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Changing Workplaces Review
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Re: International Union of Operating Engineers, Local 793 Submissions on Changing Workplaces Review Special Advisor's Interim Report

Attached please find the submissions of the International Union of Operating Engineers, Local 793 in response to the Changing Workplaces Review Special Advisor's Interim Report.

Should you have any follow up questions, please do not hesitate to contact the undersigned.

Yours truly,

Steven Sagle
Legal Counsel, Local 793

Encl.

cc. *Ken Lew, IUOE Local 793, Labour Relations Manager*
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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793

SUBMISSIONS ON THE CHANGING WORKPLACES REVIEW SPECIAL ADVISORS' INTERIM REPORT

International Union of Operating Engineers, Local 793

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INTRODUCTION

The International Union of Operating Engineers, Local 793 ("**Local 793**") is a trade union that represents approximately 14,500 members working in both the construction industry and industrial sectors in Ontario. A vast majority of our members operate heavy equipment in Ontario. Local 793 members build the province's infrastructure including the roads and bridges Ontarians travel on, the subways they ride in, and the buildings and condominiums they work and live in. Local 793 members also build pipelines, stadiums, refineries, subdivisions, wind/solar energy farms and work in landfills, plants, mines, municipalities and quarries. Since 1978, Local 793 has been designated by the Minister of Labour as the exclusive Employee Bargaining Agency for all operators of heavy equipment in the industrial, commercial and institutional sector of the construction industry in the province of Ontario. Local 793 has a long and proud history of advocating for better terms and conditions of employment for workers and their families and will be celebrating its 100th anniversary in less than three years.

Local 793 supports the province's efforts to address the plight of vulnerable workers and the problems of precarious employment through the Changing Workplaces Review. Local 793 firmly believes that precarious employment, and the problems associated therewith, are the results of inadequate legislation, insufficient enforcement, and a lack of access to justice. Meaningful amendments to the *Employment Standards Act, 2000* (the "**ESA**") and the *Labour Relations Act* ("***LRA***") would go a long way to addressing precarious employment and increasing the living standards of Ontario's workers.

Local 793 has carefully reviewed the Special Advisor's Interim Report (the "**SAIR**") and the various options for reform set out therein. We believe that many commendable and worthwhile changes have been identified which will help vulnerable workers in precarious jobs and ought to be recommended by the Special Advisors. The following submissions review only the five that, in our view, are potentially the most significant.

RECOMMENDATION #1: RETURN TO CARD BASED CERTIFICATION FOR INDUSTRIAL CERTIFICATION APPLICATIONS

Local 793 strongly supports a return to card-based certification for industrial certification applications as set out in Option 3 of section 4.3.1.1 of the SAIR.

Local 793 has substantial experience organizing both construction and industrial bargaining units and has made extensive use of both the vote-based and card-based certification systems. Having operated regularly in both certification regimes, Local 793 is well-positioned to comment on their respective merits.

The *LRA* currently provides that all industrial certification applications are subject to a mandatory vote. Regardless of a union's level of support at the time a certification application is filed, it will not be certified until the employees re-state their support during a Board ordered vote. This mandatory vote-based certification system too often requires employees to re-indicate their support for a union in hostile and intimidating environments. For vulnerable workers who are dependent on part-time assignments or the renewal of short term contracts, attendance at a vote can be more problematic than for others, and the increased pressure to confirm or repudiate decisions already made has a chilling effect on determining the employees' true wishes.

Under the current system, once a union files a certification application, and effectively alerts an employer to the presence of the union and the existence of supporters, a vote is not conducted for a further five business days. This period provides an employer with at least five days to mount an anti-union campaign. Employers, emboldened by the rarity with which remedial certification is granted by the Board, too often commit unfair labour practices during this time, secure in the knowledge that the worst probable outcome is that the Board orders a second vote for a bargaining unit already subjected to threats, intimidation, and coercion.

Once the five day period has elapsed, employees are then required to indicate their support for a union at a vote conducted at the employer's premises, and in front of the employer's scrutineer and other members of management. The notion of a secret ballot provides little comfort to an employee who must cast their ballot under the watchful eye of the boss. It should come as little surprise that very few votes are won by unions, even when original employee support was extremely high.

The suppressive effects of the current vote-based certification system are borne out by the evidence. Sara Slinn's review of the academic research on certification models concluded that; "These studies consistently find 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." The studies found that the opportunity for delay and the concomitant

increased opportunity for unfair labour practices were two of the characteristics of the vote-based model that led to these results. Unions know, and academic studies consistently confirm, that the best way of countering the inherent power imbalance and inequality of bargaining power between employer and employee and increasing working conditions of employees is through collective bargaining. To the extent that the mandatory vote system is an impediment to collective bargaining, as demonstrated by the evidence, it is actively harmful to the government's objective of improving the work experience of vulnerable workers in precarious jobs. Returning to card based certification in the industrial sector may be the single reform with the greatest impact on the working conditions of the province's most marginalized workers.

While the deleterious effects of a mandatory vote-based certification system are clear and well understood, its merits are far less so. It remains unclear why an employee who has expressed their desire to have a union bargain on their behalf with their employer by signing a union membership card must do so a second time at a mandatory vote. The mandatory vote adds no democratic legitimacy to the process and serves only to provide employers an opportunity to dissuade employees from supporting a union through coercion and intimidation.

For the vast majority of the time a labour relations act has existed in Ontario, all sectors operated under a card-based certification system. While workplaces have changed over this period of time, no change has occurred which has rendered signing a union card as an insufficient or inadequate means of indicating support for a union.

RECOMMENDATION #2: AMEND *LRA* TO PROVIDE MEANINGFUL ACCESS TO REMEDIAL CERTIFICATION

The current remedial certification provisions in the *LRA* provide that the Board can certify a union without a vote only if "no other remedy would be sufficient to counter the effects of the contravention." The Act further provides that when deciding an application for remedial certification the Board may consider whether the union appears to have membership support adequate for the purposes of collective bargaining. The stress on exhausting all possible alternatives means that, in practice, remedial certification is rarely granted.

The primary flaw with the *LRA*'s current approach to remedial certification is that it proceeds from the assumption that it is in fact possible to sufficiently counter the effects of a contravention of the *Act* such that the true wishes of employees can be ascertained. It must be recalled that by the time the Board considers the appropriateness of remedial certification it has already found that an Employer has committed an unfair labour practice. The Board has already determined that an Employer has used coercion, intimidation, threats, undue influence or otherwise discriminated against an employee for exercising their rights under the *LRA*. Employers have already sent the message to current and prospective union supporters that it does not want a union in the workplace and is willing to break the law to keep the union out. Viewed from this perspective, it is exceedingly difficult to conceive what possible conditions attached to a second vote can undo this influence.

The inadequacy and inability of remedial votes to counter the effects of unfair labour practices is particularly acute in the construction industry. Construction industry employees are generally subject to seasonal lay-offs but have no recall rights. By the time a union is able to successfully establish, through the Board's hearing process, that an employer has committed unfair labour practices and received a decision to that effect, it often finds that an employer has failed to recall many of its supporters. Encouraging these employees to participate in a second vote can, for obvious reasons, be exceedingly difficult. A remedial vote in circumstances where a union's bargaining unit has been decimated by a recalcitrant employer is an illusory remedy.

A second problem with the Act's current approach to remedial certification is that it encourages the Board to consider whether a trade union has membership support adequate for the purposes of collective bargaining before ordering remedial certification. This consideration perversely incentivizes employers to attack a union's organizing campaign early and aggressively to ensure the Union never obtains this threshold level of support. An employer successful in this respect generally faces only the prospect of a remedial vote of an unlawfully influenced bargaining unit.

The argument that remedial certification threatens workplace democracy by removing the right of employees to vote on whether they wish to have a union in the workplace is of no merit. Whether a bargaining unit is created through remedial certification or otherwise, employees always have the right to vote on whether they wish to have a union in the workplace by bringing a termination application. The argument that removing the requirement for adequate support for bargaining will merely create a weak

unit that cannot accomplish anything substantive for its members is also flawed. First, it is often the case that a union seeking remedial certification has already filed a certification application in which it has demonstrated that it enjoys 40% support (and often more) of the proposed bargaining unit. This level of support provides a strong foundation from which to commence collective bargaining. Second, the argument assumes that employees who have been subject to unfair labour practices and who may not have signed membership cards in fact do not support the union. This assumption is extremely problematic because it is precisely an inability to determine the true wishes of employees that remedial certification was designed to remedy. Third, and in any event, it is unnecessary and ill-advised to pre-judge the potential strength of a bargaining unit and particularly so in circumstances where unfair labour practices have been committed. The union seeking certification is in the best position to determine the strength of a bargaining unit. Certifying, negotiating collective agreements, and servicing a bargaining unit are all resource intensive and expensive activities for unions. Unions are generally not in the business of dedicating time, effort, and resources to establishing short term or otherwise untenable bargaining rights. It should be understood that a union applying for remedial certification is doing so because it believes it has sufficient support, or can achieve sufficient support, to bargain effectively.

Ultimately, the worst case scenario of granting remedial certification is that a bargaining unit is created that is unable to negotiate or ratify a collective agreement and whose bargaining rights are subsequently terminated. Such a situation is undoubtedly far more preferable than allowing an employer to benefit from its unlawful practices.

Removing both the requirement to consider whether a second vote is likely to reflect the true wishes of employees and the requirement to consider whether the union has adequate membership support before ordering remedial certification would effectively rebalance the Board's power to order remedial certification.

RECOMMENDATION #3: IMPLEMENT JUST CAUSE PROTECTION

The IUOE Local 793 endorses Option 2 as set out by the Special Advisors in respect of Just Cause Protection.

An amendment to the LRA to provide for protection against unjust dismissal of bargaining unit employees after certification and before the effective date of a first contract will be a significant step to removing

barriers to otherwise vulnerable employees standing up for their legal rights, and expressing and acting on their true wishes.

Other Canadian jurisdictions already have such protections in place and have these have not had a negative impact on the ability of employers to run their businesses. Just cause protection is inevitably part of every collective agreement ultimately negotiated – the proposed option simply amounts to implementing the standard at a slightly earlier point in time. This minor change costs employers nothing and reduces the opportunity for misconduct, misunderstandings, and other conflict which will increase instability during bargaining instead of reducing it.

In many industries where work demands vary, and in the construction industry in particular, patterns of employment often involve repeated layoffs and recalls, as work requirements fluctuate. Employees are heavily dependent on the good will of their employers to recall them season after season instead of terminating their employment and replacing them with other employees. IUOE Local 793's members are painfully aware that, unlike in an industrial setting, it is relatively easy for an employer to simply lay them off in the normal course and then instead of recalling them to employment, simply replace with employees who appear more tractable when work demands pick up again. For many employees in these circumstances it is simply an article of faith that if they stand up for themselves on any issue, they must be prepared to accept they will not be recalled, and will need to find another employer after lay off.

As the Ontario Federation of Labour has noted, even the suggestion of reprisals is enough to undermine employee confidence in asserting their rights. As a construction trade union, the ability to assure employees that they cannot be simply replaced after layoff with new and biddable workers, even when a union certification drive has been successful, will go miles towards eliminating this pervasive fear, and allowing the true wishes and concerns of vulnerable employees to be raised without fear of reprisal. For an employer to be required to show simple just cause in replacing an existing worker with a new one is not too much to ask in the face of the great benefits to workplace stability and employee workplace participation.

RECOMMENDATION #4: CONDUCT WHOLESALE REVIEW OF ESA EXEMPTION'S AND SPECIAL RULES

The *ESA* currently contains more than 85 exemptions and special rules. These exemptions have rightly been criticized as being overly complex, out-dated, inconsistent, and often lacking in rationale. Local 793

agrees with the Special Advisors' recommendation that the province establish a new process to review the current exemptions to determine whether they are warranted or ought to be modified or eliminated.

A large number of the special rules and exemptions in the *ESA* apply to employees in the construction industry. All construction industry employees are exempt from the hours of work, daily rest period, time off between shifts and weekly/bi-weekly rest period provisions of the *ESA*. While construction employees are generally covered by overtime provisions, when they are working on road construction and sewer and watermain construction projects they are subject to higher overtime thresholds. Finally, and most significantly, all construction employees are completely exempt from the notice of termination / termination pay and severance pay provisions of the *ESA*. This means that all non-unionized construction employees in Ontario can be terminated at any time, without cause, and without notice or pay.

When considering amendments or exemptions to any legislation it is imperative to bear in mind the expressive and communicative functions of law. This is of particular importance when reviewing legislation such as the *ESA*. The *ESA* establishes a basic floor of terms and conditions of employment to ensure employees are treated with a minimum of fairness and decency. Exemptions to any of these standards not only deprive employees of a particular right or benefit, but send a message to society that certain groups of workers are not worthy of the same level of fairness or decency enjoyed by other employees and that it is acceptable to treat them thusly. It lowers the esteem of workers in the eyes of the public and serves to devalue their work. This message, reinforced by the power of the law, can create significant problems for unions and employees to negotiate replacement terms and conditions where complete exemptions apply or more beneficial terms and conditions when an alternative standard applies.

Local 793 had direct experience with this issue in its 2012 bargaining with Windsor area employers in the sewer and watermain sector of the construction industry. Section 13 of *Exemptions, Special Rules and Establishment of Minimum Wage, O Reg 285/01* provides that construction employees engaged in road building construction are not entitled to overtime pay until they have worked in excess of 55 hours in a week. Although the standard applies only to road building employees (the special rule for sewer and watermain construction employees provides overtime pay after 50 hours), sewer and watermain employers nevertheless attempted to impose this standard on its employees through collective bargaining. It is difficult to imagine an employer taking this position without the special overtime rules

for construction employees in place. In all likelihood employer representatives considered road and sewer and watermain construction employees to be sufficiently similar to warrant the same treatment with respect to overtime. The Executive's approbation for a 55 hour work-week, expressed through the special overtime provision in *O Reg* Exemptions, Special Rules and Establishment of Minimum Wage, O Reg 285/01, almost certainly informed, if not determined, the employer's position on this issue. Ultimately, Windsor area sewer and watermain employees engaged in a successful strike for ten days to maintain an overtime standard enjoyed by most other employees in Ontario.

The expressive and communicative aspects of *ESA* exemptions have also presented serious problems for construction employees terminated without cause. *Termination and Severance of Employment, O Reg 288/01* exempts all construction employees from notice of termination, termination pay, and severance pay. Under the *ESA*, all non-union construction employees in the province of Ontario, regardless of their years of service with an employer, can be terminated at any time, for any lawful reason or for no reason at all, without notice or compensation of any kind. Non-union employees seeking redress are required to sue their employer through the court system, an option which is prohibitively costly for most employees. However, even an employee who has taken this step will find that the message sent by the legislature by excluding construction workers from notice/termination pay and severance pay has acted to dramatically limit their common law right to reasonable notice. In *Scapillati v. A. Potvin Construction Ltd.*[1] a non-union finishing carpenter in residential construction who had worked for his employer in excess of ten years before being terminated without cause and without notice brought a wrongful dismissal suit against his employer. The matter proceeded to trial and was decided by Bell J. of the Ontario Superior Court of Justice. In the course of his decision, Bell J. determined that there was a custom and usage that provided that long-term construction workers could be and were terminated without notice, payment in lieu of notice, or severance pay. Bell J. then proceeded to consider whether the custom and usage was reasonable. At para. 30, with clinical dispatch, he decided that the custom was reasonable:

> *By permitting an exemption in s. 2 of Regulation 327 of a person employed on-site in the construction buildings, the Legislature has recognized no need to give even the minimum protection accorded to other long-term employees under s. 57(1)(h) of the Act. For that*

[1] 1997 CanLII 12420 (ON SC)

reason and because of the nature of the industry [...] I cannot find that the industry custom and usage is unreasonable.

The legislative declaration that construction industry employees did not deserve notice, termination pay, and severance pay effectively created and then justified a practice that was relied upon to deny construction workers common law entitlements. The decision was subsequently affirmed by the Ontario Court of Appeal[2]. These decisions have effectively eliminated notice entitlements of any kind for non-union construction employees in Ontario.

This is of particular frustration for construction employees and unions because the underlying justifications for the complete exemption of construction employees to notice and severance entitlements have largely gone unexamined. It is increasingly the case that construction employees resemble employees in other sectors. The prevalence of pattern agreements in the construction industry means that often an employer's main competitive advantage is access to a stable, long-term, experienced, and familiar workforce. Collective agreements increasingly reflect this reality by providing employers greater ability to recall and name hire employees. Many Local 793 members work for the same employer year after year subject only to a short, seasonal layoff. Despite this, construction employees have continued to be denied notice entitlements on the basis of outdated *ESA* exemptions and their reverberation through the common law.

A systematic review of *ESA* exemptions is long overdue. Of the options identified in section 5.2.3 of the SAIR Local 793 supports Option 1. However, we submit that the Core Conditions identified by the Ministry of Labour should themselves be subject to a further consultation and review process to allow relevant stakeholders to provide focussed submissions on the subject. Local 793 submits that a Ministry led process to review the current exemptions and special rules in the *ESA* include the following:

1. **Onus Rests with Party Seeking to Maintain Exemption:** The *ESA* establishes a basic floor of terms and conditions of employment to ensure employees are treated with a minimum of fairness and decency. It follows that any terms or conditions below ESA standards are an affront to fairness and decency. *ESA* standards should therefore be

[2] *Scapillati v. A. Potvin Construction Limited*, 1999 CanLII 1473 (ON CA)

maintained and protected unless absolutely necessary to deviate therefrom. The onus of establishing that deviation is necessary should rest with the party seeking the deviation.

2. **Deviations from Standards Should be Minimal:** For the same reasons, any deviation from an employment standard should impair that standard to the minimum extent possible. Special rules should be presumptively favoured over complete exemptions.

3. **Employee Participation:** Any process of review should include mechanisms to ensure that employees, employee groups, and unions are notified and invited to participate. The current exemptions have rightfully been criticized for having been introduced as a result of lobbying efforts by employers and employer organizations. The legitimacy of any deviation from an employment standard will rest on the extent to which those affected are consulted and their interests are taken into account.

4. **Time Bound:** The process for the review of *ESA* exemptions should be subject to a clearly defined procedure including strict time limits. It must be designed such that a review of all exemptions will be completed by a specified time.

RECOMMENDATION #5: GRANT HORTICULTURAL EMPLOYEES THEIR CONSTITUTIONAL RIGHTS TO FREEDOM OF ASSOCIATION

Local 793 strongly supports an immediate elimination of the exclusion of employees "other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture" from coverage under the *LRA*.

Local 793 has been distressed to note that among the submissions made during the first phase of this review, no single group has spoken out specifically about this stark violation of the *Charter* rights of Ontario employees. The almost total absence of voice or community representing the interests of these employees is disconcerting and highlights, in our view, how exemption from labour relations legislation creates vulnerable workers in precarious jobs.

There is zero justification in law or policy for the continued exclusion of this sub-set of horticultural employees from the *LRA*.

As defined by Ontario Labour Relations Board, horticultural employees are the employees engaged in ornamental and landscape gardening and plant production. Horticultural employees are contrasted with agricultural on the basis that they are not involved in the production of plant life *for food purposes*.

'Ornamental' horticulture plays a huge role in Ontario's construction industry. Appropriate landscaping is an important element in erosion control and drainage and can play a primarily role in the beautification of new construction and renovation projects. A huge number of employers of horticultural employees in Ontario are active on construction sites, and the majority of horticultural employees impacted by the exclusion have more in common with a specialized construction work force than employees of any other sector, including agriculture. To the extent that the seasons, fluctuations in workforce demands, and time sensitivity are issues in the horticultural sector, they track similar issues as they appear and are dealt with in the construction industry.

What particularly undermines the confidence of employees in the justice of Ontario's labour relations system is that the current exclusion is limited only to one sub-set of horticultural employees. Employees who are excluded by the current language of the *LRA* can and do find themselves performing the exact same work side by side with employees of other employers who are not so excluded. Horticultural employees of municipalities, or of the landscaping division of a construction company which also performs other types of construction, are free to unionize, to negotiate collectively and to go on strike. Employees of companies which do horticultural work exclusively are not, whether or not they themselves ever lay a hand on plant life. The seasons and the lifespan of plant life impact all types of companies, but only the one subset of such employees are excluded from exercising their constitutional right to negotiate with their employer as a group. The distinction is arbitrary and indefensible.

The Preliminary Report describes the Ministry's own 'Principles for Exemptions and Special Rules' by which it determines whether exemptions in the ESA are justified. If those principles were applied to the *LRA* exclusion of this group of horticultural employees the exclusion would certainly not survive. There is no basis to believe the industry as a whole would be harmed by eliminating this narrow exclusion, or that any benefit accrues to society to make the violation of the rights of these horticultural employees in any way justified.

Of the Options set out in the SAIR, we strongly oppose maintaining the status quo and strongly support the elimination of the *LRA* exemption for both agricultural employees and horticultural employees.

We also oppose the option of the creation of a new labour relations act to deal specifically with horticultural employees. Other provinces do not exclude horticultural employees or require them to unionize under separate legislation. Employees engaged in horticulture in this province, who do not fall within the current exemption, are able to unionize under the *LRA*, and are so unionized, including by Local 793. Multiplying labour relations acts, particularly where one employer may perform various kinds of work, will only lead to further confusion and injustice. There is also no basis, nor support for, yet a third labour relations option being developed to apply to this one subgroup of employees.

Finally, we reject the option of adding horticultural employees to the *AEPA*. In addition to our concerns as outlined above, and as noted by the Ontario Federation of Labour and others, the *AEPA* has been a resounding failure in providing agricultural employees a realistic or viable path to collective negotiation of their interests. Local 793 urges the Special Advisors to resist linking horticultural employees with employees in the agricultural sector. While decades ago these groups were part of a linked exemption, there is little evidence today of overlap or common labour relations practices as between these two groups to dictate they must stand or fall together. It is our belief that the majority of ornamental horticultural employers have more in common with construction industry enterprises.

While we strongly urge the repeal of *AEPA*, the exclusion for horticultural employees is unconstitutional and must be repealed no matter the ultimate decision on that issue. The way forward is to eliminate this archaic exclusion and permit all horticultural employees to unionize and bargain on a common footing with each other and with their counterparts in other provinces, under the *LRA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.