SUBMISSIONS OF HYDRO ONE INC.

TO THE CHANGING WORKPLACES REVIEW

Introduction

Hydro One Inc. ("Hydro One") welcomes the opportunity to provide stakeholder input to the Changing Workplaces Review Interim Report ("Interim Report"). Given the wide range of issues being considered in the Interim Report, Hydro One's submissions do not address every issue, which is not to be interpreted as Hydro One's acceptance of same. From a conceptual standpoint, many of the proposed changes in the Interim Report are not necessarily responsive to the industry Hydro One operates in, or the heavily unionized nature of the company's workforce. The following represents Hydro One's submissions on those issues from the Interim Report which could have the most impact on the company, as well as utility industry in general.

Background: About Hydro One Inc.

Hydro One is Ontario's largest electricity transmission and distribution utility. Hydro One, through its subsidiary, Hydro One Networks Inc., delivers electricity safely and reliably to over 1.3 million customers across the province of Ontario, and to large industrial customers and municipal utilities.

Hydro One's regular workforce is significantly unionized, at a density of approximately 85%. It is comprised of:

- Trades, operators and clerical personnel represented by the Power Workers' Union ("PWU"), representing approximately 60% of the regular workforce;
- Engineers, front line managers and professionals, represented by the Society of Energy Professionals, accounting for about 25% of the regular workforce; and,

This workforce is augmented by a Hiring Hall of causal and seasonal workers, also represented by the PWU, as well as casual tradespersons from the Canadian Union of Skilled Workers ("CUSW") and a number of building trades construction unions (e.g. Labourers, Carpenters, Teamsters, Operating Engineers, Iron/Rodmen, and so forth). When this group is included, Hydro One's rate of unionization rises to approximately 90%.

Hydro One's collective bargaining relationships with the foregoing unions are longstanding and sophisticated. The corresponding collective agreements are reflective of this, containing compensation packages which have been carefully negotiated to reflect the nature of the company's operations, and are highly competitive. Indeed, many of the employment conditions contained therein constitute "greater rights or benefits" than that which is presently provided for in the *Employment Standards Act, 2000*. Furthermore, those employees who are not covered by a collective agreement benefit from competitive compensation packages and favourable working conditions. It is within this context that Hydro One makes the following submissions.

Proposed Changes to the *Labour Relations Act, 1995* ("*LRA*")

Issue: Related and Joint Employers (4.2.2)

Hydro One Recommendation: Maintain the status quo

The Interim Report contemplates modifying the *LRA* to authorize the OLRB to, amongst other things, declare two or more entities to be "joint employers" and/or enhance the related employer provisions of the Act. Any proposed amendment would have far reaching consequences and is not supported by Hydro One. For example, there could be significant implications regarding liability for health and safety and the definition of "constructor" under the *Occupational Health and Safety Act*.

The premise in the Report is that contracting relationships may be used to avoid union or collective bargaining related obligations. However, this has not been the experience of Hydro One, which has a healthy direct-hire workforce. Furthermore, with certain of our unions, our ability to contract work is restricted by the applicable collective agreement. With other unions we are obligated to contract using labour requirements which include the obligation to use unionized staff.

The current purpose of the related and successor employer provisions within the *LRA* is to protect bargaining rights - not expand them. Hydro One is of the view that the options for amendment identified in the Interim Report would have the effect of expanding bargaining rights.

Issue: Card Based Certification (4.3.1.1)

Hydro One Recommendation: Maintain the status quo; alternatively, if card-based certification is introduced, enact safeguards to ensure that employees who signed cards still support the union

The Interim Report notes that vote-based certification methods "are associated with statistically significant reduction in certification application activity, including success rate". Given Hydro One's union density, it is not apparent to us that the current model of certification is a bar to unionization. Even though Hydro One is a large geographically dispersed organization, it is not clear that the present vote based certification method poses particular difficulties for unions wishing to represent our workers. The experience in the electricity sector suggests that card based certification is unnecessary to achieve bargaining rights, and therefore the Hydro One recommends that the status quo be maintained.

In the alternative, should a card-based certification model be introduced, then it must be accompanied by a method that ensures that an employee who signed a card is still in support of certification once a certification application is filed. The so-called "Terminal Date" approach discussed in the Interim Report is appropriate. Or, alternatively, a simple review of cards signed prior to a particular date could occur in order to ensure that the employee remains in support of the union.

Issue: Access to Employee Lists (4.3.1.3)

Hydro One Recommendation: Maintain the status quo

The Interim Report states that unions have argued that a lack of access to employee lists prior to filing an application for certification inhibits unionization efforts. The Report notes that this is a particular problem in large organizations that are geographically spread out.

Introducing new rules which would require employers to provide unions employee lists prior to filing an application for certification, including employee contact information, would be a significant departure from the norm in Canada, and indeed, in all jurisdictions with Wagner-based labour relations regimes.

Hydro One questions whether there is a demonstrated pressing need to alter the current regime regarding the provision of employee information, or that any such pressing need outweighs the detriments to such a proposed plan.

While unions have argued that they are facing difficulties in certifying large organizations without employee lists, this is not apparent in the electricity sector in Ontario. As previously noted, Hydro One is a large provincial organization, yet the vast majority of our employees are unionized. Indeed, union density is very high across the electricity sector. This experience suggests there is no pressing need for changes to the rules regarding the provision of employee lists.

Moreover, Hydro One is concerned that the provision of an employee list—particularly one that includes employee contact information—at some point before it is absolutely necessary raises a significant privacy concern. The current regime provides the appropriate balance between the desire for an effective certification process and individual privacy interests. Hydro One suggests that the provision of personal information about individual employees is inappropriate until the union becomes the legal representative of an employee.

Issue: Off-site, Telephone, and Internet Voting (4.3.1.4)

Hydro One Recommendation: Maintain the status quo for off-site voting; alternatively, require the union to demonstrate a real and substantial concern with voting on the employer's property

Although Hydro One appreciates the administrative difficulties in arranging a vote, we believe that the implementation of off-site voting would only serve to create additional challenges. Due to the geographically dispersed nature of Hydro One, we believe that the implementation of off-site voting would only serve to create additional challenges. Off-site voting would mean securing a number of voting locations with a cost attached to each—a cumbersome and challenging endeavour. The underlying premise in the Interim Report that on-site votes (the easiest method for employees to vote), are subject to undue employer influence is unproven and worthy of scrutiny. Should the Advisors determine that off-site voting is necessary, Hydro One recommends that it should only occur when the union can demonstrate a real and substantial concern with voting on the employer's premises.

Hydro One has no submission regarding telephone or internet voting.

Issue: Renewal Contract Interest Arbitration (4.3.2)

Hydro One Recommendation: Maintain the status quo

In this respect, the Interim Report proposes options for extension of the current first contract provision to all subsequent renewal agreements, and the possibility of automatic interest arbitration in situations where a first contract negotiation results in a strike or lockout (after a defined period of time has elapsed). Amongst other things, the Special Advisors also contemplate a "mediation intensive" model akin to that used in British Columbia, which, in Hydro One's respectful submission, would ultimately have the same effect as interest arbitration: the terms of the agreement would be determined by an external third party.

Hydro One respectfully does not support the Interim Report's recommendations to introduce interest arbitration provisions, as well as managed mediation provisions, for any renewal contract negotiations. In this regard, Hydro One submits that if such changes are established, parties to a collective agreement simply will not bargain as hard as they would if there are no interest arbitration provisions. In other words, interest arbitration (i.e. "fallback") does not necessarily permit creative resolutions to operational issues — rather, it can deny experienced parties the opportunity to negotiate an agreement that is deftly balanced between the interests of the employer and its employees.

Issue: Consolidation of Bargaining Units (4.3.4)

Hydro One Recommendation: Introduce a consolidation provision with a narrow test (i.e. to be used only where existing bargaining unit structure has been objectively demonstrated to be no longer appropriate)

The Interim Report contemplates the introduction of a consolidation provision or modification of s. 114 of the *LRA* to allow the Ontario Labour Relations Board ("OLRB") the power to alter bargaining units. Hydro One's position on this issue is that any alteration of bargaining units ought to be strictly limited to situations where the existing bargaining unit structure has been demonstrated as no longer appropriate. For example: where it is demonstrated that bargaining unit structures do not reflect current workplace realities, impedes operational flexibility and innovation, and/or has a significant detrimental effect on labour relations. In instances where multiple, well established and rational bargaining units exist within

one employer, as is the case at Hydro One, the OLRB should not have free reign to interfere with the bargaining structure.

Issue: Replacement Workers (4.4.1)

Hydro One Recommendation: Maintain the status quo

The Special Advisors' Interim Report also raises the potential for prohibiting the use of replacement workers who would typically fulfill some or all functions of employees on strike or lockout, or alternatively, restricting their use along the lines of the *Canada Labour Code* model. Hydro One does not support the introduction of any language that would limit or ban the use of replacement workers as it is a natural counterbalance to the right to strike and allows for vital services to remain operational during labour disputes. The ability to use replacement workers ought to remain an option in the electricity industry in the event of a strike.

Regarding the option of utilizing the *Canada Labour Code* model, Hydro One notes that there are downsides to this. For example, the phrase "undermining a trade union's representational capacity" is unclear as it is not presently defined by the legislation, or jurisprudence. Furthermore, this provision is counterbalanced by other provisions of the *Code* which provide for the retaining of essential workers during a strike, which have not been included in the Special Advisors' proposal.

Proposed Changes to the *Employment Standards Act, 2000* ("*ESA*")

Issue: Definition of Employee (5.2.1)

Hydro One Recommendation: Maintain the status quo

Hydro One does not support the options in the Interim Report with respect to the following proposed definition changes:

- The definition of "employee" should be expanded to include dependent contractors; and,
- The burden of proof to establish that a person is not an employee should be on the employer (reverse onus).

It is Hydro One's respectful submission to maintain the current ESA definition as status quo. In our experience contractors, dependent or independent, are not disadvantaged and in some areas may in fact be advantaged. Indeed, Hydro One has heard from contractors who prefer to remain contractors and would not accept an offer of a regular position.

Issue: Who is the Employer and Scope of Liability (5.2.2)

Hydro One Recommendation: Maintain the status quo for joint liability; alternatively, joint and vicarious liability ought to only exist in industries/sectors where vulnerable and precarious employment is commonplace

Many of the options being considered by the Special Advisors would have a significant impact on how employers structure their businesses. Some examples of options being considered, amongst others, include:

- Requiring employers and contractors to ensure *ESA* compliance by subcontractors; and,
- Creating an expanded "joint employer" test.

With respect to the options considered in the Interim Report related to joint liability, Hydro One recommends that the status quo be maintained.

Electricity costs and rates are heavily scrutinized and have attracted great public and media attention. Hydro One's labour costs and productivity are regulated by the Ontario Energy Board. Hydro One is under pressure to not only cut costs but find efficiencies within its operations. In this context, Hydro One has looked to contract out non-core services that can be fulfilled by specialized organizations at a lower cost. As this allows Hydro One to focus on and invest in its core operations, this activity ought to be encouraged.

As electricity is a vital service to all Ontarians, Hydro One engages in a rigorous procurement / Request for Proposal ("RFP") process to ensure we engage in contracts with reputable organizations who have the capacity to meet our high standards. As part of this, Hydro One requires that the companies we contract with will comply with all relevant legislation, including employment standards.

In the Interim Report the argument for joint liability between employers and contractors is based on an argument that employers use contracting out arrangements in an attempt to avoid employment

standard obligations and/or shield an employer from liability for breaches on employment standard obligations. Hydro One submits that we do not enter into contracts for services for these reasons. There is no suggestion that contracting out by Hydro One has led to increases in employment standards violations in the electricity industry.

However, despite the care taken by Hydro One, we are not able to control the employment practices of other companies. In such circumstances, the failure of a contractor to properly implement employment standards should not result in Hydro One becoming liable.

If the advisors decide to recommend that the *Employment Standards Act, 2000* be amended to create joint or vicarious liability between employers and contractors then this should only be implemented in industries where there are demonstrated concerns over the use of such relationships to avoid employment standards obligations.

Issue: Standards (5.3)

Hydro One Recommendations: Maintain status quo

Generally, Hydro One does not support recommendations to introduce new minimum standards in the *ESA*. The terms and conditions of employment, whether established through collective bargaining or in order to attract high quality candidates to non-union positions, are crafted in consideration of the specific needs of Hydro One's business, which include 24/7 operations, critical infrastructure, and a variety of workplace environments. As such, the process of developing terms and conditions of employment creates a specific balance between the interests of the employee and the needs of Hydro One. This is distinct from the *ESA* which represents a "one size fits all" model of minimum standards for employment.

The terms and conditions of employment in the electricity sector have been developed through a long history of negotiations and trade-offs between sophisticated parties to be responsive to the needs of both the employees and employers. Hydro One is concerned that amendments to the *ESA* may disrupt this balance and further increase labour costs which already represent a significant portion of Hydro One's expenses, and ultimately impact electricity rates.

Issue: Hours of Work and Overtime Pay (5.3.1) + Scheduling (5.3.2)

Hydro One Recommendations:

5.3.1: (1) Eliminate requirement for employee consent / Ministry approvals (e.g. excess hours); (2) Maintain status quo regarding overtime pay trigger and averaging

5.3.2: Maintain status quo

Hydro One supports the options in the Interim Report regarding "hours of work" which could be seen as reducing some of the restrictions and administrative burdens—for example, eliminating the need for a Director's approval for excess weekly hours between 48 and 60. Similarly, Hydro One supports the Interim Report's proposed options to lessen restrictions on daily hours, such as removing the requirement to have an excess daily hours agreement.

However, with respect to hours of work, overtime, and scheduling more broadly, Hydro One recommends that the status quo be maintained. Our collective agreements provide very strict parameters which govern these issues. The agreements include protections for employees as well as flexibility for Hydro One to maintain its operations. These are negotiated provisions and Hydro One believes that sophisticated bargaining parties should retain the ability to construct creative and mutually agreeable solutions to such challenges.

Issue: Termination, Severance and Just Cause (5.3.8)

Hydro One Recommendation: Maintain the status quo

Hydro One does not support the introduction of a "just cause" protection for non-unionized employees in the *ESA*. A change of this magnitude would have far-reaching consequences for employers. Hydro One recommends that the status quo be maintained so that parties in non-unionized relationships continue to be free to negotiate provisions related to termination, provided that such contractual provisions are consistent with the minimum standards of the *ESA*. As long as the reason for termination is not illegal (e.g. in violation of the *Human Rights Code* or a reprisal for filing an *ESA* complaint), Hydro One submits that neither the common law nor the *ESA* ought to require an employer to have cause for dismissal.

Issue: Greater Right or Benefit (5.4.1)

Hydro One Recommendation: Allow employers and employees to contract out of the ESA based on a comparison of all the minimum standards against the full terms and conditions of employment in order to determine whether the employer has met the overall objectives of the Act

The Interim Report makes it clear that the advisors appreciate that the ESA should not apply equally to all industries. The Special Advisors note several ways that this can be achieved, either through creating a streamlined process to apply for exemptions (5.2.3 Exemptions), or by introducing certain standards into the ESA on a sectoral basis (5.3.2 Scheduling). It is also clear that the Advisors would prefer to limit exemptions as much as possible.

Rather than rely on exemptions in order to achieve the necessary flexibility within the ESA, Hydro One recommends the above noted change to the greater right or benefit provision of the Act. A global assessment approach under the greater right or benefit provision does not necessarily need to be any more complicated than the exemption process laid out in the Interim Report in section 5.2.3. In fact, it could be less complicated. Given that the exemptions would be broad based and built into the ESA itself, the procedural safeguards would be significant and time consuming. In addition, the exemptions would not be responsive in the face of changes in a particular sector or employee group. In comparison, expanding the greater right or benefit provision could easily be fulfilled by a simple review of the provisions of the ESA against the terms and conditions of employment. In the vast majority of cases it should be easy to see whether the overall terms and conditions of employment fulfill the underlying purpose of the Act. Further, unlike the proposed exemptions process, presumptions can be built into the process, such as a rebuttable presumption that a collective agreement provides greater rights than the Act on balance.

Opponents to the broader greater right or benefit provision claim that different employees have different needs. Rather than being a drawback of the proposal, it is actually the crux of why this approach makes the most sense. Employees and employers should be encouraged to craft terms and conditions of employment which reflect the needs of both parties. This will often mean maximizing some terms at the expense of other terms, such as receiving higher pay as a trade-off for not being enrolled in a group benefits plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED