# Response to the Interim Report of the Ontario Changing Workplaces Review

UNIFOR
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October 2016

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## Introduction: Response to the Interim Report

The Interim Report of the Changing Workplace Review has met Unifor's hope and expectation that this overdue and generational process can fulfill the mandate of updating Ontario labour law to respond to the realities of work and the evolution of worker rights. Now it is time to live up to the expectations of Ontario's precarious and vulnerable workers.

The Interim Report has struck a clear chord regarding the scope and importance of this process, particularly that it is the first independent review of the *ESA* and *LRA* in more than a generation, the first integrated review of the law of work in unionized and non-unionized workplaces and the first review of labour law in the context of recent Supreme Court decisions on the constitutional rights of workers.

The Interim Report has signaled a focus on addressing the needs of vulnerable employees, defined broadly as:

> all workers in Ontario whose employment makes it difficult to earn a decent income, or interferes with their opportunity to enjoy decent working conditions, or puts them at risk in material ways. (page 24)

In welcoming this framework, Unifor emphasizes that these contexts and criteria apply to a broad range of Ontario workers in both unionized and non-union workplaces and industries, including many thousands of Unifor members.

We note also the far reaching findings in the Interim Report concerning the economy and the labour relations system in Ontario.

The Report details demographic changes in the work force and changes in business strategy including "fissured workplaces" which have resulted in a "radically altered nature of the workplace over many years" (page 20).

It reaches the conclusion that there is a "serious problem with the enforcement of *ESA* provisions" resulting in "too many people in too many workplaces who do not receive their basic rights" (page 260).

It finds that the decline in union density and the system of labour relations embedded in the current *LRA* makes it necessary to "consider whether the existing system makes the expression of freedom of association through collective bargaining a meaningful possibility for very large numbers of private sector employees" (page 32).
These and other conclusions point to the need not only for rule changes and modifications to standards, but also to larger structural issues that must be resolved in order to have a modern, effective labour relations system for all workers.

Unifor looks forward to a Final Report and to legislative changes in Ontario that are as comprehensive and meaningful as the Interim Report.

## Principles, Pressures and Trends

Unifor endorses the key principles and values set out in the Interim Report of

- decency at work
- respect for the law and a culture of compliance
- enhancing access to justice
- consistent enforcement of the law
- freedom of association and the value of collective bargaining
- creating an environment supportive of business

We would add a perhaps self-evident observation that this latter principle of the business environment is not equivalent to supporting the specific interests or initiatives expressed by business. Rather it refers to defining and implementing the broader public policy imperatives that will permit employers who respect and comply with the law, and recognize the constitutional value of collective bargaining, to flourish.

Unifor recognizes and agrees that a one size fits all province-wide regulatory solution is not necessarily the best way forward. Differentiation by sector, as mentioned at page 19 of the Report, in response to the unique circumstances of some businesses and or employees may well be an appropriate public policy response.

This conclusion reinforces the submission Unifor has made in its first brief that the extension of minimum guaranteed employment standards on a sectoral basis, reflecting freely bargained terms applicable to other employers and workers in the sector would serve to reflect the need for smart regulation that is responsive to the particular needs of employers and workers in sectors where precarious employment is prevalent. Our proposals would establish universal minimum standards and allow, where appropriate, higher standards to lift workers out of precarity.

Differentiation by sector also supports the development of a more comprehensive legislative framework to allow collective bargaining agents and employers the opportunity to negotiate and apply sectoral agreements that enhance efficiencies and productivity in the pertinent sector, by for example, creating sectoral training and skills improvement programs, joint sectoral pensions and benefits.

## Freedom of Association

It should not be surprising that Unifor observes here that of all the principles and values properly recognized by the Report, one has an overriding importance: freedom of association and collective bargaining. It must be reiterated that the scope of a person's individual and collective freedom to associate goes beyond the interests of unionized workers. The Supreme Court of Canada has affirmed its earlier initial observations that Section 2(d) of the Charter of Rights and Freedoms (the freedom to associate) supports extending protections to all workers, unionized or non-union, including those workers not currently protected under any labour relations legislation. The Court has found that one fundamental purpose of Section 2(d) is to allow individuals (i.e. employees) to act together to protect themselves from more powerful entities (i.e. employers).

Collective action allows vulnerable persons to buttress their relationship to those with more power and wealth, as the Report recognizes at page 17. This principle underlines Unifor's submission regarding the matter of legally protected "concerted action" set out in our observations about "employee voice".

## The Fissured Workplace

The "Fissured Workplace" and remedies for it is a central theme in the Interim Report. It is therefore a connecting thread runs through this reply and our proposals for recommendations in the Final Report.

Fissured business strategies are widespread in the Ontario economy and possibly understated in the data research. These issues are directly related to many of the key issues identified in the Interim Report, particularly contracting, franchising, temporary help agencies and definitions of employers and employees, among others.

Employer concerns over competitiveness and their response to the Interim Report must be considered also in the context of the "fissured workplace." The Interim Report describes fissuring as a "deliberate business strategy to create intense competition at the level of employers below the lead company, and causes significant downward pressure on compensation while shifting responsibility for working conditions to third parties." To say the least, it would be a perverse conclusion that competitive pressures arising from this business strategy would now be invoked as a reason not to address this fundamental problem in the labour market.

Whereas the Advisors conclude the discussion on fissured workplaces with the comment that "jurisdictions everywhere are struggling to find mechanisms as to how the law can respond effectively…" Unifor respectfully responds that substantial and

effective responses and remedies to fissuring are found in the options identified in the Interim Report.

Decline of Unions in the Private Sector

The findings in the Interim Report on the decline in private sector unionism in Ontario are a wake-up call for unions, employers, government and policy makers. In less than 20 years, private sector union density has declined from 19.2% to 14.3%. This low point for collective bargaining in Ontario is shocking, in spite of the general understanding of a relatively long term decline and the reasons for it.

It must be noted that there is no evidence in any current research that declines in private sector union density result from a change of attitude by workers. To the contrary, the available evidence - summarized in Gomez, "Employee Voice and Representation", pages 16-19 - show the opposite. There is a "representation gap" which, if filled in, would substantially raise the level of union density to several times its current level in the private sector.

The Interim Report has done Ontarians a service by situating the decline in union density very clearly in the context of a changing economy and workplaces. Perhaps equally shocking is the finding that 87% of all Ontario workplaces today have 19 or fewer employees.

While Unifor has in fact organized workplaces of 19 or fewer employees, we cannot but note the remarkable conclusions of the Advisors:

> About 87% of the workplaces and almost 30% of the workforce are practically ineligible for unionization…
> We must consider whether the existing system makes the expression of freedom of association through collective bargaining a meaningful possibility for very large numbers of private sector employees or whether broader based bargaining structures need to be considered. (Page 32)

Unifor's experience affirms this conclusion. The introduction of private sector Broader Based Bargaining (BBB) structures into Ontario labour law and practice is a necessary precondition to provide a practical basis for collective bargaining in many workplaces and to arrest the decline in trade union density.

Ontario's 6 million payroll workers are increasing at a rate of 1.5% per year. To maintain the current union density of 28.6% it would be necessary for Ontario unions to organize over 25,000 new members each year. However, Ontario unions are nowhere near organizing fast enough to keep pace. The 2015 OLRB Annual Report cited 412

certifications covering 11,638 workers. The 2014 OLRB Annual Report indicated 405 certifications covering 11,444 workers. Assuming a similar performance in 2016, we can expect the decline in union density to continue.

It is an irony that the preponderance of small workplaces has also resulted in the fact that a majority of all new bargaining units in Ontario in 2014 and 2015 were less than 10 employees. However this does not contradict the conclusion that small workplaces are largely impractical for unionization within the current model. More than half of union organizing drives result in a relatively miniscule number of Ontario workers gaining bargaining rights.

Unifor is an instructive case study on these trends. Unifor was founded in September 2013 with a mission to be an organizing union and significant resources were accordingly provided. 10% of all revenue is allocated to organizing which amounts to approximately $10 million per year.

Unifor's efforts have resulted in 73 certifications in Ontario covering 7,435 workers over its first 3 years. The largest group of new bargaining units are in the service sector but the new bargaining units are spread over multiple sectors from manufacturing to resources, telecommunications, media and health care. Among Unifor's organizing breakthroughs was the largest new certification in Ontario in many years with the 1,695 members at Casino Rama in 2015. However, the median size of all new Unifor bargaining units is 29. About 40% of Unifor certifications in Ontario were bargaining units of less than 20, but these represented only about 4% of new members.

In spite of these relatively impressive results for Unifor, they are gross gains rather than net gains after job losses from plant closures and attrition. Taking this into account, Unifor's net gains are less than half of organizing successes.

Unifor's experience shows that in the present socio-economic and political environment, even the most well-resourced and committed trade unions will struggle to maintain their existing density in the existing model or to slowly eke ahead. The hundreds of thousands of vulnerable workers who would benefit from exercising their rights to free association need the CWR process to result in systemic change that can make it a practical choice to engage in collective bargaining.

## Competitive Pressures and the Verma Research Paper

We acknowledge the Report's statement on the need to address and make policy in light of "an increasingly competitive global environment". However we reject broad generalized assertions from the employer community suggesting that any progressive

change to the regulation of individual or collective employment relationships will harm the competitive standing and health of the Ontario economy.

Indeed, Unifor believes that the Report recognizes this essential point:

> We agree that there is a need for "smart regulations" that can foster equity and fairness and at the same time also foster conditions that support the needs of the employers for efficiency and competitiveness. (Page 19)

In our first submission, at Part VII, Unifor reviewed the correlation between employment standards, labour relations, and economic performance. There we found that "economic research consistently indicates that labour costs are just one component and in many industries a relatively small component of overall business competitiveness, profitability and investment attractiveness. Yet employers also capture measurable and offsetting benefits as a result of attaining a higher quality, more secure, and satisfied workforce."

The study commissioned by the Panel in this context, by Professor Anil Verma, entitled "Labour Regulation and Jurisdictional Competitiveness, Investment and Business Formation" does not in our view contradict the submission made by Unifor in Part VII of our initial brief.

Professor Verma's essay takes a nuanced view of the liaison between the degree of labour regulation in a jurisdiction and the level of foreign direct investment ("FDI") in that same jurisdiction.

The framework of Professor Verma's paper appears to be that the degree of foreign direct investment in a jurisdiction such as Ontario may be taken as an indicia of the health and competitiveness of the economy in that jurisdiction. The thesis was used to measure whether an enhanced degree of labour regulation adversely impacts the amount of foreign direct investment, thus harming the prospects of business formation and growth in that jurisdiction. For this analysis to have weight there must be seen to be a causative link (and not just some correlation) between labour regulation and foreign direct investment and further there must be some justification for finding that foreign direct investment is a proper indicia of the "health" of an economy. Unifor submits that this proposition requires closer scrutiny and critical challenge.

For example, ten years ago, in September 2006, a leading Canadian mining company Inco Canada Ltd. was bought by Brazilian multinational corporation Vale in a 19 billion dollar takeover. This transaction largely turned on factors other than the degree or extent of labour regulation in Ontario at the time. Rather the price of nickel, and other mineral commodities, the value of the Canadian currency at the time, and the

anticipated synergy of two large concerns coming together were more probably the driving reasons for the deal. In fact Unifor submits that this "investment" led to a loss of jobs at the head office of Inco in Toronto and a decrease in research and development and innovation efforts in the mining sector in Ontario. Accordingly the amount of foreign direct investment in Ontario is a poor proxy for the evaluation of the state of labour regulation in the province.

Putting aside the link between FDI and the level of labour regulation, the study by Professor Verma nevertheless reinforces the conclusion that the equation of more labour regulation with less economic performance is outdated and not the right way to understand the role of regulation in the economy.

Professor Verma sets out three contingencies to be considered when evaluating the impact of labour market regulations (*Page 30*):

One contingency is the sector or industry under review. "Not all industries are equally affected by greater labour regulation."

A second contingency is that different types of labour regulation have different effects at different stages of growth of a particular enterprise or national economy.

A third contingency identified by Verma is the degree of local versus national or international competition within the market for the service offered or the product being sold.

At page 32 of his report Verma helpfully offers a summary of several considerations for policy makers. While he finds that investors will seek jurisdictions where their capital can be productive, he also concludes that employers are willing to accept reasonable levels of regulation if other non-labour factors are attractive and if the regulations are evenly applied so all firms compete on the basis of a level playing field. In short, if Ontario regulations fall within the range of regulations found in other proximate jurisdictions, it is unlikely that investments would flow away from the province on account of labour regulations.

Unifor submits that Verma confirms the proposition that if a product or service is offered locally, and is relatively shielded from national or international competition, then it is unlikely that labour regulation would cause investments to flow away from that sector, as long as all enterprises in that local market competed on a level playing field. Verma's observations generally support that a sectoral approach to employment standards and collective bargaining is a more flexible and equitable way of responding to the variety of specific economic circumstances of employers and employees in Ontario.

Also noteworthy is Verma's conclusion that enhanced labour regulations can play a significant role in moving an economy from a low skill equilibrium to a higher skill equilibrium. The Ontario Minimum Wage Advisory Panel report also proposed a skills training approach to low income and precarious work. As the Minimum Wage Advisory Panel wrote:

> Aside from poverty considerations, it can be argued that Ontario needs a high wage strategy to maintain and foster its prosperity. This is a broader, longer-term goal which could nonetheless factor into setting of minimum wages in the future. Such a strategy would involve improving the skills of the Ontario workforce so that they can add greater value to goods and services produced in the province. It would mean gradual elimination of simple, unskilled jobs from our economy. In such a scenario, certain types of low-skill jobs would be lost but the ones that remain would provide a decent standard of living to any individual working full-time, full year. This is a goal worth working towards for all kinds of reasons but especially because it may be within our reach. *(https://www.labour.gov.on.ca/english/es/pubs/mwap/section_06.php)*

Unifor submits that Ontario already offers a highly attractive and competitive environment in which to start and build an enterprise. We can do no better than to ask the Panel to return to Part VII of our first submission, pages 143-146 to review again the factors, such as skilled labour, comparatively superior infrastructure and competitive tax regime, along with a more appropriate Canadian dollar exchange rate, that make Ontario an attractive place to do business.

Further, recent studies conducted after the submission of our brief reiterate this contention. Recent data from the KPMG Competitive Alternatives Study released in 2016 compares global business costs and shows that neither Canada nor Ontario face a cost competitive disadvantage among our major trading partners. (https://www.competitivealternatives.com/)

Canada is ranked second in terms of low business costs among 10 trading countries with business costs 14.6% less than the United States, which is taken as baseline for the study. Canada has lower business costs than UK, Germany, France, Italy, Australia, Japan, and Netherlands. Ontario is also well positioned in this study which shows that Toronto business costs are competitive with other Canadian cities, less than all American and Asia Pacific cities in the study, and less than almost all European cities.

## Comment on employer concerns

Unifor appreciates the recognition in the Interim Report of employer concerns and the effort to find a “balance” that considers the competitive pressures on employers. While

there are employers that are ideologically hostile to the rights of workers and willfully non-compliant with law, there are many others who are simply attempting to compete against what are perceived as prevailing standards.

Unifor is ready to engage with employers on “flexibility” and recognition of their specific business realities, unless it turns out that these conditions are explained largely by gross labour market imbalances and exploitive, low wage business strategies.

Unifor's experience is that in spite of employer rhetoric concerning labour costs, addressing the needs of vulnerable workers and making work less precarious for workers in the service sector is not an impediment to successful business.

In the case of Metro grocery store, Unifor in 2015 negotiated substantial gains for 4000 retail workers at 29 Ontario stores. Gains included higher minimum wages, "minimum wage plus" provisions, scheduling notice provisions, minimum hours and the conversion of part time jobs into 32 new full time positions. While competitive issues were raised by Metro, a year later the company has reported revenue growth and an increase in net profits (*Canadian Press August 12, 2016*). More important from Unifor's perspective is that the addition of full time jobs has not resulted in part time job losses. In addition the basic elements of the Metro agreement became a "pattern" which have now been negotiated for more than 4000 additional workers at other Ontario grocery stores including Loblaws, Save A Centre, The Barn, Food Basics, No Frills and Value Mart.

In our view the Ontario retail sector is well able to accommodate long overdue reforms to the laws of work that will provide a greater measure of decent work.

We must stress that there can be no “balance” that results in a failure to meet the core mandate of the CWR. Nor can the urgent needs of workers and their constitutional rights be horse-traded in political and ideological arguments over a perceived “swing of the pendulum.” (Page 20) Unifor finds the pendulum analogy out of place and discordant in the Interim Report because it would substitute political calculations for the analysis of problems and solutions and thereby do a disservice to Ontario workers who are hoping for solutions.

In short, the balance we demand can be no less than the commitment well stated in the Interim Report to:

> [make] recommendations for minimum terms and conditions of employment and for a labour relations system that are consistent with – and will help pave the way to – the ultimate objective of creating decent work for Ontarians, particularly those who have been made vulnerable by changes to our economy and workplaces. (page 13)

# The Labour Relations Act

## *4.2.2 - Related and Joint Employers, THAs and Franchise Operations*

The "fissuring" of Ontario workplaces

At the outset of this submission, Unifor noted the impact of "fissured" workplace strategies. These issues must be at the heart of reforming Ontario's definitions and laws concerning related and joint employers.

The "fissuring" of Ontario workplaces over the last several decades has produced grim obstacles for workers who want to exercise the right to collective bargaining. To overcome these obstacles set out at page 64 of the Interim Report, measures are needed to identify the "true" employer of a group of workers, that has real influence and control over working conditions and then bring that entity (or entities) to the bargaining table.

David Weil analysis

The Interim Report contains an important and substantial assessment of the new forms of work organization that have altered Ontario workplaces. These include advances in the collection and dissemination of information through digital and web based technologies, and increasing forms and instances of nonstandard employment and fissured workplaces. At the centre of this analysis is the authoritative study by David Weil of the "Fissured Workplace." *(David Weil, The Fissured Workplace, Harvard University Press, 2014)*

Weil makes clear the impact of the fissured workplace on the labour market and vulnerable workers:

> Fissured employment fundamentally changes the boundaries of firms - whether through subcontracting, third party management, or franchising. By shifting work from the lead company outward - imagine the outsourcing of janitorial or security workers - the company transforms wage setting into a pricing problem. As will be seen this pushes wages down for workers in the businesses now providing services to the lead firm, while lowering the lead business's direct costs. Fissuring results in redistribution away from workers and toward investors. It therefore contributes to the widening income distribution gap.

The key policy issue for the CWR identified by Mr. Weil is the outsourcing of responsibility (and ultimately legal liability) for guaranteeing that basic employment

standards will be met in the course of the conduct of the service, activity, or business transferred by the lead company to the second level employer.

Weil examines four distinct types of fissured employment strategies, namely (a) subcontracting in, (b) franchising, (c) third party management, and (d) outsourcing.

As the Interim Report explains at pages 27-28, the common thread linking these fissured workplaces is the employment strategy of the lead employer (or employers at lower levels) to shed or externalize activities characterized as outside the employer's "core competency."

The core competency of the lead employer is typically restricted to the development of brands, government and or public relations, strategies to encourage customer identification with the service or product sold, product or service design/ engineering/improvement, the facilitation of economies of scale and scope of production, and oversight from afar of the operations of the second level employer. Activities outside of these "core competencies" such as the actual delivery of all or part of the lead employer's service, or the actual production in whole or in part of the lead employer's commodity, are transferred to a third party simply to reduce costs, and to escape or minimize exposure to liability for employment standards.

While the lead employer delegates all or part of the process by which its service is delivered or commodity produced, the direction of the actual performance of work associated with the lead employer's business is too important to leave entirely in the discretion of the second level employer contractor, franchisee, or third party partner. The lead employer remains fully aware of the second level employer's performance in delivering a quality service or product that meets or exceeds the lead employers' customers' expectations, needs and or past brand experience.

Accordingly, the lead employer retains control over the establishment, monitoring and enforcement of its own operating rules or production standards within the activities or business of the second level employer that support the continued delivery of a superior and frequently branded service or product. The lead employer's control and oversight of the overall delivery of service or product, from a distance is maintained by the kind of new information and communications technology referred to at page 28 of the Report.

Indeed, the entire passage under the heading "Changes in Business Strategy and Organization: Fissured Workplaces" found at pages 27-28 of the Interim Report explains concisely the phenomenon of the fissured workplace. It should be highlighted and given a more prominent place in the considerations of the Advisors.

In addition, the substantive examination by the Gunderson Research Paper of the fissured, or "fracked", workplace as characterized by Dean Harry Arthurs - provides a

sound basis upon which to assess the options for reform with respect to the matter of joint and or related employers. *(Morley Gunderson, Changing Pressures Affecting the Workplace and Implications for Employment Standards and Labour Relations Legislation).*

Legislative solution to the fissured workplace

Unifor submits that a new broader approach to the determination of a joint or related employer must be implemented. And it should reflect the findings and thrust of the Weil analysis.

This new approach should remedy the manner in which one or more entities are determined to be the "true" employer of workers under and for the purposes of the *LRA* and the *ESA.*

The legislative goal should be the mending of the split between the lead employer and the second level employer that has been introduced by a franchising, outsourcing, contracting in, or temporary help strategy. The solution must also entail a deliberate and forthright departure from some of the Board's past jurisprudence which has focused on whether the bargaining rights of the applicant union have been eroded, and instead facilitate the conduct of free collective bargaining with both the lead employer and the second level employer

The key to legislative reform is to ensure that those businesses, firms or entities that truly have control over the working conditions of workers and benefit from the labour of those delivering the service or making the commodity in question adhere to minimum employment guarantees and engage in collective bargaining when and where workers choose to exercise that right.

**Unifor supports Option 2 and Option 3 of 4.2.2 (page 69).**

**This new broader approach should expand and supplement the current test expressed in section 1(4) of the *LRA 1995*. The formulation below is not meant to be exhaustive of the breadth of a proposed new test. Rather it is illustrative of how the Legislature must view the solution to fissured workplaces, which Unifor says are more likely to be found in sectors of precarious employment.**

> **Where one entity carries out associated or related activities with another entity and has the power to, or does control or regulate, directly or indirectly, in whole or in part, the activities of the other entity, by, without limiting the above, establishing, monitoring and enforcing operating rules or standards, then the Board may treat the entities as constituting one employer, where in the opinion of the Board it will facilitate the exercise of free collective bargaining and the objectives of the *LRA*.**

This proposal to define related and joint employers is not about simply preserving the existing bargaining rights of Unions in Ontario. This is about bringing the true employers to the bargaining table, so that a bargaining agent may negotiate with those entities that benefit from the labour of the employees in the appropriate bargaining unit, and share in the decision making processes that impacts working conditions.

Temporary Help Agencies

**Unifor endorses option 4 at page 70 of the Report.**

Unifor submits that in addition to the new reform outlined above special rules ought to apply to the circumstances of Temporary Help Agencies (THAs).

A rebuttable presumption should apply where a group of THA workers are "supplied" to a client. The OLRB should presume that the THA and the client are a single employer, with respect to a combined bargaining unit of agency and client workers. That presumption could only be rebutted if the client employer or agency can demonstrate that the new expanded rules do not apply to them. The onus of proof and procedural onus should rest on the respondents who seek to rebut the presumption. That "shift" in onus is reasonable since the THA and the employer to whom the THA has supplied workers are in possession of relevant facts and documents about their relationship. The introduction of a presumption is also reasonable, because almost by definition a THA has no business, or operating standards pertaining to the production of a commodity or delivery of a service. Its business model concerns the supply of labour which adheres to the standards and business model of the client.

Franchises

**Unifor also endorses the two-pronged approach set out in Option 4(b), at page70.**

The Interim Report proposes a model (4.6.1, page 124) which contemplates the certification of a unit(s) of franchise operations of a single parent franchisor with accompanying franchisees whereby a single unit of one franchisee could be married to the parent franchisor and then perhaps later to other franchisees on an accretion basis. This proposal must go hand in hand with the proposals in 4.2.2 regarding the status of related employers in the franchise environment.

We say that the Legislature should likewise introduce a rebuttable presumption rule that provides that where an applicant identifies a franchise arrangement, the respondent business entities should carry both the onus of proving they are not related , and the procedural onus of going first and disclosing all relevant documentation. The latter onus is identical to that set out in the current section 69(13) of the Act in relation to the onus of proceeding applicable in "sale of business" cases.

The marriage of the related employer provisions and the new broader based certification and bargaining model pertaining to franchises is necessary to give effect to both the "mending" of the fissured workplace split apart by the franchising strategy, and the fulfillment of the promise that workers should have a real opportunity to choose to support the option of collective bargaining that can bear fruit by allowing them to negotiate with all of the entities that have significant control over their working conditions.

This connection between the issues of certification, related employer status , and unit consolidation ( for example: the power of the OLRB to certify smaller franchise bargaining units, and then by accretion consolidate them into larger units over time, by using a consolidation power and its expanded powers regarding related employers, in order to facilitate collective bargaining) is simply just one illustration as to how so many issues under review in this exercise are coupled to each other. All of these matters discussed here need to be legislated as a whole in order to rightly address the fissured workplace, income inequality and the right to an effective process of collective bargaining.

And while these reforms make substantial labour relations sense across all sectors of the economy in which these business strategies occur, and while Unifor vigorously supports the introduction of these reforms across all sectors, the reforms are particularly essential and indispensable for vulnerable workers employed in sectors such as food services, hospitality, retail, building and cleaning services, logistics and distribution, private health care, public sector bodies and agencies, publicly funded services and others as identified in Unifor's reply to the Options in 4.3.3.

## *4.3 - The Certification Process*

The Advisors are well aware by this point that the issues canvassed in Section 4.3 of the Interim Report on union organizing are an overarching priority for the labour movement.

The reason for this priority is evident, but bears restating. Unions have experienced in thousands of actual circumstances how labour law deliberately limits the ability to organize. On the other hand, regardless of any change to bargaining models or to standards, the entire labour relations system rests on the ability of workers to organize.

The results of Bill 7 on organizing in Ontario are succinctly set out by *Sara Slinn in Research Paper #9, Collective Bargaining.* In brief, mandatory voting certification procedures have resulted in a significantly reduced likelihood of certification, especially

in “more vulnerable units.” Bill 7 procedures resulted in fewer successful certifications outside the manufacturing sector and in smaller workplaces. Slinn summarized the research findings that increased unfair labour practices (ULPs) and reduced certification successes:

> This research has found that significant reductions in certification success are associated with specific employer tactics including the tactic of frustrating union access to employees (Bentham, 2002). Reductions in likelihood of certification success are also associated with: illegal terminations (31% reduction), group coercion (19% reduction), and ULPs directed at individual employees to employees (7% reduction) (Riddell, 2001). As well, reductions in certification success are associated with captive audience speeches, small group meetings held by the employer, distribution of anti-union literature, employer promises of increased wages and benefits, tightening of work rules, threats against union supporters, and interrogating workers (Thomason and Pozzebon, 1998). (Page 13)

There are a range of issues affecting organizing rates that begin with access to the workplace and the ability to communicate with workers, unfair labour practices during organizing drives, tactics employed in determining bargaining units and inclusions and exclusions of employees, contested mandatory elections, the likelihood of first contract disputes and the economic retaliation of employers to close facilities or flip contracts, and the larger viability of enterprise based collective bargaining outcomes in precarious sectors.

Card based certification is seen as central to this litany of challenges that face a union in the organizing process because the mandatory election process is the focus of most employer unfair labour practices. In its *2014 Annual Report the OLRB*, reported “In complaints against employers, the principal charges were alleged illegal discharge of or discrimination against employees for union activity in violation of section 70 and 72 of the Act, illegal changes in wages and working conditions contrary to section 86, and failure to bargain in good faith under section 17. These charges were made mostly in connection with applications for certification.”

Unfair labour practices during the election process are a material factor discouraging workers from exercising their rights. The election process requires a critical mass of union supporters to openly declare themselves and risk retaliation.

Unifor organizers would agree with their colleagues throughout the movement that a return to card based certifications would be the single most effective change affecting organizing success rates.

**However Unifor stresses that card check cannot be seen either as a silver bullet or a single focus of urgently needed reform to the certification process in Ontario. We urge the Advisors to examine the organizing process as a whole and to come forward with a meaningful reform including:**

- **card based certification**
- **access to lists**
- **reasonable access to the workplace for union organizers**
- **electronic membership evidence**
- **remedial measures in response to unfair labour practices**

### *4.3.1.3 - Access to employee lists*

Unifor's high profile experiences at Toyota Canada underscore the importance of access and contact with workers near the beginning of the organizing process. Toyota demonstrates the need to modernize organizing rules to reflect dramatically different circumstances. The workplace at Toyota is divided over 3 separate facilities located in different communities, and within each facility there are distinct segregated departments. Workers in different departments will rarely if ever have direct contact with each other. Each facility has extensive security perimeters with fences and the great majority of employees live scattered in various communities at distances of up to 100 km or more from the workplace.

It is well known that the Toyota experience required the union to estimate the number of employees and that even after providing evidence of more than 3,000 union supporters, it was necessary to withdraw an application for a vote when the company added more than 1,000 employees to the employee list than was known to the union. The result of this experience created a detrimental delay in the organizing process that forced the union to begin re-signing expired membership cards. Organizing at Toyota continues today, two years later, but there is no doubt that the employer was able to leverage its advantages with the current organizing rules to prevent a clear expression of the wishes of the workforce.

Unifor asserts that the right of free association for Toyota workers includes their practical ability to communicate with each other about union membership. That ability in turn requires knowledge of the number and location of employees when such information is beyond their personal experience in the workplace. It must extend to the

ability of a union supporter to contact and speak to an employee located outside the limits of their normal workplace experience.

The complications of a modern workplace are found also in small workplaces. Unifor recently provided organizing support to workers at an Indigo location. This Indigo retail outlet is located in an urban centre. The workforce is primarily casual and part-time, and largely young workers. Indigo's business goes through regular peaks and lows requiring the hiring of large numbers of people for back-to-school and the holiday seasons, followed by lay off. This provides for very small windows in which the stability of the workplace is sufficient to carry out a sustained organizing drive. The union was never able to apply for certification due to the uncertainty of total workers employed at any given time. Access to the employee list would address these barriers to organizing, and make it possible for workers at Indigo and like situations to make a practical choice to form a union and engage in collective bargaining.

**Unifor argues strongly that employee lists should be provided to the union as provided in Option 2.** Given that a percentage threshold is not possible to accurately estimate in the absence of an employee list, access to the list should be provided when a union demonstrates sufficient support in a workplace to conduct an organizing drive. As a first step, we propose that the union should be able to ask the employer for the list and if that request is denied, recourse to the OLRB would be available. We propose that the provision of a list for a given group of employees would not be a relevant consideration in the later determination of an appropriate bargaining unit description. In these circumstances the union should have access to the larger employee list.

Privacy issues that have been raised in objection to access to lists for union organizing have been well addressed in multiple uses of access to individual contact information well established in Canadian law and political practice, and in commerce such as telemarketing. These well-established practices and guidelines include appropriate privacy protections and constraints on the misuse of information.

Notably, voter list information is available to Canadian political parties:

> In accordance with the Canada Elections Act, Elections Canada provides voters lists (containing name, address and unique identifier) to members of Parliament, registered political parties and candidates, who may use the information as authorized under the Act. The Guidelines on Use of the Lists of Electors explain what information is shared with members of Parliament, political parties and candidates, when it is shared, how they are authorized to use it, and their responsibility to safeguard this information. *(Elections Canada*)

The right to free association for workers in a modern complex like Toyota or in a small workplace under the constant glare of the employer should guide the Advisors in asking practical questions. These questions should clarify the provisions that are necessary for workers to communicate, to meet and to choose to unionize even when segregated in their workplaces and their disparate residences, or in situations where the direct and daily influence of the employer is to be expected.

### *4.3.1.5 - Remedial Certification*

The matter of remedial certification engages all of the themes and principles expressed by Chapter 2 of the Report. After all, the fundamental values associated with free collective bargaining and a worker's freedom to associate to pursue common objectives with other workers must have been trampled upon by an employer if a tribunal like the OLRB is considering the matter of remedial certification.

Accordingly, if the law is to truly support the right of workers to use the tool of collective bargaining to legitimately advance their interests in society then the current rules regarding remedial certification must be liberalized to be more available and effective.

This is not about punishing employers, or abridging the right of workers to decide about the merits of collective bargaining, absent a tribunal order. This is about putting a group of workers whose fundamental rights have been violated truly back in the position that they would have been in had the contraventions not occurred.

Employers can be expected to characterize a liberalized and accessible remedial certification authority in the hands of the OLRB as a major departure from past practice. Unifor replies that such a significant change may serve as a deterrent to such employer misconduct, an objective that is entirely consistent with the principles expressed by Chapter 2 of the Report.

**Unifor supports at a minimum Options 2 and 3 at 4.3.1.5. However Ontario should go further and streamline the process towards a remedy.**

**Unifor suggests that the amendment to the current rules regarding remedial certification could include a proposal set out in section 4.3.2 of the Report under the heading of First Contract Arbitration. That proposal at Option 3 of 4.3.2 would provide for first contract arbitration in the case of a remedial certification ordered by the OLRB.**

Unifor proposes that in the case of a successful union application for remedial certification there should be immediate access to first contract arbitration simply upon the request of the union.

This remedy ought to be granted if the OLRB is satisfied that after considering the effect of all the remedies provided to address the unfair labour practices, and the implementation of a first collective agreement, the applicant union would have sufficient membership support and internal resources to administer a collective agreement.

In effect this would mean that the union would solely have to demonstrate that it has a core of support, and the resources of local or parent union structures to properly and fairly represent the employees in the bargaining unit after the first agreement was in place. That core of support could well be less than the 30% threshold that the Report, at page 78 says was the threshold in the 1993-1995 Act.

This approach would permit an applicant union to demonstrate to employees over the life of a first agreement the merits of collective bargaining. It would allow the union to recover its lost opportunity to build support among the employees in the bargaining unit in an environment in which the expression of support for the union and or union activity would less likely jeopardize the employment status of the employee(s).

This approach would also allow the parties to establish a collective bargaining relationship and dial down the emotions that may have accompanied the organizing campaign. If after the expiry of the first agreement the applicant union has failed to persuade a majority of workers of the value of collective bargaining employees would, as is the case now, be able to seek a termination of the union's bargaining rights.

The special nature of remedy may deter future employer misconduct during an organizing campaign and improve the prospect of overall compliance with the law.

## *4.3.2 - First contract arbitration and 4.4.3 - Long Term Dispute Resolution and 4.4.2 - Return to Work*

Dispute resolution, both first contract and long term disputes, are another priority for Unifor.

With regard to First Contract Arbitration, we draw the attention of the Advisors to the summary of information provided in *Slinn, Collective Bargaining*. While OLRB data

appears to be distressingly incomplete, Slinn shows a disturbing trend of a declining rate of successful first contract negotiations, declining to 59.8% after the 1995 changes.

Slinn cites a number of relevant studies:

> Work stoppages in first negotiations are more common than in renewal bargaining (Walker, 1987, p. 7-8; Gunderson et al., 2001; Rose, 2006, p. 203). For first contracts settled in Ontario between 1999 and 2002, 7% involved a work stoppage, and first contract work stoppages were more prevalent in larger units (16.4%; 200 or more employees) than in smaller units (6.3%; 200 or fewer employees) (Rose, 2006, pp. 205, Table 212.202).
>
> Fewer first contracts are reached through direct bargaining, and frequent resort is made to third party assistance, compared to negotiations in general. Joseph Rose (2006, pp. 205, Table 12.2) documents that 9.5% of cases settled only after a work stoppage or arbitration, 30.1% during or after conciliation, 19% with mediation, and only 41.6% settled through direct bargaining. He concluded that this suggests that first negotiations are particularly difficult, and supports involving mediators at an early stage in first negotiations (2006, p. 206). (Page 40)

**Unifor recommends the adoption of Options 2 and 4 set out in 4.3.2.**

**Concerning long term dispute resolution, Unifor reaffirms its support for a modified "Manitoba" model as envisaged in Option 2 of 4.4.3. In discussion with other major private sector Ontario unions we concur that interest arbitration should be an option after 6 months of a strike or lockout.**

We refer the Advisors also to the Research Paper by Timothy J. Bartkiw, *Collective Bargaining, Strikes and Lockouts under the Labour Relations Act, 1995*. While data on the use and consequences of replacement workers in labour disputes is sparse and in some cases contradictory, it is clear that the use of replacement workers prolongs disputes and are associated most strongly with long disputes. Legislation prohibiting replacement workers would clearly shorten disputes. On the other hand, first contract arbitration and long term renewal arbitration would diminish the use of strikebreakers.

In addition, the right of workers to return to their employment after a labour dispute regardless of its duration would also diminish significantly the incentive and threat of replacement workers. **We therefore strongly urge that Option 4 at 4.4.2 be enacted, which in our view is an essential provision to protect the constitutional right to strike.**

### *4.3.3 - Successor rights*

A priority for Unifor in this process is the urgent need for an end to the unacceptable contract flipping that is endemic in the services and supply chain economy. This practice prevents the establishment of collective bargaining relationships and often severs those relationships just when they begin to show results. It is particularly egregious that public sector authorities are often the worst offenders.

Needless to say, successorship in the contract sector is a fundamental response to the fissured workplace. Unifor asserts that in principle, the right to free association requires that successorship in the contract sector mirror sale of business provisions, which regrettably is not an option in 4.3.3.

**Option 2 at 4.3.3 is the very least that should be enacted, but with this important clarification and addition:**

- **successorship in the contract sector should apply to all public sector bodies and agencies, or to any service with public funding.**
- **Unifor also proposes an additional general category for successorship where contract workers are deemed vulnerable and successorship would protect their ability to achieve or maintain decent work.**

Unifor suggests that a case study to guide the extension of successor rights to the contract sector can be seen in the treatment of school bus drivers in Ontario.

There are 150 private school bus operators in Ontario, but only two companies - First Student and Stock Transportation - have contracts to provide 80% of all school bus routes.

School bus drivers are part-time workers with low wages between minimum wage and $15 per hour. These part time jobs of 4.5 hours per day or less require a full time commitment for the 195 days in a school year. Many work-related tasks (e.g. safety checking, fuelling, cleaning, etc.) are typically not compensated, nor is there compensation for summer months as is the case for many other education employees. Access to Employment Insurance benefits during periods of layoff is difficult.

Unifor represents hundreds of school bus drivers across Ontario who face the additional problem of annual contract flipping imposed by a provincial requirement for an “RFP” process. When contracts flip as they did this school year in Toronto and last year in Ottawa, all affected drivers are laid off, and the new company hires new drivers. There

are no provisions for drivers to move with the contract flip and there is no successorship provision.

Contract flipping and the difficulty in hiring new drivers at low rates of pay have recently focused public attention on the chaos for parents caused by cancellation and delays on many Toronto and Hamilton school bus routes. However the public services affected are the flip side of equally important worker rights issues which have seen hundreds of Unifor members lose collective bargaining rights, gains made in bargaining and often lose employment also.

There may be reasons and justification for an RFP process to provide a public service. Unifor asserts there is no justification to use RFP processes to lower compensation and void collective bargaining relationships. The right to enjoy decent work demands that successorship provisions apply to unionized Ontario school bus workers when contracts are changed.

**An important issue of successorship not addressed by the Interim Report is the possible loss of bargaining rights when businesses or undertakings are transferred from the federal to provincial jurisdiction. Unifor has had considerable experience with this problem when part of a federal undertaking has been sold or transferred into a provincial jurisdiction. While the Canada Labour Code takes inter-jurisdictional transfers into account and applies successorship rules for a provincial to federal sale or transfer, the same is not the case federal to provincial sale of business. We urge the Advisors to not neglect a remedy for this gap in protecting the established bargaining rights of workers.**

### *4.3.4 – Consolidation of Bargaining Units*

**Unifor supports Option #2 concerning consolidation of bargaining units.**

This option is the reintroduction of a consolidation provision similar to the one in place in the *Labour Relations Act* between 1993 and 1995. We emphasize that our recommendation would allow consolidation between bargaining units of the same union and not be narrowly constricted to bargaining units of a local union as was the case prior to 1993.

In addition, we also recommend an enhanced review power for the Ontario Labour Relations Board, to permit “accretions” to an existing bargaining unit. We note that bargaining unit accretion is provided in section 18 of the *Canada Labour Code.*

The 1993 amendments to the Act introduced a provision which empowered the Board to combine bargaining units if the employees in each unit were represented by the same trade union. The Board could combine pre-existing bargaining units and/or proposed bargaining units. To facilitate this process, the Board was authorized to amend certificates or collective agreements.

The consolidation provision permitted the rationalization of bargaining structures. It permitted for example the consolidation of bargaining units of part-time and full-time employees that had been certified separately. It permitted the consolidation of bargaining units of employees performing the same work in different locations of an employer's operations.

The reintroduction of a consolidation provisions would assist in creating a "dynamic" model of bargaining unit determination by permitting post-certification modification of a bargaining unit. *(See Sara Slinn, Collective Bargaining, page 125)*

This dynamic model would recognize the inherent contradictions between organizing and collective bargaining and allow unions more flexibility to organize incrementally, without sacrificing bargaining strength. In today's climate of "fissured workplaces" and precarious employment this model accommodates the reality of small-scale organizing and fosters broad-based, stable bargaining structures.

**A further recommendation is that the Board be empowered to amend bargaining units to allow for accretions to an existing bargaining unit, without the need to first establish that the group to be added constitutes a viable bargaining unit. While parties may currently have the power to amend the scope of bargaining units by agreement, this provision would allow the Board in appropriate cases to overcome employer resistance to bargaining unit expansions.**

### *4.5.3 - Administrative Penalties and procedures*

Unifor welcomes the proposal for administrative monetary penalties for violations of the *LRA* and offers this response to the questions posed by the Advisors.

The Interim Report contemplates the creation of a new position of "Director of Labour Enforcement" whose responsibility would be to determine if and when the state would seek the imposition of administrative monetary penalties under the *LRA*. "(*Page 111*)

As Unifor understands the proposal, an applicant could refer an unfair labour practice complaint to the Director concurrently with the delivery of the complaint to the OLRB. The Director would assess whether a public policy interest would be served by

intervening in the matter to seek a monetary penalty which reflected the seriousness of the allegations alleged. If the Director decided that participation in the proceeding to call for such a payment was desirable, then the office would have full standing as a litigation party. The Director could continue the litigation to a conclusion, even if the parties themselves, in the interim, had made a settlement of the matter. Further, while the parties could agree the amount of an administrative penalty, the Director would have standing to persuade the OLRB not to approve the tentative settlement.

These propositions raise difficult labour relations questions. The argument in favour of this proposal is that by significantly raising the cost of violating the *LRA,* it would encourage compliance with the law, and ensure that all employers play by the same rules on a level playing field. Moreover, any system of rules that discourages violations of the *LRA* is bound to support the exercise of the right to organize and conduct free collective bargaining.

An argument against this proposal is that it would introduce a third party "stranger" into essentially a two party relationship; (an employer and a union, or an employer and employee(s)) at the point that the relationship is under the strain of a dispute and the ensuing litigation. The authority of the Director to seek a potentially significant sum of money, based on the Director's own assessment of the alleged violations, risks widening the gap between the actual parties to the dispute, interfering in their relationship, whatever the quality of that relationship, and lessening the chances for settlement.

The expeditious and private settlement of labour relations disputes has long been a desirable and a fundamental public policy objective, no matter how egregious the conduct underlying the dispute. This proposal may be seen as diminishing this longstanding principle.

While it is proposed that the parties to the dispute could always settle the matter before the issue of the amount of any administrative penalty is resolved, and that the Director could not bar the tentative settlement of the amount of the penalty, the reality is that an employer's willingness to settle a case will necessarily turn on a calculation of the total "all in" payment it is obliged to make.

This reality may bring great pressure upon the Office of the Director to minimize its pursuit of a penalty, when the parties for their own reasons, seek to put a dispute behind them, once they are satisfied that their own private interests have been met. This will be so, particularly if the monetary payment will be transferred to the Consolidated Revenue Fund.

Indeed, in this context, an applicant union's perspective may well be to maximize the payment of every dollar to the affected employees or the union's own coffers and seek

to dissuade the Director from pursuing any administrative penalty at all, in order to facilitate a settlement.

This dynamic could change somewhat if the funds obtained by administrative penalty were used to improve the state of employee/labour relations in the pertinent workplace. This could include training and education programs, paid union time to address workplace issues, or third party facilitators.

Another option to address these concerns would be to eliminate the discretion of the Director to seek and or fix the amount of the administrative penalty. A more deliberate process is envisioned here. A fixed administrative penalty could be imposed on all who commit an unfair labour practice based on a percentage calculation of the damages caused by the violations, with a minimum payment to be made where no monetary damages were incurred. And again that sum of money would be returned to the workplace for the purposes of improving the state of labour or employee relations through education, training and continued third party facilitation.

By establishing an automatic and or fixed administrative payment on the basis of an OLRB finding of a commission of an unfair labour practice, the law would similarly deter infringements of the *LRA*, and still evade the potential for adding other litigious points to the dispute. The prospect of a possible additional payment by an unsuccessful respondent would also encourage the early dispute of complaints.

**On balance, Unifor supports the introduction of administrative monetary penalties payable by those who are found to have committed an unfair labour practice.** However, Unifor submits that the office and functions of a Director of Labour Enforcement should not be introduced in the statute.

We see the proposed Office of a Director of Labour Enforcement as a poor fit within the well understood and established bilateral relationship that underscores labour relations.

Today the law in the arbitral and human rights environments has expanded to permit the recovery of damages outside the traditional civil compensatory realm at the instance of a successful complainant, without the intervention of a public officer. Similarly the same deterrent and remedial objectives can be imported into the *LRA* through a clarified and expanded remedial jurisdiction in the hands of the OLRB, without the intervention of a third party Public Director.

<u>Options</u>

**Unifor states that the law should not permit the private prosecution of breaches of the *LRA* in the Courts**. Justices of the Peace, and the procedures of the Provincial

Offences Court of Ontario, are ill equipped to assess, at first instance, in a trial proceeding, the facts underpinning a labour dispute and the law applicable to it.

The OLRB is the logical and expert juridical location for the kind of prosecution contemplated by this part of the Report, and such a prosecution should be part and parcel of the proceeding launched by the applicant seeking a remedy from the OLRB.

**The amount of the administrative penalty should not be left in the full discretion of the Director. Rather it ought to be fixed by law at a certain amount based on the threshold of damages payable by the respondent. The monies obtained should be returned to the workplace in question to improve the state of employment or labour relations.**

The private parties to the dispute ought to be able to settle ALL aspects of the litigation between them. This proposition is consistent with the long standing convention of labour relations that the parties are in the best position to resolve issues in dispute and build their relationship going forward.

### *4.6.1 - Broader based bargaining structures BBB*

The options presented in 4.6.1 of the Interim Report are possibly the most important findings of the Interim Report that could address labour market inequity and provide large numbers of Ontario workers the opportunity to enjoy decent work.

As Unifor argued in its first submission to the CWR, BBB structures are not new and in fact are well established in Ontario's tradition and current practices. Construction certification and sectoral bargaining are long established norms of labour relations. Public sector bargaining structures in education and health care are also proven mechanisms for providing decent work, and are popularly supplemented by broad based social and political commitments such as the measures to raise wages for Personal Support Workers and Early Childhood Educators.

BBB is absent only from the private sector economy and in particular its precarious sectors. In spite of the historical tradition in which forms of sectoral bargaining provided the basis for our contemporary *ESA*, business strategies and the failure of public policy have allowed this anomaly to become the norm.

The contemporary arguments for evolving the "Wagner Act" model in the private sector are persuasively argued in Chapter 2 and Chapter 3 of the Interim Report. Unifor would add and emphasize the over-arching and compelling reason for BBB as the most effective response to the fissured workplace.

The prevalence and ubiquity of fissured workplace business models presents a dilemma for labour law reform. The complex of relationships in supply chain economics are designed intentionally to obfuscate actual lines of command. There are many options in the Interim Report that would make it more likely that lead employers are held accountable and liable for the economic control and conditions that are imposed on the multitude of precarious employers in the supply chain. However these measures will inevitably be contested and bring litigations. A sectoral standard or BBB regime holds the potential to void the fissured workplace model by making decent work the standard for all designated workers regardless of the maze of business relationships that may have been established.

<u>The BBB options</u>:
Option 2 – Extension model

Juridical extension has been proven successful in Quebec and Europe to provide greater security and decent work to wide sections of workers, and could have similar positive results in Ontario.

This option rises in significance to the extent that increased union density is seen as unlikely. The extension model as practised in Quebec and Europe has not increased density, but it has increased "union coverage" and provided a social floor that addresses many of the core issues in the CWR mandate.

Unifor's proposal for "sectoral standard agreements" has been referenced as an example of the "extension model" of BBB. While Unifor's proposal for "sectoral standard agreements" can be seen as a form of juridical extension, it was not Unifor's intention to present this proposal as a general model for broader based bargaining in the private sector.

The Unifor proposal would extend negotiated provisions in defined labour markets as minimum standards on *ESA* provisions only. By doing so it would over time provide a secure floor in precarious sectors for unions to negotiate above. The minimum *ESA* standards for these sectors would be based on a transparent labour market test of collective bargaining, rather than lobbying and bureaucratic decisions. Another important feature of the Unifor proposal was the use of these sector agreements to establish sectoral councils that would provide a form of employee voice and encourage skills training and HR planning.

While the extension model should be considered seriously for precarious private sectors, Unifor considers that the specific model it has proposed for establishing

minimum standards is best considered as an option for *ESA* "exemptions, special rules and general process" in Section 5.2.3.

Unifor's proposal links the *LRA* and *ESA* concerning the development of minimum standards. While not providing full "union coverage" the extension of bargained minimums to form *ESA* standards would be a very meaningful step for many thousands of workers.

As Unifor understands the remaining options – Options 3-9 - they are not presented as separate alternative choices but rather as a menu of the BBB measures that could apply to different sectors of the underrepresented and precarious work force. While as a whole these options are complementary and distinct, some are alternative choices towards a similar purpose.

Unifor urges that the Final Report recommend a combination of the sector specific options that are discussed in order to offer a meaningful choice for all Ontario workers to organize and engage in collective bargaining.

Options 4 and 5

Options 4 and 5 set out two alternatives for a BBB regime to make collective bargaining practical for underrepresented sectors dominated by small workplaces. The main difference we see between these proposals is that Option 4 (Baigent Ready) is based on incremental steps forward allowing for each workplace to unionize separately but still be joined to a geographic/sector bargaining unit, while Option 5 (All Hotels in Windsor) would require multi-employer elections on a community and industry basis.

Unifor is pleased that these two proposals are offered for discussion because they each offer a real choice for the mainstream of workers in the private sector now excluded from collective bargaining.

There is no doubt that these options would represent large cultural change for many affected employers, and for workers. **For this reason, Unifor believes that Option 4 is the more practical choice that would allow an evolution of practices and attitudes towards respectful and successful sectoral bargaining.**

**Option 3**

**Options 3 is designed to address the specific situation of franchising and to provide bargaining rights through a determination of related and joint employers and a subsequent consolidation of bargaining unit. This option is consistent with Unifor's submission and we strongly endorse it.**

Option 6

Option 6 envisages an employer led return to industry bargaining structures through employer accreditation. Unifor strongly supports industry and pattern bargaining and has used its bargaining strength in many sectors to maintain these structures in the face of employer strategies to revert to enterprise bargaining. In most cases employers would find the union a willing partner to negotiate on an industry or sector basis regardless of the accreditation that is suggested here.

**Option 7**

**Option 7 would provide specific sectoral models for industries or sectors with highly specific structures. Unifor strongly supports specific mechanisms to provide bargaining rights for agricultural workers and for domestic and care workers.**

**Construction labour relations has stood apart and within the *LRA* for many decades, and there is no reason why similar variations could not be implemented in agriculture, domestic and "agency" situations.**

Options 8 and 9

Options 8 and 9 have a specific application to independent contractors that otherwise do not meet standard definitions of employee.

Unifor notes that Ontario's arts unions have long called for federal Status of Artist recognition to be extended provincially. As Unifor indicated in its principal submission, in the view of former CLRB chair, Elizabeth MacPherson, Status of the Artist Act (SAA) provisions could be effectively extended to media freelance and independent contractors. This would be a bold and practical step to address one of the most visible areas of precarious work.

**Taking these options as a group, Unifor urges a strong recommendation for private sector BBB in the Final Report that would include:**

- **An Ontario model of geographic/sector bargaining based on Option 4.**

- **Changes to the definition of employer to recognize franchise operations as a single employer and allowing for site specific certifications and consolidation of bargaining units as proposed in Option 3.**
- **Sector specific bargaining models to extend bargaining rights to agricultural workers, domestics and "agency" care givers.**
- **SAA provisions to provide bargaining rights to artists, freelancers and similar independent contractors.**
- **A modified form of the extension model to provide sectoral *ESA* minimum standards**

### *4.6.2 - Employee Voice and the Gomez Research Paper*

Unifor also welcomes the Interim Report discussion on "worker voice" – although we cannot concur with the major conclusions reached in the principle research paper on this subject.

Worker voice is not and cannot be an abstraction. A genuine worker voice can only be expressed in the context of the principles that the Advisors have already laid down as the basis for labour law reform in Ontario.

These include notably "the inherent power imbalance and inequality of bargaining power between employer and employee… This power imbalance manifests itself in almost every aspect of the employment relationship, particularly in a non-union environment." (page 11)

They include further the need for "access to justice" for employees regardless of the economic, social or psychological barriers that can impede justice. Access to justice further requires "consistent enforcement." (pages 14-15)

Most of all, worker voices are expressed in the context of the right of free association. These principles set out clearly in the Interim Report beg the question of what measures must be undertaken to ensure that the power imbalance between employers and employees does not undermine genuine worker voice, whether through co-option or intimidation?

What remedies would be open to workers to redress grievances or to obtain justice that would be applied consistently to all? How would workers be protected from reprisals for giving voice to their issues and concerns? Would new workplace structures facilitate or undermine and divert free association?

The principal research paper on this matter, *Raphael Gomez, "Employee Voice and Representation in the New World of Work",* presents much valuable information but pays scant attention to these core issues. While recognizing briefly criticism of employer influence in some studies, there is not a substantive discussion on power imbalances that affect worker voice models. Instead, we find that this debate is quickly passed over as in this key paragraph that dismisses these problems on the basis that some workers are attracted to non-adversarial structures:

> Again, as the case with employer initiated voice models, there is the concern such (employee) associations would be weak and prone to manipulation by employers (Adams, 2008). That said, surveys indicate many employees prefer informal non-statutory collective representation over certified exclusive agency (Adams, 2008; Thompson, 2015). (Page 56)

Similarly, the Gomez paper suggests using mandated Health and Safety Committees in Ontario workplaces as possible structures to introduce German style "work councils." (page 91) However there is no discussion of the critiques of the Ontario health and safety committees which have been shown to be compromised by the power imbalances in the workplace. Unifor refers the Advisors to the discussion of this critique in our principal submission.

The Gomez paper discusses concerted action only in the context of alternative minority union models and not as a precondition for worker voice to be expressed in any circumstances. Nor is there discussion on "just cause" provisions for workers in non-union workplaces.

Another approach to worker voice suggested in the Gomez paper would bring to Ontario a variation of UK "Information and Consultation of Employees Regulations (ICE Regulations.) These regulations flowing from European Union social directives intend to require employers to inform employee representatives about the strategic plans for the business and to consult about workforce planning, including potential threats to employment and any "anticipatory" action that might be taken; and, to "inform and consult with a view to reaching an agreement on significant changes to work organization and contractual relations."

There are no requirements on any employer in Ontario today to share such strategic information and to consult before taking business decisions that could affect

employment. Consultation or negotiation may take place in a unionized situation if a collective agreement prohibits actions that the company seeks to implement, but it is extremely difficult to imagine how a worker voice would be expressed in such a situation without worker representation and a clear right to say "no."

While we are critical of the Gomez paper, Unifor appreciates the obvious intent to find voice and workplace democracy for more Ontario workers. In this analysis Gomez also made a substantive analysis of the shortcomings of the Wagner Act Model, the reasons for the decline in union density and the gaps that result. It is important to note Gomez' conclusion which points the Advisors in a different direction to consider practical options for worker voice:

> "that irrespective of underlying causes, the proximate cause of union density decline has more to do with the nature of Wagner-style representation systems than anything else." (Page 11)

There is no doubt that both the evolution of constitutional rights and the goals of decent work lead to the conclusion that all Ontario workers deserve a voice. Unifor believes strongly that worker rights are not divided into separated spheres but are a continuum commencing from the first day of work. These include the right to decent work, the right to take concerted action in pursuit of better working conditions and justice, the right to just cause for discipline or termination, the right to free association and the right to organize, and the right to strike. These goals to provide a voice for all workers underlie the broad sweep of Unifor's submissions to the CWR.

<u>Worker voice options</u>

Option 2 – minority unionism

Unifor committed at its founding to provide membership and to represent workers not covered by collective agreements. Unifor members without collective agreements are in "community chapters" that can be community or workplace based, or can be sectorally based such as Unifor's Canadian Freelance Union. This project by Unifor remains in the building stage but we are committed to expanding the base of the labour movement to workers that remain outside the traditional model.

Unifor does not see our community chapter movement as "minority unionism" for practical reasons. It will require extensive organizing and building before these forms of worker organization can wield bargaining power with an employer.

However Unifor considers that some aspects of trade union rights already apply to our members in community chapters. They enjoy the right to free association and any

discrimination or reprisals to them as a result of their union membership we believe constitutes an unfair labour practice.

**Option 3 – employee interests to be expressed in the plans and policies of employers**

**Unifor concurs that employers should have the obligation to share business plans and strategies that affect the employment security and conditions of workers and to consult on these matters. This obligation should apply to all employers in Ontario.**

Option 4 – Models in the research report (Gomez)

Most of the principal models in the research report are effective in the context of European state policies, extensive labour market regulations and a strong trade union presence based on membership (density) and coverage (extension models).

These conditions do not exist in Ontario today, but the possibility of an evolution of Ontario's Wagner Act model is before us. Unifor urges the Advisors to give priority to the BBB models that are under discussion rather than the models outlined in the research paper.

**Option 5 – Concerted Action Protection**

**Unifor strongly agrees that the starting point for worker voice in Ontario is the protection for concerted action and just cause provisions. With these rights in hand, Ontario workers will give expression to their needs and concerns in many effective ways.**

# The Employment Standards Act

## *5.2.1 - Definition of employee*

Given the fact that 86% of private sector employees rely on the *ESA* for protection of their minimum employment rights, the first and most pressing concern of the CWR is the scope and application of the *ESA* for Ontario workers. This includes the 84 exemptions and variations of the *ESA,* considered below at 5.2.3 and 5.2.4, and the definition of employees which presently excludes many thousands of vulnerable workers.

The exclusion of dependent contractors and the misclassification of employees and the significant economic consequences for vulnerable workers are well described in the Interim Report.

Unifor is proud to include in its ranks many thousands of taxi drivers, truck drivers, film and media employees, and freelancers who at different points in their working life may occupy the grey area between employee, dependent contractor and independent contractor. Despite the definitions included in the *LRA* and its dependent contractor category, Unifor has found that misclassification and the denial of rights to workers can occur. The present exclusions in the *ESA* encourage misclassification and denies rights to hundreds of thousands of Ontario workers.

**Unifor strongly recommends Option 4 to place the onus for exclusion on employers.**

**Option 6 should be revised to simply include dependent contractors as employees.** In the event that any group of dependent contractors are in need of Special Industry Rules (SIRs), these variations ought to be considered in the same process as other variations in 5.2.3.

## *5.2.2 – Employer and scope of liability*

In our comments about the *Labour Relations Act* above, we emphasized that the Advisors ought to place much weight on the concepts put forward by David Weil in *The Fissured Workplace*. We said in reply to section 4.2.2 that meaningful reform to the manner in which multiple entities are determined to be the "true" employer of workers is one of the key tools available to the Legislature to remedy the adverse effects of increasingly fissured workplaces. We very much support the observations made by the Advisors at page 149 about the relevance of these concepts in an *ESA* context.

***Related employer test***

The measure that might most easily be undertaken is the subject of option #5 at page 155 of the Interim Report. That measure is to repeal the "intent or effect" requirement in section 4 of the *ESA*. As discussed at page 150, the related employer provision in Ontario's employment standards statute is unique in Canada in having a restrictive definition that relies on a finding of "intent or effect". That aspect of the related employer provision has been interpreted to severely limit any benefit in many common fact situations. It is often of little use in its present form as described at the bottom of page 153 of the Interim Report.

However, Unifor favours a more significant departure from the status quo. The US Department of Labour "joint employment" test described at page 151 of the Interim Report provides a sound basis on which a more purposive definition of relatedness might be built. It is a definition that would encompass the various ways in which intermediaries of various kinds are placed between an employee and the entity that benefits from their work including subcontracting relations and others. It is a definition that would encompass both horizontal joint employment and vertical joint employment as described on page 151.

**We therefore endorse the Advisors' option #3 at page 154 and favour it over option #5.**

***Franchise relationships***

In section 4.2.2 above, we said that there ought to be a rebuttable presumption that franchisors and their franchisees are related for purposes of the *Labour Relations Act.* We similarly contend here that there ought to be a rebuttable presumption for purposes of the *ESA*.

Alternatively, we say that franchisors and their franchisees might be made jointly and severally liable for the *ESA* violations of the franchisee for the reasons at page 152. If it is contended by franchisors that this would be too onerous, their liability might be made "strict" rather than "absolute" so that a franchisor could escape liability if it were able to demonstrate that in structuring and administering its franchise relationship, it took all reasonable steps to ensure that the franchisee operated in full compliance with the *ESA.* Alternatively and more restrictively, the franchisor might only be made jointly and severally liable for the franchisee's violations if (adopting the "brother's keeper" concept at the top of page 151 of the Interim Report) the franchisor knew, or ought to have known, that the franchise agreement did not provide sufficient funds for the franchisee to comply with employment laws.

***Other subcontracting relationships***

Applied more broadly, the "brother's keeper" concept as described at page 151 would ensure that contracts for the performance of work under a contracting arrangement are structured to enable the contractor to comply with employment laws. This would still permit a defence to be offered by the employer or lead contractor that it took reasonable steps to enable or ensure that the subcontractor was complying with employment laws by, at a minimum, requiring a contractual provision to that effect. **We therefore generally endorse option #2.**

***Other matters***

There are other options set out at pages 154 and 155. We offer no comment about option #6 or #8. **We generally endorse option #7 without further comment.**

## *5.2.3 - Exemptions and new process*

In the discussion on exemptions and variances in the *ESA*, the Interim Report has identified a fundamental fault line running through Ontario labour law. Taken as a whole, the 85 exemptions and special rules fail tests of transparency, consistency, and fairness. The culture of non-compliance by employers is clearly related to this regulatory failure which excludes large numbers of workers with little or no justification. For workers, the sense of a rigged system is understandable and their skepticism with the system would rise considerably if they were aware of some of the facts that have been revealed – for example that 70% of low income workers are excluded from overtime provisions.

Unifor agrees with the core conditions that are proposed for future exemptions and special rules. Those conditions are that the *ESA* minimum standard is impractical and precludes the work from being done at all, and that the conditions of work are outside the control of the employer.

We agree also with the supplementary conditions, particularly that any exemption or variation is based on consensus of employers and employees.

**Unifor strongly recommends that the exemptions and variations listed in category 1 of Existing Exemptions (page 161) should be removed immediately and workers in these seven categories (IT workers, pharmacists, managers and supervisors, residential care workers, building superintendents, janitors and caretakers, students and liquor servers) have the full protection of the *ESA*.**

In each of these categories, the Interim Report showed that there is not a consistent approach to exemptions and variations across Canadian provinces, and the Ontario provisions are highly controversial in general and questionable in their detail. There is far from any consensus between employers and employees on the merit or justification of Ontario's current rules.

The question should be put: would any of these exemptions meet the core conditions set out for future exemptions? We assert that the onus should be on employers and employees in these sectors to show any merit or justification for the continuation of these exemptions and that their application should pass a transparent process for future variances to the *ESA*.

**Concerning "category 2 exemptions", Unifor disagrees that these exemptions can be said to be recently considered and agreed to by a consensus of employers and employees in the relevant industries.** Unifor represents employees in four of the six sectors named: public transit, ambulance services, film and television, and automobile manufacturing. While in the case of the film and television industry we confirm that Unifor Local 700 (NABET) was in agreement with the Special Industry Rules (SIR), in the case of automobile manufacturing, Unifor is on record as opposing the SIR exemption in 2006. In the case of the automobile sector, Unifor's predecessor union, CAW-Canada, was of the view in 2006 that the new regulation permitted employers to schedule employees in a way which encouraged the working of excessive hours, and would place pressure on employees and unions to agree to such schedules. CAW-Canada did not consider that it was adequately consulted about the new industry exemption.

Unifor concludes that the Ministry of Labour should now canvass the parties in each of these industries to confirm that there is a strong consensus to grandfather the SIR. If objections are raised, the SIR in question should be joined with the "category 3" exemptions and SIRs.

## The New Process for Special Industry Rules

Unifor has been consistent in its submissions to the CWR and in its discussions with employers that sectoral variations of *ESA* minimums can be appropriate. The conditions of work may vary from industry to industry and economic circumstances can vary within an industry in different communities or regions.

Unifor's concern with the proposals for a new process in 5.2.3 is that they may continue the practice of using exemptions and SIRs exclusively for the purpose of lowering or eliminating standards. Unifor strongly opposes this exclusivity which has resulted in the

perception that employer lobbying can circumvent the intent of the *ESA*, but for workers the *ESA* is not a minimum but a maximum.

**We propose that the recommendations in 5.2.3 speak to "variations" instead of "exemptions" and that it be made clear those variations cannot be understood as simply a lesser or no standard, and in some cases a higher standard may be appropriate**. It is also important that mechanisms are in place to allow minimum standards to rise over time to reflect the efforts of workers to improve their conditions. Unnecessary low minimums or no minimums act to suppress wages and benefits and make progress for workers extremely difficult.

It was in this context that Unifor proposed an extension model for *ESA* minimums which would allow minimums in collective agreements to be extended as an *ESA* standard for all workers in a defined labour market, (Sectoral Standard Agreements).

The Interim Report casts these issues in a somewhat different context with a goal of reviewing most or all existing exemptions and special industry rules and providing a structure and process for evaluating new proposals for SIRs.

In Option 2 of "Approaches for a new process" (page 162) a model is set out based loosely on the former practices of the Industrial Standards Act. Unifor believes that the intent and substance of its proposal for Sectoral Standards Agreements could be incorporated into Option 2. **To integrate these proposals, we recommend the following clarifications to Option 2:**

- **The Ministry "SIR" Committee or Structure would have standing committees chaired by an independent neutral person with experience in labour relations issues and including Ministry staff and appointees from the labour and management community.**
- **Unions or employers could make applications for a SIR variation to the *ESA* minimum on a provincial basis or for a defined labour market.**
- **While an application for a lesser or no standard must meet the core requirements and supplementary requirements set out by the Advisors, an application for an equal or higher standard could be recommended on the basis of improving labour market conditions and addressing the needs of vulnerable workers. Negotiated standards in the sectoral labour market could be used as the basis for an application.**

- **Recommendations to the Minister could include proposals for the creation of sectoral structures to implement and enforce minimum standards and promote training and skills development.**

### *5.2.4.1 - Exclusions – Interns & Trainees*

Ontario's current regulations regarding the use of unpaid interns and trainees leave open the possibility for ongoing exploitation of vulnerable workers in the labour market. The most cited estimates suggest there are at least 100,000 unpaid interns in Ontario – and that does not include trainees.

Permitting unpaid work sends a signal that not all work is valuable. It places downward pressure on wages. It reduces the availability of entry level jobs. It is a disincentive to employers to invest in on-the-job training. Furthermore, unpaid work has been found to have negative effects on lifetime earnings. It also creates socioeconomic barriers as those without the financial stability to perform unpaid work will face even greater barriers in launching their careers.

Any person who is performing work – including internships and training – should be paid.

The options put forward in the interim report do not go far enough to protect vulnerable workers from unpaid exploitation in the labour market. The exclusion for both interns and trainees should be eliminated.

**Unifor supports Option 2 – eliminate the exclusion, with the clarification that this applies to both "interns and trainees."**

### *5.2.4.2 - Exclusions – Crown Employees*

Excluding Crown employees from basic provisions including hours of work, overtime pay, minimum wage, public holidays and vacation pay leaves non-unionized, public sector workers vulnerable to exploitation and leaves government the opportunity to set a bad example. If government, the organization responsible for enforcing the rules, is not even held to the minimum standard then how can it credibly enforce those rules and standards on others?

When it comes to employment standards for crown employees, Ontario is an outlier in the broad range of crown employees that are excluded. On the other end of the spectrum, many provinces stress inclusion in employment standards directly stating the Crown employees are covered by the legislation.

**Unifor supports Option 2 – remove the exception.**

### *5.3.1 - Hours of Work and Overtime Pay*

The Advisors at page 193 of the Interim Report note that limitations on hours of work were not at the forefront during their consultations. This may reflect that the hours of work rules as they exist now are reasonably acceptable to both business and employee interests. It may be appropriate therefore to leave in place the *status quo* which is option #1 at page 195.

Unifor and its predecessors have in the past expressed concern about long hours of work. We have sought to increase time away from work and we have resisted long work hours in order to create more job opportunities in our communities. Those and similar concerns caused the Donner Task Force thirty years ago to recommend that the standard hours of work be reduced to 40 hours with overtime pay above that level. As noted in the Interim Report (p. 184-5), those recommendations were not adopted.

Unifor remains concerned that even in unionized workplaces, employees frequently are pressured into working longer hours. Indeed, even in some Unifor-represented workplaces, overtime work on weekdays and weekends is mandatory pursuant to collective agreements. We are therefore sceptical that arrangements of the kind described in option #2, #3, #4 and #7 would offer sufficient protection to employees (particularly unrepresented employees) and we therefore do not favour them.
Option #5 would have the effect of providing a flexible or floating regular work day of up to 12 hours. Employees would be deprived of any predictability in the scheduling of their work because employers would not be confined to daily maximum hours of eight or a greater number of hours if the employer has established a longer work day.

The existing “hard cap” on daily hours (as it is described at the bottom of page 189) should be retained. It permits employees to resist demands for very long daily hours of work. We therefore oppose option #6.

Unifor observes that the removal of things like agreement and approval requirements for work in excess of 48 weekly hours would increase involuntary long work hours even if there is enacted the kind of right of refusal for family, educational, or other work reasons as described in the Advisors’ option #2. We therefore do not endorse the options that would see approval requirements eliminated (i.e. options # 9 and #10).

**Unifor does endorse option #11 at page 196 of the Interim Report. That option is to reduce the weekly overtime pay threshold from 44 to 40 hours which would match the thresholds in federal workplaces and in Manitoba, BC, Saskatchewan, Newfoundland and Quebec.**

**Without expressing opposition to all overtime averaging arrangements, such arrangements should not allow employers to make averaging agreements that are too long. We would therefore endorse option #12. If the maximum length of an averaging arrangement is short, the requirement for an approval of every averaging agreement might be reconsidered.**

### *5.3.2 – Scheduling*

As noted in the interim report, many workers in Ontario face irregular hours and schedules with hours and days of work changing from week to week. This common practice leaves the possibility of a second job, or the ability to plan for life's other important aspects, out of reach for too many Ontarians. While the need for flexibility is often cited as the reason for these practices to have become so ubiquitous, Unifor has made major strides in recent contract negotiations regarding fair scheduling provisions and transitioning part-time workers into full-time jobs in the retail sector. Our negotiations increased the amount of notice employers are required to provide regarding schedules; increased the minimum call-in period to four hours of work; and strengthened and expanded language regarding minimum hours of work to ensure more part-time workers could count on a specific number of weekly hours and the pay..

These changes have significantly improved stability and security for our members as they are better able to plan hours of work to accommodate a second job or volunteer opportunity, and other family and life commitments. These changes would mean that workers experience more security sooner as they progress in their tenure with the company. The improvements also mean that workers achieve increased hours faster in order to progress through the wage grid and achieve increased remuneration in recognition of experience with the company based on total number of hours worked.

**Unifor supports:**

**Option 2b): Expand or amend existing reporting pay rights in *ESA*: increase minimum hours of reporting pay from 3 hours at minimum wage to 4 hours at regular pay.**

**Option 4: Require all employers to provide advance notice in setting and changing work schedules to make them more predictable (e.g., San Francisco Retail Workers Bill of Rights).**

This may include (but is not limited) to:

•require employers to post employee schedules in advance (e.g., at least 2 weeks);

•require employers to pay employees more for last-minute changes to employees' schedules (e.g., employees receive the equivalent of 1 hour's pay if the schedule is changed with less than 2 days' notice and 4 hours' pay for schedule changes made with less than 24 hours' notice);

•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;

•require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted.

Additional options and caveats:

**Option 3: Provide employees with a job-protected right to request changes to their schedule at certain intervals, for example, twice per year. The employer would be required to consider such requests.**

We support this option with the caveat that scheduling requests not be limited to a certain period of time or number of times per year. Workers cannot control when life changes and emergencies occur or how many happen in a year, they need to be able to request scheduling changes regularly.

### *5.3.3.2 – Paid Vacation*

**Unifor recommends option #3 which is to increase the minimum vacation entitlement for all employees to three weeks of paid vacation.**

The United Nations' *Universal Declaration of Human Rights* indicates that paid vacation is a basic human right:

> Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay *(U**N** General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) available at: http://www.un.org/en/universal-declaration-human-rights/ [accessed 9 September 2016])*

More generous vacation times are widely recognized as beneficial to mental health and physical wellbeing*. (Margo Hilbrecht & Bryan Smale (2016) The contribution of paid vacation time to wellbeing among employed Canadians, Leisure/Loisir, 40:1, 31-54 at 39, 48.)*

> Paid vacations can enhance satisfaction with work–life balance by allowing people time to reconnect with family and friends, psychologically detach from the demands of their job, and more easily fulfill parental role expectations. *(Ibid at 49)*

Canada is one of the lowest ranked developed countries when it comes to paid vacation entitlement.

Ontario is one of two Canadian jurisdictions with the least generous vacation entitlements. The other is Yukon. There is no reason that vacation entitlements for Canadians should be inferior to that of other strong economies. There is no reason that vacation entitlements for Ontarians should be inferior to almost all other Canadians.

Currently Ontario provides only two weeks after one year of employment with an employer and that minimum entitlement never increases.

Ontario and the Yukon are the only Canadian jurisdictions that do not increase the minimum vacation entitlement with length of service. Of the provinces and territories that do mandate an increase in entitlement, the majority do so after five or six years of service.

The *Canada Labour Code* provides that federally regulated employees are entitled to two weeks of paid vacation after twelve consecutive months of employment. That entitlement increases to three weeks after they have been employed for six years with an employer.

Saskatchewan has led the way in advancing paid vacation entitlements. Saskatchewan legislation provides a minimum entitlement of three weeks of paid vacation for employees after one year.

Unifor's preferred option is that increased vacation entitlement should not depend on long service. The rise in precarious employment in Ontario reduces the time that employees may be expected to remain with one employer. As a result, a greater minimum entitlement that is based on long service effectively precludes a large portion of employees from ever attaining that greater entitlement.

### *5.3.5 – Paid Sick Days*

According to the World Health Organization and The Work and Family Legal Centres, there are at least 145 countries around the world and 23 jurisdictions in North America that give workers paid sick days. Ontario is not one of them. Clearly Ontario is lagging behind.

Workers who are not covered by voluntary paid sick day policies in their workplace are often low waged and vulnerable workers who are already struggling to make ends meet. This makes the choice to stay home while ill nearly impossible. Persistent disparities in access to paid sick days are a clear sign that Ontario needs a provincial standard. Without one, ill workers who are too poor to not work will either face profound economic hardship or attend work while sick leading to poorer health outcomes for them and others. Neither result is one which we should be satisfied with.

The Ontario Medical Association ("OMA") has repeatedly made note of this problem, observing that permitting employees to take protected sick days reduces the duration of illness, the risk of worsening minor conditions and the transmission of illness to others, as well as decreasing the strain on public health resour*ces.*

Furthermore, employer concerns about costs and competitiveness are misguided. Employers across North America and around the world are recognizing that the provision of paid sick leave is not detrimental to business competitiveness. For example, following the introduction of paid sick leave in New York City, a study by Appelbaum and Milkman entitled "No Big Deal: The Impact of New York City's Paid Sick Days Law on Employers" assessed the overall impact of the extension of paid sick leave on employers. The consensus of employers, many of whom had expressed reservations about the negative impact of paid sick leave legislation, was that the provision of paid sick leave was overwhelmingly a "non-event". Workers did not abuse sick leave, costs were negligible and productivity did not decline.

**Unifor supports Option 2 (a) (ii) which supports the introduction of paid sick leave for all workers, to be earned at a rate of 1 hour for every 35 hours worked. That is the option most likely to result in extension of sick leave to all workers.**

Provision of doctor's notes as a matter of course should not be required. Such a demand puts unnecessary pressure on our health care system while exposing workers to other infectious agents. Should it be determined that medical notes may be required, the cost of obtaining any such note, including the true cost to the health care system, should be borne by employers.

### *5.3.6 – Domestic Abuse Leave*

**Unifor welcomes Option 3 at page 219 of the Interim Report, the addition of a new leave of absence for workers facing situations of domestic abuse and violence.**

Unifor seeks a five day paid leave, with the right to an extended unpaid leave as needed (with the right to return to their jobs without reprisal once the employee's personal situation has been secured). These leaves might be made contingent on adequate verification from a recognized professional (i.e. doctor, lawyer, professional counselor, social worker, or intake worker from a women's shelter).

It is now broadly recognized that domestic violence is a workplace issue. Studies in the US indicate that the single greatest cause of death for women in the workplace is domestic violence. (*Newman, Elaine, Preventing Violence and Harassment in the Workplace, A Practical Guide to Ontario's Bill 168 for Employers, Unions and Employees, Toronto: Lancaster House, 2012, page 26*)

Violence also directly affects workers' attendance and performance at work. That imposes significant economic costs to employers, including loss of productivity, absenteeism and increased risk of workplace accidents. In addition, research has shown that job security is a significant factor in a woman's decision to leave an abusive relationship. Paid and unpaid domestic violence leave can help to provide essential economic security in a period of upheaval, allowing women to maintain their home and standard of living for themselves and their children. (*Wathen, C.N., MacGregor, J.C.D., MacQuarrie, B.J. with the Canadian Labour Congress. (2014). Can Work be Safe, When Home Isn't? Initial Findings of a Pan-Canadian Survey on Domestic Violence and the Workplace. London, ON: Centre for Research & Education on Violence Against Women and Children.)*

The importance of paid and unpaid leave for workers who have experienced domestic violence is now recognized in Canada and internationally. Other jurisdictions have successfully introduced such legislation. Further, as noted in the Interim Report at page 219, a private member's bill now seeks to amend the *ESA* to include paid and unpaid domestic violence and sexual violence leave. Unifor supports the principles underlying this Bill but our proposal is limited to domestic violence leave.

**As set out in Unifor's first submission, there ought also to be requirements that employers adopt policies for responding to domestic violence situations affecting their employees including confidentiality, workplace safety planning, referral to domestic violence support services, training for workplace representatives, flexible work arrangements and protection against reprisal and discrimination.**

### *5.3.7 – Part-time and Temporary Work: Wages and Benefits*

Unifor's initial submission to the Changing Workplaces Review made significant recommendations surrounding pay and benefits for part-time workers and temporary agency workers. As the interim report notes, part-time and temporary employees make up significant portions of Ontario's labour market. These workers are more likely to face instability, insecurity and precarity. They are also more likely to be members of marginalized and vulnerable groups including women and racialized workers.

Systemic pay and benefits discrimination based solely on hire date, age of an employee or employment status is unacceptable. Unifor supports the principle of pay and benefits equity for all workers, including temporary and part-time workers. In our recent negotiations in the retail sector, our minimum hours of work improvements led more part-time workers (who were previously excluded) to become eligible for the company's benefits package for part-time workers.

**Unifor supports Option 3 and rejects option 4.** All workers deserve fair and equal treatment at work and access to pay and benefits that reflect their skills, commitment and tenure, no matter where they sit on the income ladder.

**Furthermore, Unifor supports Option 5 but only with additional measures in order to ensure effectiveness. To avoid turnover in those temporary contracts, workers must have access to just cause protection if another worker is hired to conduct the same or continuing work at the end of the contract. The option should be rewritten as follows:**

**Option 5: Limit the number or total duration of limited term contracts and provide just cause protection to temporary employees if the work is continuing.**

## *5.3.8 – Termination and Severance*

### *5.3.8.1 – Termination Notice and Pay*

Though not on the Advisors' list of issues on which additional comment is particularly sought, Unifor wishes to make some submissions about termination of employment and severance pay issues that are set out beginning at page 228 of the Interim Report.

***Increase the cap on notice of termination***

**Unifor endorses Option # 2 at page 231 which is to increase from eight weeks the cap on termination notice and pay obligations. We emphasize that the employment standard permits employers to avoid all costs by giving a termination notice in advance of a termination. At least assuming that employers are able to give such a notice, an increase on the cap of notice and pay obligations need not therefore cause increased costs for any employer.**

For long–service employees, the existing cap of eight weeks of termination notice or pay provides an insufficient employment standard compared to the common law period of reasonable notice for long-service employees. As noted by the Advisors at page 229, a wrongful dismissal lawsuit is often impractical even though the eventual recovery might be greater than in a claim for termination pay. The employment standard should more closely resemble the likely common law litigation outcome. An eight-week cap means that the standard does not resemble the likely common law litigation outcome for employees with more than a few years of service. Even though termination pay entitlements are not subject to a mitigation duty requiring employees to mitigate or reduce their lost earnings after a job loss, and wrongful dismissal damages are subject to such a duty, a longer period of termination notice or pay entitlement is justified. **Unifor favours lifting the 8-week cap to either 16 weeks (which would match the longest required notice and pay entitlement in mass termination cases) or 26 weeks (to match the maximum severance pay entitlement).**

***Termination after recurring periods of employment***

This matter is the subject of Option #4 at page 231. Currently, an entitlement to notice of termination or termination pay is determined with reference to the employee's most recent "period of employment" (*ESA, s. 57 and Ont. Reg. 288/01, s.8*). A period of employment is the length of time that the employee has worked since last being hired after a notice of termination was given or after a deemed termination occurred (which will typically be the first day of a previous layoff (*ESA, s. 56(5*)).

The definition of period of employment means that employees can have a long relationship with an employer but have no termination notice or pay entitlement if the nature of the employment is such that it has been periodic or seasonal or pursuant to successive limited-term contracts. **Unifor agrees with the positions referred to at page 230 of the Interim Report that attention ought to be given to reform of the way in which an employee's "period of employment" is identified in such cases.**

The requirement to provide notice of termination based on length of service is intended to provide employees with an opportunity to take preparatory measures and to seek alternative employment. The requirement to pay termination pay where the required notice in advance is not given is intended to cushion employees against the adverse effects of economic dislocation which are likely to follow from the absence of an opportunity to search for alternative employment (*Re Rizzo & Rizzo Shoes Ltd.* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at p. 205). Those purposes are not different for employees whose employment is interrupted seasonally or periodically. Those employees equally require an opportunity to seek alternate employment if a termination occurs during a period of employment or, if notice is not given, to be compensated for the economic dislocation that results from no notice.

***Temporary lay-off rules require revision***

The Advisors refer at page 230 to comments that the rules concerning temporary lay-offs are complex and open to manipulation. No option is provided about this subject.

A notice or pay requirement only exists if a temporary lay-off becomes a termination. That is a forward-looking exercise. Employers can, in order to avoid the potential cost of a termination pay claim, give notice in advance of a lay-off so that if the lay-off lasts so long that it becomes a deemed termination, the employer need not pay termination pay. If notice of termination at the time of the lay-off is not given, and the lay-off turns into a termination, the employer is exposed to a termination pay liability.

Unifor agrees that the rules about temporary lay-offs have become unnecessarily complex. Section 56(2) of the *ESA* sets out a simple scheme that defines the transition from a temporary lay-off to a termination. The default situation is that a temporary lay-off can last for 13 weeks and then is deemed to be a termination. Alternatively, it can last for 35 weeks if the employer does one of a number of things that benefit the laid off employee such as continuing to provide insured benefits. Finally, a trade union can make an agreement that a temporary lay-off can be extended for longer than 35 weeks.

For unionized employees, arbitration awards have created considerable uncertainty about when a temporary lay-off becomes a termination. Arbitrators have interpreted subsections 56(2) as meaning that a temporary lay-off can always last for as long as 35

weeks for employees covered by a collective agreement (see for example *Johnson Controls*, unreported, (July 31, 2008, McLean), judicial review dismissed 2010 ONCA 131; *T.I. Automotive* (2009), 101 C.L.A.S. 47 (Surdykowski)). Those awards relied on the interpretation given to section 56(2) of the *ESA* by the Ontario Court of Appeal in *National Automobile, Aerospace Transportation and General Workers Union of Canada (C.A.W. - Canada) Local No. 27* v. *London Machinery Inc.* (2006), 79 O.R. (3d) 444) which was taken to mean that a collective agreement always extends the duration of all temporary lay-offs to 35 weeks for unionized employees. These decisions have undermined the general rule described in the second paragraph of page 229 of the Interim Report. Their effect is to permit employers to prolong the temporary lay-off of many employees without continuing to make payments for their benefit such as continuing insurance benefits. These are matters that ought to be addressed by legislative action and we recommend that the Advisors consider that subject if the rules about temporary lay-offs are considered.

***No notice requirement for quitting***

**Unifor opposes an amendment as outlined in Option #5 that would require employees to provide notice of quitting**. The *ESA* exists for the protection of employees by providing employment standards. There exists a common law requirement that an employee must give reasonable notice of a resignation. Employers can theoretically recover damages where the employee does not provide notice. That cause of action is largely unused because employers are well able to manage the departure of quitting employees. Employers generally prefer that quitting employees leave the workplace sooner than later. A requirement to give notice would serve no useful purpose other than to trap departing employees in an unwelcome situation.

## *5.3.8.2 – Severance Pay*

Unifor observes that the five–year requirement before an employee is severance pay-eligible disqualifies many employees whose employment is of the kind described in Chapter 3. In particular, the five year requirement will often mean that employees in precarious or vulnerable employment will never find themselves in a position to be severance-pay eligible. **A reduction to 12 months to match the federal sector severance pay entitlement would be appropriate. Employees would then be entitled to one week of severance pay for each completed year of service and a prorated amount for each partial year of service.**

The $2.5 million payroll threshold and 50-employee threshold unreasonably limits employees' access to severance pays. The Interim Report at page 232 discloses that only 40% of Ontario employees are severance-pay eligible. The eligibility thresholds have

endured since the 1980s and it is not evident that it remains good policy to make only larger employers liable for severance pay claims. Indeed, there appears no policy basis to determine employees' entitlements according to the size of their employer's business. **Unifor therefore favours an elimination of the employer size thresholds or at least a substantial reduction in them.**

### *5.3.8.3 - Just cause for termination*

In its first submission, Unifor proposed to require employers to have or demonstrate just cause for termination of an employee's employment as a critical measure by which the law could protect and "fortify the legal space in which workers can exercise their voice and moreover eliminate a key aspect of the precarious nature of their employment". We reiterate this argument here.

**Unifor supports Option 3 of 5.3.8, namely "to provide just cause protection (adjudication) for all employees covered by the *ESA* with the proviso that such protection be furnished to employees with 12 months service."**

Just cause protection for all Ontario workers is entirely consistent and supportive of the principles and objectives expressed by the Report in Chapter 2, specifically the objectives of decent and fair working conditions and effective and reasonable access to justice.

Since the publication of the Report the Supreme Court of Canada has issued its decision in *Wilson and Atomic Energy of Canada et al,* 2016 SCC 29. This decision offers helpful guidance to the Advisors and the Legislature.

The facts of the Atomic Energy case are straightforward. Mr. Wilson was employed as a senior buyer and administrator by Atomic Energy of Canada Limited ("AECL") for four and a half years, until his dismissal in November 2009. He had a clean disciplinary record. His employer advised him in writing that his termination from employment was on a non-cause basis. The employer provided Mr. Wilson with a dismissal package of compensation which it characterized as generous and in excess of statutory requirements. Mr. Wilson claimed his dismissal was in reprisal for his filing a complaint about improper AECL procurement practices.

AECL came before the adjudicator appointed to hear Mr. Wilson's complaint with a simple submission: the employer's delivery of a sizeable severance package meant that the dismissal was a just one, even if there was no cause for it.

The adjudicator disagreed and found that since there was no cause for his discharge, Mr. Wilson's employment should be reinstated and his complaint granted, notwithstanding the generous severance payment offered by AECL.

A Superior Court Judge and the Federal Court of Appeal upheld AECL's position.

However, the Supreme Court of Canada preferred the analysis of the adjudicator and restored the ruling that termination of employment without cause even with notice and compensation was contrary to the provisions of the Canada Labour Code.

In so doing, the Court expressed reasons which resonate strongly with the themes and principles of this Report; namely the adoption of fair and decent conditions of employment, and access to cost effective justice.

At paragraph 49 of the ruling Justice Abella approves a passage from Professor Arthurs' *2006 report on Part III of the Canada Labour Code* in which he finds that the introduction of the unjust dismissal provisions in the federal Code and associated substantive and procedural protections " has coincided with and arguably hastened the adoption of progressive attitudes and practices in the field of workplace discipline, many of which were also advocated by human resource and industrial professionals as a matter of best practice."

This kind of development would be welcome in the Ontario provincial jurisdiction. Moreover, at paragraph 50, Justice Abella again relies on the findings of Professor Arthurs when she underlines that the federal Code statutory regime relating to unjust dismissal represents "a cost effective alternative to the civil court system for dismissed employees which are far more expansive than those available at common law."

Justice Abella quotes Professor Arthurs' observation that: "In effect then, one great merit…. Is that it overcomes the main deficiencies of civil litigation. It provides effective remedies and it removes cost barriers to access to justice. It thereby translates a universally accepted principle- that no one should be dismissed without just cause- into a practical reality. Part III can therefore be understood as an exercise in the reform of civil justice."

An employee's reasonable and cost effective access to justice is clearly in the public interest, and has been an overriding concern of union and worker advocates for many years.

Now is the time for Ontario to join Canada, Quebec and Nova Scotia in permitting workers to contest their termination from employment on the grounds of the absence of just cause, in order to allow for the possibility of reinstatement.

### *5.4.1 – Greater Right or Benefit*

**Unifor strongly opposes option 2 described at page 255 of the Interim Report.** That option would do away with the traditional "greater right or benefit" analysis. It would allow employers and employees to contract out of an employment standard by providing a more generous benefit with respect to something that is subject to a different employment standard. Such a rule would undermine individual employment standards. Given the frequent inequality of bargaining power between employers and employees, such a rule would surely erode for many employees basic employment standards such as holidays and vacations, hours of work, etc.

The Advisors at page 254, correctly identify that the traditional approach has been to insist that employment terms only be made comparable to the employment standard that deals with the same subject matter. This is said to require the comparison of "apples with apples". This approach is one that is now familiar to employers, trade unions and employees.

The current approach has the advantage of relative simplicity. While comparisons in areas such as leaves can in fact be complex and difficult, and often somewhat subjective, comparisons would be immeasurably more difficult if employment terms unrelated to the subject matter of an employment standard were compared with that employment standard.

Adoption of the second option described at page 255 would permit some employment standards to be eliminated or compromised. That undermines the fundamental structure of employment standards laws which is to establish separate minimum entitlements for a variety of terms and conditions of employment.

### *5.4.2 and 5.4.3 – Agreements and pay periods*

The continued availability of so-called alternate employment standards ought to be assessed in order to confirm that they are in fact a real alternate to the default employment standard and not a second-rate benefit or entitlement.

Assuming that alternate employment standards are in fact equal, issues of unequal power as between employees and employers may be addressed by the mandatory use of more formalized mechanisms for making agreements to accept an alternate standard instead of the default standard. Formalized mechanisms might include for example, plain language forms prepared by the Ministry of Labour that include Ministry-prepared

information that advises employees of their rights to decline to enter into such agreements. A precedent for that kind of mechanism is the kind of document that the Ministry has prepared pursuant to section 21.1 of the *ESA*. That document advises employees about their rights concerning hours of work agreements and overtime pay.

## *5.5 - Enforcement and Administration*

Identifying measures by which the Legislature may facilitate and fortify a culture of compliance with employment law in Ontario is a key objective of the Changing Workplace Review.

In the article "Employment Standard Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness", Kevin Banks has highlighted the critical importance of enhancing the employer community's consistent compliance with the law, absent any particular intervention of a public authority by way of an inspection, investigation or prosecution.

The Report initially looks to the Internal Responsibility System, prevalent in the occupational health and safety sphere, as a template for bringing greater responsibility for compliance directly into the workplace.

Unifor has already expressed its view that the concept of a mandatory joint employee/employer work council or committee devoted to employment standards matters (perhaps as an add-on to existing health and safety concerns) is problematic.

While Unifor did not reject this proposal out of hand, we noted that there is a significant line of academic literature that finds that the presence of a union in a workplace, and the support of that union for the worker participants in the joint committee, is the unstated real premise for the potential success of a joint committee, as an outgrowth of the internal responsibility system. Where there is no union in the workplace, the efficacy and true independence of the joint committee is dubious.

There is a meaningful risk that employee members of a joint committee will be apprehensive about truly exercising their voice and fully pursuing the statutory rights and entitlements of their coworkers, if they do not enjoy the protection of a grievance system and a collective bargaining agreement (see page 95 of our initial submission for a fuller discussion of this issue).

We reiterate our view that other fundamental building blocks need to serve as the foundation for a successful internal responsibility system. Those building blocks include protection against unjust discharge, and statutory safeguards with respect to the conduct of "concerted collective action" in connection with employment issues.

If the Legislature sees its way clear to adopting the joint committee model as an expression of the internal responsibility system, then Unifor plainly says that the "enhanced model" of the joint *ESA* committee described at page 271 of the Report is our preferred model.

Compliance with the law will be enhanced if the committee has **ongoing** responsibility to promote awareness and compliance with the *ESA*. The enhanced model furnishes employee members of the committee with a better opportunity to detect and perhaps prevent violations of the *ESA*. The enhanced model comes closest to the practice of proactive inspection which has been recognized as an effective means of addressing events of noncompliance which have not been made the subject of a complaint.

Section 5.5.4.1

We reiterate our standpoint that the Legislature ought to remove the *ESA* provision allowing the Director to require an employee to first contact their employer before being able to make a complaint to the Ministry.

In his supporting article, Kevin Banks reports data from British Columbia that after the requirement for workers to seek employer compliance prior to filing a claim was introduced into the law in 2002, claims in that province fell from over 12,000 in number to between 3,400 and 6,500. To say that this decline was largely due to increased rates of claim resolution at the first stage of the process is wrong headed and naïve.

The decline was due, in significant part, to the introduction of this "self-help" step. Similarly, the decline in the number of complaints following the 2010 amendments to Ontario's *ESA*, from approximately 19-23,000 to 15 -17,000 thereafter, must be ascribed, at least in part, to the same kind of "self-help" step imposed by the 2010 law. In effect this means that the self-help procedure inappropriately added to the *ESA*, in 2010 has truly discouraged workers from pursuing their employment standard guarantees, as such the self-help rule actively counters the very objectives of fairness and access to justice expressed by the Report .

Section 5.5.4.2

Providing an expedited and special procedure for the quick determination of reprisal complaints goes hand in hand with the objective of a new strengthened focus on compliance with the law. If complainants do not have reasonable confidence that their complaint of reprisal will be dealt with expeditiously, and effectively, then they will be, (and have been) less likely to seek reinstatement to their employment with a full make whole remedy. In turn this reticence, on the part of complainants, will set the stage for a reverse incentive for that troublesome segment of the employer community that stands

ready to violate the law; the anticipation that workers will not complain makes the prospect of employer malfeasance unfortunately, and relatively more likely.

Section 5.5.5.1

In this section the Interim Report examines how conventional enforcement practices regarding proactive inspections may be re-targeted in the context of increasing precarious employment in service sector, and small workplaces where women, people of colour, and recent immigrants toil.

**Unifor supports all of the options set out at page 285 of the Report save for option number one, which of course is the option about maintaining the status quo. The status quo is not working.**

The proposition that there should be an increase in the breadth and number of proactive inspections in workplaces where migrant and other vulnerable workers are employed reflects a sensible realization that vulnerable workers in less secure jobs where profit margins and/or revenue may be thin, are more likely to be subject to employment law violations, and less likely to feel safe and able to complain on their own volition.

Section 5.5.5.3

**Unifor concurs with the submission described at page 291 of the Report that the current remedies set out in the *ESA*, are "inadequate" for protecting Ontario workers. We support all of the options except option one and option ten.** All the options with which we find favour share a common thread. They increase the cost of noncompliance, and generally in so doing create a logical incentive for employers to adhere to the law. However, one option that is not explicitly set out that deserves mention is that described by Kevin Banks at page 27, where he suggests a recommendation by which workers are enabled to recover, where a claim is upheld, costs associated with gathering information to file the claim, and with attending meetings or hearing days. This is in reference to a cost recovery that is distinct from legal costs per se, but responds to the actual costs of lost pay, and disbursements that the claimant incurs on his or her own.

**Unifor does not, on balance support the option expressed at point ten.** While we understand the motivation to incentivize employers to adhere to the law by raising the prospect that the employer could lose lucrative government contracts if the employer violates the law, we are concerned about the real life consequences of such a policy.

A worker who is aware that his or her employer's business is significantly supported and underwritten by one or more government contracts may be discouraged from making a complaint if that worker believes that one end result may be the denial of government

work to the employer in the future, and the consequent lay off or cutback in business. To the extent that a worker's job security is tied an employer's access to government contracts, this kind of reform would place a worker whose rights have been violated in an unenviable position. If he or she complains to validate his or her rights, concurrently the complaint risks causing a chain of events that could lead to a loss of employment within a foreseeable time. Once the complainant's coworkers learn of the complaint, they may well fear that their jobs have been jeopardized. They could bring undue and unfair pressure upon the complainant to withdraw the matter. And moreover the employer may well act more rashly in reprisal, fearing the loss of work and revenue.

**Option 11 speaks to enlarging the jurisdiction of the OLRB to impose administrative monetary penalties upon employers who offend the *ESA*. Unifor supports this option for change.**

I**n addition, Unifor says that every employer found to have violated the *ESA*, whether by a ruling of an ESO or the OLRB, upon review or any other proceeding should pay an enhanced administrative penalty or fee.** This basic rule should not take away from the power of the ESO or OLRB to impose a heavier administrative fee in the appropriate case, particularly when there is evidence of a deliberate course of action that has infringed the law.

This alternative for reform is entirely consistent with a primary objective of the Report and the CWR: to enunciate changes that would improve compliance with the law.

Indeed, we envision granting the OLRB a wide discretion to effect significant fee obligations, (up to one hundred thousand dollars per violation) where there is evidence of an intentional violation of the law. The actual sum imposed should reflect such factors as the severity of the violation, the number of persons affected, and the damages incurred.

**The OLRB should be permitted to direct the sums paid by miscreant employers to be deposited in a trust fund apart from governmental Consolidated Revenues. These trust fund monies should be used for the express purposes listed by the Report at page 297, a proposal we strongly endorse. We say that the fourth bullet point at page 297, pertaining to funding legal and other support for employees who wish to file complaints, should be explicitly expanded to include the proposal for reform set out at page 301 of the Report, namely the suggestion that there is a need to increase resources and support for unrepresented complaints by way of expanding the mandate of the Office of the Worker Adviser. Monies obtained from a more active implementation of administrative fees or penalties could be devoted in part to help fund a new broader role for the OWA.**

Unifor considers administrative penalties to be remedial fees that respond to civil wrongs and the cost to the state and workers arising out of the violation of law. The purpose of the administrative fee is not to punish, but to address among other things, the systemic costs to society that develop due to employer noncompliance with employment law. That explains why the funds achieved through these administrative fees should be devoted to the education of all participants in the labour market regarding employment guarantees, and the support of other claimants seeking to vindicate their rights.

As noted in the Report it would be impractical for the Office of the Director Enforcement to be involved in the carriage of each complaint that appears meritorious. That realization, and the absence of a public policy rationale for denying claimants the right to seek enhanced administrative fees supports granting the OLRB the authority to issue such remedies **at the instance of individual workers.** Further, the *ESA* should reflect measures taken by the Legislature that ease the way for successful claimants to obtain a more liberal range of damages, including general, special, and exemplary damages.

Amidst the detailed discussion of options pertaining to the opening up of new routes for the enforcement of rights under the *ESA* (and ultimately, therefore better compliance with the law), Unifor has noted one option that has not been set down and examined. **We refer to our earlier submission that claimant workers should be able to choose to file a complaint directly with the OLRB where he or she would be empowered to prove his or her claim.**

It is understood that the direct access model may not be equally desirable for all workers in that new Canadian workers from several communities around the world may not have the language or literacy skills that would make the direct access model a practical choice. Nevertheless, many other workers could take advantage of such a reform, as would third party agencies, trade unions, and worker clinics etc. to take control of the agenda of a complaint and prosecute it expeditiously and as they see fit straight before a Tribunal.

The alteration of the Ontario Human Rights Code allowing direct complainant access to the Human Rights Tribunal has been a success, in the eyes of Unifor. That change positively contributed to the practical achievement of greater access to justice for thousands of Ontarians. A similar reform to the *ESA* would make a similar positive contribution.

**Unifor backs the proposal to amend the *ESA* to provide that on a review at the OLRB, the burden of proof should be on the applicant party to prove on a balance of probabilities that the order made by the ESO is wrong.** The orders of ESOs, who should be recognized as experienced, reasonably specialized and knowledgeable persons

engaged in the field of employment law, should attract sufficient deference such that an applicant should go first and meet the burden of proving the ESO wrong. Most orders written by ESOs are in relation to contraventions by employers, who generally speaking in any event already possess the information and documentation that would fairly permit them to address the issues in dispute without having heard the full case of the claimant first. Moreover, option one at page 300 if implemented would insure that the record relied on by the ESO in his or her investigation would be placed automatically before the ORLB and therefore even an unrepresented employer should have an easier time insuring all relevant evidence was "properly" admitted as evidence.

Finally, as we note above, option number 5 at page 301 to "increase resources and expanded mandate for the office of the Worker Adviser" is a suggestion strongly supported by Unifor. The OWA has developed an expertise and presence in communities across Ontario that can be put to good and increased use for all non-union workers who seek the vindication of their workplace rights.

## Conclusion

Unifor commends the Interim Report of the Changing Workplaces Review. With the exceptions of some matters or recommendations noted in this submission that in our view ought to have been included, the Report contains fundamental solutions to the problems facing Ontario workers.

It is our opinion that if the substantive recommendations contained in the Report were enacted comprehensively, it would result in a transformation of the world of work for many hundreds of thousands of workers. Taken as a whole, these reforms to our employment and labour laws and labour relations systems would confront the dramatic changes in the economy, workplaces and labour force that have taken place.

The Interim Report identifies correctly the systemic issues and trends that must be addressed to meet the mandate of the CWR. Proceeding from "problems" to "solutions" point clearly to the recommendations that should be in the Final Report.

As we mention at different points in this submission, the underlying issues and principles set out in Chapters two and three of the Interim Report require an integrated set of policy responses that cannot be contained or isolated to any one matter in the *LRA* or *ESA.* And once we set down the path of reforms to redress the problems of vulnerable workers, precarious work and the constitutional rights of all workers, the shortcomings and inconsistencies of incremental change alone is soon apparent.

It is for the Legislature to ultimately determine its political will to meet the mandate of the CWR. The best conditions for those political decisions will be created by a Final Report that is comprehensive, consistent and based on principle.

Unifor urges the Advisors to present Ontario with a bold challenge of justice and fairness for workers in a modern economy. The time is now to make it the law of Ontario that every worker will have the right to decent work.

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