Retail Council of Canada | Conseil canadien du commerce de détail

Via Email: CWR.SpecialAdvisors@ontario.ca

Retail Council of Canada Submission to the *Changing Workplaces Review*
October 14, 2016

Retail Council of Canada (RCC) is pleased to have the opportunity to provide its views to the *Changing Workplaces Review* (CWR). We welcome the CWR as a necessary and timely assessment of Ontario workplaces and of relevant provisions under the *Employment Standards Act and Labour Relations Act.*

RCC has supported and participated in the work of the *Keep Ontario Working* (KOW) group of employers. While RCC does not share all points of emphasis with KOW, RCC is broadly supportive of the thrust of KOW's submission to the CWR. There are however, issues of particular importance to retail merchants that require comment outside the KOW initiative.

RCC made a wide-ranging submission to CWR on September 18, 2015 and made an in-person presentation to the panel on that date. Having appeared toward the end of the first phase of the process, RCC did have the opportunity to review the submissions already received by CWR and we were thus able both to put forward our own proposals and to respond to certain proposals from other stakeholders. Insofar as the CWR Interim Report serves in part as a compendium of stakeholder views and proposals, RCC has already commented on most of the issues of importance to our member retailers. Rather than re-write submissions already made during the first phase, RCC has provided additional comment (immediately below) on two particular issues: (a) replacement workers; and (b) joint/related employer. In addition, we have made brief comment on a few other matters, under the heading *Other Issues*.

Replacement Workers

RCC has noted the CWR Interim Report's observation under the heading *4.4.1 Replacement Workers* that some labour relations experts believe that the use of replacement workers makes labour stoppages more likely and prolongs their duration. However, our industry's experience is of longer strikes in jurisdictions where replacement workers were forbidden, like Quebec and British Columbia and relatively shorter strikes in jurisdictions where the use of replacement workers is permitted.

In our view, prohibiting the use of replacement workers tips the scale too far in favour of labour and places undue stress on businesses. Workers are free to take another job to earn income during strike action – business should be provided with parallel flexibility. Ultimately, permitting the use of replacement workers is a matter of fairness; employers need to be empowered to operate their businesses during a strike.

This issue of business being able to continue operations during strike action is of great consequence to our members. Most of our operating costs, including utilities, municipal taxes, payment to suppliers, stale-dating or perishability of goods, and rental or occupancy costs,

continue during strike action and the inability to earn income during that time will inevitably affect profitability and potentially even viability.

We would also point out that there is another interested constituency: the Ontario consumer. In the retail industry, most unionized workplaces are found in the grocery sector. An inability to continue operations through the hiring of replacement workers would inevitably limit customer access to necessities including groceries, health and wellness products and in some cases, pharmacies.

Lastly, we would view a ban on replacement workers as a major change to the core principle underlying strike action. Withdrawal of employees' labour, while hopefully to be avoided through collective bargaining, is a legitimate exercise of worker rights when conducted in accordance with the LRA. But that is a substantially different outcome than the outright prevention of continued employer operations during a strike. Simply put: "we may withdraw our labour" is not the same thing as "you shall not be permitted to operate" and a ban on replacement workers is tantamount to the latter.

For these reasons, we believe that the balance of interests militates in favour of allowing the use of replacement workers during industrial action.

4.2.2 Related and Joint Employers (LRA) and
5.2.2 Who is the Employer and Scope of Liability (ESA)

Retail merchants operate under a wide range of corporate structures. While many of our members operate under a single banner, there are others which operate under multiple banners. Some of this is driven by branding in distinct lines of business and some of it by acquisitions and consolidations of formerly independent merchants. Still more of our members operate through buying group and franchise arrangements. These include independent businesses operating franchises with some of Canada's most recognizable brands, in local hardware stores, grocery, sporting goods and general merchandise

There are good and valid reasons why a business may wish to avail itself of an established brand and goodwill and tap into the franchisor's expertise, purchasing and marketing scale on the one hand, yet maintain independence at an operational and financial level on the other. It would be unfortunate if public policy were to evolve in such a way as to create a forced choice between these two sets of advantages.

While individual franchise agreements differ, by and large franchisees have complete autonomy and discretion to hire, train, supervise, manage, discipline and terminate employees, as well as deal with labour relations matters such as union certification and collective bargaining. The current statutory criteria for a related employer declaration do not limit "common direction or control" to those with respect to employment and labour relations matters. As a result, the mechanical application of statutory criteria for common employer declaration may lead to a

franchisor being declared the employer of employees that it had no involvement in or authority to hire, train, discipline, terminate, etc.

Where the franchisor does not exercise any direct control over employment and labour relations matters, it is inappropriate for the franchisor and franchisee to be treated as a common employer simply to make it more administrative and cost efficient for trade unions to negotiate and administer collective agreements, and to extend their bargaining rights where employees have not expressed any wish to be represented.

Accordingly, RCC makes the following recommendation for your consideration:

> *Address the poor fit and resulting unfairness resulting from the application of the "control test" in related employer applications involving franchisor and franchisees in order to recognize the unique business model of franchising and to deem two entities to be related employers only where one entity exercises direct control over the employment and labour relations of the other.*

Whether in relation to the LRA or ESA, it is important that franchising be properly understood by policymakers and that any decisions in this area be undertaken with great care so as not to damage a model of business operations that generates employment for tens of thousands of retail employees in Ontario and start-up opportunities that are a major contributor to our province's economic wellbeing.

Other Issues

Part Time and Temporary Work:

Just as it is unfair to characterize franchise arrangements as being motivated in part to avoid employers' reasonable responsibilities, similarly, part-time employees, temporary agency workers, contractors and other contingent and non-standard workers are positive and legitimate parts of the workforce that enable the kind of flexibility that workers and employers need to balance their economic and family objectives.

Indeed the availability of workers for irregular or short-term engagements is one of the main tools with which employers can support unplanned absences and extended leaves for workers, as provided for by statute or envisaged elsewhere in the Interim Report, allowing the employer to cover those absences to continue to meet the needs of the employer's customers.

RCC addresses these issues at greater length in its September 18, 2015 submission (attached hereto), especially our views on the importance, both economically and societally, of part time employment.

4.6.2 Employee Voice:

The CWR Interim Report suggests that the Advisors are of the view that it is the role of government to facilitate the organization of workers into unions or other action groups. Rather, we believe that the role of government is to allow workers to organize themselves should they choose to do so but not to attach a higher value to one model over the other and to avoid "placing a thumb on the scale" in those determinations.

5.3.8.3 Just Cause:

The current notice and termination provisions of the ESA along with related common law standards and human rights legislation already provide protections and sound guidance on how to end the employment relationship in a sensible manner. Extending the union concept of "just cause" to all workers in Ontario will simply fuel unproductive disputes and slow business' ability to adapt to changing business and economic conditions.

Conclusion

This brief submission, dated October 14, 2016 should be read in conjunction with our more comprehensive September 18, 2015 submission below. RCC looks forward to further engagement with the Changing Workplaces Review as it moves to the next phase of its deliberations on the direction for labour and employment law in Ontario.

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