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Changing Workplaces Review

Greater Sudbury Chamber of Commerce Submission

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

Dear Special Advisors,

Thank you for the opportunity to make this submission in response to the *Changing Workplaces Review*.

The Greater Sudbury Chamber of Commerce represents approximately 1,000 business members who employ in excess of 45 000 employees, and acts as the voice of business for Greater Sudbury.

As a business organization championing economic prosperity and growth, we understand that employees need to be protected. However, we are extremely concerned with a number of options being presented for consideration under the Interim Report of the *Changing Workplaces Review*.

The chamber echoes the principles outlined by the *Keep Ontario Working* coalition, particularly the principles of ensuring any changes to labour legislation are evidence-based, protect competitiveness and consider the current economic climate. Any changes should take into consideration the potential impact on the economy, on jobs, on small business growth, as well as on Ontario's competitiveness. Employee rights can still be protected while being mindful of advancing economic growth in our province. We should ensure that the responsibility of government is not downloaded onto the backs of our businesses.

We ask that any changes to labour legislation consider the current cumulative burden faced by employers. Employers in Ontario are faced with the second highest minimum wage in the country, electricity prices that have increased 374% since 2004, some of the highest WSIB premiums in Canada, and a newly established cap and trade system which will impose further costs on business. Additionally, businesses are now shouldering more than ever in terms of having responsibilities downloaded on them related to mental health, violence and harassment, accessibility and occupational health and safety. Unfortunately we have witnessed too many businesses in our community shut their doors, lay off employees or increase the costs of goods and services due to the rising cost of doing business. Further regulation when it comes to the *Labour Relations Act* (LRA) and the *Employment Standards Act* (ESA) will only serve to exacerbate these issues.

The chamber recently launched a campaign alongside the Ontario Chamber of Commerce called *Small Business: Too Big to Ignore*. As part of this campaign our chamber hosted a series of four roundtable sessions with small business owners in our community to ask them what their top obstacles are to growth. Within the top three most mentioned small business challenges were existing labour laws and regulations.

Challenges identified in our roundtable consultations with small business employers (employing 100 or less employees) included having difficulty navigating through the complex system of both the ESA and LRA, lack of flexibility/recourse to deal with badly behaved employees and the costs associated with defending claims brought forth to the Ministry of Labour (MOL). Many employers also mentioned feeling powerless when it came to dealing with the excessive amount of labour laws and red tape/paperwork associated with labour legislation. During these sessions, employers also recommended that the Human Rights Commission and the Ministry of Labour be consistent with one another. Employers in our region say that they have successfully defended a case with the MOL, only to have a similar case accepted by the Human Rights Commission. Defending such cases can be very costly. The government should ensure that aggrieved employees are directed to the right forum at the outset, so that employers are not required to defend cases in multiple fora. Business owners feel that they can't win a case brought before the Human Rights Tribunal, as even a meritless case will result in significant costs being incurred, while a claimant is provided with a lawyer at the cost of the taxpayer.

We would like you to consider the impact of drastic labour changes particularly on small employers that often lack sophisticated human resource departments or resources to deal with further regulation.

There are a number of different regulations to support employees but there is often less support and protection extended to employers. Many employers have mentioned the need for employees to be accountable to their employers for abuse of health benefits, Personal Emergency Leave days, sick days, absenteeism, etc. Employers we have spoken with have mentioned spending the vast majority of their time dealing with those employees who violate workplace policies and often having little time or resources to recognize the behaviour of good employees.

The chamber would also like to reinforce the importance of timing. Any changes should consider the current economic realities our province and regions are facing. Northern Ontario for example, is currently facing a commodity downturn which has negatively impacted the ability of businesses to grow and hire in the north. Further, increasing globalization of the mining and other commodity-based industries means that incremental costs associated with changes of the type currently contemplated may result in decisions by multinationals not to invest in the Province. These decisions will have a disproportionately large and negative effect in Northern Ontario.

Any changes to the ESA or LRA should be sensitive to the timing of implementation and use phase in approaches when possible. It will take both employers and employees time to fully understand the drastic changes that could potentially come with this review. The Ministry of Labour should focus on education when it comes to these changes rather than immediate enforcement once these changes are enacted.

The chamber also contends that existing legislation adequately responds to employee concerns. We do not believe tightening of labour laws is needed. On the contrary, we believe that Ontario is, and is regarded as being, a jurisdiction where employees' rights are vigorously and appropriately protected. To add more legislation will increase uncertainty, complexity and cost to a stable, efficient and effective employment and labour law regime.

Many employers we have spoken with feel that labour legislation has already gone too far in providing employees with incentives, and means to challenge their employers as well as limiting employers' ability to deal with poorly performing employees or those in violation of workplace policies.

Rather than more regulation, we believe greater scrutiny of claims brought to administrative tribunals is necessary, to ensure that businesses are not required to defend meritless legal proceedings, and to incur the significant cost and inconvenience that results from these proceedings.

The following submission will focus on those areas under review that are most concerning to our chamber including: card-based certification, replacement workers, joint employers, scheduling provisions, ESA exemptions, and the Personal Emergency Leave (PEL).

LABOUR RELATIONS ACT

1. Unionization and Card-Based Certification

One option under consideration under the *Changing Workplaces Review* is moving back to card-based certification. The chamber contends that a move towards card-based certification would represent a major step backwards in democratic processes and be inconsistent with almost every jurisdiction in Canada and the United States.

There are a number of concerns with the move away from secret ballot voting. Card-based certification makes employers particularly vulnerable as certification is based on those working on the date of application. This means that automatic certification will apply even where 55% of the employees at work constitute a minority percentage of the employers' actual total workforce. The system is open to abuse as the wishes of only a few

employees, can dictate the unionized status of others. Two employees could certify an entire workforce. Card-based applications may be brought by unions on a Saturday for strategic reasons when few employees are working for example. Union strategies can also include the use of "salts" (individuals sent by the union to seek employment for the sole purpose of bringing a union to the workplace) to certify companies against the will of regular, longer-term employees by bringing forward applications on a day where it is known that only a few employees are working.

Certification based on membership cards removes the employee's right to vote on whether or not they choose a union. Secret ballot voting safeguards employees from intimidation or pressure from union organizers and employers and helps ensure their true opinion is represented. While a secret ballot vote is conducted in a neutral environment by the Labour Relations Board, the collection of signatures on union membership cards is controlled entirely by union leadership. There is little means to address abuse and fraud by union organizers during an organizing drive.

Card-based certification also eliminates an employer's opportunity to communicate with their employees about the union certification application prior to a vote. In a card-based certification, the employer is usually unaware that a union organizing drive is taking place, until the application date has passed, at which time the cards are signed and cannot be revoked.

Card-based certification shifts the balance in favour of organized labour. Small employers without specialized knowledge of labour law are at a particular disadvantage relative to large union organizers. Moreover, there is a lack of evidence to suggest that employees' true wishes or rights have been compromised since the move to card-based certification.

In addition to maintaining the current secret ballot voting system, the chamber also advocates for the elimination of the card-based certification system for small construction employers. Construction employers are currently the only sector in Ontario required to use the card-based certification system. Small construction employers are particularly vulnerable to the machinations of an ill-motivated union organizing system.

Recommendation:

- Ensure transparency in the union certification process. Maintain the LRA requirement for a secret ballot vote in terms of the current process by which a union may organize.
- Eliminate the card-based certification system for small construction employers.

2. Replacement Workers

The Interim Report refers to replacement workers as "workers hired to fulfill some or all of the functions of workers who are either engaged in a legal strike or who have been locked out by the employer."

The ability of an employer to hire replacement workers during a strike or lockout is essential for the balance between employers and unions. If the use of replacement workers was prohibited, it would tip the balance of the power in negotiations disproportionately toward unions. Even though employers currently have the ability to hire replacement workers, the ability of unions to go on strike already imposes a great deal of pressure on employers through loss of revenue and public opinion. A strike can be a devastating weapon in the hands of the union. In our community, this has led to the shutting down of business operations. Removing the ability of employers to

maintain nominal operations during a strike through the hiring of replacement workers would result in more businesses being shuttered because of unrealistic and unreasonable union bargaining positions. Employers require the ability to hire replacement workers for the purpose of maintaining nominal operations during ongoing negotiations toward a compromise of collective agreements.

Additionally, replacement workers allow for employers to keep their operations afloat and to continue to meet customer needs during a strike. In Greater Sudbury, we have various companies that maintain multi-million dollar pieces of equipment for their operations. These pieces of equipment need to be constantly running and operated by employees or risk damage and machine failure. Companies could face the loss of millions if they do not have the employees needed to continue nominal operations or equipment maintenance during a strike.

The chamber also does not view the issue of replacement workers as one related to the protection of workers, but more about the unions' interest in shifting the balance of bargaining power in their favour.

Recommendation:

- Maintain the status quo – continue to allow the employer the ability to utilize replacement workers in the face of a strike.

3. Determination of Related/Joint employers

One option presented in the Interim Report is to add a general provision providing that the Ontario Labour Relations Board (OLRB) may declare two or more entities to be "joint employers" as well as an option to expand the related employer provision. Joint-employment refers to the sharing of control of an employee's activities among two or more business entities.

A move towards such options would have major impacts on the franchise industry.

A joint employer designation for franchisees and franchisors would represent a disruption in the current relationship between employers and employees. We echo the view of the Canadian Franchise Association that these options under consideration undermine the independent nature of the franchisor-franchisee relationship by making franchisors co-employers and therefore liable for franchisees' employees. The definition of franchisors as joint employers would immediately open franchisors up to enhanced uncertainty and costs including being exposed to employment, labour and collective bargaining risks. This would represent a fundamental change as currently the majority of franchisors have minimal impact on the employment related decisions of franchisees.

Moreover, a move towards expanding the definition of "employer" to deem franchisors joint employers would mean the loss of autonomy of the franchisee. For instance, a joint employer status might result in franchisees having to pay the same salary for employees in all regions across Ontario. This would reduce employer's flexibility to base employee pay on performance or other regional factors.

A change in the standard of joint or common employer can also result in the unintended consequence of franchisors offering less support to their franchisees to avoid the risk of being classified as a common employer. This could in turn make the purchasing of a franchise a less attractive option for entrepreneurs and negatively impact jobs in the province.

Franchise businesses employ hundreds of thousands of Ontarians, disrupting the current balance that exists between the franchisee and franchisor can compromise the competitiveness of this sector.

Recommendation:

- Maintain the status quo – the push for joint employer status would be harmful to the independence and flexibility of business owners.

EMPLOYMENT STANDARDS ACT

1. Scheduling Provisions

As mentioned in the Interim Report there are currently no provisions in the ESA requiring an employer to provide advance notice of shift schedules or of last minute changes to work schedules. The Interim Report presents options including requiring employers to provide advance notice of changing work schedules such as posting employee schedules two weeks in advance and requiring employers to pay employees for last-minute changes to scheduling.

The chamber believes that these options do not recognize the diversity of Ontario workplaces. A universal scheduling provision also limits employers' flexibility to respond to shifting demand for goods and services. Employers in the manufacturing sector for example are constantly faced with last minute adjustments to production in order to meet demand. Similarly, the health sector often undergoes unexpected surges in demand that need to be met by increases in staffing. It is extremely difficult to predict the daily demand for health services. Legislative scheduling requirements would greatly reduce the competitiveness of these types of business sectors by inhibiting their ability to meet changing demand.

On the other side of the equation, we have also spoken to a number of employers who have indicated that they have made concerted efforts to post work schedules two weeks in advance. A number of these employers have indicated that despite the advance notice, they have been faced with employees cancelling their shifts last minute or not showing up for work. Some employers see this as a shifting priority amongst younger employees away from work and toward "work-life balance". While this may be a positive development for those individuals, the increasing unreliability of employees to show up for work when scheduled increasingly challenges employers' ability to schedule work, as employees are not showing up for work when scheduled. This hits the employers' bottom-line and their ability to meet client needs. Despite these challenges, there is very little protection for employers when it comes to their employees' cancelling their shifts last minute. There is no provision to allow employers to recoup costs from their employees for lost production and last minute changes; similarly employers should not be required to pay employees for last minute changes that are often out of their control. Again we would like to reinforce the importance of having a balance between employee and employer rights.

Recommendation:

Do not amend the ESA to include a universal provision around employers' scheduling obligations. Maintain the status quo.

2. Sectoral Exemptions

The Interim Report includes options to remove some or all sectoral exemptions. The chamber recommends that the ESA continue to take into consideration sectoral differences when it comes to the organization of work and its costs. It echoes the *Keep Ontario Working* submission which states that certain industries like IT which has unique working conditions or agriculture which is highly dependent on global market demand require standards that are flexible and responsive to the nature of their distinct work.

Recommendation:

Continue to recognize sectoral differences and maintain current sectoral exemptions under the ESA.

3. ESA Exemptions - Managers and Supervisors

Employees who are classified as managerial or supervisory are exempt from overtime pay and from the rules which govern daily and weekly hours of work. The review outlines various options which could narrow the definition of manager and supervisor and eliminate some of these exemptions.

The chamber recommends that the status quo apply to the treatment of managers and supervisors. Narrowing the definition of managers/supervisors would greatly impact an employer's bottom line and could also limit the professional development of an employee by potentially changing their title and/or duties/responsibility levels.

Employers often provide managers/supervisors in their organization with benefits that more than offset the protection that they would receive under overtime and hours of work rules. The government should be loath to interfere in these freely negotiated contracts between the employer and employee.

Recommendation:

Maintain the status quo in terms of the treatment of managers in the ESA when it comes to overtime pay and hours of work.

4. Personal Emergency Leave (PEL)

The chamber urges the preservation of the existing 50 employee threshold for the PEL. Existing leave provisions are reasonable. Significant changes to the PEL could compromise the competitiveness of Ontario's business community. The removal of the threshold would be extremely costly for small employers who often lack the human resources or financial capacity to manage PEL. Changes should not be considered without a full

understanding of how this additional pressure/cost will impact small business. We have spoken with many small business owners who have indicated that they would have to offset these additional cost somehow either in the form of reducing shifts, laying off employees or raising the costs of products/services. The issue of what is considered an "urgent matter" under the PEL is also up for interpretation. Employers in our network have reported that some employees have taken the PEL days as general personal days without being faced with an actual urgent matter or emergency. To the extent changes are to be considered, we urge the government to clarify the circumstances in which PEL is warranted, and allow for reasonable decisions by employers to deny such leave, without being subject to punitive allegations and consequences by the MOL. Under the current language, it is difficult for employers to manage these requests and to refuse PEL days due to their sensitive nature, the vague language presented in the ESA and because of the significant threat of a reprisal allegation being made against it by MOL officials.

Recommendation:

Maintain the 50 employee threshold for PEL. Clarify circumstances in which an employee will be entitled. Allow for a non-contentious dispute resolution mechanism.

Other Recommendations:

1) **Vacation:** Maintain the current ESA vacation entitlement of 2 weeks.
2) **Greater Right or Benefit:** Maintain the current provision that exempts employers from the ESA when the employer provides the employee benefits (pay, hours, personal days etc.) that are more generous than the minimum standards as outlined in the ESA.
3) **Hours of Work:** Maintain the status quo for the general number of hours workers can work in a day or week (8 hours per day or 48 hours a week) and when overtime must be paid (after 44 hours in a week).
4) **Employee Status:** Do not enact a reverse onus provision regarding employee status under which a worker is presumed to be an employee, unless the employer demonstrates otherwise. Employers make use of independent contractors for various types of services such as janitorial services or security for example. A reverse onus provision would not only enhance red tape and reporting but could also raise the cost of doing business by changing relationships between employers and contractors.
5) **Successor Rights:** Broadening successor rights to other industries can reduce employers' flexibility when it comes to determining what is best for their business in terms of their workforce. The chamber suggests maintaining the status quo when it comes to successor rights. If successor rights were to be broadened, the chamber recommends that the type of industries that successor rights be broadened to be narrowly defined and not up to interpretation.
6) **Part-Time Work:** The review presents options to require part-time, temporary and casual employees to be paid the same as full-time employees in the same establishment unless differences could be justified based on other factors. We suggest maintaining the status quo regarding part-time work. Employers often take into consideration various factors when determining pay for part-time/casual employees versus full-time employees including range of responsibilities of the employee, performance, future development/promotion of the employee within the organization, years of experience, years of employment within the organization etc. Requiring employers to pay the same rate for part-time employees and full-time employees can impose significant costs to employers' bottom line and may also result in employers reducing their hiring of part-time staff because of these added costs.

Considerations

Education:

We echo the *Keep Ontario Working* submission regarding the importance of enhanced educational efforts to promote a better understanding of obligations, responsibilities and rights outlined in the LRA and the ESA for both employers and employees. We also agree with the *Keep Ontario Working* coalition that the majority of employers that have faced infractions are non-compliant because they lack a proper understanding/knowledge of their obligations under these Acts rather than being intentionally non-compliant.

We hear constantly from employers in our region that they find it extremely challenging to navigate through labour legislation because of the technical language presented in both the LRA and ESA and the vagueness of certain sections, leaving much to be interpreted.

The chamber advocates for an awareness campaign type of approach when it comes to educating employers and employees. The focus of any educational efforts should be proactive, positive and take a "how can we help you?" attitude. Any type of educational efforts should be voluntary for employers rather than mandated.

The chamber recognizes that there were a number of inspection blitzes carried out by the Ministry of Labour of different industries and various employer infractions were found. However, we believe that positive educational awareness before these blitzes would have reduced the average number of infractions.

In addition to education, we would like to reinforce the importance of the Ministry of Labour having more of a customer service and "how can we help" attitude. Many employers have advised us that the MOL seems like more of a policing agency that a government department aiming to help both employers and employees understand their rights and obligations. We have heard accounts from employers regarding difficulties receiving correct responses from the MOL over the phone or waiting for days to receive answers to inquiries. We have also heard of accounts of MOL inspection staff treating employers with hostility when entering their workplaces even before conducting their inspections and blitzes. Although we cannot say for certain how widespread these situations are, we do reinforce the need for a better customer service attitude at the MOL and enhanced training of MOL staff.

We would also like to reinforce that education/prevention and enforcement should be treated together as a whole. Enforcement will become less of an issue with enhanced educational awareness of the ESA and LRA. In terms of enforcement, the Ministry of Labour should focus on managing exemptions and targeting its efforts on those areas of the ESA and LRA that require the most need or that are faced with the most non-compliance.

Conclusion

The chamber believes that the status quo should be maintained in many areas under consideration in the Interim Report. The chamber contends that employees are much more protected today than ever before and that drastic changes to the LRA and ESA are not needed at this time. Labour market flexibility is needed to allow both employers and employees to respond to changing market conditions and to help reduce shock associated with our cyclical economy.

Rather than focus on increased regulation when it comes to labour legislation, the chamber would like to see the Government of Ontario focusing on issues such as skills development and training, enhancing inter-provincial labour mobility and promoting the trades.

Northern Ontario has some of the most pronounced labour shortages as well as unemployment rates in the province. Drastic changes to labour legislation can make it even more difficult for employers in our region to hire and grow their business.

On behalf of the Greater Sudbury Chamber of Commerce and our membership, we thank you for allowing us the opportunity to respond to the *Changing Workplaces Review's* Interim Report. We would welcome any opportunity to meet with you to further discuss these issues.

Yours truly,

Debbi M Nicholson
PRESIDENT & CEO

cc : The Honourable Glenn Thibeault, MPP Sudbury & Minister of Energy
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