Carpenters' District Council of Ontario

United Brotherhood of Carpenters & Joiners of America

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October 14, 2016

VIA E-MAIL

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

Attention: Honorable John C. Murray
Mr. C. Michael Mitchell

Dear Sirs:

Re: Submissions of Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Concerning Changing Workplaces Review Special Advisors' Interim Report

Attached please find the submissions of the CDCO filed on behalf of our 16 affiliated local unions and 30,000 members in the province.

Our Union appreciates the opportunity to comment on these important and long overdue proposals for reform.

Thank you for your attention to these submissions.

Yours very truly,

Tony Iannuzzi
Executive Secretary-Treasurer
Carpenters' District Council of Ontario

c.c all affiliated local unions
Nikki Holland, Director of Public Affairs

SUBMISSIONS OF

CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

CONCERNING

CHANGING WORKPLACES REVIEW

SPECIAL ADVISORS' INTERIM REPORT

In response to the Special Advisors', C. Michael Mitchell and the Honorable John C. Murray's, request for submissions concerning their Changing Workplaces Review Interim Report, the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (the "Carpenters") states the following:

General

1. The Carpenters is a trade union which, through its various affiliated local unions across Ontario, represents approximately thirty thousand members throughout this province.

2. The vast majority of the members of our union are employed in the construction industry and the vast majority of the bargaining rights held by the Carpenters relate to the construction industry and are therefore governed by the construction industry provisions of the *Labour Relations Act* (the "LRA"). As such, significant portions of the Interim Report do not directly apply to

our members and our bargaining rights and our ongoing collective bargaining activities involving the construction industry.

3. Despite the caveat noted above, certain portions of the Interim Report concerning possible changes to the general provisions of the *LRA* (which apply to the construction industry if they do not conflict with the specific construction industry portions of the Act) would/could affect the general membership and activities of the Carpenters in the construction industry. Further, the Carpenters also represent a large number of workers outside of the construction industry. These members/bargaining rights generally fall within the healthcare (long term care facilities and retirement homes) and the light manufacturing industries. Therefore, the Carpenters are making submissions concerning the Interim Report given its importance to our Union and our members.

4. The Carpenters recognize that, given the extensive scope of the task before them, the Special Advisors are likely to receive a huge number of submissions consisting of thousands and thousands of pages. Therefore, we have decided to limit these submissions to the specific areas of the Interim Report which we feel could most affect our members. In particular, we are limiting our comments to the LRA portions of the Interim Report, rather than the *Employment Standards Act* portions, given that our members are (by definition) covered by collective agreements which set the terms and conditions of employment and the mechanisms by which those terms and conditions are enforced. However, we wish to stress that this self-limitation is by no means intended to

devalue the importance and significance of those specific parts of the Interim Report which we do not address, particularly to other trade unions and/or groups of workers.

Section 4.2 - Scope and Coverage

Subsection 4.2.1 - Access to the LRA

5. For the most part, the groups of workers who are specifically excluded from the *LRA* are not groups of employees whom the Carpenters have traditionally sought to organize. However, as a trade union we are in favour of as many workers as possible having access to collective bargaining (and all of its significant benefits) and therefore believe that exclusions from the *LRA* should be as small as absolutely necessary.

6. Further, there is one currently excluded group of workers whose employment abuts the construction industry and which the Carpenters submit should be addressed. Landscaping work often involves workers who, depending upon the day or time of day, may be working, for the same employer, performing both construction industry work and horticultural or silvicultural work. There is, impractical work terms, often no separation between the employees who perform the *hard* landscaping work (such as building planter boxes, rock gardens, water features and pathways, etc.) and the *soft* landscaping work (such as placing the plants and trees in the planter boxes and gardens which they have built).

7. Under the current wording of the *LRA* hard landscaping is considered construction industry work and therefore workers performing it are fully covered by and have full access to collective bargaining and all of the rights and protections of this Act. Conversely, workers performing soft landscaping (or the same groups of workers depending on what tasks they are assigned on any particular day or jobsite) are generally considered to be employees engaged in horticulture and/or silviculture. As such, they are excluded from the *LRA* and collective bargaining. Given this, and whatever other changes may ultimately be made to the exclusions from the *LRA*, the Carpenters assert that workers engaged in horticulture and/or silviculture should no longer be so excluded, at the very least where such activities are combined with work within the construction industry.

Subsection 4.2.2 – Related and Joint Employers

8. The Carpenters have not, generally, experienced problems or issues involving the current *common control and direction* criteria of subsection 1(4) of the *LRA*. Therefore, although we are not opposed to the elimination of this particular criteria we would simply note that our principle industry, the construction industry, is made up of vast networks of contractors and subcontractors who have extremely close business relationships (sometimes spanning multiple generations) which nevertheless remain separate entities/employers for labour relations purposes. Accordingly, should this particular criteria be changed, we would assert that suitable criteria must be substituted so that such separate entities which work closely together do not become

related/joint employers under the Act which could have the potential of disrupting existing patterns of organizing/collective bargaining.

9. In its applications for certification, the Carpenters repeatedly deal with the issue of who is the *true employer* of employees referred to companies by Temporary Hiring Agencies ("THA's"). Although we believe the Ontario Labour Relations Board generally correctly concludes that such employees are in fact employees of the client employer, rather than of the THA, we agree that the evidence and argument necessary for it to reach such conclusions often takes a considerable amount of, unnecessary, hearing time. As such, the Carpenters are very much in favour of reforming the *LRA* to include a rebuttable presumption that employees referred to a client employer by a THA's are employees of the client employer.

10. Conversely, the Carpenters very much oppose a change to the *LRA* which would find THA's and their client employers to be related/joint employers pursuant to subsection 1(4). With construction industry applications for certification, we are required to organize bargaining units consisting of all of a particular group of workers (carpenters for example) at work for an employer within a particular geographic area on the date of application. If the *LRA* was amended such that THA's and their client employers are considered to be a single employer for the purposes of the *LRA*, it would be next to impossible for unions to identify and organize the statutory defined bargaining units given

the sheer number of potential jobsites which any THA might be supplying employees to on any particular day.

Section 4.3 – Access to Collective Bargaining and Maintenance of Collective Bargaining

Subsection 4.3.1.1 – Card-Based Certification

11. The Carpenters are in favour of a return to the Bill 40 card-based certification regime in all industries and sectors. As pointed out in the Interim Report, the card-based system currently exists for the construction industry. We believe that, when properly scrutinized (as the OLRB has always done), the card-based certification system presents no particular problems or concerns concerning employee choice and, in fact, promotes such choice, especially for employees in those industries who may be particularly vulnerable to employer influence.

Subsection 4.3.1.3 – Access to Employ Lists

12. The Carpenters are in favour of a union being able to request that it be provided with employee list, provided that it can establish that it has an organizing campaign underway and that it has already achieved a minimum level of employee support, with respect to organizing activities outside of the construction industry. We believe that it is self-evident that the ability to request such lists would increase the ability of employees to become organized and thereby gain access to collective bargaining. This is particularly the case in modern workplaces and

newer industries where, primarily because of new communications technology, the workforce is more disparate.

13. We are however opposed to extending such list requirements to the construction industry. As you are well aware, construction industry bargaining units, for the purpose of applications for certification, are composed of those employees, within a particular trade, who are at work on the date of application. Given this, it would appear to us that to impose such a requirement upon construction industry employers would constitute a significant burden (in that they would have to keep track of exactly who was doing what, for how long and on what day, just in case a union might ask for a list) without providing any real benefit to the unions and employees involved as any lists so provided would not necessarily have any relevance to the composition of the bargaining unit on any future days. Further, it is unclear, given the daily changes to the number of employees in construction industry bargaining units, how the minimum membership threshold requirements necessary for a union to be entitled to a list would be established for this industry.

14. Finally, it must be noted that, unfortunately, construction industry unions often have a particular passion for engaging in internecine warfare. If such employee lists were available in the context of construction industry applications (and in particular displacement applications) it is easy to envisage that the construction industry *raiding period* would become even more of paranoid *free-for-all* than it already is.

Subsection 4.3.1.4 – Off-Site, Telephone and Internet Voting

15. The Carpenters assert that access to collective bargaining could be enhanced by greater use of off-site voting. Under the OLRB's current practices most votes take place in the workplace. For vulnerable groups of workers and in small workplaces, this can often be an intimidating process given the immediate proximity of their employer. Accordingly, we believe that, appropriate amendments should be made such that where a union requests it employee votes take place at more neutral locations.

16. Conversely, the Carpenters are not in favour of reforms to allow for telephone and/or internet voting. Provided appropriate resources are provided for the conduct of votes at enough voting places and for long enough periods of time, it is our view that telephone/internet voting will not significantly enhance access to collective bargaining. Further, such reforms bring with them serious concerns (and at the very least perceived concerns) about the integrity of the voting process. If votes are conducted by phone or by internet there is no way of definitively determining who actually casts the ballot and under what circumstances. Such concerns are particularly significant with respect to vulnerable groups of workers. In this respect, it is unclear how the OLRB, unions and workers within the bargaining unit (and perhaps even employers) could be assured that the casting of the ballot was done by the actual employee entitled to vote, in secret and without persons present exercising unlawful pressure upon employees voting in this way.

Subsection 4.3.1.5 – Remedial Certification

17. The Carpenters are not sure about the experiences of other unions but we do not believe that this section (section 11) of the *LRA* needs to be amended. Our experience before the OLRB has been a positive one. Specifically, we believe that Remedial Certification should be a remedy of last resort as we do not believe that it enhances our position as the exclusive bargaining agent (or the status of unions generally) if employees feel that a union has been imposed upon them despite their wishes. Accordingly, we believe the current balance provided by the *LRA* (as interpreted by the OLRB) is the correct one, in that it is not any and/or every violation of the *LRA* which will lead to Remedial Certification, and this remedy will only be imposed in those circumstances where the violations are found to be sufficiently serious, such that the true wishes of the employees cannot be realistically ascertained. In circumstances where such employee wishes can be ascertained, with or without the imposition of lesser remedies for violations of the Act, then it is our view that a union should not be imposed upon the employees without their consent.

Subsection 4.3.2 – First Contract Arbitration

18. Becoming unionized is a meaningless achievement for the workers involved if it does not lead to the bargaining of a (meaningful) first collective agreement. Accordingly, given that first collective agreements (particularly with respect to workers in industries or sectors without strong histories of unionization) are

often extremely difficult to negotiate, the Carpenters are strongly in favour of providing for relatively straightforward access to first contract arbitration (FCA) when requested.

19. Under the current provisions of the *LRA* the mere fact that a collective agreement has not been reached after a significant period of time is not sufficient to provide access to FCA. Therefore, parties often find themselves involved in significant and divisive litigation before the OLRB in an attempt to establish the required criteria necessary to gain access to FCA. In our view, such time, efforts and resources are better spent in getting the first agreement established as quickly as possible so that the relationship required between employer and union once certification has been achieved can mature into a more positive and (hopefully) mutually beneficial one. Further, given that arbitrators, particularly in the case of first contracts, have generally refused to award *breakthroughs* and instead limit the parties to industry norms, we do not believe that greater access to FCA places a higher burden upon employers.

20. Based upon the above beliefs, we are in favour of amending the *LRA* to provide for automatic first contract arbitration, if applied for by either party, following a thirty day strike/lockout period or following the granting of Remedial Certification (if requested by the union), given that in such circumstances it is unclear whether the true wishes of the employees could be reflected in a ratification and/or strike vote. Finally, we are also in favour of reforms which would prevent termination applications once an

application for FCA has been made since we believe that such a reform would encourage all parties to at least *give collective bargaining a try* before the employees could be required to vote on ongoing union representation.

Subsection 4.3.3 – Successor Rights

21. The Carpenters are in favour of expanding the coverage of the Successor Rights' Provisions of the LRA such that they would be similar to the law in place between 1993 and 1995. Under that previous regime, particular marginalized/vulnerable groups of workers (such as cleaners) were able to make real gains through collective bargaining. As the *LRA* currently stands such groups of workers are generally denied the actually benefits of collective bargaining (after they become unionized) in that they are generally employed by contractors which can be (and usually are) swiftly removed if the union and the employees are able to make gains in bargaining. Therefore, returning to the 1993-1995 legal regime offers the prospect of realistic collective bargaining for such groups of workers while the current system does not.

22. The Carpenters are, at least at the present time, not in favour of substantive and broader expansions of successor rights to cover all subcontracting. In this respect, we believe that whatever reforms are made must take account of the fact that Ontario cannot and does not exist in isolation. Many industries rely upon the ability to contract and subcontract portions of their work in order to survive in the modern economy. While we obviously

believe that workers' rights should be protected and enhanced we also believe that a regime of successor rights should not be established within our province which employers view as so severe and restrictive that when making decisions concerning such subcontracting they send the work out of Ontario in order to escape the jurisdiction of the *LRA*.

Subsection 4.3.4 – Consolidation of Bargaining Rights

23. With respect to bargaining units outside of the construction industry, the Carpenters are in favour of amendments to the *LRA* which would enable the OLRB to consolidate bargaining units pertaining to the same employer and the same union. This would affect the Carpenters with respect to bargaining units involving long term care facilities and retirement homes. In our view such amendments would enhance access to effective collective bargaining in that it would enable discrete and manageable groups of workers to organize but would thereafter allow such smaller groups of workers to come together for actual bargaining. In this way both organizing opportunities and bargaining power would be maximized.

24. The Carpenters are not however in favour of providing the OLRB with the power to combine bargaining units represented by different unions (as exists at the federal level). It is our view that such procedures do nothing to further the reach of collective bargaining. Rather, if anything, they simply encourage unions to focus on groups of workers who are already organized.

Section 4.4 – The Bargaining Process

Subsection 4.4.1 – Replacement Workers

25. Replacement workers are not a significant feature in most of the industries which we are involved with (replacement workers being mostly unused in the construction industry and there being no strikes/lockouts within the LTC sector). That said, as a general principle, the Carpenters are in favour of legislative reforms which would prevent the overall use of replacement workers. In addition, if the less stringent alternative of banning the use of replacement workers to undermine a union's representational capacity is adopted, it is our view that a reverse onus provision must also accompany any such amendment. Such a reverse onus is necessary, as in such circumstances, it would be almost impossible for a union to have evidence as to the motivation behind the use of replacement workers, while such evidence would obviously be readily available to the employer.

Subsection 4.4.2.1 – Return to Work After Six Months From The Beginning Of A Legal Strike

26. The Carpenters are in favour of eliminating the six month time limit. There is no logical reason why an individual who is on strike for 5 months and 28/30/or 31 days should retain the right to return to work while an employee, in an otherwise exactly similar situation, who is on strike for one day longer should loose such status and rights.

Subsection 4.4.2.2 – Refusal of Employers to Reinstate Employees Following a Legal Strike or Lockout

27. In our view impediments to ending strikes/lockouts should, to the extent possible, be eliminated. In many cases, disagreements concerning return to work scenarios and protocols can and do prolong strikes/lockouts for days and weeks after the more substantive issues involved have been resolved. Accordingly, the Carpenters would be in favour of amending the *LRA* such that all of the employees who initially went on strike or were locked out must be returned to employment at the end of the strike/lockout. Thereafter, the employer could take necessary and appropriate action, concerning laying off unneeded employees for example, but any such action would of course be subject to the provisions of the new collective agreement and therefore the parties would have access to a means of resolving any disagreements without continuing the cessation of work. Alternatively, and at a minimum, it is our view that the *LRA* should contain provisions which allow for the grievance and arbitration of any discharges which occur during the course of a strike/lockout to ensure that such discharges do not become an issue in resolving the work stoppage itself.

Section 4.5 – Remedial Powers of the OLRB

Subsection 4.5.1 – Interim Orders and Expedited Hearings

28. The Carpenters believe that the power to issue interim orders and decisions pursuant to section 16.1(1) of the *Statutory Powers*

Procedures Act should be restored to the OLRB. The OLRB is one of the most respected and experienced statutory tribunals in our province. The OLRB should have the same general powers which have been granted to various other statutory tribunals through the SPPA.

29. The Carpenters would also be in favour of broadening the scope of the OLRB's remedial powers by providing it with the ability to grant interim relief on "such terms as the Board considers appropriate" in cases of alleged violations of the *LRA*. Such a change would make the Board the master of its own processes and allow it to respond effectively to the situations placed before it on a case by case basis. That said, the Carpenters do not insist that the provisions requiring a finding of irreparable harm before the Board exercises such interim powers be specifically removed. In our experience, and based upon the Board's jurisprudence (under the current and previous versions of the Act), the Board has, when required to do so, generally defined irreparable harm in a sufficiently broad manner so as to allow for the exercise of interim relief when truly required.

Subsection 4.5.2 – Just Cause Protection

30. The Carpenters are strongly in favour of amending the *LRA* such that just cause protection with respect to discipline and discharge be put in place as early as possible. Even with the exercise of good will on the part of all parties it can often take a considerable period of time before first collective agreements actually take effect. In such circumstances, and where the union has already been certified, there would appear to be no logical reason why

employees should not have access to such protection prior to the first agreement being finalized. This is so, given that just cause protection is one of the most important benefits of collective bargaining for employees and forms part of every collective agreement (at least with respect to employees with seniority) in any event. This is especially important if the aim of reforming the *LRA* is to expand collective bargaining to vulnerable groups of workers since such a reform, putting in place the just cause standard at the earliest possible opportunity, could provide significant reassurance for employees that they can be protected from reprisal for exercising their right to participate in collective bargaining.

Subsection 4.5.3 – Prosecutions and Penalties

31. From our perspective, the *LRA* must promote collective bargaining, which in turn means that it must promote the development and maintenance of *good relationships* between employers and unions/employees. Obviously, the rights established by the *LRA* must be enforced and meaningful penalties must be possible. However, given the overall purpose of this Act, we believe that care should be taken to make sure that the *LRA* remains a means of establishing and promoting collective bargaining and does not become a *criminal code* of the workplace to be used simply to punish employers.

32. Given the above, we believe that the compensatory remedies which the OLRB has traditionally granted should remain the norm.

Nevertheless, exceptional circumstances can and do exist. No employee should lose her or his job, and have to remain without a pay cheque for months (or even years), simply because they wish to take advantage of their rights under the *LRA*. Accordingly, the Carpenters would be in favour of providing the OLRB with the power to award special damages (including such measures as triple wages) in circumstances where the employer has violated the Act with respect to the discharge of employees during union organizing campaigns and for other serious violations of the Act. Such enhanced powers would hopefully not have to be used very often since their mere presence would provide a significant disincentive for employers to even consider violating the *LRA,* in such serious ways, in the first place.

Section 4.6 – Other Models

Subsections 4.6.1 Broader Based Bargaining Structures and 4.6.2 Employee Voice

33. As noted initially herein, most of the Carpenters' bargaining rights and collective bargaining activities involve the construction industry and are therefore already covered by broader based bargaining regimes and which do not come within the ambit of your review in any event. However, the Carpenters do have an interest in the possibility of the broader based bargaining structures which you are considering given the potential impact that such structures might have for our bargaining rights and

collective bargaining activities in the healthcare sector (involving LTC and retirement facilities).

34. As discussed previously, the Carpenters are very much in favour of structures which allow for separate bargaining units outside of the construction industry, whether already organized or which may become organized in the future, being able to combine into larger (and possibly even single province-wide) bargaining units when they involve employees of a single employer that are represented by the same union (or related local unions of the same parent union). We are not, however, in favour of the forced amalgamation of bargaining units represented by different trade unions. In our view, such actions would not broaden and promote access to collective bargaining but would instead focus unions on competing with each other for the right to represent the already represented workers within the larger combined units.

35. The Carpenters also have no philosophical objection to broad based, multi-employer, sectoral bargaining. Even beyond our activities in the construction industry we are involved in such pattern bargaining. In the LTC Facilities' industry, which is covered by HILDA, such pattern bargaining is the *de facto* norm already with certain unions engaging in the bargaining of multi-employer master agreements and, thereafter, other unions and/or employers negotiating or being awarded similar terms and conditions (and/or negotiating or being awarded *catch-ups* to bring them into line with industry/area norms).

36. Given the above, we would generally welcome the adoption of broader based bargaining structures which would promote access to, and access to effective, collective bargaining for employees who are currently lacking such access. That said we believe that adoptions of such structures must be sufficiently flexible to ensure that the groups of workers involved are not so large that they could not actually be organized. For example, and based on the scenarios provided, a unit of *all fast-food workers in North Bay* might be a group that could be organized while a comparable unit of *all fast-food workers in Toronto* might be such a large and disparate group that it could never actually be organized (at least not at one time and as one single bargaining unit).

37. Finally, and related to the above, employee voice and multi/minority unionism may have to accompany broader based bargaining. In the construction industry, our broad based bargaining is assisted by the fact that the employees in any particular bargaining unit are generally part of the same trade and/or sub-sector of an industry and are transient as between the various employers that are bound to the relevant collective agreements. Even then there are often serious tensions between the interests and desires of the workers and groups of workers contained within a single broad based and multi-employer bargaining unit. In industries that do not have the trade traditions and historic bargaining patterns of the construction industry, care would have to be taken to insure that all of the workers within large, multi-employer and/or sector wide, bargaining units feel represented and do not feel trapped within a regime based upon

principles of majoritarian and exclusivity which is too big for them to have any real influence over or ability to get out of.

Section 4.7 - Additional LRA Issues

Clients and Third Parties

38. One additional area of potential reform which we would ask you to consider is amending the *LRA* such that arbitration proceedings and decisions would, in the appropriate circumstances, be able to be binding upon third parties and/or clients of the employer bound by the collective agreement.

39. Large numbers of workers work for particular employers in circumstances and/or workplaces where others have significant control over a worker continuing to be employed. An office cleaner or a construction worker, for example, can be accused of theft by the owner of the building in/on which they are working and ordered to be removed from their place of work. If the owner (of the building) happens to be the direct employer of the worker involved, a grievance can be filed and ultimately the matter can proceed to final and binding arbitration at which the union has the possibility of getting the employee's job back. However, if the owner of the building is a third party and not the direct employer of the employee involved, the union and the employee are often left without any meaningful process or remedy. In such circumstances the direct employer that is subject to the grievance and arbitration provisions of a collective agreement can simply assert that (regardless of what it believes,

agrees to and/or is ordered to do) it does not have the ability to return the employee to the workplace given the ban issued by the owner and given that it has no other work for that particular employee.

40. Scenarios similar to the example described above are becoming increasingly common. Further they are likely to become even more common in the future given the changing nature of our economy, work patterns and employment relationships. More and more employees are employed in businesses which provide services to third parties and/or in which they work for subcontractors in circumstances where their own direct employer is dependent upon the entities from which it secures its work and with which its own employees must directly interact.

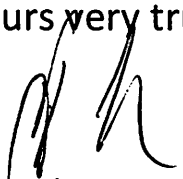
41. Therefore, we are suggesting that in the relevant circumstances and under the overall direction of the arbitrator with jurisdiction of the relevant grievance, such clients and third parties, which are the actual decision makers involved in an employee losing her or his job, could be made parties to and would become bound by the outcome of the arbitration process. Joining additional parties would obviously have to involve providing the requisite notice and allowing the additional party to participate. Therefore such hearings might be somewhat different from the traditional arbitration hearing involving a union and the employer but there are already circumstances in which more than two parties can participate at arbitration. In promotion/job posting grievances notice has to be given and successful candidates do participate as

parties in their own right. As such, tri-partite hearings are not completely abnormal and such a reform could foster meaningful collective bargaining by providing access to actual final and binding arbitration in circumstances when the real decision in issue has been made by someone other than the employer.

Conclusion

42. On behalf of our membership, I thank you for the opportunity to make submissions with respect to these issues and look forward to your report.

Yours very truly,



Tony Iannuzzi
Executive Secretary-Treasurer
Carpenters' District Council of Ontario