SUBMISSIONS OF THE CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS TO THE ONTARIO MINISTRY OF LABOUR IN RESPONSE TO THE CHANGING WORKFORCE REVIEW SPECIAL ADVISORS' INTERIM REPORT

Respectfully submitted by

THE CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS

"CACE"

OCTOBER 14, 2016

Toronto, Ontario, Canada

I Introduction

The Canadian Association of Counsel to Employers, CACE, is a national not-for-profit association of management side labour and employment lawyers from across Canada, who are in private practice, or who work in-house for government or private-sector employers. Formed in 2004 as the only national organization of labour and employment lawyers representing the interests of employers in Canada, CACE now has over 1200 members working in every sector of the economy.

CACE is pleased to be able to provide the Special Advisors with the present submissions regarding the potential reform of the *Labour Relations Act, 1995* (the *"LRA"*) and the *Employment Standards Act, 2000* (the "*ESA*"). A significant percentage of CACE's members act for, or are employed directly by, Ontario-regulated employers. As a result, they have a high degree of familiarity with both the *LRA* and the *ESA*.

Overall, we commend the authors for their broad consideration of issues under both the LRA and the ESA and the broad range of options that are laid out for consideration in The Changing Workforce Review: Interim Report (the "Review"), which are particularly focused on the needs of vulnerable workers in precarious employment. CACE accepts the premise that the ESA, as minimum standards legislation, should protect vulnerable workers in the province, and that it is important to conduct periodic reviews to identify opportunities to enhance the legislation so that it continues to meet this objective. CACE's members are also broadly in favour of amendments to the two statutes, together with their regulations and procedures, that would reduce complexity and confusion, and enhance the workplace parties' understanding of what is required of them.

Clear rules are the first step to compliance. The rules then have to be communicated to the workplace stakeholders. For example, adding information to the ESA poster aimed at educating workers about the distinction between employees and independent contractors would assist in reducing instances of misclassification (though clearer rules would also be helpful).

At the same time, CACE's members also support the proposition that there are opportunities to improve enforcement when employers do not comply (particularly with regard to employment standards). Improved and consistent enforcement would be, in our view, the single most impactful change to benefit vulnerable workers in precarious employment, while also creating a more balanced playing field for employers who may now find themselves competing against other companies that are not complying with the rules. One of the key terms of reference for the Review is to "improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians" in the workplace (Review, page 10). The Review expressly recognizes as two of its objectives, the need for "balance in its recommendations and for stability in bringing change to the workplace" (Review, page 20).

With regard to the discussion of the *LRA,* our members have significant concerns that the Review is in danger of missing the mark. For example, the Review is often dependent upon selected statistical and legal review over a 10-year period of dramatic change (between 1993 and 2003) driven by the various governments of the day – the period that the Special Advisors have called out as representing undesirable changes that were driven by political ideology and the strength of a lobby groups. As such, and of particular concern from our perspective, is that there is insufficient evidence that an overhaul of the *LRA* will ameliorate the condition of vulnerable workers in precarious employment.

II. The Need for Meaningful Consultation and Tripartite Support

While periodic review of how labour and employment relations has changed and how legislation may need to evolve to reflect the needs of employers and workers within the Ontario economy is important, the breadth of the proposals considered by the Review is substantial by any measure. Changes are being considered to fundamental aspects upon which business and labour have functioned with general stability under the LRA for the last decade (and much longer for all employees regulated by the ESA), with measured evolution under progressive and targeted amendments. Dramatic recalibration, particularly without broad stakeholder support and consensus will only

upset the stable labour relations environment that has finally developed (or re-developed since the 1990s).

The Review has, to date, lacked meaningful tripartite consultation, involving government, union and employer stakeholders. Tripartite consultation in labour and employment matters, last seen in Ontario in the 1970s and early 1980s, had been, and should be the bedrock of stable labour relations dialogue and change. Meaningful tripartite participation and the introduction of amendments based upon overall consensus will avoid the "politicization of laws", which the Review stipulates as one of its guiding principles, and is also more likely to garner broad acceptance, support, implementation and compliance. Evolution based upon consensus among stakeholders will facilitate the broader goals of the Review, as effective protection for vulnerable workers in precarious jobs depends on the education of employees and employers concerning their respective legal rights and obligations; a respect for the law; compliance strategies (for employers) and consistent enforcement within a stable human resources environment (Review, page 10). Each of these goals has a greater likelihood of success in an environment in which all stakeholders have understood and accepted the need to implement the changes ultimately recommended.

Balanced and stable workplaces in Ontario will not and cannot be served by re-starting the swinging pendulum of workplace law that reacts to political ideology or influence. Tripartism must be the foundation for the evolution of labour and employment law in Ontario. The Tripartite Consultation (International Labour Standards) Convention, 1976, of which Canada is signatory, at Article 1, paragraph 1, provides that:

> Each Member of the International Labour Organisation which ratifies this Convention undertakes to operate procedures which ensure effective consultations, with respect to the matters concerning the activities of the International Labour Organisation set out in Article 5, paragraph 1, below between representatives of government, of employers and of workers.

Fundamental legislative changes, as are being contemplated by the Review, must be reflective of the wishes and concerns of all stakeholders and shaped through consensus. The International Labour Organisation ("ILO") described the optimum

decision making process in its National Tripartite Social Dialogue, An ILO guide for improved governance, as follows:

> To lead to agreements, tripartite negotiations involve choices and compromises between all parties. The golden rule is consensus-building. There must be a conducive atmosphere of willingness to give and take, and strike a win-win bargain. Both parties need to concede.
>
> A decision reached by consensus is the expression of the collective will of all the parties involved. Consultations and negotiations take place until a decision that is acceptable to all is reached.
>
> (*National Tripartite Social Dialogue*, page 34)

Only in consensus can successful legislative change be achieved in line with the principles set out in the Review. In this respect the ILO described the optimum result based process as follows:

> ILO experience shows that labour law reforms that have been crafted through an effective process of tripartite consultation involving the organizations of workers and employers, as real actors of the labour market, alongside relevant government agencies prove more sustainable, since they take into consideration the complex set of interests at play in the labour market. Also, they can ensure a balance between the requirements of economic development and the social needs.
>
> Conversely, labour law reforms imposed without effective consultations not only often meet with resistance on the part of the labour market actors, but also, more importantly, will lack legitimacy and support and thus will face problems at the implementation stage. The development of a sound legal framework requires broad-based dialogue that guarantees support and ownership as well as effective enforcement of the legislative provisions. In this respect, it is important that the consultation of social partners starts early in the process and takes place at every step of labour law development.
>
> (*National Tripartite Social Dialogue*, page 261)

III. Facilitating Unionization Is Not the Solution for Protecting Vulnerable Workers in Precarious Jobs

When the authors of Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context (a study on vulnerable workers and precarious work, commissioned by the Law Commission of Ontario just following the

end of the Great Recession in 2009) considered how to define a “precarious” job, the authors utilized the following definition upon which to structure their report:

> In the conceptualization of precarious jobs, recall that we use four key indicators of dimensions of labour market insecurity: low wages, no pension, no union coverage (i.e., either by a union or a collective agreement), and small firm size.
>
> (*Precarious Jobs,* page 12)

However, when focused on union coverage (or unionization rates), the authors found no correlation between an increase in unionization rates and the elimination of “precariousness”, or an increase in wages or size of employers. Although the definition of “precarious employment” used in the study is stated to be reflected in the overlap of the four factors, the authors objectively concede that the key factors in identifying precarious employment is the nature of the employment itself, that being temporary, seasonal or part-time in nature, concluding that:

> In Ontario a continuum of precarious forms of employment exists, whereby full-time permanent jobs exhibit the fewest and part-time temporary jobs exhibit the greatest dimensions of labour market insecurity. Part-time temporary jobs are characterized by the largest number of features of labour market insecurity followed by jobs that are part time and other jobs that are temporary …
>
> (*Precarious Jobs,* page 33)

The Review has utilized a more descriptive definition of vulnerable workers, to include those who are:

- working full-time for low wages, with minimal or no benefits, (such as no pension plan); or
- working for low wages without any or minimal benefits such as without a pension plan; and who
    - work part-time involuntarily because they want more hours – about 30% of all part-timers (referred to in the literature as involuntary part-time);
- working part-time voluntarily, in the sense that they do not want, or cannot avail themselves of, more hours;
- working for temporary help agencies or on a temporary basis directly for employers;
- working on term or contract;

- seasonal workers or casual workers;
- solo self-employed with no employees;
- multiple jobs holders where the primary job pays less than the median hourly rate.

(*Review*, pages 33-34)

Since the Precarious Jobs study was conducted, we have seen continued evolution in both regulation and global marketplace trends, thus is limited in its application to current economic factors in Ontario. First, it does not (and cannot) take into consideration the increase in minimum wage (from $9.50 at the time of the study to its current level of $11.40). Second, it defines "pension plan" to be limited to an employer sponsored pension plan, which would be limited to either a defined contribution or defined benefit registered pension plan. No account is provided, for example, for employer contributions to a registered retirement savings plan. Moreover, there is no review of ongoing changes to the structure and trends of non-government pension plans, particularly within industries and businesses that are highly unionized. Further, the study could not have foreseen the current global trend towards self-employment in the "on demand workforce". The Review itself does not limit its definition of vulnerable workers simply to those without a pension plan, but to those having minimal or no employment benefits, a factor for which the authors of Precarious Jobs found no statistical data to review (*Precarious Jobs*, page 6).

IV. The "Sharing" Economy

With regard to the "sharing economy" (also referred to in various other ways, such as the "on demand economy", "zero hour contracts", "gig workers", the "liquid workforce", etc.) there is a massive, global shift under way. Technology is transforming the opportunities for consumers and independent workers to get connected with the introduction and expansion of platforms such as Uber, AirBNB and Upwork. Studies have suggested that many workers in this paradigm have consciously chosen this path for reasons such as flexibility, control and the ability to do work about which they are passionate.

According to a recent study by McKinsey Global Institute, *Independent work: Choice, necessity, and the gig economy* (http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy), approximately 70-75% of independent workers do so out of choice, either as a primary or secondary source of income. Another survey found that more than 94% of "gig" workers would not stop their work to focus solely on traditional 9-5 employment if they had the opportunity, and more than half (54%) believe they can earn more through this marketplace than in traditional 9-5 employment *(Survey conducted by Invoice2Go, November 2015, discussed in Invoice2Go Insights: Side-Gigging and the New Normal of Work, https://blog.2go.com/invoice2go-insights-side-gigging/).*

According to the McKinsey study, approximately 20-30% of the workforce is engaged in independent work, and the expectation is that this segment of the economy will continue to grow. The study found that those engaged in independent work by choice reported very positive work experiences, and even those who were working independently out of necessity enjoyed the flexibility of the work, but were concerned about their level of income.

The McKinsey study has also identified the need for the various workforce parties, including policy-makers, to address the areas of concern identified by independent workers, including tax incentives, affordable benefits, training and planning for their retirement. In our view, this new economy offers tremendous opportunities to provide meaningful, engaging and remunerative work for many Ontario workers and that there is an opportunity for Ontario to lead in this emerging space if it takes well-informed, measured and targeted steps to addressing the needs of the marketplace, which may well include expanding some coverage under the *ESA* in appropriate circumstances. We also urge the Special Advisors to be cautious in accepting that the ideal paradigm is the "traditional 9-5 job". One recent commentator observed:

> The left tends to romanticise the idea of the 'job for life', forgetting that for a lot of people the reality was decade after decade of turning up like clockwork to do work they hated, and longing for retirement. This, too, is miserable, even if your pay is fair. Job security can be a kind of burden, a brake on the nurturing of hopes and the following of dreams.
>
> *"Are zero-hours contracts really worse than 'jobs for life'", Deborah Orr, The Guardian, September 10, 2016*

The global marketplace is moving away from the traditional job, and independent work offers the opportunity for individuals to benefit from flexibility, control, more interesting work and the ability of being one's own boss.

To assume that independent workers are by definition "vulnerable" is not only factually incorrect, but creates a significant risk that any legislative changes based on this assumption will already be out of step with the modern economy.

V. Options for Change Demonstrate a Bias in Favour of Change Without Adequate Support

Under its terms of reference, the Review expressly agreed with the statement of Professor Gunderson that: "… any policy initiatives must consider their effect on business costs and competitiveness especially given the increased competitive global pressures, the North-South re-orientation and the increased mobility of capital" (Review, page 19). The Review recognizes that fundamental review and change cannot be dictated in an economic vacuum and that "the regulation of labour and employment law must not be so burdensome as to impair unnecessarily the competitiveness of Ontario business". (*Review*, page 19)

However, in its summary of options in respect of various proposed changes, there is no context provided to employer stakeholder propositions for keeping the *status quo*. After more than a decade of dramatic fluctuation in labour relations policy based upon ideology, the Review has unfairly equated the *status quo* with potential stagnation. The review of options proposed by union stakeholders is done without: (a) any expression of the need for change, except on the basis that it supports institutional union goals; (b) consideration of the economic impact of the proposed change on employer and the economy generally; and (c) how the proposed change would meaningfully address

needs related to vulnerable workers. Any proposed legislative reform must address these contextual factors.

VI. CACE's Response to Specific Issues Raised in the Report

A. Section 4.3.1.1 Card-based Certification

As part of the Review, a number of reports were commissioned, including *Collective Bargaining* (Toronto: Ontario Ministry of Labour, 2015), authored by Dr. Sarah Slinn. The Review stated that Dr. Slinn had concluded that: "studies [had] consistently [found] that the presence of [a mandatory vote certification model rather than a card-based certification] procedure is associated with a statistically significant reduction in certification application activity, including success rates." (*Collective Bargaining*, page 11)

The Review acknowledges that Dr. Slinn identified the two aspects of the vote model that she determined had inhibited successful certification of a bargaining unit: (i) delay; and (ii) the related opportunity for an employer to engage in an unfair labour practice (a "ULP") prior to the vote (*Collective Bargaining*, page 12).

Combating delay and available remedies for potential ULP activity have been addressed in prior changes to the *LRA*. The most recent statistics published by the Ontario Labour Relations Board (the "OLRB") in its 2014/2015 Annual Report show that 95% of industrial certification votes were held within five working days of application, entirely in line with the "quick vote, quick count" model in place in Ontario for the last twenty-years. Dr. Slinn, in *Collective Bargaining*, relies upon a single study, conducted in respect of the impact of delay for the time period following introduction of the mandatory vote requirement of 1995-1998, where she acknowledges that the most typical reason for "delay was due to the OLRB exercising its discretion to delay the vote." (*Collective Bargaining*, page 13). There is simply no evidence that the current timelines for a certification vote are not being enforced and followed by the OLRB or that a five business day voting period is too lengthy so as to inhibit certification or promote illegal activity by Ontario employers. The Review simply cannot presume that all or even most Ontario employers will or intend to act in an illegal manner during a

certification application. There is no evidence to support such a negative view of Ontario employers.

The proposal for a card-based model is not supported by the evidence of a compelling need, and appears to be entirely based upon the unsubstantiated assumption that increased unionization automatically addresses the needs of vulnerable workers in "precarious employment".

In *Precarious Jobs*, the authors state in their introduction:

> To date, studies of Canada as a whole have shown that precarious jobs are most often held by workers in certain social locations, especially women, immigrants, and racialized people and in certain sectors, industries and occupations, such as in the private sector and sales and services in particular.
>
> (*Precarious Jobs,* page 1)

There is no statistical correlation provided that connects declining union rates, particularly as it relates to employees in vulnerable positions, with a vote-based model for certification. Statistics Canada, in its most recent review of unionization trends confirms that the unionization rate has been in steady decline since 1980 (and started when a card-check system was in place for non-construction employers in Ontario). The same review shows that the unionization rate among young women decreased at a much lower rate when compared with men of any age group and that the unionization rate for women between the ages of 45 to 64 had actually increased when comparing 2014 with 1981. This evidence, therefore, does not support the conclusion that the rate of unionization is correlated to those in vulnerable employment. For example, the Review identifies women as the fourth largest population represented in precarious jobs (with low skill employees (those without a high school diploma), single parents and recent immigrants being more represented) (Statistics Canada, *Canadian Megatrends*, 11-630-X).

Simply stated, the unionization rate is and continues to be more reflective of a shifting economy rather than the manner in which certifications are conducted. The evidence

does not support revolutionary change of the *LRA* and the current vote-based union certification model, particularly in light of more recent evolutionary changes that have addressed specific concerns with broader stakeholder acceptance (Bill 144, *Labour Relations Statute Law Amendment Act, 2005*), and that have maintained labour and business stability. Transformation is appropriate when a system has proven incapable of functioning and serving the purposes sought – this is not the case in Ontario, where labour relations has been effectively regulated for decades and stable for at least the last ten years.

The foregoing does not provide support for an amendment to fundamental democratic principles in Ontario workplaces that would take away from employees themselves a meaningful participatory right in determining whether they wish, by simple majority, to assign their personal contractual rights to an agent.

Moreover, we suggest that a mandatory card-check system in the context of the *Wagner Act* model runs afoul of the views of the Committee of Experts at the International Labour Organization:

> [W]hen national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all the workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; **(b) the representative organization to be chosen by a majority vote of the employees in the union concerned**; (c) the right of an organization, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organization other than the certified organization to demand a new election after a reasonable period has elapsed." [bolding added]
>
> *Freedom of Association and Collective Bargaining, Report III (Part 4B), International Labour Conference, 81st Session, 1994, Geneva, para. 240*

B. 4.6.1 Broader-based Bargaining Structures

The Review has proposed options related to sectoral and/or multi-employer bargaining outside of the construction industry. Unlike the introduction of province-wide bargaining of the industrial, commercial and institutional construction sector (and the accreditation system) put in place in the 1970s for Ontario's construction industry more generally, the Review concedes that there has been no support expressed by employer groups for broader-based bargaining structures for non-construction businesses. This is in direct contrast to the employer support that preceded the legislative changes and sectoral representation in Ontario's construction industry.

The Review refers to two "models" of broad-based bargaining: the aforementioned Ontario construction industry and the federal arts sector. However, the Review concedes rightly that examples of broader based bargaining models outside of these highly specific industries are limited. Both example industries, not surprisingly, have two key employment aspects that distinguish their employment from those in large industries with many (sometimes smaller employers): (a) the work is transient and temporary; and (b) is divided into common and identifiable trades or skills that are then interchangeable amongst employers.

The Review notes that:

> Another option for sectoral bargaining is a model which permits an application for certification for bargaining rights for multiple employers in an entire sector, defined by industry and geography, in which multi-employer bargaining would take place with a union or council of unions and a designated employer bargaining agency in a sector. In this scenario, the collective agreement would apply to the entire sector.
>
> (*Review*, page 120)

This structure is reflected in Ontario's construction industry, which is divided into construction sectors, by building trades. However, there is no detail whatsoever provided in the Review as to how industries would be defined and how/if they would be internally divided.

As an example of an industry sector that could be a candidate for broader-based bargaining structures, the Review references service industries, such as restaurants. In our view, this suggestion is so vague and impractical as to verge on being irresponsible. The Report offers no suggestion on how such an outcome could be implemented. For example, would the industry sector provide for all-employee units, including wait staff, cleaning staff, kitchen staff, and chefs? Would there be demarcation based on size of restaurant, size of staff, pre-existing bargaining rights, location? How would the industry divide amongst food types offered at restaurants and address the vastly different working conditions of workers at fast food restaurants at the one extreme and workers at high end formal dining restaurants at the other. The Review describes, as "technical details" important factors never previously applied to non-construction multi-employer bargaining units in Ontario, such as:

a) how would appropriate sectors be identified;

b) when, identified, how would they be defined in terms of skill set, job, industry and geography (to name a few key characteristics); and

c) what membership evidence, level of support and method of proof of support would be necessary for determination of a sector application and certification.

A key component of the success of the sectoral system within the construction industry in Ontario is based on an employment structure that is unique to construction – the hiring hall. As noted in the Review:

> Put simply, employers in the construction sector who do business in a very competitive market and whose product, or a similar one, can be purchased from numerous contractors at the same or similar price, felt vulnerable in a single-employer collective bargaining regime. Multi-employer bargaining was seen as providing the best chance for creating a level playing field for all unionized employers in the sector.
>
> (*Review*, page 121)

The Review fails to accept that a key component of the success of this structure, however, is also a result of the fact that competition for labour has effectively been removed from the construction industry and with it substantial obligations of employers

(from severance and notice costs to licencing and training). Voluntary recognition in Ontario for construction employers can be viewed by some as a net positive by providing such businesses access to limited skilled labour.

The Review also states that a single majority vote model is to be preferred to a double majority (such a currently used for non-ICI accreditation in Ontario's construction industry). The Review apparently concludes that a double majority process is not to be preferred as it would, by definition, accept there to be a non-union portion of the sector. The conclusion ignores the fact that there remains a very large and vibrant non-union construction industry option in Ontario, which provides a substantial economic benefit to the province. As conceded by the Review, a simple single majority, instead of a double majority, system would result in the certification of all employers in the identified sector, with no non-union component, necessarily including both new employees and new employers that join the sector who were not party to or participated in the initial certification. Not only would such "forced" association not be constitutionally supported, it would cause economic turmoil in the affected industry.

C. 5.2.2 Who is the Employer and Scope of Liability

In respect of *ESA* enforcement, the Review boldly states that:

> Non-compliance in many industries may be driven by the practices of organizations at higher levels of an industry structure. The higher level company may, for example, control the economic model that dictates whether the entity with responsibility for running the business or providing the goods or services can even afford to conform to minimum standards. An example is a franchisor whose economic model makes it problematic for the franchisee to comply with minimum standards. Also a business needing a particular service may create fierce competition among subordinate businesses with whom it contracts by constantly retendering. Or, it may set pricing policies that make ESA compliance by the subordinate businesses difficult. Sometimes there is a contracting chain with multiple levels of subcontractors, with the actual work being performed at the lowest level.
>
> (*Review*, page 149)

However, no evidence or statistics were provided or reviewed which supports the contention that compliance with employment standards obligations under the *ESA* (or any other employment related statute – the *Occupational Health and Safety Act*, *Human Right Code*, *Workplace Safety and Insurance Act, 1997*) suffers through a supply chain and/or franchise economic model. The Review does not reference the fact that Ontario "supply chain" employers are, in themselves, large sophisticated businesses within the Ontario economy. The "fissuring" of business and employers through the supply chain is reflective of a change in the global economy (and Ontario's place within it) that has replaced vertical integration with specialization for efficiency.

Extending compliance liability could result in unintended grave economic consequences not considered in the Review. First, compliance liability for "supply chain" employers may cause businesses to keep more work in-house, affecting supply chain cost scales, resulting in reduced employment overall. Second, extending liability could affect a core goal of the Review, increased compliance. If companies at the top of the supply chain are de-incentivised to maintain and strengthen legislative compliance obligations as an aspect of their ongoing contractual relationship because of the threat that such "integration" will result in joint liability, many companies could move to a complete "hands off" approach and make sure that all such contractual relationships are at full arms-length. This would be a very unfortunate reversal of a trend that has developed in the past decade of companies embracing corporate social responsibility and introducing expectations of compliance down through their respective supply chains.

D. 5.2.3 Exemptions, Special Rules and General Process

We think it is a reasonable and fair suggestion made in the Review that current exemptions be reviewed for current relevance. That said, we do not support the view on exemptions that the Review states need no review and should be discontinued. The occupations in that group can be broken down into three categories: safety and health, occupations with great control over working conditions, and students.

Whether personal care workers or building caretakers, these unique jobs have critical health and safety responsibilities, and no decision should be taken without careful

consideration of the implications of doing so. Even on the premise that these are vulnerable workers in these occupational groups, consideration must be given to alternative means for addressing the concerns that originally gave rise to the exemption.

Managers and supervisors, and IT technologists typically have greater control over their working hours. Many IT technologists have considerable bargaining power due to their skills and workforce shortages, and have historically negotiated favourable terms and conditions of employment. Managers and supervisors are usually well compensated for excess hours of work, and typically have greater control over how, when and where their work is carried out.

CACE recognizes that there are certainly circumstances where position title does not match the true situation of a worker, or when the general experiences in the market are not borne out in a particular role or workplace, especially where compensation does not reflect the higher expectations. To address these concerns, we suggest that a compensation threshold might be considered for an exemption, or possibly other conditions. Regardless, no changes should be made to these exemptions without careful consideration of the implications of doing so, and alternate means for addressing those implications.

The third group is composed of students. The exemptions were obviously not driven by a view that they do not need protections. Rather, there are socio-economic drivers involved that merit consideration, such as the need to promote employment among young workers. We do not disagree that students are often vulnerable as workers, and that we have a special obligation to ensure protections for students. However, to drop the exemption without a deeper consideration of the implications would not be good policy.

Otherwise, we see a review of the exemptions under the ESA to be a valuable undertaking.

E. 5.3.1 and 5.3.2 Hours of Work and Scheduling

CACE strongly believes that the hours of work and overtime provisions need to be reformed. The existing rules are outdated, difficult to administer, and costly for employers. Furthermore, they do not reflect the realities and structure of modern workplaces or the preferences of many employees in modern society.

With regard to the right to request flexible working arrangements, employees and managers have been working out arrangements to accommodate the personal needs of the employee for years. But the *ESA* does not make it easy. Many employees would prefer to work longer days over shorter weeks, or would like to be able to take a few hours off work one day and make them up another. The strict rules around hours of work, overtime and overtime pay put severe limitations on how flexible these arrangements can be. While the modified hour provisions are designed to provide some assistance in this regard, these provisions are overly cumbersome and too impractical to address situations requiring greater flexibility as they arise in the day-to-day lives of employees.

The approval process for alternative hours of work schedules creates a huge disincentive to ask for or grant a long term accommodation of changes in working hours. It is an even greater barrier to short term accommodations. Thus, the current process does not serve workers or employers. It should be considerably simplified, if not completely eliminated.

In addition, we anticipate collisions between the rights of workers requesting flexible working arrangements due to personal preference or convenience and the rights of workers requesting flexible working arrangements that are required to accommodate human rights grounds (such as disability, religion, family status). Any attempt to include the right to request flexible arrangements must recognize the paramountcy of requests for accommodation. For CACE's thorough position on the topic of creating a right to request flexible work arrangements, please find attached our recent submissions to the federal Minister of Labour.

F. 5.3.8.3 Just Cause

The Review did not provide a detailed analysis of submission and proposals regarding what would be a significant change to employment relations in Ontario, “unjust dismissal protection that allows employees to contest their termination and provide for possible reinstatement by an independent arbitrator where no cause is found to exist” (page 233). The Review does not address or consider the process, risk or cost of expanding and/or creating a dispute resolution mechanism that would be necessary to adjudicate matters currently handled by the courts. There is also no consideration as to whether: (a) the adjudicative process would fall within the exclusive jurisdiction of the dispute resolution mechanism created; (b) permit self-represented complainants; (c) administrative oversight would be provided to dismiss complaints that lacked any reasonable prospect of success; and (d) how termination related to economic and business circumstances would be addressed.

Fundamentally, however, there is simply no evidence that Ontarians do not have ample protection and enforcement mechanisms available at law to address any termination issue. In particular, Ontarians benefit from notice of termination provisions as generous as other provinces, and for those who are eligible, severance pay which is not available in any other province. Moreover, the common law has been extended over the past few decades to address perceived deficiencies in the law of termination by recognizing new causes of action and by awarding greater damages to employees who have been mistreated by their employers. While the common law does not offer workers the opportunity to be reinstated to their jobs from which they have been dismissed, experience has shown that non-unionized employees often do not wish to be reinstated to work for a company that has terminated them unlawfully. Finally, access to justice for non-union employees has been significantly enhanced, including expanded access to Small Claims Court, the Simplified Procedure, and the evolution of the Summary Judgment Process. In short, at least in Ontario, this is a proposal in search of problem that does not exist.

Should the Special Advisors consider this option, CACE submits that the remedy should be limited to situations where an employee alleges that his or her termination was

unlawful (e.g., terminated in retaliation for having reported wrongdoing in the workplace, or for refusing to perform an illegal task), and that the issues raised in the first paragraph above must be addressed.