or benefit provision encourage employers to exceed minimum employment standards and also provide flexibility in operations. We strongly support the comparison of all minimum standards against employment benefits, particularly in the context of negotiated collective agreements. This would enable employees to choose the policies of most importance to them.

CVMA also supports the input provided by the Canadian Manufacturers and Exporters on the Interim Report (copy attached).

We trust that our comments will be considered. The CVMA requests an opportunity to meet with you to discuss our submission and address our comments on the Interim Report. My office will follow-up with you to seek a mutually convenient time.

Please do not hesitate to contact me directly at 416-364-9333 in the interim.

Yours sincerely,

Mark A. Nantais
President

Attachment

cc: S. Dennis, Ministry of Labour
M. Crouse, Ministry of Labour

File: 53050YTK8_16

Attachment

CME Response to the Changing Workplace Review Interim Report
Submission Date: October 14, 2016

CME Response to the Changing Workplace Review Consultation Report

Introduction

Canadian Manufacturers & Exporters (CME) directly represents more than 10,000 leading companies nationwide. More than 85% of CME's members are small and medium-sized enterprises. As Canada's leading business network, CME, through various initiatives, including the establishment of the Canadian Manufacturing Coalition, touches more than 100,000 companies from coast to coast, engaged in manufacturing, global business and service-related industries. CME's membership network accounts for an estimated 82% of Canada's total manufacturing production and 90% of exports.

The manufacturing sector in Ontario continues to face challenges, lagging the national average since the early-2000s. Despite these challenges, the manufacturing and exporting sector continues to be the largest business sector in Ontario, with approximately $275 billion in annual shipments and 748,200 direct jobs. Most of these jobs are highly skilled and highly paid. Another 1.2 million Ontarians are indirectly employed in manufacturing.

Every dollar invested in manufacturing, generates nearly $4 in total economic activity, the highest multiplier of any major sector. Manufacturing and exporting is on the cutting edge of Ontario innovation. Manufacturing also accounts for 50% of all private sector R&D and over 80% of all new products commercialized.

Manufacturer's success drives Ontario`s prosperity.

Manufacturing has undergone a significant restructuring over the last decade driven largely by an increasingly global marketplace for goods and services. These factors have prompted a shift towards higher value-added activities and more capital-intensive, automated forms of production.

Activities once core to manufacturing are now characterized as services, often performed by a third party provider.

Demand for such skills has outpaced supply in many instances, creating a constraint on growth and prosperity. Meanwhile, the advent of just-in-time delivery and mass customization requires manufacturers to be extremely agile and responsive to changing customer demands. The long term trend in an effort to reduce costs to remain globally competitive, companies have moved to just-in-time delivery

to avoid expensive inventory costs and improve time-to market. In today's web based world, customers can source product from all over the world. Such conditions require a simplified regulatory environment to enable manufacturing to continue to survive and thrive in Ontario.

High-cost jurisdiction in which to manufacture

CME is seriously concerned about a growing sentiment amongst our membership that Ontario is becoming an increasingly challenging high-cost jurisdiction in which to manufacture. This is very concerning given the many benefits that manufacturing continues to generate for the Ontario economy and the increasing competition for manufacturing investment globally. The main driver for this sentiment is the cumulative burden of regulation on manufacturing which creates a substantial drag on investment and job creation. Coupled with among the highest electricity costs in North America, many manufacturers find themselves struggling for survival.

Key Principles

CME recognizes the amount of time, energy and expertise that has gone into the public consultation process and the creation of your Interim Report. While we support a review of the *Labour Relations Act* ("*LRA*") and the *Employment Standards Act* ("*ESA*") we remain concerned with the increasing cost of doing business in Ontario. We are, however, encouraged by the balance you have been asked to strike in your mandate:

Protect employees while supporting business in our changing economy.

Toward this objective, CME urges the consideration of the following key principles as you formulate your recommendations to government:

1. Clarity and certainty for employers, employees and trade unions.

2. Identify and maintain the balancing of interests of employers, employees and trade unions.

3. Workplace flexibility should be increased enabling manufacturers quickly respond and adjust to global customer needs.

4. The economic impact of your recommendations that increase cost must be avoided or mitigated to the greatest extent possible.

5. Streamline processes to reduce administrative cost that may lead to increased competitiveness for manufacturers.

6. Recognize Good Employers and re-direct limited government resources toward other more challenging sectors of the economy.

Submissions

CME provide the following comments on the issues and options most relevant to our member for your consideration:

The *Labour Relations Act*

4.2.2 Related and Joint Employer

The current "common employer" provisions should be maintained.

Contracting Out

As noted earlier, manufacturing has undergone a significant restructuring over the last decade driven largely by an increasingly global marketplace for goods and services. These factors have prompted a shift towards higher value-added activities and more capital-intensive, automated forms of production. It has led to increased contracting out of non-core activities (e.g., skilled maintenance, indirect labour, etc.). Finally the realities of just-in-time delivery demands have also seen a rising reliance on temporary help agencies due to the requirement to quickly staff up to meet changing customer demands or market circumstances.

These are commercial arrangements that have arisen in direct response to global competition and growing customer demands. They are bona fide and necessary. We urge you to maintain a focus on striking a balance between employer, employee and trade union interests in this area.

We understand the need for certainty with respect to who is the true employer. Respectfully, this does not require the casting of a broader net. It requires a continuing analysis of which entity or entities exercise fundamental control over the day to day labour relations matters. We believe the current *LRA* provides both guidance and certainty with respect to this analysis[1].

Interfering in and/or reducing the ability for CME members bona fide business practices such as sub-contracting would seem like a step backwards. In the manufacturing sector the ability to contract out certain aspects of the business is necessary and results in more competitive businesses. Increased

[1] Section 1(4) Ontario Labour Relations Act, RSO 1990 c.1

competitiveness contributes to both job security and job growth – both key to the Ontario's future prosperity.

Temporary Help Agencies

In a manufacturing environment, the primary use of temporary "assignment employees" or contract workers is to cover fluctuations in production (e.g. seasonality, cyclicality, mandated leaves) or specific projects (e.g., new construction). The labour supply industry provides a stable solution to the problem of over and under-employment, reducing the experience of frequent, short-term layoffs. The assignment employee benefits by having their skills matched with a broader pool of employment opportunities and this benefits industry which can address labour requirements in a targeted and flexible manner.

It is important that employment standards do not interfere with the certainty and clarity which exists in the relationship between the company, the temporary agency and assignment employees. The recent extension of joint and several liability for unpaid wages to clients for the assignment employees of temporary help agencies[2] was unnecessary and has not resulted in any identifiable gains for the assignment employees. Blurring the lines of the employment relationship, shifts the risk balance towards the manufacturer and other unintended consequences making the use of temporary assignment employees less attractive.

While this may create stronger attachment to the workplace in the near term, longer term it increases the challenge of volatility and cyclicality thereby discouraging new or re-investment.

The current common employer analytical framework provides clarity and certainty and ultimately equips all of the workplace parties with the ability to identify the true employer and the engage in meaningful collective agreement negotiations. We do not believe that sub-contracting and/or the use of temporary help agencies interferes in effective collective agreement negotiation. The current provisions of the *LRA* in relation to the collective bargaining process are robust, balanced and encourage the creation of long term collective bargaining relationships between employers and trade unions.

Finally the creation of a new test such as "in order for collective bargaining to be effective" would only serve to further blur the lines, increase uncertainty, litigation and lead to further instability. We need just the opposite – we need to maintain clarity and certainty which the current provisions of LRA provide.

[2] Bill 18, Stronger Workplaces for a Stronger Economy Act

4.3.1.1 Card-based Certification

Democracy should be maintained.

The democratic principle is core to our Canadian society. The current secret ballot vote provisions affording all affected employees the opportunity to have a confidential say in whether their workplace will be unionized or not is critical for a number of reasons. Central to the establishment of new bargaining rights and obligations is the belief by the employer, the trade union and the employees that all employees have had an opportunity to make an informed choice while having their confidentiality protected.

We do not subscribe to the point of view that the vote based certification process has caused the decline in unionization her in Ontario. The decline in unionization is occurring throughout North America. We believe that it is more likely that increased workplace regulation, the decline in sectors of the economy best known for heavier union density juxtaposed with the increase of our service based economy are likely the more prevalent causes of the decline.

CME submits the *Canadian Charter of Rights and Freedoms* supports the maintenance of the secret ballot vote process.

Eliminating the democratic vote process will be a step backwards. It is inconsistent with the process in almost every jurisdiction in Canada and the United States, and removes from employees the opportunity to have an 'informed' say in their individual and collective futures. It will also place Ontario employers at a competitive disadvantage. For all of these reasons, eliminating the vote cannot remain a realistic and appropriate option.

4.3.1.2 Electronic Membership Evidence

Permit electronic membership with appropriate safeguards.

If technology evolves to the point that employers, trade unions and employees can be confident that membership evidence collected via electronic means is authentic and devoid of undue influence CME would support this option. However, until we are able to achieve these certainties the current paper document process should be maintained.

4.3.1.3 Access to Employee Lists

Maintain the status quo.

This was the subject of great concern to CME membership. Access to employees should always consider a prevailing respect for privacy and property rights. CME membership does not see how the provision of employee information could outweigh these rights. We do, however, recognize that once a union achieves a certificate to represent the employees in collective agreement negotiations with their employer there is a new balance to be struck. At that point in the relationship striking a balance between the union's right to represent the employees and the privacy rights of the employees supports the provision of employee contact information.

With today's means of communication we do not accept the notion that trade unions have difficulty in reaching employees, communicating with them and/or ascertaining the number of employees eligible in any single workplace. The media coverage of the recent unionization of a number of Goodlife Fitness sites suggests just the opposite. Organizers stated that they relied on electronic means of communication for the majority of their organizing, meeting less than 30% of the eligible employees face to face.

We understand that the threshold (e.g., 40% or more) set in the *LRA* which entitles the employees and a trade union to a secret ballot vote result often results in litigation. Litigation in an attempt to define which employees are considered to be employed within the appropriate bargaining unit and as a result whether there is a sufficient membership evidence to meet the threshold requirements. Adding another threshold after which the trade union would become entitled to employee information will only add another layer of litigation, lead to further delays in the process and increase the costs associated with the entire certification process.

Finally, we urge you to consider recommendations that provide clarity and certainty for employers, employees and trade union as opposed to ones that will only form that basis for additional litigation and complex regulatory burdens.

4.3.1.4 Off- Site, Telephone and Internet Voting

We support assessment of additional opportunities for voting in conjunction with voting.

First and foremost CME supports a vote process that will maximize the employees' ability to participate in a confidential secret ballot vote. To date, our member companies have experienced this best achieved by supervised polling stations being available in the workplace.

The *LRA* does not dictate how or where a secret ballot vote is to be conducted, although traditionally the OLRB has directed the vote occur in the workplace. As we understand it, the underlying policy rationale, at least in part, has been to ensure employees have a reasonable opportunity to cast a ballot. Not only is this consistent with voting protocol across Canada, but CME members do not accept the assertion that there is an issue with employers unlawfully influencing employee choice, nor that the OLRB has insufficient power to remedy unlawful conduct.

Ultimately, ensuring the greatest number of employees have an opportunity to vote freely and voluntarily (without undue influence from any party, including a union), and the authenticity of the outcome of a vote, should be the Government's primary objective. Any transition to off-site, telephone or internet voting must keep this objective at the forefront.

4.3.1.5 Remedial Certification

We ask that you recommend the removal of the power of the OLRB to remedially certify an employer.

At present, the OLRB may order the certification of a union without a vote if the employer has contravened the *LRA* in a way that makes it unlikely the true wishes of the employees can be ascertained through another vote (referred to as 'remedial certification'). The OLRB may also take into consideration whether the union has adequate membership support for the purpose of collective bargaining.

CME asserts that the current remedial certification power of the OLRB unnecessarily interferes with the right of each employee to have a say in whether or not they wish to be unionized. The existing unfair labour practice sections of the *LRA* provide sufficient guidance to employers, employees and trade union of their respective rights and obligations. The alternative power to order a 2nd vote of the employees with

a variety of remedial conditions is more than sufficient to regulate conduct while still preserving the employees' right to vote.

There have been relatively few remedial certification orders by the OLRB over the last decade; instead we see second votes being ordered pre-conditioned on the implementation of other remedial orders. In essence, for the most part, we are simply asking you to recommend codifying current practice. The OLRB Vice-Chairs, the individuals empowered with the authority to exercise this remedy, typically have years of experience representing either unions or employers. Their experience affords the best opportunity to identify unlawful conduct, appropriate remedies short of remedial certification and overall balance in the workplace.

Also as we understand it, you are also considering the elimination of the OLRB's discretion to consider whether the union has adequate membership support for the purpose of collective bargaining. The assessment of adequate membership support has been present in the *LRA* for decades. In fact, if you look at other provincial labour relations legislation such as the Newfoundland Labour Relations Act you see further support for maintaining this discretionary factor. In the conduct of the actual certification vote, the Newfoundland legislation still requires the board be satisfied that at least 70% of the employees in the unit have voted and a majority of those voting have selected the trade union to be a bargaining agent of their behalf[3].

4.3.2 First Contract Arbitration

We support the maintenance of the current remedial relief requirements.

Once certified, the employers, employees and trade union benefit from several interconnected provisions of the *LRA* that strike a fragile balancing of all interests. When this legislative framework is adhered to by all workplace parties it assists in the establishment of collective agreements, ongoing relationships and little need for government intervention. With this clarity and certainty, workplace parties have been freely agreeing to collective agreements without disruptions with increasing frequency over the last two decades. We believe this has been caused, at least in part, by the balance struck by the current provisions of the LRA.

[3] Section 38 (2)(c) Newfoundland Labour Relations Act, RSNL, 1990, c.1

The options you provide in relation to either automatic or discretionary access will impact this fragile balance. We have a seen a fraying of labour relations in the sectors of the Ontario economy (e.g., fire, police, hospital, etc.) that currently rely on automatic access to interest arbitration processes to resolve first and/or mature collective agreements.

The current collective agreement framework motivates employers, employees and trade unions to co-create workable solutions and compromises to achieve long-term, sustainable relationships. If any party to the collective agreement negotiation process is no longer required (or motivated) to seek compromise, but rather can simply have a third party award the terms and conditions of the collective agreement it will tilt the balance, undercut motivated compromise and ultimately disrupt relationship building processes whose value should not be underestimated.

As you know, the current provision (introduced in 1986) for first contract arbitration requires the applicant (typically a union) to demonstrate collective bargaining has been unsuccessful due to one of the following reasons:

- the refusal of the employer to recognize the bargaining authority of the union
- the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification
- the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement
- any other reason the OLRB considers relevant.

The “reasons” provide the workplace parties with guidance as to the required behaviours during the collective bargaining process. These ”reasons” are also part and parcel of the overall legislative framework that results so often in freely negotiated collective agreements.

We are unfamiliar with the “mediation intensive” model utilized in British Columbia and as a result make no comment about this option.

4.3.3 Successor Rights

We support the maintenance of the current successor rights provisions.

Workplace flexibility enables manufacturers to respond and to quickly adjust to changing customer needs (e.g. just-in-time delivery), business and market conditions.

We understand and accept that the objective of current provisions of the *LRA* are to protect union bargaining rights where there has been a sale of a business, ensuring those rights and collective agreement obligations flow through to the successor employer. At present, section 69 captures several forms of business transactions, a common feature of each is the passing of assets from one party to another. The ongoing obligation to employees and trade unions union rights by the purchaser of the business finds its rationale in the purchasers' reliance on the transferred assets from the vendor enabling it to maintain the business.

We submit that when nothing passes from the one contractor to another the essential rationale for any form of successorship disappears. CME members establish commercial relationships with a variety of suppliers. Those commercial relationships are governed by the provisions in the commercial agreement. They typically motivate both parties to perform to a standard, even to innovate to increase productivity, performance and efficiency. It is difficult to imagine the options you are considering not having a significant impact again on the current balance among employers, employees and trade unions.

4.3.4 Consolidation of Bargaining Units

We ask that you recommend the maintenance of the status quo.

CME members' experience, is limited for the most part, to common bargaining unit definition ordered by the OLRB for single workplace of a specific employer at a particular geographic location. We recognize that the OLRB at the outset has the power to determine the appropriate bargaining unit description. We understand that over time workplaces evolve and may alter the context within which the first bargaining unit was found to be appropriate. It is in these unique circumstances that we support the OLRB being given greater power to address the new context to determine the appropriate bargaining unit description.

Following the OLRB's determination of the appropriate bargaining unit description the employees eligible to case a secret ballot are identified and a secret ballot vote takes place. It is this secret ballot vote that protects employee voice and we urge you to recommend any alteration in a bargaining unit need be followed by a secret ballot vote of the applicable group of employees. Our submission should not be taken as implicit acceptance of micro units, just the opposite, CME membership urges the maintenance of the current broader based bargaining unit structure in a workplace.

4.4.1 Replacement Workers

There is no need to make any change in this area.

In reviewing your Interim Report we understand that it defines a "replacement worker" as a "worker hired to fulfill some or all of the functions of a worker who is either engaged in a legal strike or who has been locked out by the employer". Today, in every Canadian jurisdiction (save British Columbia and Quebec) during a lawful strike or lockout, an employer is permitted to rely upon a replacement worker to continue to meet customer needs.

This is part of the critical and fragile balance in the collective agreement relationship with employers, their employees and the trade union. The ability of an employer to rely on a replacement worker encourages ongoing compromise toward a collective agreement, and ultimately labour relations stability. Without the ability to hire replacement workers, many unions will be in a position to effectively strangle their employers, undercutting any necessity the union has to compromise or reach meaningful 'agreement'.

Investors and clients will factor into their decision making the stability of the production a significant risk to the business and the employees. At a minimum this will increase the costs associated with collective agreement negotiations and see unnecessary inventory build requirements created in the lead up to collective agreement negotiations.

The fact that strike and/or lockout occurs in less than 5% of Ontario workplaces operating under a collective agreement, is strong evidence the current practice of allowing replacement workers has had a positive impact on the stability of labour relations. Altering this balance ought therefore to be very carefully assessed.

4.4.2. Right of Striking Employees to Return to Work

6 Month Threshold

We support the elimination of the 6 month threshold

The current provisions of the *LRA* provide an employee with a protected right to return to work after a lawful strike or lockout provided the employee exercises this right within six (6) months of the commencement of the lawful strike or lockout. While in theory, an employee in Ontario is at risk of not being reinstated if he/she has not applied for reinstatement within the six (6) month window, in practice, more often than not, an employer will reinstate an employee who wants to return to work, even outside of the six (6) months window.

4.4.3. Renewal Agreement Arbitration

Please see Section 4.3.2 First Contract Arbitration

As discussed in Section 4.3.2 - First Contract Arbitration - *the LRA* provides for an interest arbitration proceeding to establish the terms and conditions of the parties' first collective agreement when negotiations have been unsuccessful due to certain employer actions (see s. 43(2) of the *LRA*). There is no similar process for interest arbitration regarding the renewal of a collective agreement.

For the reasons addressed in Section 4.3.2, all employers should be concerned with the possibility of interest arbitration for the renewal of a collective agreement and we urge you not to recommend automatic or discretionary access to renewal agreement interest arbitration.

4.6.1 Broader Based Bargaining Structures

We are opposed to Options that would create any form of sectoral collective agreements

CME is opposed to any option that would seek industry-wide bargaining and/or force unionization of employees based on their participation in a certain industry. If a union is certified for a sectoral unit, it would commence bargaining with all employers whose employees have been certified. It is difficult to imagine how manufacturing employers would retain the necessary flexibility and unique needs matching the wide variety of industry representative of our sector (e.g., tool and die, fine-blanking, mass production, etc.).

Our sector has been well served by one employer – one trade union negotiation. In support of this recommendation, the Interim Report looks to sector bargaining in the construction industry, some of the hospital sector, and with professional artists and producers who engage their services. The construction sector involves nomadic employees that move from one construction site to another. As we understand it, this was a significant factor in the government legislating province wide bargaining in the industrial, commercial and institutional sector of the construction industry in the 1970s. The majority of CME's members operate manufacturing facilities with employees working at a single facility.

The option of having an industry wide collective agreement with superior terms and conditions of employment would be cost prohibitive and harm overall competitiveness with any employer outside of the province of Ontario. As you might expect CME members would see such a broader based bargaining model as an unnecessary additional cost of doing business with no corresponding gains for employers or employees, especially in the manufacturing sector.

Respectfully, we submit the manufacturing sector is not a sector of the economy where 'vulnerable workers' are found working in 'precarious jobs'. Finally, while certain sectors of the Ontario economy experienced pattern or central bargaining in the 1970s and 1980s, the Interim Report acknowledges there has been a general shift away from this type of bargaining, as well from bargaining at the enterprise level.

The *Employment Standards Act*

5.2 Scope and Coverage of the *ESA*

When considering any change to the ESA, CME asks that you to keep top of mind the following considerations:

1. Clarity and certainty for employers and employees.

2. Identify and maintain the balancing of interests of employers and employees.

3. Workplace flexibility enables manufacturers to respond and to quickly adjust to changing customer needs (e.g. just-in-time delivery), business and market conditions.

4. The economic impact of your recommendations that increase cost must be avoided or mitigated to the greatest extent possible.

5.2.2 Who is the Employer and Scope of Liability

Please refer to our submissions in Section 4.2.2.

5.2.3 Exemptions, Special Rules and General Process

We support your conclusion that all exemptions should be reviewed at some point in the near future and that this task is too big to be undertaken within the context of the Changing Workplaces Review. We also agree a common analytical framework should be established. However, we do not believe that the current exemptions grouped into Category I should be eliminated without further review. CME is specifically concerned about the risks associated with the elimination of the "manager and supervisors" exemption from the *ESA.*

Managers and Supervisors

We urge the maintenance of the *status quo*.

Managerial representatives are not typically identified as precarious and/or vulnerable portions of the workforce – identified as a greater concern in your overall mandate. Many manufacturers operate 24/7. With this in mind it is critical that there are sufficient management representatives available to direct employees. We also ask you to consider principles of harmonization with the *LRA.*

In a unionized environment there can, unfortunately, be competing interests between employers and their trade unions. As a result we believe the portions of the *LRA* were devised with just this in mind. Section 1(3)(b) establishes a balance between employers, employees and trade unions by excluding managerial representatives from coverage under the *LRA* to ensure they are not placed in a conflict of interest. That is the conflict of interest that arises between their duties to direct and supervise employees and, at times, opposed interests of unionized employees.

Many Canadian provinces exempt managers from overtime pay and/or rest or eating periods. The current exemption of managers and supervisors from the application of overtime pay and rules which govern maximum daily and weekly hours, rest periods and time off between shifts is a universal exemption applicable to all Ontario employers. We urge you to delay any elimination of this exemption until there has been a consultation process to hear from workers' representatives, managers, supervisors and employers. It would seem counter intuitive to the review process advocated to move forward without such a process. We would also ask that an economic analysis be undertaken to clearly scope the impact of the elimination of such an exemption.

5.3 Standards

5.3.1. Hours of Work and Overtime Pay Employees

CME asks that you recommend:

(i) the elimination of the requirement for employee written consent to:

(a) work longer than the daily and weekly maximums (12 and 60), but maintain the daily rest period requirement of 11 hours; and

(b) averaging of overtime to a maximum of four weeks.

(ii) that an employee's written agreement to a greater daily or weekly maximum or a period of overtime averaging greater than 4 weeks, be accomplished via electronic means.

Our members need clarity and certainty in the regulatory environment in which they operate. Ontario is currently also recognized as a high cost environment. We believe a more competitive Ontario will mean more and better jobs. Creating more regulatory complexity are not the answer.

5.3.2. Scheduling

We recommend maintenance of the *status quo*.

The Interim Report suggests the lack of legislated, consistent scheduling of an employee's hours of work makes it very difficult for employees to plan child care, search for a second job, make commuting arrangements and plan other important activities.

Comparisons to U.S. legislation require "complete" comparisons, not on a subject by subject basis. CME believes that Ontario employees receive superior protections. For example, Ontario employees receive superior leave entitlements than their neighboring U.S. employees (*e.g.,*pregnancy leave in the U.S. is roughly 6-8 weeks vs. 52 weeks in Ontario).

Legislated, consistent scheduling of work hours, is not possible in an industry such as ours in which services are provided 'just-in-time' with fluctuating volumes. Our members provide as much advance notice of schedules of work to employees as possible. Respectfully, we submit that it would be unfair to

enact a requirement that a specified number of weeks of advance notice and penalize employers for trying to remain flexible in an effort to respond to just-in-time customer requirements.

All options under consideration come with increased cost consequences to Ontario employers. Requiring the provision of advanced and fixed hours of work not aligned with the fluctuation in customer needs strike at the heart of supply and demand economics.

5.3.3.1 Public Holidays

We recommend the maintenance of the *status quo*.

The number of legislated public holidays is at the upper end of the range across the country. Given the number of issues and options identified in the Interim Report on other more critical subjects, we ask that the maintenance of the status quo be recommended.

5.3.3.2 Paid Vacation

We recommend the maintenance of the *status quo*.

CME asks the cost consequences of any recommended increase in the number of weeks of vacation without commensurate economic offsets be the deciding factor on this subject. In a province with significant increases to minimum hourly wages rates, high electricity rates, and cap and trade further increases may tip the fragile balance existing today in the manufacturing sector. We respectfully ask that you take into consideration the total amount of time (unpaid and paid) CME members must already provide to employees beyond vacation entitlement: public holidays, personal emergency leave days and ten other legislated leaves in the *ESA*.

Each additional week of vacation results in a four percent increase in employer costs. In isolation this would underestimate the cost impact. Consider the overtime costs associated with replacement labour, the costs of increasing the size of our members' workforce to cover the additional weeks of vacation and the potential for increasing employee absenteeism both before and after the additional week(s) of vacation. Each of these factors CME members' ability to compete globally and service customers.

5.3.5 Paid Sick Days

We recommend the maintenance of the *status quo*.

CME recognizes there is a balance to be struck between the needs of employees and employers. A number of our members are attracted to Ontario for its universal provision of education and healthcare. Our members treat employees fairly with competitive compensation packages. Most importantly, our members seek to provide good jobs that will be sustainable for years to come.

We ask that you recommend a consolidation of the current leaves legislated under the *ESA.* The ten unpaid personal emergency leave ("PEL") days have been in the *ESA* for less than a decade and have been augments by another 6 forms of leave entitlement. The PELs are also seen by many as a bridge to the *Employment Insurance Act* illness benefits.

As we make these submissions, we also await your recommendations with respect to personal emergency leave days, and we hope recommendation(s) on how to simplify their integration with other leaves. We also hope you will not only maintain the greater right or benefit section of the *ESA*, but bring clarity to the concept of comparing bundles employment benefits.

5.3.6 Other Leaves of Absence

We recommend the ESA leave provisions be reviewed in an effort to consolidate some of the leaves.

Our members, like many other employers offering submissions, find the web of leaves confusing and burdensome. We ask that serious consideration be given to a consolidation and/or simplification of these numerous leaves.

In addition, the requirement to provide a medical note to support access to a mandated leave is appropriate and necessary. Employees who access mandated leaves place a burden on those left behind in the workplace. Given the number of submissions that have provided statistics questioning the authenticity of many employee absences, removing this last check will severely reduce employers' ability to effective manage employee absenteeism. An effective attendance management system is necessary.

We also ask that, following your recommendations regarding PELs, we be given another opportunity to make submissions about leaves generally.

5.3.7 Part-time and Temporary Work – Wages

We recommend the maintenance of the *status quo*.

Wages

CME members rely on full-time, part-time, temporary/casual employees, sub-contractors and temporary help agency employees. In just-in-time manufacturing operations the need for a variety of employee hours fluctuates with demand. As a percentage of the overall cost of operating, labour costs are relatively high in the manufacturing sector.

We recognize there is a co-hort of employees who would, in fact, work more hours if they were available. However, in reality we believe there is a significant portion of the part-time, temporary/casual employees who want only to work part-time for a variety of reasons personal to their own individual circumstances (*e.g.,* study, family obligations, simple preference, etc.). Legislating a requirement that part-time, temporary and casual employees be paid the same rate of pay unless qualifications, skills, service, seniority or experience justify the difference may lead to further confusion and complexity.

Will a full-time employee's incremental service hours quickly justify a different hourly rate of pay? These changes, if recommended, will necessarily lead to increased employer costs.

5.3.8. Termination, Severance and Just Cause

5.3.8.1 Termination of Employment

We recommend the maintenance of the *status quo*.

As you are aware the current qualifying period and cap on entitlements in Ontario already result in greater cost to Ontario employers than to employers in any other Canadian or American jurisdiction.

Anecdotally, we have been told that the majority of the complaints filed with the Ministry of Labour with respect to *ESA* compliance relate to termination pay and the employer's failure to make such payments in a timely manner. We ask that you consider further educational initiatives and incentives prior to expanding the current termination pay provisions.

5.3.8.3 Just Cause

We ask that you recommend maintenance of the *status quo*.

If "just cause" protection was required under the *ESA* for non-unionized workers, it would fundamentally change employment practices in this province. Ontario would be out of step with the majority of North America. We respectfully ask that serious consideration be given to the assessment of the pragmatic gains versus costs. "Just cause" as it exists federally, in Quebec and in Nova Scotia is supposed to be remedied via a "make whole" order that includes the possibility of an ordered reinstatement of the employee. In these jurisdictions, this has not, in fact, resulted in many reinstatements. Instead the settlement costs associated with the employee terminations have simply escalated. Recent jurisprudence also appears to have blurred the clarity of the reinstatement remedy. Recent arbitrators in these jurisdictions have actually referenced common law reasonable notice amounts to reach resolutions in unjust dismissal cases in these other jurisdictions.

It is also often mutually beneficial to end an employment relationship in exchange for ESA payments as it allows the employee to move on to new more suitable employment with financial support and with their dignity intact. The current termination and severance pay provisions of the *ESA* assist in this regard. Making available a remedial reinstatement absent an employer being able to prove that they had "just cause" to end the employment relationship would lead to more conservative hiring practices (i.e. fewer employee being hired), increased probationary terminations (on the assumption probationary periods would be retained) more stressful work environments as employers more closely manage performance in order to prove "just cause", and more litigation.

5.3.9 Temporary Help Agencies

We ask that you amend the *ESA* so that *prima facie* the temporary help agency is the employer of assignment employees.

There are several reasons for our request:

CME members rely upon temporary help agencies to achieve a number of important objectives (not to avoid employment liability), including:

- recruitment and screening for a variety of skills

- quick access to candidates
- address unexpected workforce requirements
- staff short term assignments
- maintain flexibility to meet fluctuating needs caused by just-in-time service delivery requirements.

Second, many of the options outlined in the Interim Report will increase the costs associated with the use of temporary help agencies making our members less competitive than our counterparts in neighbouring US states such as Minnesota, Wisconsin, Michigan and Ohio.

Third, while the Interim Report suggests a significant increase in the prevalence of temporary workers, research has shown the most significant upward trend occurred in the 1980s, slowed into the 1990s, and thereafter has fluctuated with Canadian economic cycles[4]. In other words, there is no 'crisis' regarding temporary workers in Ontario. To the contrary, temporary workers are a natural and necessary part of the business cycle.

Finally, it should not be overlooked that temporary help agencies have themselves become large, global enterprises, serving organizations around the world. In North America alone, two of the largest temporary help agencies place more than a quarter of a million employees each week. These agencies are large-scale employers in their own right and should be given clarity and certainty with respect to their rights and obligations as employers.

5.4.1 Greater Right or Benefit

We ask that you recommend Option 2 from your Interim Report

Many of our members have employment policies that provide greater entitlements than required by the *ESA*. Some have collective agreements with provisions that provide greater entitlements than the *ESA*. We ask that employers be recognized for providing these greater entitlements as opposed to penalized by being required to recognize both the entitlements within their policies and certain entitlements under the *ESA.*

We hope you will not only maintain the greater right or benefit section of the *ESA*, but will also provide clarity to the concept of comparing bundles of employments benefits to employment minimums.

Our members would benefit from clarity, certainty and reduced litigation in this area.

[4] ACSESS submissions to the CWR, September, 2015

5.4.3 Pay Periods

We ask that you recommend the maintenance of the *status quo*.

Legislating the harmonization of pay periods will only serve to increase employer administration and cost without commensurate economic gains.