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Our File No. 15-795

October 14, 2016

Via E-mail (CWR.SpecialAdvisors@ontario.ca)

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

Dear Special Advisors:

Re: Labourers' International Union of North America, Local 183
Submissions on the Interim Report of the Changing Workplaces Review

Please find attached the submissions of the Labourers' International Union of North America, Local 183 respecting the Interim Report of the Changing Workplaces Review.

We would be happy to discuss these submissions or any other matters with you at your convenience.

Sincerely,

L. A. Richmond
LAR:dm/cope 343
Encl.

c.c. Mr. John Evans

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LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

SUBMISSIONS RESPECTING THE CHANGING WORKPLACES REVIEW – INTERIM REPORT

OCTOBER 14, 2016

A. INTRODUCTION

On September 11, 2015, the Labourers' International Union of North America, Local 183 ("Local 183") provided the Special Advisors with its initial submissions respecting suggested reforms to the *Labour Relations Act, 1995* ("*LRA*") and the *Employment Standards Act* ("*ESA*").

In these supplementary submissions, Local 183 provides additional commentary on a number of key issues addressed by the Special Advisors in their Interim Report. This additional commentary should be read in conjunction with Local 183's initial submissions.

B. POTENTIAL AMENDMENTS TO THE *LABOUR RELATIONS ACT, 1995*

1. "Who is the Employer" Where Labour Supply Company Used

In our submissions of September 11, 2015, Local 183 addressed the problems created by the need to identify the "employer" in circumstances where companies use labour supply companies to staff their workplaces and projects. Local 183 recommended amending the *LRA* to include a rebuttable presumption that the entity an individual is directly benefitting through that individual's labour is the employer of that individual for the purposes of the *LRA*.

We are pleased to see that section 4.2.2 of the Interim Report includes this option (i.e., under option 4(a)). In Local 183's view, such an amendment will lead to greater certainty in the law, avoid unnecessary and prolonged litigation about "who is the employer," and places the initial evidentiary onus on the appropriate party.

The lack of certainty in the law respecting who is the "true" employer in a workplace using temporary help agency employees creates serious barriers to unionization and to representation of these vulnerable workers. As Professor Timothy J. Bartkiw states in his paper on the impact of temporary help agency employment on labour unions:

The presence of agency workers in organizing targets may create various challenges. In each campaign, a union must make a strategic decision to formally include or exclude agency workers from its proposed bargaining unit, and take a position as to whether the agency or the end-user/client is legally the "true" employer. Unions face uncertainty over whether the labour relations tribunal will approve of these positions ex post (Bartkiw, 2009). Both the inclusion and exclusion strategies entail risks for the union, and both may be challenged by the employer in the certification process. According to one organizing director:

> the minute there is an agency involved in the organizing campaign, there's going to be a fight at the board... the minute we say "excluding temp workers," the employer jumps and says "oh no, they should be in" and deliberately attempts to screw up the numbers.

Agency worker inclusion in the bargaining unit may also increase union vulnerability to an employer challenge under section 8.1 of Ontario's Labour Relations Act, 1995, which enables employers to challenge the ex-ante sufficiency of the union's membership evidence after a vote has already been held. To raise an "8.1 challenge," employers merely "check this off" in their certification response form. The difficulty is that if agency workers are less inclined to sign membership cards than regular employees, their inclusion makes it more challenging to meet these requirements. ...[1]

In Local 183's experience, not only is Bartkiw correct in terms of the initial barriers to gathering membership evidence, but even after that hurdle is overcome, the parties end up embroiled in days of litigation over who is the "true" employer.

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[1] "Unions and Temporary Help Agency Employment" Relations industrielles / Industrial Relations, vol. 67, n° 3, 2012, p. 453-476 available online: https://www.erudit.org/revue/ri/2012/v67/n3/1012539ar.pdf.

Section 4.2.2 of the Interim Report also includes options to make it easier for unions to have entities deemed to be joint or related employers. In our view, these options – at least as they would pertain to tripartite relationships involving temporary help agencies - maintain the fundamental unfairness of the union bearing the initial legal onus of establishing crucial facts about the temporary help agency and clients' businesses, facts that are within the knowledge of these businesses. Furthermore, an approach that merely amends the *LRA* to enable unions to more readily demonstrate that the client and temporary help agency are joint or related will undoubtedly still result in many days of litigation, but now wasted on litigating the issue of whether the temporary help agency and client are joint or related. Furthermore, such an approach would not address the problem of identifying the employer when there is a change in the temporary help agency.

Overall, an amendment is needed to create certainty, and should deem the "client" to be the "employer" for the purposes of the *LRA,* unless the "client" can demonstrate otherwise.

2. Successor Rights

Local 183 supports option 2 set out in section 4.3.3 of the Interim Report to address successor rights, i.e.:

> Expand coverage of the successor rights provision, similar to the law in place between 1993 and 1995, to apply, for example, to:
>
> a) building services (e.g., security, cleaning and food services);
>
> b) home care (e.g., housekeeping, personal support services); and
>
> c) other services, possibly by regulation-making authority.

As we highlight in our September 11, 2015 submission, between 1993 – 1995, there were provisions in both the *ESA* and the *LRA* respecting building services workers. The *ESA* included a requirement that a new contractor offer the same or similar work to

employees of the previous contractor, where available, pursuant to the same or comparable terms and conditions of employment. Local 183 reiterates its position that amendments should be made to both the *ESA* and the *LRA* to address successor rights in non-unionized and unionized workplaces.

3. Broader Based Bargaining

Local 183 supports amendments to the *LRA* that would allow for broader based bargaining in sectors for which the traditional Wagner Act model is ineffective.

Of the options listed in 4.6.1 of the Interim Report, addressing broader based bargaining structures, Local 183 is of the view that a model combining some of the elements of options 2 and 4 ought to be adopted for small enterprises where employees have been historically under-represented by unions, such as building services workers.

In this two-step model, any union that has successfully negotiated a collective agreement in any sector could apply to the OLRB to have that collective agreement "registered" as the Registered Collective Agreement ("RCA") for that sector in that geographic locale. For example, if Local 183 negotiated a collective agreement for building services workers at a building in Toronto (Building "A"), Local 183 could apply to have that agreement registered as Local 183's RCA for Toronto building services workers.

The effect of an RCA is that if Local 183 then certifies another bargaining unit of building services workers in Toronto (at Building "B"), the RCA Local 183 negotiated for workers at Building "A" would automatically apply to workers at building "B", and in the next round of negotiations, employers at Buildings "A" and "B" would have the option of forming a counsel of employer representatives who would then bargain together with Local 183 to negotiate a single renewed collective agreement. Where the employer at Building "A" and "B" are the same, the union could apply to consolidate those bargaining units.

Under this model, within the same sector and geographic location, multiple unions could operate, and there could be multiple RCAs in effect.

In the second step, where a union has organized a minimum threshold of workers in a particular sector/geographic region, that union could then apply to the OLRB to have their RCA extended (as minimum entitlements) to cover all workers, unionized and non-unionized, within the sector/geographic region. Local 183 believes that the appropriate threshold is the then current rate of unionization in the private sector in Canada.

With this hybrid model, unionization of the most vulnerable workers will be assisted through knowledge of what a successful application for certification will mean for them. It will assist in organizing sectors considerably as has been experienced with the accreditation model in the construction industry. With enough success in a sector, the union could justify extending minimum entitlements to organized and unorganized workers in that sector.

4. Card-Based Certification

Local 183 supports a return to the "Bill 40" model (and current construction industry model) of card-based certification, set out as option "3" in section 4.3.1 of the Interim Report.

In our view, so long as the union meets the threshold of 55% support on the date of application, there should be automatic certification.

As noted in the Interim Report, the introduction of a mandatory vote certification model, rather than card-based certification, is associated with a decrease in certification applications, as well as a decrease in the success of those applications. While employer groups, like the Ontario Chamber of Commerce try to argue that a secret ballot system is more democratic and will give employees a "real say,"[2] in fact the vote procedure gives employers the opportunity to threaten and interfere with true employee choice. As Sara Slinn points out in her article "Collective Bargaining," commissioned for this Review, research suggests that employer unfair labour practices during certification drives are common and also intentional. Most of the time, employees have the "democratic" choice of voting to retain their job or voting for a union, but not both.

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[2] http://keepontarioworking.ca/

In Local 183's experience, the most egregious unfair labour practices on the part of the employer invariably follow immediately after the union's certification application is filed. There is no way for a vote to be held soon enough following the certification application to avoid the potential for serious and negative interference by employers. Research also demonstrates that unfair labour practices by employers have a more drastic negative impact on certification in the mandatory vote model than they do in the card-based certification model. Furthermore, as Slinn points out, empirical research has shown that card-based certification procedures have a positive impact on industrial relations stability.

While it is illusory, of course, to believe that certification resolves the problem of employer intimidation and coercion, with card-based certification, there is at least a greater chance that an employer's unfair labour practices won't undermine employees' true wishes to certify.

5. Extension of Time Limits to Refer to Arbitration

Section 4.7 of the Interim Report invites comments on the issue of whether an amendment to the OLRA is necessary to address the fact that arbitrators no longer have the authority to extend time limits to refer a matter to arbitration. Local 183 agrees with the view of stakeholders, noted in the Interim Report, that the effect of this lack of authority is that potentially meritorious grievances can be defeated on technical grounds.

Prior to the 1995 amendments to the OLRA, the purpose of the OLRA was stated to be, *inter alia*:

> 4. To provide for effective, fair and expeditious methods of dispute resolution.

However, in 1995, this purpose was amended to state:

> 7. To promote the expeditious resolution of workplace disputes.

The removal of "fairness" and "effectiveness" from the purposes of the OLRA is telling, and reflects entirely the change that was made to s. 48(16). That is, the removal of an

arbitrator's jurisdiction to consider a grievance referred beyond the timelines stated in the collective agreement, regardless the merit or significance of the grievance, and regardless of the reasons for the delay, places the value of expeditiousness higher than the value of fairness and justice.

The patent unfairness of allowing a technicality – what could be an untimely referral due to illness of a union representative or an innocent oversight – to "kill" a grievance has no doubt animated the currently convoluted case law interpreting the current wording of s. 48(16).

In 2004, the Divisional Court in *James Bay General Hospital v. P.S.A.C.*, [2004] O.J. No. 4666 (Ont. Div. Ct.) upheld an arbitrator's ruling that where the provision in the collective agreement respecting referral to arbitration forms part of the "grievance procedure" rather than the "arbitration procedure", an arbitrator does have the jurisdiction to extend the time for referring the grievance to arbitration. As a result, where faced with an objection to hearing a grievance based on a late referral to arbitration, arbitrators are often required to conduct a searching construction of the grievance and arbitration procedures under a collective agreement to determine, whether in all the circumstances, the parties intended to include referral to arbitration as a part of the "grievance" procedure.

Labour arbitrators are sophisticated and are trusted with discretion in many contexts to make decisions based on a weighing of all the circumstances, including potential prejudice to the parties. There is no good reason why arbitrators should have discretion to waive timelines within the grievance procedure, but not where within the arbitration procedure. The same considerations apply in both contexts, including the potential prejudice occasioned by the delay, the rights at stake, and the reasons, if any, explaining the delay. The current state of the law, where an objection to arbitrability will be upheld where referral to arbitration is part of the "arbitration" procedure but not part of the "grievance" procedure is arbitrary.

In short, an amendment is needed to return discretion to arbitrators to waive timelines in the arbitration procedure where the arbitrator believes there are reasonable grounds for the extension and the opposite party would not be substantially prejudiced.

C. POTENTIAL AMENDMENTS TO THE *EMPLOYMENT STANDARDS ACT*

1. Temporary Help Agencies

Local 183 reiterates its September 11, 2015 recommendation respecting the treatment of clients in the context of a tripartite relationship involving a temporary help agency. That is, the *ESA* should be amended to deem that the "employer" for the purpose of the *ESA* is the "client" of the temporary help agency, and not the agency, when the employee is directed to work for the client by the agency. The agency would remain jointly and severally liable for all statutory contributions and remittances. This recommendation is reflected in option 2(b) of section 5.3.9 of the Interim Report.

As noted in our earlier submissions, simply expanding joint and several liability to clients will not address the problem of the growth in this type of precarious work, as the sharing of responsibility between these two parties still maintains an incentive for clients to use temporary help agencies for the purpose of sharing the risk of non-compliance (i.e., avoiding their full liability) under the *ESA*.

In addition, Local 183 supports a number of other options outlined in section 5.3.9 of the Interim Report, namely:

- Provide the same pay to an assignment worker who performs substantially similar work to workers directly employed by the client unless there are objective factors which independently justify the differential;
- Require disclosure of mark-up to assignment workers and place significant restrictions on the permissible amount of mark-up;
- Reduce barriers to clients directly hiring employees by changing fees agencies can charge clients;

- Limit how much clients may use assignment workers (e.g., through a cap on the proportion of the client's workforce that may be agency workers); and
- Promote transition to direct employment with clients.

2. Who is an "Employee?"

Local 183's September 11, 2015 submissions recommended that the *ESA* be amended to deem anyone engaged to work for an entity to be an "employee" unless that individual earns more than $150,000 per year.

This recommendation is not specifically referenced under section 5.2.1 of the Interim Report, which deals with issues respecting the "Definition of Employee" under the *ESA*. Option 4, however, states:

> Provide in the *ESA* that in any case where there is a dispute about whether a person is an employee, the employer has the burden of proving that the person is not an employee covered by the *ESA* and/or has an obligation, similar to section 1(5) of the *LRA* in relation to related employers, to adduce all relevant evidence with regard to the matter.

In Local 183's submission, a rebuttable presumption that a person engaged to perform services for an entity is an "employee" of that entity would go a long way towards remedying the prevalent problem of "misclassification" in Ontario workplaces. If either the individual and/or the entity engaging that individual wishes to have the individual treated as an independent contractor, they should be required to submit evidence to an employment standards officer to determine the matter, subject to appeal, and otherwise the individual must be treated as an "employee".

Local 183 rejects the option of including a "dependent contractor" provision in the *ESA*. Such an option will only create further, new and prolonged litigation, as it has done in the *LRA* context. Furthermore, vulnerable employees in the non-unionized context are seldom, if ever, in a position to advance the case that they are "dependent" contractors through litigation.

3. Equal Treatment of Temporary or Part-Time Employees

Local 183 reiterates recommendation #5 of its September 11, 2015 submissions respecting the need for an *ESA* amendment to require that part-time employees be paid the same rate (including proportionate benefits) as permanent employees performing similar work. The only effective way to increase the supply of decent, full-time, permanent jobs is to eliminate the incentives for employers to create these precarious positions. The cost of temporary and part-time labour must be proportional to the cost of full-time, permanent employees.

This recommendation is reflected in the options set out at section 5.3.7 of the Interim Report. Local 183 is of the view that option 2, requiring "part-time, temporary and casual employees be paid the same as full-time employees in the same establishment," unless objective factors justify the difference, should apply both to pay and to benefits.

Local 183 rejects option 4, which would make this requirement of non-discriminatory treatment for part-time and temporary labour applicable only to "lower-wage employees" who earn "less than twice the minimum wage."

First, there is no justification for paying part-time and temporary employees less than their full-time counterparts at any strata of the labour market. Where employers cannot commit to hiring a permanent, full-time employee, they are permitted the "flexibility" of hiring individuals on a part-time and/or temporary or casual basis. If employers are permitted to pay these employees less, this creates unjustified incentives on employers to convert decent, full-time and permanent jobs into cheaper short-term, temporary positions.

Second, even if there were some justification for discriminatory treatment of temporary and part-time labour at some strata of the labour market, the threshold of "less than twice the minimum wage" is far too low and also does not take into account that an employee earning more than twice the minimum wage, but in a part-time job, may still be making a daily wage that places him or her below the poverty line.

In terms of the option to "limit the number or total duration of limited term contracts," Local 183 supports the imposition of a limit to the percentage of an employer's workforce that may be working under limited-term contracts to no more than 10% of any workforce. As well, the duration of these limited-term contracts should be no longer than 3 months for any individual. After 3 months, if the employer wishes to continue to employ a contract employee, that individual's employment must be regularized.

4. Scheduling for Temporary and Part-Time Employees

In Local 183's submissions of September 11, 2015, we recommended that the *ESA* be amended to ensure that part-time and temporary employees receive at least two weeks' notice of their scheduled hours of work.

We are pleased to see that this is one of the options currently being considered by the Special Advisors in section 5.3.2 of their Interim Report. In addition, a number of other options listed in relation to scheduling would help address the need that workers have for some predictability – particularly where many part-time and temporary workers are attempting to balance other jobs and family caregiver obligations. In particular, Local 183 supports the following additional suggestions respecting scheduling:

- Provide employees job-protected right to request changes to schedule at certain intervals, for example, twice per year. The employer would be required to consider such requests;
- Require employers to pay employees more for last-minute changes to employees' schedules;
- Require employers to offer additional hours of work to existing part-time employees before hiring new employees;
- Require employers to provide part-timers and full-timers equal access to scheduling and time-off requests; and

- Require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted (at least 2 weeks in advance).

Local 183 disagrees with the option of encouraging sectors to "come up with [their] own arrangements." Employees are entitled to expect a minimum level of predictability regardless of the sector in which they work. Where employers require more, so-called "flexibility", for example, because the amount of work to be done is subject to fluctuation, the costs of those needs should be borne by the employer, not by vulnerable workers in any sector.

Local 183 also supports an amendment to the *ESA* that would require the employer to pay employees the lesser of four hours at their regular rate or the length of their cancelled shift (at their regular rate).

5. Initiating a Claim

Local 183 reiterates its view that the *ESA* should be amended to provide for a simplified, low-cost "collective complaint" procedure to be heard by the OLRB, which should incorporate the following features:

a) use of a representative plaintiff who need not be an employee;

b) ability of unions to advance these claims;

c) the cost of representation should be permitted to be done on a contingency fee basis;

d) allow for the award of costs and lawyers' fees to be ordered against the defendant (where the plaintiff is successful) but not against the plaintiff in any circumstances; and

e) a low threshold of commonality.

Option 5 under section 5.5.4.1 of the Interim Report contemplates allowing third parties to file claims on behalf of an employee or group of employees. We encourage the

Special Advisors to seriously consider Local 183's "collective complaint" procedure when it considers this option in more detail in the Final Report.

In addition, Local 183 supports the following options:

- Remove the ESA provision allowing the Director to require that an employee must first contact the employer before being permitted to make a complaint to the Ministry;
- Allow anonymous claims;
- Require ESOs to investigate and decide reprisal claims expeditiously where there has been a termination of employment (and other urgent cases such as those involving an alleged failure to reinstate an employee after a leave); and
- Require the OLRB to hear applications for review of decisions in reprisal on an expedited basis if the employee seeks reinstatement.