ONTARIO POWER GENERATION

700 University Ave, Toronto, ON M5G 1X6

Changing Workplace Review – Special Advisors' Interim Report

Submissions of Ontario Power Generation

INTRODUCTION - WHO WE ARE

Ontario Power Generation ("OPG") is an electricity generation company whose principal business is the generation and sale of electricity in Ontario. OPG's focus is on the effective stewardship of generation assets owned by the people of Ontario. This is achieved by focusing on: (i) the safe, reliable operation of its facilities; (ii) the management of these facilities by maintaining a strong focus on delivering value for money; and (iii) adhering to the highest standards of corporate citizenship, including a commitment to environmental and social objectives.

OPG owns and operates two nuclear generating stations, 65 hydroelectric stations on 24 river systems, 2 biomass stations, 1 thermal station and 1 wind turbine. OPG also owns two other nuclear stations which are leased to Bruce Power L.P., and is co-owner (not operator) of the Portlands Energy Centre in Toronto and the Brighton Beach gas-fired generating station in Windsor. Ontario Power Generation produces almost half of the electricity that Ontario homes, schools, hospitals and businesses rely on each day. We are committed to ensuring our energy production is reliable, safe and environmentally sustainable for Ontarians today and for the future.

We are pleased to have the opportunity to provide comments on the content and draft options for change set out in the *Changing Workplace Review: Special Advisors Report*. OPG supports the efforts of the government through the Special Advisors to consult with union, employee and business stakeholders across the province in an effort to best consider the suitability of Ontario's

existing labour and employment law framework to today's rapidly changing economy.

Like many other global jurisdictions Ontario's economy has been beset by significant technological change and market forces that have affected and/or altered the working lives of many Ontarians. Employees in many sectors have seen their overall compensation levels stagnate, or even deflate, and the shrinking availability of full-time, well paid work. Concomitantly, many businesses are forced to seek greater flexibility and cost savings in the face of increased competition and other economic pressures associated with a globalized economy. It is the tension between these two realities that must be balanced by the Special Advisors through the Changing Workplaces Review.

Within this broader context, while OPG supports legislative change that would assist vulnerable workers who may also be limited by precarious employment opportunities, we would urge caution to ensure that that any recommendations arising out of the report are focused and targeted towards that group – vulnerable workers. It is our submission that workers at OPG and other broader electricity sector employers do not fall within the definition of "vulnerable worker" as they are not victim to the range of concerns identified with such workers. In short, to the extent that need for legislative change is reasonable and supported by evidence, employers in the unionized broader electricity sector such as OPG should be exempted from the affect of that legislative change.

Scope and Focus of Review

The Introduction to Interim Report clearly states that "*a key focus will be on vulnerable workers in precarious jobs and the need for legislative amendments to address some of the issues facing these workers."*

The authors also recognize the following:

> There are many employers in Ontario who provide "good jobs", with decent wages, benefits, and reasonable hours of work for their employees where there is an opportunity for self-fulfillment and participation in the workplace. These employers know that there are vulnerable workers and precarious "bad jobs" in parts of the economy, but they are concerned that changes designed to address those workers if applied to all employers will negatively impact their businesses and undermine their competitive position.

The above-captioned statement helps to neatly frame OPG's main submission in response to the issues and options set out in the Review. While we understand

and support the need for change where sound evidence exists in support of such change, we are indisputably a “good employer” with “good jobs that does not generally employ workers who fit within “vulnerable worker” description. We are concerned that any across the board alteration of the existing legislative framework may have unintended and negative impacts upon our business.

OPG supports change for vulnerable workers facing precarious employment where the need for such change is supported by evidence and is reasonable within the context of Ontario’s economic landscape. OPG submits that employers such as OPG should be exempted from the effect of such legislative change. To the extent that outright exemption for a specific company or industry is viewed as too cumbersome or unwieldy, then, alternatively, any legislative changes should be carefully tailored to narrowly apply only to those vulnerable workers who are the key focus of the review. Given the link between overall compensation, representative voice issues, and the vulnerability of certain workers, perhaps the Special Advisors should consider the establishment of certain economic thresholds or bright-line tests in order to ensure that any required changes are directed at those most in need.

OPG has limited our submissions to a few targeted sections of the Interim Report and associated options. We urge a cautious approach given the ongoing fragility of the Ontario economy and the fact that employers normally bear the administrative and economic costs associated with the implementation of legislative change. While our default option would ordinarily be status quo where we have not commented on a specific segment of the report or accompanying option(s), we acknowledge that the Special Advisors may find the existence of compelling reasons for discrete legislative changes not addressed in our submissions below. OPG trusts that any such changes will be properly mindful of legitimate employer and business interests, and that sufficient emphasis will be placed on the broadly framed concept of “greater right or benefit” as set out in Section 5.2 of the ESA.

Submissions

Our submissions are organized as follows:

1. OPG Jobs & Employee “Voice”
2. Section 5.2 - Scope and Coverage of the ESA
3. Section 5.3 - Standards

OPG Jobs and Employee "Voice"

As of year-end 2015, OPG employed a total of 9,247 regular Employees. Of these employees, approximately 57% were represented by the Power Workers Union, 32% were represented by the Society of Energy Professionals, and 11% were excluded, unrepresented Management Group, or "MG" employees. Of the total number of employees, only a very small fraction (17 employees, less than 0.01% of the total employee population) is classified as part-time or job share employees. All these part-time or job share employees are represented by a union and have the same (pro-rated) rights/benefits under the collective agreement, including participation in the OPG pension plan, as regular employees. As opposed to the situation where many vulnerable workers are limited to part-time hours and uncertain schedules, the job share and part-time workers at OPG have chosen their working arrangements. OPG also employs PWU represented Regular Seasonal workers, who are "steadily employed throughout the year, except for short term layoffs". These seasonal workers are also covered by the collective agreement and receive OPG pension and benefit coverage.

OPG also regularly employs a large number of temporary construction employees hired through a hiring hall process administered either directly through the Building Trades Unions (BTU) or through the PWU "Appendix A" hiring hall process. The rates of pay and associated pension and benefit remittances are directly negotiated with the applicable union representatives and are generally in line with the rates paid to unionized construction workers employed in the ICI sector.

In 2015 OPG also employed a number of other Temporary employees. Approximately 89% of those temporary employees were hired into positions represented by either the PWU or Society. While both collective agreements exclude Temporary employees from participation in the pension plan, in addition to being paid at negotiated wage rates, represented temporary employees are provided with:

- Three floating holidays after 20 weeks service
- Sick leave earned at one-half day per month of service
- The right to participate in the benefit plan at group rate
- Entitlement to certain leaves and Special Time off afforded to regular employees
- Pay step progression for extended Temporary assignments
- Priority over external candidates to advertised vacancies (Society)
- Accumulated service credit (PWU)

- Recognition of service if hired into regular position

Overall compensation levels of OPG are consistent with those in the unionized electricity sector, and a large number of OPG employees have their names published annually having earned in excess of $100,000. All regular OPG employees enjoy generous extended health and dental coverage. All regular OPG employees enjoy participation in the OPG Pension Plan, a defined benefit plan described by Special Advisor Jim Leech in the *Report on the Sustainability of Electricity Sector Pension Plans to the Minister of Finance* ("Leech Report") as follows:

> In general, benefits in these plans are richer than most of the Broader Public Service (BPS) plans and employee contributions are also lower than BPS plans in general.

All hours of work and scheduling provisions affecting the unionized employees at OPG are negotiated directly with either the PWU or Society. Regular hours of work for all employees, including MG, are either 35, 37.5 or 40 hours per week. For unionized employees any hours worked beyond regular hours are paid at premium rates of either 1.5X or 2X regular hourly pay. Employees enjoy the option to bank certain portions of this overtime to use as paid time off as per the appropriate collective agreement provisions.

Time Off/Leaves of Absence

All OPG employees enjoy a total of 11 paid statutory holidays each year, and unionized employees required to work on those days are compensated at 2X regular hourly pay. Unionized employees with 20 weeks or more continuous service are also entitled to 3 floating holidays per year, to be taken on mutually agreeable dates. Employees who have or are serving in the Canadian Forces are also entitled to a paid day off for Remembrance Day. Unionized employees also enjoy graduated vacation entitlements based on years of service, with entitlement to three weeks vacation for Society-represented employees commencing after one year's service. The collective agreements also contain the following paid time off/leave provisions:

- Sick leave paid at either 100% or 75% of regular pay
- Paid jury duty/required attendance at court
- Funeral leave
- Medical appointments of less than one-half day

- Pregnancy/Parental leave – extended periods where pay is 93% of employee base pay
- Long-term disability

In addition to paid time off, unionized employees are also entitled to take 5 unpaid Family Care days per year and have the option to use banked overtime, work the time back over a reasonable period of time, or take the time as unpaid. Beyond the express provisions of the collective agreement, where workload permits employees have also been granted discretionary extended periods of leave without pay.

Employee "Voice" at OPG

While the Interim Report makes mention of the "presumptive imbalance and inequality of bargaining power as between employer and employee", this is not the case at OPG. In contrast to the declining rate of unionization across Ontario union density at OPG has remained relatively unchanged for decades. The main industrial trade unions, the PWU and Society, play an integral representative/advocacy role in the ongoing operations of OPG, as evidenced through their representation on a number of bilateral and tripartite committees dealing with employee safety, diversity, and management/union relations.

In the field, bargaining unit employees are represented by well trained, experienced workplace representatives. Both unions have negotiated detailed provisions establishing paid reasonable time off for union representatives for involvement in joint processes under their respective collective agreements. All unionized employees have access to grievance and arbitration process, and sophisticated legal representation, in the event that any dispute arises in respect to their rights and entitlements under their respective collective agreements.

OPG also highly values a respectful, diverse and inclusive workplace where discrimination and harassment will not be tolerated. All employees are entitled to file complaints alleging discrimination or workplace harassment and are afforded full procedural and substantive protections under the OPG Human Rights and Harassment Procedure. Additionally, OPG has a robust ethics and compliance program where employees can file complaints, including anonymous complaints, directly with the Chief Ethics Officer, for investigation and resolution.

OPG employees are not "vulnerable" workers as envisioned by the Interim Report. Categories of workers who in other sectors might be viewed as vulnerable (part-time, job-share, temporary, seasonal) are entitled to most of the

same rights and benefits as regular employees, albeit on a pro-rated basis. On any evaluation of the measures set out in Section 2 (Guiding Principles, Values and Objectives, Decency at Work, Respect of the Law and Culture of Compliance, Access to Justice, Consistent Enforcement and Compliance/Level Playing Field, Freedom of Association and Collective Bargaining) OPG meets the test of being a "Good Employer" with "Good Jobs".

The ESA operates to prevent or ameliorate the exploitation of vulnerable workers. While the establishment of minimum standards is consistent with the idea of workplace and economic fairness, in our submission there needs to be greater acknowledgment of the strength and influence exercised by union representatives. Where sophisticated parties have negotiated generous terms and conditions of employment beyond those minimum standards there should be greater deference to the decisions of those parties when it comes to consideration of whether the application of discrete employment standards are compliant with the purposes of the Act.

Section 5.2 - Scope and Coverage of the ESA

Section 5.2.1 – Definition of Employee

Given the often technical, highly specialized work performed in the hydroelectric sector, in particular within our Nuclear organization, OPG is constantly challenged to recruit and retain a dedicated and skilled workforce who are available to provide short-term staffing or project support. On October 15, 2016 OPG commenced the largest single nuclear project in our history, the Darlington Refurbishment project. Darlington Refurbishment will generate $14.9 billion in economic benefits to Ontario and create 11,800 jobs per year, at its peak. It will increase provincial household revenues by $8.5 billion and government revenues by $5.4 billion. It involves vendors, suppliers and contractors from all over province. While the work is planned and ready to be executed, as with any major project OPG anticipates that the demands of the project will involve numerous resourcing decisions involving questions regarding the potential hiring of full-time employees, temporary employees, and contractors.

Operating as public company in a highly regulated electricity marketplace, OPG faces very particular challenges that are not applicable to most employers in the province. Our shareholder, electricity industry stakeholders, and the public all expect OPG to demonstrate fiscal prudence in our operations. The overwhelming bulk of OPG revenues are subject to review and approval before the Ontario Energy Board (OEB). Given the role of the OEB as market proxy and

advocate for the interests of the public, and given the participation of various OEB stakeholders seeking to limit the rise in electricity prices, all OPG decisions regarding staffing and compensation are subject to close scrutiny. In a case that proceeded to the Supreme Court of Canada (see *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, the OEB disallowed certain payment amounts applied for by OPG as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry. External stakeholders through the OEB hearing process have also regularly challenged OPG on staffing levels.

OPG has employed staffing and compensation strategies to reduce overall regular headcount numbers and control costs in order to be responsive to OEB and shareholder concerns. In light of significant project commitments such as the Darlington Refurbishment, however, OPG is regularly required to retain the use of augmented contract staff to perform project and emergent work. With the exception of a few Managerial and Executive roles, every decision to contract out work at OPG is subject to the review and approval of one of our industrial trade unions through a Purchased Services Agreement.

Purchased Services Agreements (PSA)

There is significant involvement of both the PWU and Society in all decisions to contract work that would otherwise fall within the jurisdiction of either union. The PSA provision in both collective agreements contain a presumption in favour of using regular employees, joint consideration of the most effective way to get the work done, and a joint decision making process to consider outsourcing of work. These provisions afford the unions with an extraordinary degree of involvement in OPG decisions to contract out work.

OPG contract staff includes individuals hired to perform specific roles, or to perform defined tasks or projects in support of OPG's overall organization.

In the electricity industry many of these individuals have specialized skill sets that may not be readily present amongst regular staff or are in short supply. Most of these individuals operate through incorporated business arrangements for tax purposes, and many are former employees of OPG, or other electricity-sector employers in receipt of a defined benefit pension. Many of these individuals, particularly in the nuclear industry, are in high-demand and understand their value in the market. OPG is often in competition for many of these resources with other electricity industry employers. Whereas engaging such individuals as

Temporary Employees under the respective collective agreements might sometimes be preferred, it is often not how the individual contractors wish to establish an economic relationship with OPG.

In order to ensure such individuals are not characterized as “employees”, they are secured through various specialized staffing companies or Temporary Help Agencies (THAs). To the extent that an actual employment relationship exists, OPG submits that the THA acts as the employer, as it is the THA who is responsible for any statutory deductions, hiring and firing, and for any disciplinary or performance management requirements. It must be stressed that these are not vulnerable workers. Rather, it is understood that these are well compensated individual contractors who prefer independent contractor status and are not seeking to be declared as employees.

OPG is concerned that options explored in the Interim Report may be damaging to OPG’s business strategy, prove administratively burdensome and costly, and result in little appreciable benefit or protection to contract workers performing services for OPG. OPG is concerned that legislative change may reflexively characterize such individuals as employees even where no indicia of worker vulnerability exists, and where the work being performed has been appropriately contracted out through the applicable PSA process. Such a finding could inappropriately trigger collective agreement representation rights, including just cause protection and questions regarding whether the “position” they occupy must be posted in accordance with the relevant collective agreement. This could unintentionally disrupt the finely negotiated balance between bargaining unit employees and augmented staff who, by design and in some cases necessity, work under different terms and conditions of engagement.

OPG’s primary submission is to exempt unionized employers in the electricity sector from any proposed legislative change that would adversely affect the agreed to economic relationship between the contracting parties. It is submitted that once the representative trade unions have effectively sanctioned the contracting out of work through the PSA processes, OPG and individual contractors should be provided with the leeway to establish the economic vehicle through which necessary services can be secured. At page 117 of the Interim Report the Special Advisors recognize that in the Arts Sector many individuals “need or desire to have independent contractor status for tax purposes”. In our submission, such recognition is also appropriate within the context of highly skilled, well compensated contractors in the electricity sector. Any interference with these relationships could have a negative impact on the ability of OPG to secure in demand resources and hamper our ability to meet project and operational milestones. This in turn could adversely impact shareholder and public confidence in the ability of OPG to meet its mandate, and negatively impact electricity prices.

Alternatively, to the extent that the definition of “employee” is expanded to include dependent contractors, any such expansion should be limited to vulnerable workers. Where the overall remuneration of dependent contractors exceeds a minimum threshold, the economic relationship used by the contracting parties should be given deference. Such an outcome would be consistent with a broadly framed concept of greater right or benefit.

Section 5.2.2 - Who is the Employer and Scope of Liability

OPG submits that the status quo should be maintained in this area. Like many employers OPG often relies upon temporary employees and contractors, including those secured through THAs, to fill staffing requirements occasioned by project work, long term sick leave/disability, and pregnancy/parental leave coverage. Through a competitive process OPG has awarded Master Service Agreements (MSA’s) to a number of reputable external recruiting firms. Each of these firms has been approved to source specific types of resources in the various business functions across OPG.

Where work has already been contracted out through the PSA process, this engagement may involve the use of large industrial and construction contracting companies, who are engaged through robust RFP processes, as well as many smaller firms providing specialized services and individual independent contractors. Many of our service suppliers are themselves unionized companies, including a number that employ employees who are represented by the PWU and Society. It is neither fair nor administratively practicable to make OPG liable for ESA compliance requirements. Alternatively, and as referenced in Option #2, any secondary liability should only be applied to specific industries where vulnerable employees and precarious work are commonplace.

5.2.3 Exemptions, Special Rules and General Processes – Issue 3 – Managers and Supervisors

OPG has largely constructed its organizational structure in compliance with the existing ESA exclusion rules. One exception is the fact that a number of supervisory employees who exercise some degree of authority over other workers in the workplace are nonetheless entitled to union representation by the Society of Energy Professionals. The Society’s recognition clause specifically includes Supervisors (as distinct from those who exercise “managerial functions”), and also includes a number of employees performing information technology work who might otherwise be exempted as “Information technology professionals” as defined under ESA Regulation 285/01. As members of the

Society bargaining unit these employees enjoy terms and conditions of employment that exceed the minimum standards set out in the ESA.

OPG is concerned that options explored in regards to exemption of Managers from the application of the ESA hours of work, overtime, and scheduling provisions may impact the organization. A number of excluded MG staff may regularly perform non-supervisory/non-managerial tasks as part of their broader duties and responsibilities, or have the accountability for defined project work that does not, for periods of time, involve the day-to-day management of other employees (although this remains their core accountability). The question of which individuals truly exercise "managerial functions" is of particular interest at OPG, since the exercise of managerial functions defines the limit of the Society's representation rights.

A very recent arbitration award from Arbitrator Kevin Burkett is on point. In this case the Society argued that OPG needed to meet a three-part test that included the requirement for a Manager to "spend the majority of his/her time performing managerial duties". Arbitrator Burkett reviewed the history of labour relations between the parties, including the provisions of the original Voluntary Recognition Agreement (VRA) and subsequent amendments to the VRA. He reached the conclusion that while the parties had used certain language in one section of the agreement to set out the test for managerial exclusion, the actual test involved a somewhat complex formula tied to a previous job evaluation plan that required a certain number of employees to be supervised, and a specific rating of the complexity of the work performed by those being supervised. *(Arbitration Award Enclosed)*

The point here is not to suggest that OPG's organizational structure should be the measure of what constitutes a proper managerial exemption under the ESA. Rather, it is to hi-light the fact that in sophisticated, complex and mature labour relations environments, the parties have in depth knowledge about who should or should not be exempt from the application of the Act. Where unions enjoy "all employees with the exception of" bargaining units, they will invariably seek to maximize their jurisdiction rights. So too has OPG established its organizational structure to create effective managerial oversight that can properly meet the test for exclusion. Exempted MG staff may occasionally work beyond normal working hours to meet the production or project requirements, and they are exempt from overtime pay. It must be acknowledged, however, that there are economic benefits to accepting such managerial roles, including typically higher base salaries and eligibility for a bonus. This in an environment where employees cannot be characterized as "vulnerable", but where individuals have the ability to choose the type of work and terms and conditions of employment that suit their personal career aspirations.

In summary, OPG submits that if legislative action is required to alter the status quo in respect to the managerial exclusion, then serious thought should be given to excluding from its' application all unionized workplaces. Alternatively, the category should be defined by looking at not only the primary purposes of the job but at the overall role and accountability of the job in the organizational structure. Another potential alternative would be the establishment of bright-line annual salary level (inclusive of bonus) as a measure to ensure vulnerable workers are not being inappropriately characterized as supervisory or managerial.

Section 5.3 - Standards

Section 5.3.1 – Hours of Work and Overtime Pay

Section 5.3.2 – Scheduling

The Interim Report correctly recognizes that as the exclusive bargaining agent a union can enter into an agreement with the employer on behalf of all bargaining unit employees. It is also stated that the Ministry takes the position that individual employees cannot unilaterally revoke such an agreement, and written agreement to average overtime can be embodied into collective agreement provisions.

Given the foregoing, and given the importance of union representation rights or "voice" in the workplace, what is not clear is why employers who negotiate with sophisticated unions in a complex working environment such as OPG are still required to submit to the Ministry's permit approval process every three years. Put another way, if the Ministry permits parties to negotiate exceptional scheduling provisions that still fall within defined parameters (e.g. 60 hour per week limit, 11 consecutive hours off), and the parties then agree to such scheduling provisions and incorporate them into collective agreements, why is the Employer still required to seek the approval of the Ministry to an arrangement that is satisfactory to the workplace representatives? What if a workplace representative who has contractually agreed to certain exceptional scheduling provisions subsequently tells the Employer they will not provide their consent to when the Employer seeks a permit from the Ministry? Does this not create the opportunity for mischief that is not consistent with underlying purposes of the Act?

OPG has experienced complaints to the Ministry from individual employees arguing that specific negotiated scheduling provisions are somehow not in complete alignment with the precise language used in the ESA. Beyond the requirements of the ESA, OPG is also subject to scrutiny from our nuclear regulator, the CNSC, in regards to appropriate limits on hours of work. In 2015 a number of individuals attempted to advance an argument (unsuccessfully) that

certain negotiated scheduling provisions were in violation of CNSC hours of work expectations. This creates a scenario where the ESA minimum standards may be relied upon by individual employees to challenge collective agreement provisions negotiated with the exclusive bargaining agent. Such an outcome is inconsistent with purposes of the Ontario Labour Relations Act and the ESA.

On the issues of hours of work and scheduling, OPG submits that the parties should be left to negotiate their own specific arrangements that are designed to balance legitimate employee compensation and employee health concerns with the operational requirements of the business.

Section 5.3.4 – Personal Emergency Leave

Section 5.3.5 – Paid Sick Days

Section 5.3.6 – Other Leaves of Absence

OPG submits that the three discrete leaves listed above are examples where a more expansive view of the "greater right or benefit" provisions of the Act would be appropriate. Workplace parties should be permitted the flexibility to aggregate the type and resultant economic treatment of such leaves under a specific collective agreement in order to determine whether a greater right or benefit exists. For example, the Personal Emergency Leave provisions of the ESA provide for 10 days of unpaid leave for specific circumstances related to personal illness, injury or medical emergency or death of a family member. OPG employees enjoy paid bereavement and sick leave, as well unpaid Family Care leaves, that far exceed the ESA minimum standard.

Section 5.3.8.3 – Just Cause

OPG opposes any change that would extend just cause protection to excluded MG staff. OPG requires full discretion to make rapid and necessary staffing decisions to respond to business, operational or performance decisions. OPG routinely offers reasonable separation terms for non-cause terminations, and all MG employees have access to the courts to seek additional common law notice provisions should they wish.

Section 5.4.1 Greater Right or Benefit

As noted above, OPG submits that a more considered and comprehensive approach to the greater right or benefit provisions should be considered.

OPG favours the approach suggested by Option #2 of the Interim Report, whereby employers and employees may contract out of the ESA based upon a consideration of all terms of conditions of employment and whether the employer has met the overall objectives of the Act. While recognizing that such an outcome may not be appropriate in all workplaces, it is submitted that it is appropriate where employees are represented by a trade union. Unions and employers should have the ability to fashion arrangements that are responsive to both the desires of the members of the bargaining unit and the needs of the business or organization, provided that the purposes of the Act are met.

This ability to tailor mutually acceptable outcomes is a fundamental component of collective bargaining. It is submitted that the evaluation of whether the entirety of the bargain, whether on a holistic or specific entitlement (e.g. time off, hours of work) basis is a greater right or benefit, is a task that could be performed relatively quickly. Such an outcome could thereby help free employers and unions from economic constraints imposed through the universal application of all standards.

Sincerely,

Terry Fitzpatrick
Director, Employee Relations
Ontario Power Generation