



PROGRESSIVE CONTRACTORS ASSOCIATION OF CANADA

Changing Workplaces Review Submission

29/09/2016

INTRODUCTION

The Progressive Contractors Association of Canada (PCA) is pleased to provide this submission in response to the *Changing Workplaces Review: Special Advisors' Interim Report* (the "Interim Report") which invited feedback by October 14, 2016.

The Interim Report presents a wide range of issues and topics as the government considers possible changes to the *Ontario Labour Relations Act (LRA)* and the *Employment Standards Act (ESA)*. While PCA understands that provisions related to the construction industry in the LRA were explicitly outside the scope of the Special Advisor's review, many of the topics raised in the Interim Report could still impact businesses across many industries, including construction.

These issues include:

LRA

- Related and Joint Employer
- Electronic Membership Evidence
- Access to Employee Lists
- First Contract Arbitration
- Replacement Workers
- Mandatory Access to Interest Arbitration

ESA

- Who is the Employer and Scope of Liability
- Scheduling
- Part Time and Temporary Work – Wages and Benefits
- Temporary Help Agencies
- Education and Awareness Programs

PCA appreciates the opportunity to provide feedback on these issues and is optimistic the Special Advisors will give PCA's concerns full consideration before drafting their final report and recommendations.

ABOUT PCA

PCA member companies employ more than 25,000 skilled construction workers across Canada and are represented (unionized) primarily by CLAC. Our members are building major projects that are vital to Ontario's prosperity but also contribute to keeping Ontarians safe, including: ongoing work on over 30 water treatment facilities across Ontario; road and bridge construction, particularly in southern Ontario; heavy involvement in building schools and long-term care facilities; and the Billy Bishop Toronto City Airport and terminal.

PCA member companies are also responsible for 40 per cent of energy and natural resource construction projects in British Columbia and Alberta, and are leaders in infrastructure construction across Canada.

Our members include small, medium and large companies organized under a progressive labour model. These include some of Canada's largest construction contractors such as: Ledcor Group; JV Driver; Kiewit; Flint Energy; Flatiron Construction; North America Construction; JMR Electric Ltd; and medium sized contractors in Ontario including: McLean Taylor/Stonetown Construction Ltd; Looby Construction Ltd.; among many others.

In Canada, there are basically three ways workers are organized: traditional unions – known as the Building Trades Unions (BTU); progressive unions primarily represented by CLAC; and non-union companies known as “open shop” or “merit.”

PCA is the voice of progressive unionized employers in Canada's construction industry. We call ourselves “progressive” because we take an inclusive, collaborative, non-confrontational stance that is a fair-minded, middle option in the construction industry. PCA represents a fast growing number of companies that share a vision of a labour model that is committed to a non-adversarial relationship between employees and employers, and we work to bring together the interests of both labour and business to meet important commercial goals. PCA's goal is to ensure all jurisdictions in Canada have a fair and open construction industry, cooperative labour relations, and a robust, inclusive and highly-capable workforce. PCA believes in open competition in which no sector is given an artificial and unfair advantage over another on the basis of union affiliation or lack thereof.

PCA's unique labour-management model ensures a strong voice for employees, enabling better dialogue between employers and employees, improved workforce management capabilities, and a cohesive workplace culture. This highly-cooperative relationship between employers and unions means there are no jurisdictional disputes, and we are united in our focus on building a high-productivity, high-performance business and culture around construction.

The progressive unionized model is well-suited to respond to Ontario's current and future labour market needs because it is flexible and develops highly-productive workforces. PCA member companies bring innovation to the job site by offering multi-skilling, which has many productivity benefits. Skilled workers are moved around within a job site to perform work that gets the project done. Utilizing a

multi-skilled workforce from beginning to end results in increased flexibility; fewer delays; increased job satisfaction for the workers on a job and thus lower worker turnover; reduced costly transitions (layoffs and transfers); and a smoother workflow with reduced dead time between tasks.

PCA continues to strengthen Ontario's workforce through its commitment to high safety standards and extensive skills training. PCA member companies are leaders in promoting healthy, safe and professional workplace cultures. They promote occupational health and safety best practices for their workers, as well as extensive training and professional development opportunities. In our collaborative model, PCA and CLAC believe health and safety is a shared responsibility between employers and employees, and we have achieved excellent safety records as a sector. While the rest of the construction industry has a Lost Time Injury (LTI) Frequency Rate of 1.390, our sector (PCA/CLAC) outperforms the industry by far with an LTI Frequency Rate of 0.6.¹

An important mark of our progressive model is a commitment to our workers and their future, and that involves investments in the workplace culture and in skills development. PCA is a leader in promoting inherent dignity in the skilled trades. Work in the construction trades should provide a venue for the worker to exercise his or her ability to make meaningful choices in the workplace, develop his or her capabilities as a worker, and contribute in a meaningful way as a team on the completion of a project.

PCA member companies focus on helping workers expand their opportunities through skills training and apprenticeships. The majority of PCA members contribute to CLAC's robust training fund here in Ontario, in addition to making substantial investments in training both in-house, and through other third parties. As leaders in the industry, PCA supports employer-driven training programs such as the Canada-Ontario Job Grant, which works with employers to fund skills training for workers according to the jobs that employers need to fill.

According to our members' data, PCA member companies employ a workforce that is seven per cent younger than the industry average. In jurisdictions where journeyman-to-apprentice ratios permit, apprentices comprise between 35 and 45 per cent of a PCA contractor's workforce, on average. In Ontario, 75 per cent of PCA members train apprentices, and that increases to 85 per cent for PCA member companies with more than 10 employees.

PCA wants to work with the government, municipalities and the private sector to make the most of our collective investments and infrastructure dollars in this challenging economic environment. Our inclusive and progressive labour model will help the government meet its fiscal targets, grow the economy, and provide more employment for skilled workers and apprentices in Ontario.

¹ According to Infrastructure Health and Safety Association 2012 Data. LTI Frequency rates are derived from Lost Time Injury Data divided by person hours worked within a sector.

PCA is encouraged by the opportunity to contribute to the important work being undertaken in this review and share our views on how Ontario can move forward in a manner that is in the best interest of employees, unions and employers.

POTENTIAL IMPACT OF CHANGES TO THE LRA

While the construction provisions of the LRA were explicitly excluded from the scope of the Special Advisors, there are a number of issues and topics that have been raised that could potentially impact all employers, including those in the construction sector.

The following areas of the Interim Report related to the LRA are of particular concern for PCA and our members.

Section 4.2.2 – Related and Joint Employers

Many employers use sub-contracting arrangements to allow employers to focus on their core expertise, while leaving other entities to deliver goods and services in their own area of specialty. This is particularly true in the construction industry given its trade-based nature. At PCA, we represent companies on both ends of these arrangements – including companies that sub-contract all or parts of a project, and the sub-contracted parties. This structure has been beneficial to all parties, as it creates predictability, increases productivity and efficiency, and creates jobs.

While PCA cannot speak for other industries, there is no question the construction industry would face extreme challenges if our members' ability to subcontract was limited or restricted.

The *status quo* contained in legislation and case law is sufficient to protect the concerns raised regarding attempts to avoid employment liability, without disruption of long-standing business practices which have been carefully developed over time and have become necessary to remain competitive.

If the final recommendations include substantive changes to the current balance in the law, this could cause many employers to rethink their commercial structures, which could put future investments and job creation at risk.

Section 4.3.1.2 Electronic Membership Evidence

The single largest issue with regard to this potential recommendation is the ability to determine whether evidence is authentic. This should present concerns for all parties in the labour relations community including employees, employers, unions, and administrative tribunals. Simply put, in an era in which electronic communications are subject to outside access and interference, electronic membership evidence presents issues with reliability. This directly impacts the ability of employees to make sure their true wishes regarding the presence, or absence, of union representation are respected in a given workplace.

Aside from the primary consideration of ensuring employee desires are accurately taken into account, the potential for electronic evidence is likely to result in increased administrative and litigation costs associated with processing applications for certification involving electronic membership evidence.

Section 4.3.1.3 Access to Employee Lists

The current practice in Ontario for a union seeking to represent employees at a workplace is that the union can gain access to a list of employees only after the union has filed an application for certification. That list would not contain contact information of employees.

However, PCA is aware that some labour unions have asked that this process be changed so that a union would receive a list of employees and their contact information, prior to the filing of an application, after demonstrating a certain number of signed cards.

The risks of making this change are substantial. For one, this would represent a considerable intrusion into the privacy rights of all employees, based solely on a minority of employees that have signed a union card. In addition, an additional layer of Ontario Labour Relations Board litigation would likely result, with increased challenges regarding whether a union has demonstrated sufficient support.

Further, if applied to displacement applications in the construction sector, this would result in unjustifiable access by a raiding union to employee information. Providing information on all employees after receiving support of a minority of employees would only serve to streamline attempts at certification by a union that cannot otherwise show majority support of employees. For PCA members, that have taken great pride in building a lasting, collaborative relationship with our CLAC union partners, a change in law that creates more uncertainty during the “open season” would pose a significant threat with no corresponding benefit to the democratic interests of employees.

Section 4.3.2 - First Contract Arbitration

While PCA understands the need for an appropriate balance of power between a union and an employer, we believe the existing provisions in the LRA (*e.g.* remedial relief; duty to bargain in good faith; ancillary strike/lockout provisions) already provide an appropriate balance of power.

A recommendation from the Special Advisors for automatic access to first contract arbitration, with little to no pre-conditions, would shift this balance of power substantially in favour of unions.

In PCA’s experience, the current structure of collective bargaining motivates parties to build positive relationships and consider practical solutions and compromises to achieve long-term stability in the workplace. Any change to this structure could have a very serious impact on the current incentive of all parties to reach meaningful compromise and agreement.

Section 4.4.1 – Replacement Workers

Replacement workers are permitted in every Canadian jurisdiction (save British Columbia and Quebec) during a lawful strike or lockout. In these circumstances, an employer is permitted to rely upon a replacement worker to continue to meet customer needs.

Allowing for replacement workers encourages ongoing compromise toward a collective agreement, and ultimately, labour relations stability.

As with all recommendations under consideration in this review, the need to alter the *status quo* should be evidence-based. Statistically, a strike or lockout occurs in less than 5% of Ontario workplaces operating under a collective agreement. This is strong evidence the current practice of allowing replacement workers has had a positive impact on the stability of labour relations. Any recommendation that would alter this balance should carefully consider the potentially negative impact on the current structure and incentives in collective bargaining.

Section 4.4.3 – Mandatory Access to Interest Arbitration

PCA is aware that some unions have asked the Special Advisors to consider mandatory access to interest arbitration during mature rounds of collective bargaining. Similar to the section above regarding First Contract Arbitration, this could have a profound impact on the current structure and incentives built into the current collective bargaining process. Most of all, the balance of power would shift dramatically to unions during bargaining, and would reduce their incentive to reach meaningful compromise and agreement.

POTENTIAL IMPACT OF CHANGES TO THE ESA

The Ontario legislature has long understood that the construction industry is unique. For the most part, it is project-based and seasonal in nature. This results in unique considerations for PCA members that have a direct interest in maintaining the *status quo* in a number of areas under consideration including: managerial and supervisory exemptions (5.2.3), hours of work and overtime (5.3.1), scheduling (5.3.2), paid sick days (5.3.5), wages and benefits for part-time and temporary work (5.3.7), and temporary help agencies (5.3.9).

At the outset of our submission on the ESA, the PCA urges the Special Advisors to consider the impact changes in these areas would have on employers in the construction industry. Given the nature of the industry, some of the potential changes would negatively impact a booming industry in Ontario that has helped create a large number of opportunities for small business while at the same time create jobs. The following areas of the Interim Report related to the ESA are of particular concern for PCA and our members.

Section 5.2.2 – Who is the Employer and Scope of Liability

Historically, the ESA has placed workplace responsibility and liability on the entity directly employing the employee. However, PCA is concerned with the position of some advocates that a lead employer should

be liable if that employer ultimately receives the benefit of the work of employees of a subcontractor or outsource provider.

Similar to PCA's concerns in section 4.2.2 of the Interim Report related to the relationship with subcontractors in the LRA, the position of some advocates is not practical in the construction industry. Changing liability for employers would have a significant impact on current commercial relationships, and could discourage some companies from making future investments.

Section 5.3.2 – Scheduling

PCA encourages the Special Advisors to take extreme caution in this area, as the impact of any changes in law would be problematic for employers across many industries, but particularly in construction. As above, construction schedules are dictated by the pace of a project and the seasons. Unfortunately, due to the nature of the industry, scheduling can be unpredictable (*e.g.* the weather or delay in materials being provided to a job site). Accordingly, a construction company needs flexibility when it comes to scheduling employees as many of the factors are beyond its control.

While PCA recognizes that the scheduling of work can present challenges for employees (*e.g.*, child care arrangements, commuting, *etc.*), the unpredictable nature of work in the construction industry would mean that any requirements regarding scheduling outlined in law would have a disproportionate impact on productivity and efficiency in the construction industry. This, in turn, would have a detrimental impact on individuals employed in this industry.

In particular, the government must ensure that any proposals for change do not impact the ability of the construction sector to complete public sector infrastructure projects on time and on budget. As with many areas covered in the Interim Report, there exists the potential for increased costs and delayed completion if the scheduling of work becomes less flexible.

Section 5.3.7 – Part-time and Temporary Work – Wages and Benefits

PCA recognizes that some advocates may be encouraging the government to amend the ESA so part-time and temporary employees receive the same compensation as their full-time counterparts. While there is nothing in the current law requiring this equity between full-time and part-time wages and benefits, the reality is that many employers already treat their employees equitably (*e.g.*, setting thresholds to qualify for certain benefits).

If the government was to require equal wages and benefits for part-time and full-time employees, this will increase the cost of doing business for companies in all sectors. It would also fail to acknowledge that in some cases, the work of part-time employees vs. the work of full-time employees is fundamentally different in its contribution to the organization. In these cases, it may be perfectly reasonable for employers to provide differing degrees of compensation and benefits.

Section 5.3.9 – Temporary Help Agencies

Temporary help agencies form part of the PCA membership. PCA members which rely on these agencies have a *bona fide* need for temporary help in order to be competitive in an industry that is project-based and seasonal in nature. Not only do temporary agencies provide employment opportunities in circumstances they may not otherwise exist, they are also crucial in order to be able to respond to the reality of unexpected business growth, and decline, in the construction industry.

Several items under consideration for temporary agencies, including requiring equal rates of pay with direct employees, would eliminate the utility of this mechanism in the economy, as well as the resulting job creation.

5.5.2 – Education and Awareness Programs

The PCA expresses unbridled support for improvement in the Ministry of Labour’s educational and outreach initiatives. There is strong merit to the suggestion that the legislative framework and its current enforcement mechanisms should not be blamed for a lack of compliance. Rather, the question to be asked is whether the lack of compliance results from inadequate information and education on the legislative framework.

CONCLUSION

Currently in Ontario, the government provides an effective balance between the rights of employees and the ability of employers to drive investment and create jobs. In particular, PCA believes Ontario has established an effective balance in law between the relative influence and power of unions and employers in the collective bargaining process. The evidence of this balance is that a strike and/or lockout occurs in less than 5 per cent of Ontario workplaces operating under a collective agreement.

Along with the specific issues identified throughout this submission, PCA’s over-arching concern is that the government may be considering changes to the LRA and the ESA that could disrupt the current balance between employers and unions in Ontario. The recommendations the Special Advisors choose to include in their final report could create an environment that makes it increasingly difficult for employers to be productive, drive economic growth and create jobs in Ontario.

PCA understands the objective of protecting employees in Ontario, particularly those whose work is more “precarious”. However, the areas explored by the Special Advisors seem to go well beyond the goal of protecting the most vulnerable worker, and have the potential to fundamentally change the labour landscape in Ontario. Despite explicitly excluding the construction provisions of the LRA from the scope of the review, construction employers would still be impacted if changes are made to any of the areas identified in our submission.

PCA appreciates the opportunity to provide its input into this process, and encourages the Special Advisors to take great caution in preparing their final recommendations to the government. Disrupting the current balance in labour relations in Ontario – including the construction sector – would have a substantial, negative impact on employers, productivity, job creation and the long-term economic prosperity of Ontario.

