UNITED STEELWORKERS
USW
MÉTALLOS

District 6
Ontario and Atlantic Canada

Marty Warren
District Director

Delivered By Email and Courier

October 14, 2016

C. Michael Mitchell
The Honourable John Murray
Changing Workplaces Review, ELCPB
400 University Avenue, 12th Floor
Toronto, Ontario M7A 1T7

Dear Mr. Mitchell and Mr. Murray,

Attached please find a brief from the United Steelworkers in response to the interim report of the Changing Workplaces Review.

This brief addresses matters raised in the Review generally and also addresses issues which you, in your role as Special Advisors to the provincial government, have indicated you are seeking more expanded input.

As with our original submission to you, the material in this brief is rooted in the USW's fundamental belief that developing a more successful and effective economy in Ontario requires the active, engaged, and empowered voice of employees through collective bargaining.

As noted in this brief, we commend you, the staff at the Ministry and the authors of the various research papers the review for the work undertaken to date.

We are interested meeting with you in the near future to discuss the ideas in both of our submissions in more detail, and to consider ways in which positive, practical steps can be taken to implement them.

Sincerely,

Marty Warren,
USW District 6 Director

cc. Ken Neumann, Canadian National Director

Response by the

United Steelworkers

to the Interim Report of

Ontario's Changing Workplaces Review

October 2016

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PART I: INTRODUCTION

The Changing Workplaces Review comes not a moment too soon for Ontario workers.

The world of work has changed dramatically over the last fifty years and our members have experienced these changes first-hand. Fifty years ago, the majority of our members in Ontario worked in mining, manufacturing, and steel-making. They were often hired by local employers fresh out of high school or college, and stayed working for their employer until they retired, often twenty, thirty, sometimes forty years later. The wages they earned enabled them buy a home, raise a family, and put their children through school. They usually retired after a lifetime of service with a solid pension income, and health care benefits to assist with their medical expenses as they aged. Their work gave them the opportunity to live with dignity.

Today, our members face new and greater challenges in their efforts to attain decent work. There are fewer jobs in traditionally higher-paying sectors of the economy like manufacturing, steel production, and resource extraction than ever before. In addition, the jobs that remain in these industries are themselves less stable: wages have stagnated, benefit coverage is more restrictive and deductibles have increased, good defined benefit pension plans are being eliminated for younger workers (replaced by less stable defined contribution or RRSP plans) and pension benefits cut for senior employees. Many existing defined benefit plans continue, but remain woefully underfunded and vulnerable to crippling benefit cuts.

In addition, employers have transformed the way they conduct their operations. Our members have experienced increasing amounts of contracting out (or contracting in, through the use of temporary agency employees) in their workplaces, as employers shed "non-core" workers in an effort to reduce labour costs and increase profit.

Statistics show that the experience of our members is replicated throughout the province. Manufacturing jobs in Ontario have declined steeply in the past fifteen years, and service-sector positions have increased.[1] While some of these service positions (particularly in information technology) are highly compensated, many are not. Instead, such positions are characterized by their lower wages, weaker benefits, less job security, more limited training and reduced opportunities for career development.[2]

In addition, we have seen a steep rise in self-employment and contract work in the province, as fewer Ontarians enter into "traditional" employee relationships with an employer.[3]

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[1] Sheila Block, *A Higher Standard: The case for holding low-wage employers in Ontario to a higher standard*, Canadian Centre for Policy Alternatives, June 2015, Table 1 at pg. 7.

[2] Morley Gunderson, *Changing Pressures Affecting the Workplace and Implications for Employment Standards and Labour Relations Legislation*; September 2015, https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Gunderson-7-Expected%26Actual%20Impact%20Emp%20Standards.pdf at pg. 30;

[3] *Ibid*, pg. 29-30.

These trends, coupled with an ever-lower union density rate brought about by a decade of labour policy choices designed to reduce employee access to collective bargaining and minimum standards protections has resulted in levels of income inequality not seen since the 1930's.[4]

That's why our Union has been active in the Changing Workplace Review since it was announced in February of 2015. This Review is a vital opportunity to ensure decent work for Ontarians across the province. It's an opportunity that we cannot afford to waste.

Our Union has carefully reviewed the Special Advisor's Interim Report, along with the important research and statistical data compiled in support of this project. We commend the important work that has been done by the Advisors and the researchers affiliated with the Review to date.

Our Union believes the path forward is clear. In order to reverse the high levels of precarious work in the Ontario economy, and provide decent jobs for all Ontarians, we must do the following:

- Expand the number of workers who are able to participate in meaningful collective bargaining and broaden the application of employment standards legislation by removing outdated occupational exclusions and re-defining our understanding of who is an "employee".

- Facilitate the ability of workers to freely join a trade union of their choice, by providing for card-check certification and increased fairness in the certification process, and adding new protection for the right of employees to engage in "concerted action" (even in the absence of trade union involvement) in order to improve their working conditions.

- Remove barriers to worker free choice by permitting employees at multiple sites of an employer to form a single bargaining unit, allowing for the consolidation of a union's existing bargaining units, and bargaining on a multi-employer or sectoral basis.

- Amend the definition of "employer" under labour and employment legislation to ensure that those entities that control the workplace, directly and indirectly, are compelled to bargain with trade unions, are bound by collective agreement terms and conditions, and are liable for violations of employment standards legislation.

- Improve minimum employment standards in the province, including overtime after 40 hours per week, an increase in vacation entitlement from two weeks to three weeks per year, and the provision of up to seven paid sick days per year, in order to ensure fair working conditions for all Ontarians, and make sure those standards are effectively enforced.

[4] Ontario Common Front, *Falling Behind: Ontario's Backslide into Widening Inequality, Growing Poverty, and Cuts to Social Programs*; August 2012, http://ofl.ca/wp-content/uploads/2012.08.29-Report-FallingBehind.pdf, pg. 6

- Make sure that workers in the contract services sectors of Ontario's economy don't lose the benefit of their collective agreement merely because of a change in the contractor that employs them.

- Remove barriers in the bargaining process and facilitate the ability of parties to reach a collective agreement by banning replacement workers during a strike or lockout, ensuring that workers can access interest arbitration in first contract situations and in cases of lengthy strikes/lockouts, and by protecting employee jobs at the conclusion of labour disputes.

At pages 10-20 of the Interim Report, the Advisors set out a number of principles, values and objectives that will guide their review and recommendations to the current Government. Those values include recognizing the importance of decent work, ensuring a culture of compliance and meaningful enforcement of the law, access to justice, and employees' constitutional right to engage in collective bargaining. We agree that these principles are vital considerations in this review process.

Most important, however, in our view, is the explicit recognition by the Advisors of the inherent power imbalance and inequality of bargaining power between employers and employees. In the Interim Report, the Advisors note:

> This power imbalance manifests itself in almost every aspect of the employment relationship, particularly in a non-union environment. As the Supreme Court has observed: "Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers." A recognition of this power imbalance has always informed the need for and the content of legislation and basic employee rights and employer obligations where the law acts as a countervailing force to the power imbalance in the employment relationship. Without legislation of basic employee rights and corresponding employer obligations, most employees would be powerless and vulnerable to the unilateral exercise of power by employers.[5]

We believe the importance of this passage in the Advisors' Interim Report cannot be overstated. While the world of work is changing, the rise of precarious work and the increasing vulnerability of Ontario workers is not the result of structural changes to the Ontario economy alone. Rather, Ontario workers are more vulnerable today because in addition to these structural changes, successive provincial governments have failed to act to mitigate the power imbalance between workers and employers in the face of strong employer resistance.

Given the inherent imbalance of power in the employment relationship, the dire effects of precarious work on Ontario employees cannot be mitigated by maintaining the status quo, or giving employers more "flexibility" to manage their workplaces through reduced regulation and tough

[5] Ministry of Labour, *Changing Workplaces Review Special Advisors' Interim Report*, https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf., pg. 11.

labour laws, as employers will argue, and have argued in the past. If such were the case, this Review would be unnecessary. Nor will we achieve decent work for the thousands of Ontarians currently struggling to achieve it with a few minor changes to current labour and employment laws. On the contrary, to redress growing income inequality and the increasing lack of decent work will require a bold vision, and a commitment to weathering the storm of employer opposition in order make substantive, comprehensive and meaningful changes to labour and employment legislation to better the working lives of each and every Ontarian, and create a more just and equal society for all.

This Review, and the options presented by the Special Advisors in their Interim Report, is the first step in that important process.

Our submissions on the options contained in the Interim Report are set out below. For ease of reference, we provide our comments and recommendations to the *Labour Relations Act*, *1995* ("LRA") and *Employment Standards Act ("*ESA*")* in turn, following the order of progression used in the Interim Report.

We look forward to meeting with the Special Advisors in the near future to discuss the options presented in their Report, and our submissions and recommendations on those options.

PART II: ONTARIO LABOUR RELATIONS ACT, 1995

A. Scope and Coverage of the LRA

In our view, the exclusions set out in the LRA have not kept pace with recent developments in the law relating to the freedom of association guarantee under the *Canadian Charter of Rights and Freedoms* (the "Charter"). In its most recent series of decisions, the Supreme Court of Canada determined that the freedom of association guarantee safeguards the right of workers to associate meaningfully in pursuit of collective workplace goals, and this includes the right to bargain collectively with their employer.[6]

Given the Supreme Court's recent pronouncements regarding the freedom of association guarantee, it is our view that occupational exclusions to the LRA should be defined as narrowly as possible and only in circumstances where there is a clear and overriding labour relations policy rationale for the exclusion.

Further, a number of the existing exclusions relate to "vulnerable workers" as defined by the Special Advisors in their Interim Report. In particular, domestic, agricultural and horticultural workers, currently excluded from the LRA, often work long hours for low wages and little to no benefits. Coupled with the low pay and benefits, there are a high number of migrant workers in these industries, whose entitlement to remain in Canada often rests on a continued employment relationship with their Ontario employer, thus compounding the power imbalance inherent in the typical employee-employer relationship. As a result, such workers are incredibly vulnerable to

[6] See, for example, *Saskatchewan Federation of Labour v. Saskatchewan* [2015] S.C.J. No. 4.

unscrupulous employers who are prepared to take advantage of their immigration status for the purposes of avoiding minimum employment and health and safety standards.

Access to collective bargaining, therefore, is crucial in order to ensure that these workers are better able to negotiate fair wages and working conditions with their employer. We note (as do the Special Advisors in their Interim Report) that ensuring access to collective bargaining for these vulnerable employees will require not only removing the specific exclusion that applies to them, but also ensuring that there are mechanisms present in the LRA that will allow them to organize and bargain together effectively.

Submission

Given the above, the USW supports a review and elimination of the existing occupational exclusions under the LRA for the purposes of ensuring broad access to collective bargaining, particularly for those vulnerable workers traditionally excluded from the LRA. Further, this review should, at least, result in:

(a) permitting access to collective bargaining by employees who are members of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity;

(b) permitting access to collective bargaining by domestic workers; and

(c) eliminating the LRA exclusion for agricultural and horticultural workers and repealing the AEPA for agricultural workers.

B. Related and Joint Employers

One of the most important trends giving rise to an increase in precarious employment in Ontario has been wide-spread change in the way employers structure their operations. Many large employers in Ontario with whom we have bargaining relationships are no longer overseeing the day-to-day operations of all aspects of their production process. Instead, over the past twenty or thirty years, we have dealt increasingly with employers that outsource parts of their operations in order to reduce labour and production costs. Indeed, at some of our large mining and steel operations in Ontario, it is now not unusual for an employer to have hundreds of contractors onsite at any one time. The result is a loss of stable, permanent positions, and a correspondingly smaller bargaining unit with reduced bargaining power.

Further, the companies that accept contracts from these larger "source" employers are usually non-union and offer lower wages and fewer benefits to employees. The result is that our members can find themselves laid-off from employment with the "source" employer one day, only to be hired by an outside contractor the next. Our (now former) members end up returning to work at the "source" employer's operation, performing the same work they did the day or week before, but for less pay and fewer (if any) benefits.

In addition, the outsourcing of operations does not mean the "source" employer divests all control over those operations. Indeed, in our experience, despite the contracting out, the "source" employer maintains substantial control over the work life of the employee. For example, where the outsourced work is on the source employer's worksite, employees of the contractor will be subject to all of the source employer's policies and procedures (including, for example, drug and alcohol testing and health and safety policies). A violation (or alleged violation) of those policies will result in the refusal of the source employer to allow the employee on site, thereby effectively ending the employee's employment with the contractor. Yet, the employee (or the employee's union representative) has no recourse against the source employer in such circumstances. In circumstances where employees of the contractor are unionized, the lack of recourse against the source employer effectively renders any "just cause" protection in a collective agreement with the contractor illusory. This is because an arbitrator has no ability to award a remedy against the "source" employer, who is not a party to the collective agreement between the contractor and the union.

Even where employees of the contractor have been able to unionize, the degree of control maintained by the "source" employer problematizes the bargaining relationship. In addition to negating gains made in collective bargaining, as described above, it also restricts the ability of the Union to bargain better wages, benefits and other working conditions. This is because the source employer, despite outsourcing a portion of its production process, still maintains ultimate control over labour and production costs. Where there is competition for such contracts, there is no incentive on contractors to better terms and conditions of employment for employees for fear of losing work.

This "fissuring" of the workplace is one of the primary causes of precarious work, as David Weil notes in his book *The Fissured Workplace*:

> As the fissured workplace has deepened and spread across the economy, work that once provided middle-class wages and benefits has declined. Jobs that once resided inside lead businesses providing decent earnings and stability now reside with employers who set wages under far more competitive conditions. Where lead companies once shared gains with their internal workforce, fissuring leads to growing inequality in how the value created in the economy is distributed.[7]

Entire industries, we note, are now built specifically on a variation of the "fissured" or "fractured" workplaces described above. This is the case with franchise operations, for instance, where the franchisee may be responsible for day-to-day control and supervision of employees, but where the franchisor still maintains significant control over aspects of the franchisee's operations through detailed, legally binding contracts which cover a wide variety of matters and may have significant impact on employees' terms and conditions of employment.

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[7] David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It*; Cambridge: Harvard University Press, 2014, pg. 9.

The current related employer provision in the LRA, and the manner in which it has been interpreted by the Ontario Labour Relations Board (the "Board" or the "OLRB"), creates a barrier to effective collective bargaining in "fissured" workplaces. This is because under the current section 1(4), the Board requires evidence of direct control by employers over employees' working conditions before it will be prepared to find that the "common control and direction" requirement has been satisfied. "Source" employers, however, will normally have divested day-to-day control over their operations to their contractor, thus making a related employer finding under the current LRA impossible.

Submission

In order to remedy the barriers to effective collective bargaining raised by the "fissured" workplace, maintaining the status quo is not an option. Therefore, the Union submits that the LRA should be amended to remove the requirement for a finding of "common control and direction" from section 1(4) entirely. Rather, the focus of the section should be on whether or not, where two businesses are carrying on associated or related activities, such a declaration is necessary in order to ensure that collective bargaining is effective, as set out in Option #2 at page 69 of the Interim Report.

Further, in recognition of the special nature of the franchisor/franchisee relationship, it is our view that in addition to amending the current language of section 1(4) as described above, a specific joint provision should be added to the LRA to create a rebuttable presumption of relatedness in the case of franchisor/franchisee relationships, as set out in Option #4(a) at page 70 of the Interim Report.

C. Card-based Certification

The Union made extensive representations in its original submission to the Special Advisors on the importance of returning card-based certification to the LRA. Employers continually oppose a card based certification regime on the grounds that it is less "democratic" than a mandatory vote system. Our original submission to the Advisors provided a comprehensive analysis of why that argument is flawed, so we will not repeat it here. In any event, the USW believes that most employers do not object to the reintroduction of card-based certification on the grounds that it is less democratic than a mandatory-vote regime (since it isn't) but rather employers oppose a card-check regime because they prefer to operate without union interference, and suspect that employee access to collective bargaining is made easier by card-check certification. In this respect, employers are correct. The research is clear that the implementation of a mandatory-vote regime significantly reduces the likelihood of certification by building delay into the certification process, thereby giving employers a greater opportunity to engage in resistance tactics, including unfair labour practices, which themselves have a negative effect on certification outcomes.[8] Further, research shows that the negative effects on certification outcomes in a mandatory-vote regime are concentrated where employees are more vulnerable.[9]

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[8] Dr. Sara Slinn; *Collective Bargaining*, https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Slinn-9-Access%20to%20Collective%20Bargaining.pdf, pg. 4, 11-12

[9] *Ibid*, pg. 4

As a result, there is no doubt that the reintroduction of card-based certification will have a positive effect on private sector union density, which is at a historic low in the province. Further, we know an increase in private sector union density will have a positive effect on the income and working conditions of Ontario workers, including vulnerable workers, again, because there is ample data to support such a conclusion.[10] As such, we believe that the return of card-based certification to the LRA is fundamental to increasing union density, thereby mitigating the worst effects of precarious work and reducing income inequality in the province.

Submission

The USW supports the return of the card-based certification regime which was in place in Ontario between 1993 and 1995 in the industrial sector, and that is currently in place in Ontario for those employees working in the construction industry (Option #3 at page 73 of the Interim Report).

Further, the Union supports an amendment to the Act which would specifically permit the Board to accept electronically collected membership evidence (Option #4 at page 73 of the Interim Report). The Union notes that the British Columbia Labour Relations Board has recently accepted electronically collected membership evidence on the condition that certain safeguards have been met. Specifically, where a "draw" function was used for each individual employee's signature; the name, signature and date were mandatory fields in the electronic form; and there was an "audit trail" to provide assurances of the integrity, authenticity and reliability of the e-cards. Similar conditions could be placed on electronically collected membership evidence in Ontario in order to address employer concerns regarding the integrity and reliability of such evidence.

In the event the Special Advisors determine not to recommend the return of card-based certification to the LRA, the Union submits that the Advisors should recommend the repeal of section 8.1 of the LRA. In our view, section 8.1 of the LRA is anti-democratic in that the section could (and has) resulted in the dismissal of an application for certification even where a majority of employees expressed a wish to be represented by a trade union. The section, therefore, operates to frustrate employee access to collective bargaining, and provides a (further) means by which employers can defeat the wishes of their employees to unionize.

D. Access to Employee List

Under the current LRA, employees seeking to form unions have no right to employee information until their campaign has resulted in the filing of an application for certification. The result is that unions and employees engaged in union organizing campaigns have to expend considerable time and energy trying to find and contact employees to provide them with information about the Union's organizing campaign, and information about the size and scope of the workplace.

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[10] For data on the benefits of unionization on terms and conditions of employment see, for example, Hugh Mackenzie and Richard Shillington, *The Union Card: A Ticket Into Middle Class Stability*, Canadian Centre for Policy Alternatives, May 2015. For a global comparative study on the relationship between income inequality and union density, see also Florence Jaumotte and Carolina Osorio Buitron, Inequality and Labor Market Institutions, Washington: International Monetary Fund, 2015, https://www.imf.org/external/pubs/ft/sdn/2015/sdn1514.pdf

This puts employees and the union with whom they are working at a disadvantage vis-à-vis their employer, which has easy and almost unlimited access to its employees during a union organizing campaign. The absence of such information problematizes any organizing campaign, and makes it more difficult for employees to exercise their right to join a union and bargain collectively.

As a result, the Union has proposed that the LRA be amended to provide for access to an employee list which would include each employee's name, home address, and telephone number. In addition, an employer should be required to provide each employee's job title, whether the employee works part-time or full-time, and an organizational chart of the workplace when a union can establish it has met a threshold evidencing that a serious campaign is underway, for example, the appearance of 20% support amongst employees in the proposed bargaining unit.

We are aware that the employer community has expressed concerns with this proposal, particularly concerns around protecting employee privacy, the threshold trigger for entitlement to a list, and the possibility of extensive litigation over whether or not a union has met the threshold. It is our view, however, that these concerns can be addressed and adequately dealt with in the language and administration of the legislative amendment itself.

For example, employee lists, as the Special Advisors indicate, could be subject to conditions which restrict their use by unions to contacting employees to provide information on the immediate organizing campaign only, and restricting disclosure to those individuals within the union working on the organizing campaign. There could also be requirements that such lists be destroyed and/or returned following the filing of an application for certification with the Board. We note types of restrictions are placed on political parties and candidates in Ontario's electoral system.

The Union also believes that concerns around threshold triggers and litigation could be dealt with by permitting unions to obtain such lists only in circumstances where the union can establish it has a serious campaign underway in the workplace by, for example, providing evidence which gives an appearance of 20% membership support amongst employees in the proposed bargaining unit.

With respect to workplace information, the Union submits that requiring employers to provide such information early in a union organizing campaign may reduce Board litigation, by allowing unions to more accurately craft an appropriate bargaining unit prior to filing an application for certification. Without information about the job duties and organizational structure of the employer during an organizing campaign, unions and supportive employees are forced to craft bargaining unit descriptions based only on the inherently incomplete information they have gathered about the structure of the employer's operation and the complement of the workforce. We note that such information (particularly, an alphabetical list of employees showing each person's full name, job classification, and whether they are full-time, part-time, or casual, and an organizational chart showing the relationship of the employees in the proposed unit to other employees and the lines of authority between management, supervisors and subordinate employees) is already provided by employers in the federal jurisdiction at the time they respond to a union's application for certification.

Submission

Creating greater balance in the certification process requires that unions and their supporters the same access to employees and workplace information as do employers during a union organizing campaign. Ensuring that unions and their supporters have access to employee lists and contact information where they can demonstrate a serious organizing campaign is underway is one way of leveling the playing field, and increasing fairness in the certification process.

Therefore, the Union supports Option #2 at page 75 of the Interim Report and proposes that contact information, as well as an employee's job title, and a workplace organizational chart be included in the information required to be provided by an employer where a campaign to establish bargaining rights is underway. We would add a requirement, however, that the employer update the information provided under Option #2 where changes occur on a bi-weekly basis for a period of two months or until an application for certification is filed, whichever is sooner.

E. Off-site, Telephone and Internet Voting

The Union supports the use of off-site, telephone or internet voting in appropriate cases upon the request of a union or where the Board deems it advisable to do so.

We acknowledge the concerns raised by the employer community around off-site, telephone and internet voting. These concerns include the potential for fraud or misconduct, the method of distributing ballot information to employees, and the ability to maintain the secrecy of the ballot. We note that these concerns can be addressed by providing information to employers about the electronic/telephone vote process, including the instructional information provided to employees about how to vote, and information about the safeguards used to ensure the secrecy of the vote and to prevent voter fraud or misconduct. The Union notes that internet/telephone representation votes have been used in the federal jurisdiction in appropriate cases for at least the last two years. Contrary to the concerns raised by employer, our experience with electronic votes in the federal jurisdiction is that voter turnout is on par with turnout held in an on-site representation vote.

Submission

The Union supports the use of off-site, telephone and internet representation votes in appropriate cases at the request of the trade union or the discretion of the Board.

F. Remedial Certification

Under the current LRA, the Board is hindered in its ability to fashion an adequate remedy where employers commit unfair labour practices during a union organizing campaign such that the true wishes of employees cannot be ascertained in a representation vote. In particular, under the current provision, the Board must consider the results of a previous representation vote and determine whether a trade union appears to have adequate membership support for the purposes of collective bargaining before granting remedial certification. Further, the Board can only order remedial certification if "no other remedy" is adequate to counter the effects of an employer's contravention.

These requirements create an unreasonably high threshold to the granting of a remedial certification order in a situation where such a remedy is the only useful means of counteracting the employer's unlawful conduct.

We understand employers are not in favour of amendments to the current remedial certification provision in the LRA for two reasons. First, employers oppose remedial certification provisions generally on the basis that they threaten the principle of "workplace democracy". Second, they argue that removing the requirement for "adequate membership support" creates a weak unit that cannot accomplish anything substantive for its members.

The Union disagrees. Where an employer engages in egregious unfair labour practice complaints such that the true wishes of employees cannot be ascertained in a representation vote, it is the employer that has thwarted workplace democracy by engaging in illegally coercive conduct. As a result, the only adequate remedy to such conduct is remedial certification, because the employer has already destroyed the ability of employees to make a free and informed choice about whether or not they wish to be represented by a union. Further, remedial certification has a deterrent effect on employers. Without a remedial certification remedy, employers have significantly less incentive to avoid unfair labour practice complaints.

In addition, the current requirement for adequate membership support merely encourages employers to take steps early in a union organizing campaign to rid itself of union supporters. If employers have concerns that removing the requirement for adequate membership support will create a "weak unit", the appropriate way to address that issue is not to make it harder for employees to unionize, but to give the Board the power to order a collective agreement be settled by first contract arbitration in cases where the Board orders remedial certification and the parties are unable to reach an agreement. This would ensure that employees get the opportunity to experience union representation for a period of time while still having the choice to reject representation at the conclusion of the term of the first collective agreement. Further, access to first contract arbitration would be a further disincentive on employers to commit unfair labour practices in order to thwart the exercise of free employee choice under the LRA.

Submission

The Union supports Options #2 and #3 at pages 79-80 of the Interim Report, specifically, that the LRA should be amended to remove the requirement to:

(a) consider whether a second vote is likely to reflect the true wishes of employees; and

(b) consider whether the union has adequate membership support for bargaining.

In addition to the above, the Union proposes an amendment to the LRA which would give the Board the power to order that a contract be settled by interest arbitration in cases where a remedial certification order has been granted. (This is Option #3 at page 82 of the Interim Report dealing with First Contract Arbitration).

G. First Contract Arbitration

In our original submission to the Special Advisors, our Union proposed an amendment to the LRA to provide for automatic access to first contract arbitration. We agree that such automatic access could have a positive effect on union density in the province by allying employee fears about whether or not a first contract is achievable absent strike action. Further, automatic access ensures that employees who choose unionization will be able to experience the benefits of a first collective agreement even in the face of an employer who attempts to use first contract negotiations as a means to defeat or demoralize the union.

Most importantly, perhaps, research suggest that first contract arbitration laws create an incentive for parties to reach an agreement without resorting to a work stoppage, and acts to reduce the incidences of work stoppages themselves.[11] It also supports and encourages collective bargaining.[12]

Employers oppose first contract arbitration for a variety of reasons. First, employers argue that first contract arbitration creates uncertainty for businesses by putting "key" decisions in the hands of third parties. In our view, this argument by employers is overstated. In unionized work environments, rights arbitrators already decide many financially and operationally significant issues without destabilizing employer operations.

Employers also argue that having automatic first contract arbitration undermines the need for the union to bargain realistically, because they can simply wait for time to elapse and ask for arbitration. However, this concern is not borne out by either economic theory or statistical data, which shows that contrary to employers' assertions, first contract arbitration actually creates an incentive for parties to reach an agreement before interest arbitration in order to maintain control over the bargaining process.[13]

First contracts are particularly difficult because the parties have no relationship with one another. In addition, the union is in the early stages of its relationship with its members, many of whom may never have worked in a unionized environment before. Automatic access to first contract arbitration will, in our view, increase the likelihood that parties' will avoid the pitfalls that typically obstruct the successful negotiation of first contracts, and give the parties a greater opportunity to develop a mature, stable collective bargaining relationship.

Submission

The Union supports Option #2 at page 82 of the Interim Report, which would amend the LRA to provide for "automatic" access to first contract arbitration on application by the union or the employer where the parties have been in a legal strike lock-out position for a defined period of time.

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[11] Catherine L. Fisk and Adam R. Pulver; *First Contract Arbitration and the Employee Free Choice Act*; 70 Louisiana Law Review (2009), http://digitalcommons.law.lsu.edu/lalrev/vol70/issl/5, pg. 67

[12] *Ibid*, pg. 68

[13] *Ibid*, pg. 69-71

In the alternative, if the Special Advisors are not prepared to recommend "automatic" access to first contract arbitration, the LRA should be amended to provide for automatic first contract arbitration where the OLRB made an order for remedial certification (Option #3 at page 82 of the Interim Report.)

Finally, the Union supports Option #5 at page 82 of the Interim Report, which would prohibit a decertification or displacement application while an application for first contract arbitration is pending.

H. Successor Rights

The rise of contract employment and its effect on workers is one of the primary reasons for this Review. As we noted in our original submission to the Special Advisors, in the last fourteen years, employment in the business services sector in Ontario has grown by 39% (from 240,000 in 2000 to 334,700 in 2014).[14] These workplaces are marked by high levels of part-time and casual employment and low wages.[15] As a result, workers in this sector of the Ontario economy fall within the definition of "vulnerable worker" as provided in the Interim Report.[16]

One way to improve conditions for workers in the business service sector is to ensure that they can maintain their collective agreement when a contract for services changes hands. Currently under the LRA, contract employees who have union representation often lose both their collective agreement and their bargaining rights if their employer loses the service contract covering their worksite. This is because the current successor employer/sale of business provisions of the LRA do not apply in situations of contracting out, or where a contract changes hands. The result is that employees in the contract services sector have no protection under the LRA where a contract is re-tendered. Instead, employees must attempt to re-organize and negotiate a new collective agreement with the new service provider, losing hard-won gains in an industry characterized by some of the lowest wages and least generous benefits, if any, in the province.

The Special Advisors indicate in their Interim Report that employers generally appear opposed to extending the successorship provisions of the LRA to apply in situations of contracting out, or where a contractor changes hands, on the grounds that such a provision could reduce flexibility and increase costs. However, the Union notes that not all employers take such a position. For example, our experience in the security sector suggests that many security industry employers would not fundamentally oppose such a provision, as it would encourage competition in the sector based on quality of service rather than who can do the work most cheaply. In any event, the Union notes that this provision existed in the LRA between the period 1993 and 1995, and employers continued to operate successfully in the sector. We also note that the purpose of this Review is to consider changes to the LRA (and ESA) which will alleviate against the worst effects of precarious work, with

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[14] Sheila Block, *supra*, note 1 at pg. 7-8.

[15] *Ibid*, pg. 7-8

[16] The Interim Report describes a "vulnerable worker" as one whose employment "makes it difficult to earn a decent income and thereby puts them at risk in material ways including all the undesirable aspects of life that go hand-in-hand with insecurity, poverty, and low-incomes." Special Advisors' Interim Report, *supra*, note 5 at pg. 23.

its low wages, few, if any, benefits, and prevalence of part-time and casual work. Improving working conditions for such employees may well entail higher costs for "source" or "lead" employers. However, that may be what is required to increase employee access to collective bargaining, thereby mitigating against the worst effects of precarious work and reducing the number of vulnerable employees in the province.

Submission

The Union supports Option #2 as set out at pages 84-85 of the Interim Report, which would expand coverage of the successor rights provision (similar to the law in place between 1993 and 1995) to apply to those in the contract services sector.

In addition, although not raised in the Interim Report, the Union supports an amendment to the LRA which would preserve a union's bargaining rights when an employer's business or undertaking is sold, or changes its activities, such that it becomes subject to the LRA. Such a provision, we note, currently exists in the *Canada Labour Code* in order to ensure that employees do not lose the benefits of a collective agreement and their bargaining rights merely because of the change in the nature of an employer's operations.[17]

I. Consolidation of Bargaining Units

Given the need to facilitate employee access to collective bargaining and encourage stable, broad-based bargaining structures, the Union believes that in addition to the implementation of sectoral based certification/bargaining provisions, the LRA should be amended to give the Board the ability to consolidate bargaining units where the bargaining agent and employer are the same.

Submission

The Union supports the return of a consolidation provision akin to what existed in the LRA from the period 1993-1995 (Option #2 at page 88 of the Interim Report).

J. Replacement Workers

There is considerable research outlining the negative consequences when employers employ replacement workers during the course of a strike. These negative consequences include an increased risk of violence on picket lines, longer strikes, and the undermining of the collective bargaining process.[18]

The use of replacement workers unfairly distorts the economic power balance in a strike situation. Given that there has been an overall decline in collective worker bargaining power over the past twenty years, the use of replacement workers in strike situations in Ontario exacerbates that

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[17] See *Canada Labour Code*, R.S.C. 1985, c. L-2, section 44(3).

[18] *Replacement of Striking Workers during Work Stoppages in 1991*, April 1992, Industrial Relations Division – Office of Collective Bargaining Information, Toronto; P. Crampton, M. Gunderson, and J. Tracy, *The Effect of Collective Bargaining Legislation on Strikes and Wages*, University of Maryland, June 9, 1994.

imbalance of power, resulting in a wide-scale distortion in the outcome of collective bargaining never contemplated by labour policy experts or legislators when our system was originally designed.

As a result, ensuring fairness in the bargaining process requires that legislators act to ban the use of replacement workers during strikes.

Submission

The Union supports Option #2 at page 90 of the Interim Report, which proposes to reintroduce a general prohibition on the use of replacement workers.

K. Right of Striking Employees to Return to Work

No employee should lose their job merely because they exercised their lawful (and now constitutionally protected) right to strike. Yet, employees in Ontario face just such a possibility given that the current LRA does not protect their right to return to work at the conclusion of a strike. At best, employees in Ontario have a protected right to return work during the first six months of a strike pursuant to section 80 of the LRA. Where a strike lasts longer than six months, however, and an employer engages replacement workers, striking employees can see decades of seniority with an employer effectively wiped out as replacement workers remain in active employment with the employer, while striking workers are restricted to filling vacancies as they arise.

The Union had just such a circumstance occur in 2015 with its Crown Packaging unit in Weston, Ontario. The most significant issue dividing parties in the last eleven months of that two-year dispute was the return to work of striking employees. Crown's intransigence on returning striking employees to work in preference to the replacement workers it hired during the course of the strike to do the work of our bargaining unit members seriously hampered negotiations toward a collective agreement, causing considerable long-term hardship to striking employees and their families. In addition, the ill-will between employees and management caused by both the use of replacement workers during the strike and Crown's refusal to return employees to work has significantly, perhaps permanently, damaged labour relations between the parties.

In our view, section 80 as it currently reads is both inconsistent with employees' constitutional right to strike, and is also bad labour relations policy. In addition, the protections afforded to employees in Ontario are less than those of other provinces, like Manitoba, Saskatchewan and British Columbia, where employees' return to work following a strike is protected, either through a right to reinstatement or a right to have a termination for strike-related misconduct adjudicated by a third party.

Submission

The Union supports an amendment to the LRA which would remove the six-month reference in the current section 80 of the LRA (Option #2 at page 93 of the Interim Report).

In addition, the Union supports the inclusion of a provision in the LRA similar to that which existed between 1993 and 1995 which would guarantee employees a right to reinstatement at the conclusion of a strike in preference to replacement workers, and guarantee if insufficient work exists, the employer be required to reinstate employees as work becomes available.

L. Renewal Agreement Arbitration

Lengthy strikes and lockouts can have a profoundly negative effect, not just on the immediate parties to a labour dispute, but on the surrounding community as well. As we noted in our original submission to the Special Advisors, the effect of a long strike or lockout on employees can be devastating. In order to weather long strikes, employees may be required to expend savings or cash-in retirement savings plans, re-mortgage their houses, or sell their homes because they are unable to meet mortgage and other payments based on strike pay alone. Depending on an employee's age at the commencement of a strike, he or she may never financially recover from the economic impact of the strike, which can have a profound effect on the striking employee and his or her family.

Our experience with strikes and lockouts in Ontario is that they last longer and are harder to resolve than ever before. Further, in our view, the outcome of these strikes and lockout today are not based on the peculiarities of their individual circumstances. Rather they are illustrations of systemic problems with our current labour relations system resulting from at least two important factors: one, an inequality of bargaining power arising from the fact that individual workplace bargaining units of employees are at a structural disadvantage when dealing with mobile global capital; and two, the fact that this inequality of bargaining power is exacerbated by the lack of protection for striking workers under the current LRA. For example, the lack of any restriction on the right of employers to use replacement workers during a strike, or any safeguard on the right of striking employees to return to work following a lengthy strike.

In order to encourage the resolution of intractable disputes which can cause severe damage to employees, their families, and their surrounding communities, the Union proposes that the LRA be amended to provide for a mechanism for resolving such disputes.

Such a mechanism does not currently exist in the LRA. However, one does exist in Manitoba, where unions and employers have access to interest arbitration (even where the parties have a mature bargaining relationship) once a strike has lasted for a certain period of time (in the case of the Manitoba provision, 60 days).[19]

Submission

The Union supports the implementation of a Manitoba-style renewal arbitration provision once a strike has lasted for a certain period of time (i.e. six months) (Option #2 at page 98 of the Interim Report).

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[19] See Manitoba *Labour Relations Act* C.C.S.M. c. L-10, section 87.1

In addition, the Union supports an amendment to the LRA which would allow the Board to order interest arbitration as a remedy following a finding of bargaining in bad faith as provided in Option #3 at page 99 of the Interim Report.

M. Interim Orders and Expedited Hearings

The Board's restricted power to issue interim orders in a proceeding before it is out of step with other labour relation boards across the country. As the Special Advisors note in their Interim Report, in six provinces and the federal jurisdiction labour relations boards have general power to issue interim or provisional orders in the course of a proceeding.[20] In addition, the Board's restricted interim order power is distinct amongst administrative tribunals in Ontario, the vast majority of which are entitled to make interim orders pursuant to their authority under the *Statutory Powers Procedures Act* ("SPPA").

The Board cannot effectively administer the LRA without the ability to make substantive or procedural interim orders. This is particularly true in a labour relations environment where justice delayed can often mean justice denied. Without the power to issue broad substantive interim orders in appropriate cases, the Board is without an important tool in its remedial "tool kit".

Further, expedited hearings go hand-in-hand with the need for a substantive interim relief power. A restored substantive interim relief power will only be effective if the party seeking interim relief can be assured of a quick hearing before the Board.

Submission

The Union supports Options #2(a) and (e) which would restore the power of the Board to issue interim orders and decisions pursuant to section 16.1(1) of the SPPA, and require the Board to expedite hearings for interim relief by establishing prescribed statutory time limits so that hearings proceed without unnecessary delays.

N. Just Cause Protection

The Union supports the restoration of a "just cause" protection provision in the LRA which would take effect upon certification until the time a first collective agreement has taken effect. Such a provision would provide employees with greater protection against employers who seek to "clean house" following a successful union organizing campaign. Access to just cause protection helps to ensure stability in the workplace in the critical period following certification until implementation of a first contract. In addition, it would remove one of the incentives for unscrupulous employers to slow first contract bargaining.

Such a provision is particularly important given that the Board's power to reinstate employees on an interim basis is restricted to terminations that occur in the course of a union organizing campaign, and is not available to unions and employees once a campaign has been successful. Just cause

[20] Special Advisors' Interim Report, *supra*, at note 5, pg. 101.

protection means employees would have access to an expedited arbitration process which could see them returned to work more quickly than through a Board complaint during the period between a successful union organizing campaign and the ratification of a first collective agreement. Such quick outcomes are vital in the period following certification (and while bargaining a first collective agreement) when a union is trying to retain support within a bargaining unit.

Submission

The Union supports Option #2 at page 106 of the Interim Report, which would provide protection against unjust dismissal for bargaining unit employees after certification but before the effective date of a first contract.

O. Prosecutions and Penalties

The failure of employers to abide by the provisions of the LRA causes harm not just to the interests of an employee who is illegally terminated for exercising her rights under the Act, but also to the collective interests of employees who remain in the workplace, and to the union. Effective remedies require that all parties harmed as a result of the employer's violation be remedied. To do otherwise is to encourage violations of the LRA by employers as the "cost of doing business" rather than serve as a mechanism to deter potential violators.[21]

In order to increase the deterrent effect of remedies under the LRA, the USW supports the imposition of increased penalties on employers where the Board concludes that an employee has been terminated during an organizing campaign as a disincentive to employers who are contemplating action against union supporters in the workplace. Further, it would provide assurances to employees who seek to exercise their rights that the Board will protect them from unlawful employer interference. We would also support an increase in the civil penalties for breaches of the LRA.

We do not support, however, the establishment of a Director of Enforcement who would be responsible for determining if and when the state would seek imposition of administrative penalties under the statute. In our view, the imposition of a third party stranger to the bargaining relationship who would have the ability to prosecute and impose administrative penalties even against the wishes of the union and the employer could harm long-term relationship between the parties.

Submission

The Union supports Option #2 at page 112 of the Interim Report. In particular, the Union would support an amendment to the LRA which would allow the Board to award triple wages to an employee who has been unlawfully terminated during a union organizing campaign.

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[21] Dr. Sara Slinn, *supra*, note 8 at pg. 51-2.

In addition, the Union supports Option #5 which would eliminate prosecutions in the court but give the OLRB the authority to impose administrative penalties along the lines of Ontario Securities Commission.

For the reasons set out above, the Union specifically opposes Option #6 which would create a Director of Enforcement position to enforce administrative penalties.

P. Broader-based Bargaining Structures

The best way to alleviate against the worst effects of precarious work and reduce the number of vulnerable workers in this province is to ensure that employees in Ontario have meaningful access to collective bargaining. And that bargaining must be durable, effective, and to the extent possible, efficient. This requires the government to embrace the idea that facilitating the ability of Ontario workers to join trade unions so they can bargain together and achieve common workplace goals is good public policy. (Indeed, given recent Supreme Court decisions exploring the right of employees to bargain collectively under the freedom of association guarantee, governments now ignore or hinder an employee's access to meaningful collective bargaining at their peril.)

Research on the "union advantage" and its ameliorating effect on income inequality is voluminous.[22] As our union noted in our original submission to the Special Advisors, the result of unionization is not just a greater wage advantage for union members, but a reduced gender pay gap, greater access to health care benefits and retirement security, lower poverty rates, safer, more democratic workplaces and a more politically engaged society.

Given the above, our Union has made a variety of proposals for changes to the current certification regime which would increase the likelihood that employees could successfully exercise their right to organize and bargain collectively. However, it is our view that those changes will not likely be sufficient, in and of themselves, to turn the tide on the growing number of vulnerable workers in this province. This is because, as the Advisors recognize in their Interim Report, the Wagner Act model of labour relations, on which our current LRA is based, does not blend well with the particularities of Ontario's growing service economy, characterized as it is by small workplaces, low wages, and a high preponderance of part-time and contract work. As a result, if we are to address precarious work in this growing sector of our economy, we must include other certification models which will increase access to bargaining for those employees.

While the choice of models is wide, it is the Union's view that any model adopted should be readily adaptable to the current LRA. To that end, it is our view that a model of sectoral bargaining defined by industry and geography similar to the model proposed by a majority of the special advisors appointed by the then British Columbia Minister of Labour in 1992 (the "Baigent-Ready model") should be adopted in Ontario.

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[22] See, for example, Hugh Mackenzie and Richard Shillington, *supra*, at note 10.

The Baigent-Ready model has numerous characteristics to recommend it. As Professor Sara Slinn notes in her research paper on collective bargaining written for the purposes of this Review:

> - Research suggests that the Baigent-Ready model would likely increase access to union representation for vulnerable workers and employees in small workplaces.
> - The model avoids the potentially insurmountable hurdle of requiring agreement from each individual employer.
> - The model preserves employee choice and the principle of majoritarian representation.
> - The model permits the Board to vary certifications to include employees in new locations within the defined sector helps to overcome limits of the single-workplace traditional model and may increase workers' bargaining power and ability to enforce labour rights and agreements.
> - While the model would not directly remove wages from competition, it may reduce wage competition and promote standardization of wages and working conditions within sectors.
> - The model retains flexibility and responsiveness to local needs. It does not prohibit or impede the ability of unions and employers to negotiate local agreements.[23]

As well, such a model can increase bargaining efficiency and reduce bargaining and contract administration costs for employers and unions.

The Union recognizes, however, that the addition of a sectoral based certification/bargaining process like the Baigent-Ready model will still leave workers in particular industries without access to collective bargaining, given the structure of work and employment relationships in those sectors. For example, homecare workers, domestic workers, agricultural and horticultural workers, may require further amendments to the LRA in order to ensure effective certification/bargaining processes in those industries. This may also be the case for those specialized industries dominated by freelance and/or dependent contract employment models (as in the arts and media).

Submission

Given the above, the Union believes the LRA should be amended to provide for greater sectoral certification/bargaining, as follows:

(a) Adopt a sectoral certification process, defined by industry and geography, which provides for the negotiation of a single multi-employer master agreement and permits newly

[23] Dr. Sara Slinn, *supra*, at note 8, pg. 84-88.

organized sites to attach to the sectoral agreement so that, over time, collective bargaining could expand within the sector, following the Baigent-Ready model.

(b) Amend the LRA to provide a specific certification process for franchise operations of a single parent franchisor with accompanying franchisees.

(c) Engage in consultations with stakeholders in the media, arts, home and domestic care sectors in order to fashion models of organizing and collective bargaining in those industries that would facilitate the right of individuals working in those industries to exercise their right to bargain collectively.

The submission set out above proposes the implementation, in essence, of Options #3, 4, and 7-9 as set out on pages 123-126 of the Interim Report.

We recognize that in addition to the Baigent-Ready model endorsed above, Option #5 on pages 124-5 of the Interim Report provides a system of multi-employer certification and bargaining. While, as we note above, we endorse a model of collective bargaining on a sectoral, multi-employer basis, we have serious concerns about practicality of the certification process outlined in Option #5, which would require unions to organize all employees in a sector in order to win the certification vote contemplated at paragraph (e) of Option #5. Such a requirement, would, in our view, constitute a serious impediment to accessing sectoral certification and bargaining.

Q. Employee Voice

The USW set out our position on the issue of employee voice at some length in our original submission to the Special Advisors. Given the important role work plays in our lives, facilitating employees' right to participate in workplace decision-making is vital to ensuring employees have dignity in their working lives, and to creating decent work.

The simple ability to speak or be consulted, however, is, in and of itself, insufficient to ensuring meaningful participation in workplace decision-making. Meaningful participation or voice requires not only that employees have the ability to speak on issues that affect them in the workplace, but also the certainty that when they speak, their voices will have effect. It is the ability to actually <u>effect</u> workplace change that fosters a sense of autonomy and dignity in the workplace, not mere speech alone.

Any model, therefore, being contemplated to increase the ability of employees to participate in workplace decision-making must seek to redress the inherent power imbalance in the employment relationship. Further, any such model must provide a mechanism by which employees can enforce their demands even in the face of employer resistance. Without such a mechanism, employee participation in workplace decision-making is completely subject to the whim and discretion of individual employers.

As we indicated in our initial submission to the Special Advisors, the best way to ensure effective employee voice at work is to amend the LRA to make it easier for employees to access their right to engage in collective bargaining with trade unions. This requires modernizations to the current certification model to facilitate effective employee choice, including, in particular, the establishment of sectoral based-certification/bargaining models which will support employees' right to choose unionization in sectors of the economy where union density is traditionally low. This is because employee voice can only fully and effectively be exercised in circumstances where the position of employees has been strengthened in order to offset the countervailing power of employers. Such strength can only come from an organization of workers that is autonomous and independent of management.

The simple establishment of workplace committees to allow a forum for employees to voice their views on a variety of workplace issues will not result in substantive workplace change, even if employers are subject to regulatory compliance. We know this because research has shown that statutory health and safety committees do not function as effectively in non-union workplaces as they do in unionized workplaces.[24] This is no surprise. No system of enforcement that relies on individual employees to bring forward complaints will operate effectively, because employees legitimately fear employer retaliation in the event they complain. While proactive regulatory enforcement (by government) may be preferable to a complaint-based process, the effectiveness of that enforcement mechanism depends in large part on the will of the government to expend resources to finance it.

Further, while there has been much discussion about the effectiveness of European-style work councils as potential models for effective employee voice, such work councils developed in a labour relations climate quite different from our own, and one which cannot be replicated at will in Ontario. In particular, a greater percentage of employees in Europe are covered by collective agreements, or collective agreement terms and conditions, than in Ontario, as a result of the juridical extension of collective agreements or their terms to all employees within an economic sector. Indeed, as a result of such extension in some European countries, including Sweden and other Nordic countries, statutory minimum standards legislation is non-existent or virtually non-existent.[25] Unions, therefore, play a hugely significant role in setting terms and conditions of employment for European employees, whether those employees are members of a union or not. As a result, European-style work councils are intricately bound together with trade union representation and administration, and are the product of a modern labour relations regime quite different from our own that has developed holistically over the course of the last century. It is folly to assume we can extract one aspect of that system to Ontario, piecemeal, and have it function effectively.

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[24] See, for example, Wayne Lewchuk, "*The Limits of Voice: Are Workers Afraid to Express their Health and Safety Rights*" (2013) 50 Osgoode Hall Law Journal, pg. 789-812.

[25] Rafael Gomez, "*Employee Voice and Representation in the New World of Work: Issues and Options for Ontario*" https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Gomez-8-Voice%20.pdf, pg. 78

Submission

The USW supports an amendment to the LRA which would protect the right of employees to engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection as is currently the case in section 7 of the American *National Labour Relations Act* (Option #5 at page 133 of the Interim Report). Such an amendment is consistent with recent Supreme Court of Canada jurisprudence which constitutionalized the right of employees to associate for the purposes of advancing their workplace goals. With respect to the options presented in the Interim Report to enhance employee voice, our Union believes that the only effective option to increase the ability of employees to have some control over decision-making in their workplace is to amend the LRA to protect the rights of employees to choose collective action, and to establish sectoral based-certification/bargaining models to facilitate union choice in sectors of the economy where union density is low.

PART III: EMPLOYMENT STANDARDS ACT

A. Definition of Employee

Too many workers in Ontario are not obtaining the benefits of employment standards legislation because employers choose to structure their relationships with workers in such a way as to avoid the employment obligations that are inherent in the traditional employee-employer relationship. As the Special Advisors note in their Interim Report, approximately 12% of the current Ontario workforce define themselves as self-employed individuals.[26] Research suggests that a portion of these workers have been misclassified as independent contractors by their employer.[27]

Redressing the misclassification is, in our view, fundamental to addressing the problem of ensuring decent work for Ontarians. The current union density rate in the private sector in Ontario sits at approximately 14.4%.[28] While our Union believes that the best way to alleviate the worst effects of precarious work is to ensure that employees can organize and bargain collectively with their employer, we recognize that minimum standards legislation will continue, in the near future, to be an important means of ensuring fair terms and conditions of employment for Ontario workers. However, changes to employment standards minimums will be unworkable if the problem of misclassification is not first addressed, so that workers can access the protection of the ESA.

Submission

Given the above, the Union supports the recommendations made by the Workers' Action Centre/Parkdale Community Legal Services (WAC/PCLS) in their submission entitled *Building Decent Jobs from the Ground Up*.

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[26] Special Advisors' Interim Report, *supra*, note 5 at pg. 141.

[27] The Special Advisors review this research themselves in the Interim Report, *supra*, note 5 at pg. 141-143.

[28] Sheila Block, *supra*, note 1 at pg. 17

In particular, the Union agrees:

(a) that the definition of employee should be expanded under the ESA to explicitly include dependent contractors, and that the definition should be as expansive as possible to capture all workers in an economically dependent position;

(b) that the ESA should be amended to establish a presumption of employees status;

(c) that the Ministry of Labour should develop strategic programs for enforcement with appropriate entities such as the Canada Revenue Agency and the Employment Insurance program to map sectors where misclassification is growing;

(d) that the names of companies that misclassify workers should be publicized to deter the practice; and

(e) that the Ministry of Labour should produce clear and comprehensive guidelines on employee misclassification that can be used by stakeholders in ensure consistency of application and enforcement.

B. Who is the Employer and Scope of Liability

The rise of complicated and varied corporate structures, including franchisor/franchisee relationships, subcontracting, and the increase in the use of temporary agency employment by Ontario employers has complicated the application and enforcement of employment standards minimums, permitting those who fundamentally control the employment relationship to shift and thereby avoid liability under the ESA, and downloading the responsibility for those employment obligations on subcontractors. The result is downward pressure on wages, benefits, and other working conditions for Ontario workers.

In our view, this method of structuring employment relationships is one of the primary reasons for the increase in precarious work and the rising number of vulnerable workers in the province.

The primary mechanism under the current ESA to deal with those kinds of subcontracting or restructuring arrangements is through section 4, which permits two or more employers to be treated as one entity under the ESA. Currently, in order for a "related employer" finding to be made, the Act requires that employers be carrying on associated or related activities, and that the intent or effect of their doing so is, or has been, to directly or indirectly defeat the intent and purpose of the ESA.

As we noted in our original submission to the Special Advisors, this section is drafted too restrictively, and has been interpreted too narrowly by decision-makers to redress the structural impediments to employer liability created by the "fissured" workplace.[29]

As a result, the Union supports comprehensive changes to the ESA to ensure that contracting employers or parent corporations that retain fundamental or economic control over their subcontractors, subsidiaries, or subordinate businesses are not insulated from liability where minimum standards provisions have been breached by businesses further down the "supply" chain.

Submission

Given the above, the Union supports the following:

(a) Amend the ESA to make all employers jointly and severally liable for the ESA obligations of their contractors, subcontractors, and other intermediaries.

(b) Create a "joint employer" test similar to that developed by the U.S. Department of Labour.

(c) Make franchisors jointly and severally liable for the employment standards obligations of their franchises in all circumstances.

(d) Repeal the "intent or effect" requirement in Section 4 of the ESA "related employer" provision.

(e) Enable the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA.

C. Exemptions, Special Rules, and General Process

The ESA currently contains a patchwork of exemptions, regulations and rules which can no longer be justified in our current economic climate.

As the Advisors acknowledge in the Interim Report, the ESA, as minimum standards legislation designed to provide basic minimum terms and conditions of employment applicable to all employers and employees, "should be applied to as many employees as possible, [with] departures from, or modification to, the norm…limited and justifiable."[30]

The Special Advisors have outlined a process for reviewing existing exemptions and determining whether such exemptions should be eliminated or altered. The Advisors have suggested a three stage process as follows:

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[29] See, for example, the Ontario Labour Relations Board's decision in *Novaquest Finishing Inc.* [2006] O.E.S.A.D. No 440 upheld [2009] O.J. No. 2524 (Ont. C.A.).

[30] Special Advisors' Interim Report, *supra*, note 5 at pg. 155.

(a) Seven identified exemptions should be eliminated immediately ("Category 1");

(b) Six identified exemptions or "special industry rules" should be maintained as a result of a review of those exemptions/rules which took place by the Ministry in 2005 ("Category 2");

(c) The remaining exemptions/rules should be reviewed in the future after an appropriate review process has been developed. The Advisors have provided three proposed options for that review process. ("Category 3")

Submission

The Union supports and adopts the recommendations set out in the WAC/PCLS submission *Building Decent Jobs from the Ground Up* with respect to Categories 1 and 2 on this issue, with one amendment, as follows:

(a) In respect of Category 1, eliminate <u>all</u> identified exemptions.

(b) In respect of Category 2, undertake a new review of these exemptions/rules, for the reasons elucidated in the WAC/PCLS submission.

With respect to Category 3, the Union agrees with the approach to review these remaining exclusions as set out in Option #2 at page 162 as set out in the Interim Report.

D. Hours of Work and Overtime Pay

Submission

We support and adopt the comments and recommendations in respect of hours of work/overtime pay set out at pages 23-25 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*. In summary, we support reducing the weekly overtime pay trigger from 44 to 40 hours per week. We reject all other options.

E. Scheduling

Submission

We support and adopt the comments and recommendations in respect of scheduling set out at pages 26-27 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*. In summary, we support:

(a) an increase in the minimum hours of reporting pay from three hours at minimum wage to four hours' of regular pay or length of the cancelled shift, whichever amount is less;

(b) an amendment to the ESA that prevents an employer from scheduling an employee for a shift of less than three hours per day;

(c) an amendment to the ESA that provides employees with the job-protected right to request changes to schedules without penalty; and

(d) amendments to the ESA consistent with Option #4 at page 203 of the Interim Report as modified by the WAC/PCLS submission as follows:

(i) Require employers to post employees' schedules two weeks in advance.
(ii) Require employers to pay employees more for last-minute changes to employees' schedules (i.e. employees receive the equivalent of one hour's pay if the schedule is changed with less than two days' notice and four hours' pay for schedule changes made with less than twenty-four hours' notice).
(iii) Require that employers offer additional hours of work to existing part-time employees before hiring new employees or using staffing agencies or contractors to perform additional work.
(iv) Require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted.
(v) Provide new employees with a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts.
(vi) Pay for on-call shifts. If an employee is required to be "on call" but is not called in to work, the employer must pay the employee a premium of two or four hours of pay at the employee's regular hourly rate (depending on the amount of notice and the length of the shift).

F. Public Holidays

Submission

We support and adopt the comments and recommendations in respect of public holidays as set out at pages 28-29 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*. In summary, we support:

(a) amending the ESA to revert to the former ESA's public holiday calculation for employees who work regular hours (i.e. the amount would be their regular wages for the day);

(b) amending the ESA to provide that employees with irregular hours would be paid the greater of the average of the employee's daily earnings over a period of the 13 work weeks' preceding the public holiday, or the total amount of wages earned and vacation pay payable to the employee in the 4 work weeks before the work week in which the public holiday occurred, divided by 20.

G. Paid Vacation

Submission

We support and adopt the comments and recommendations in respect of paid vacation as set out at page 29 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*. In summary, we support an increase in the amount of paid vacation to three weeks for all employees.

H. Paid Sick Days

Submission

We support and adopt the comments and recommendations in respect of paid sick days as set out at pages 31-32 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*. In summary, we support an amendment to the ESA which would provide employees in Ontario with the right to accrue paid sick leave at a rate of one hour for every thirty-five hours worked to a maximum of seven days per year.

I. Personal Emergency Leave

Submission

The USW repeats and relies on the position taken on this issue in our submission of August 31, 2016 to the Special Advisors, a copy of which is attached hereto as Appendix "A" for ease of reference.

J. Other Leaves

The USW supports expanding access to and protection for various types of paid leaves, including leaves for victims of domestic or sexual violence and a leave for employees who are dealing with the death of a child.

With respect to a leave for victims of sexual or domestic violence, the USW notes that according to 2014 research done by the Canadian Labour Congress, one in three workers in Canada has experienced domestic violence and of those, over 80 percent report that their work performance was negatively affected as a result. The research demonstrates that while both men and women experience domestic violence, victims of high-risk cases with the most serious injuries are women.[31] The same gender bias applies in respect of sexual violence, where 92% of those reporting sexual violence to the police were women.[32] According to a Canadian Centre of Policy Alternatives

[31] Centre for Research and Education on Violence Against Women and Children. "Domestic Violence – Is There a Risk of Death?" Western University. http://makeitourbusiness.ca/warning-signs/domestic-violence-is-there-a-risk-of-death

[32] Canadian Research Institute for the Advancement of Women, *Domestic Violence Fact Sheet*, http://www.criaw-icref.ca/images/userfiles/files/VAW_Eng_short_final.pdf

(CCPA) study, more than a million women report having experienced domestic or sexual violence in the past year alone, with a rate significantly higher for Aboriginal women and girls.[33]

The USW submits that victims of domestic violence or sexual violence, who are disproportionately women (and among women, are disproportionately Aboriginal, racialized, disabled, or transgender), need additional protection to deal with the consequences of domestic violence in order to ensure that they do not receive further punishment for time missed at work resulting from exposure to such violence. Further, the difficulties of dealing with the consequences of domestic violence are exacerbated for those engaged in precarious work (of which, again, women make up a disproportionate number), who often lack the material security to leave a relationship, and are more likely to have difficulty in obtaining the time off necessary to leave the abusive partner.

The Ontario government should assist those exiting abusive relationships by affording them access to paid, protected leave. This would provide such individuals with the necessary time to exit the relationship and find alternative housing without wage or job loss, the risk of which currently acts as a disincentive to leaving an abusive partner. The Union notes that the creation of such a leave is also consistent with the policy goals set out in the Government's Action Plan to Stop Sexual Violence and Harassment.

In addition to the above, the USW supports the creation of a leave for parents who experience the loss of a child in order to ensure that workers are able to grieve the loss of their child without the additional burden of worrying about their economic future.

Submission

Given the above, the USW proposes that the ESA be amended to:

(a) introduce paid domestic or sexual violence leave for a number of days followed by a period of unpaid leave;

(b) introduce a death of the child leave for up to 52 weeks;

K. Part-Time and Temporary Work – Wages and Benefits

Submission

We support and adopt the comments and recommendations in respect of wages and benefits for part-time, temporary and casual workers as set out at pages 34-36 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up.* In summary, we support:

(a) amending the ESA to require that part-time, temporary and casual employees receive the same wages and working conditions as full-time employees in the same establishment unless

[33] Kate McInturff and Courtney Lockhart, *"The Best and Worst Places to be a Woman in Canada in 2015"*, Canadian Centre for Policy Alternatives.

difference in qualifications, skills, seniority or experience or other objective factors justify the difference;

(b) amending the ESA to require employers to provide benefits to part-time, temporary and casual employees in establishments where they are provided to other workers, on a pro rata basis or, in our view, in a lump sum equal value amount where providing such benefits on a pro rata basis is unfeasible; and

(c) amending the ESA to limit the number of fixed term contracts an employer can enter into with an employee to one year. In addition, we would support a provision that contract workers replaced by another worker at the end of their contract have just cause protection as a disincentive to employers turning over contract workers at the end of the one year period as a means of avoiding service-based entitlements.

L. Termination of Employment

Submissions

We support and adopt the comments and recommendations in respect of the termination of employment provisions of the ESA as set out at pages 36-38 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*. In summary, we support:

(a) eliminating the three month eligibility requirement for termination pay; and

(b) requiring employers to provide notice of termination based on total length of an employee's employment, not just for the most recent period worked, consistent with the calculation of length of service under the severance pay provisions of the ESA.

M. Severance Pay

Submission

We support and adopt the comments and recommendations in respect of severance pay as set out at pages 38-39 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up* as set out below. In summary, we support:

(a) eliminating the 50-employee threshold;

(b) eliminating the payroll threshold;

(c) reducing the 5-year condition for entitlement to severance to twelve months, as in the federal jurisdiction;

(d) eliminating the 26-week cap;

In the event that the Special Advisors recommend the retention of a payroll threshold for entitlement to severance pay, the USW strongly supports an amendment to the ESA to clarify that the calculation should be based on an employer's total payroll, and not just the payroll for its operations inside of Ontario, in accordance with the recent decision in *Paquette* v. *Quadraspec Inc.* (2014) ONCS 2431.

N. Just Cause

Submission

We support and adopt the comments and recommendations in respect of an amendment to the ESA which would provide Ontario workers with just cause protection as set out at pages 39-40 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up.*

O. Temporary Help Agencies

Submission

We support and adopt the comments and recommendations in respect of temporary help agencies set out at pages 40-46 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up.*

P. Greater Right or Benefit

The Union fundamentally opposes any amendment to the current language of the greater right or benefit provision of the ESA, particularly an amendment that would permit employers to "contract out" of the ESA based on a comparison of the full terms and conditions of employment in order to determine whether the employer has met the overall objectives of the ESA.

Such an amendment would have the effect of diluting the effectiveness of the ESA, and would problematize enforcement. If the ESA is to act as minimum standards legislation for all Ontario employees, employers should be required to ensure that they are complying with all standards. They should not be able to "opt out" of any standard by providing more of another. Further, implementation of the kind of comparison contemplated by Option #2 would leave employment standards minimums at the discretion of adjudicative decision-makers, like arbitrators and the Board, who would have to use their judgement to determine whether or not the ESA applied at all to employees of an employer. Such a task, in our view, would be administratively unworkable, particularly in a unionized context where an employees' terms and conditions of employment are altered regularly, sometimes dramatically, with the renewal of each collective agreement.

Submission

Given the above, the Union supports Option #1 at page 255 of the Interim Report to maintain the current section 5(2) of the ESA.

Q. Enforcement and Administration

Submission

We support and adopt the comments and recommendations in respect of the implementation of an internal responsibility system model for enforcement of the ESA set out at pages 50-53 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*. In particular:

(a) We oppose the introduction of an internal responsibility system model for the purposes of ESA enforcement and administration. Given the inherent power imbalance between workers and employers (particularly in a non-union setting) such a system will not effectively raise standards of employment, particularly for vulnerable workers who are at an even greater disadvantage vis-à-vis their employers.

(b) We oppose the requirement that employer's conduct an annual self-audit on select standards with an accompanying employee debrief. Such an audit would be completely ineffective. As WAC/PCLS note, employers already operating in violation of the ESA are unlikely to conduct such audits. Further, we are concerned that such audits could be used as a substitute for proper pro-active Ministry enforcement.

R. Initiating a Claim and Reprisals

Submission

We support and adopt the comments and recommendations in respect of the options for change set out in the Interim Report on the issues of initiating a claim under the ESA and dealing with employer reprisals as set out at pages 54-58 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*. In summary, we support:

(a) removing the provision allowing the Director to require that an employee must first contact the employer before being permitted to make a complaint to the Ministry;

(b) allowing anonymous claims so long as the facts of an alleged violation are disclosed to permit an informed response;

(c) require employment standards officers (ESOs) to investigate and decide reprisal claims expeditiously where there has been a termination of employment (and other urgent cases such as those involving an alleged failure to reinstate an employee after a leave); and

(d) require the OLRB to hear applications for review of decisions in reprisal on an expedited basis if the employee seeks reinstatement.

S. Strategic Enforcement - Inspections

Submission

We support and adopt the comments and recommendations in respect of inspections as set out at pages 58-62 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up.* In summary, we support:

(a) maintaining the requirement that all individual claims of employment be investigated;

(b) targeting proactive inspections in workplaces where misclassification takes place and increase inspections in workplaces where migrant and other vulnerable and precarious workers are employed;

(c) ending the practice of giving notice of targeted blitz inspections to employers;

T. Remedies and Penalties

Submission

We support and adopt the comments and recommendations in respect of remedies and penalties under the ESA as set out at pages 63-68 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up.* In summary, we support:

(a) a requirement that Part III prosecutions take place for repeat or intentional violators, or where there is non-payment of an Order;

(b) a requirement that Notice of Contravention fines be imposed in all cases of confirmed ESA violations. In the alternative, we support increasing the frequency of use of Notices of Contravention by Employment Standards Program, by requiring employers to pay an amount equal to the administrative monetary penalty into trust to have a NOC reviewed by the Board and removing the "reverse onus" provision that applies to the Director of Employment Standards when a NOC is being reviewed at the Board;

(c) an increase in the dollar value of NOC fines;

(d) a requirement that employers pay a financial penalty equal to twice an employee's unpaid wages where the employer has violated an employee's rights under the ESA;

(e) an increase in the administrative fee payable when a restitution order is made, to include the costs of investigations and inspections;

(f) use the existing authority of an ESO to require employers to post notices in the workplace where employers are found to have violated the ESA;

(g) amend the ESA to require employers to pay interest on unpaid wages;

(h) make government procurement contracts conditional on a clean ESA record; and

(i) in addition to existing enforcement measures and the amendments outlined above, grant the OLRB jurisdiction to impose administrative monetary penalties.

U. Applications for Review

Submission

We support and adopt the recommendations in respect of applications for review as set out at pages 68-72 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up* as set out below. In particular, we support:

(a) a requirement that ESOs provide employers and employees with all documentation they relied on when reaching the decision under review;

(b) amending the ESA to provide that on a review, 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 and should be overturned, modified or amended;

(c) increase regional access to the review process by appointing part-time vice chairs in various cities around the province to conduct reviews on a local basis;

(d) request that the Board create explanatory materials for unrepresented parties; and

(e) increase support for unrepresented workers through increased funding and an expanded mandate for the Office of the Worker Advisor (OWA). In addition, the Government should consider increased funding for employment law in community legal clinics and community-based worker advocacy groups.

V. Collections

As the Advisors note in their Interim Report, over the past six fiscal years, employees have recovered only 63% of the unpaid wages and other monies owing to them under the ESA, through voluntary payment and collection activity.[34] Further, once amounts owing go to the Minister of Finance for collection, only 10% of monies owing to employees is ever recovered.[35]

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[34] Special Advisors' Interim Report, *supra*, note 5 at pg. 302.

[35] *Ibid*, pg. 302.

It is imperative that where employers violate the ESA there is an efficient and effective means of obtaining what is owed by an employer. Employment standards minimums are rendered meaningless if employees cannot collect on what they have earned. Further, those in precarious work are the most vulnerable to economic hardship when monies owed to them go unpaid.

Finally, employees should have wages and other ESA amounts protected in the event of an employer insolvency. In that circumstance, the USW submits there should be a government fund, like the previously established wage earner protection program, available to ensure that employees of an insolvent employer are reimbursed what they have earned when their employer goes bankrupt.

Submission

The USW supports amendments to the ESA as follows to improve the collection of debts owing by employers:

(a) Amend the ESA to allow collection processes to be streamlined and to provide additional collection powers in order to increase the speed and rate of recovery of unpaid orders.

(b) Amend the ESA to allow the Ministry to impose a wage lien on an employer's property upon the filing of an employment standards claim for unpaid wages.

(c) Require employers with a history of contraventions or that operate in sectors with a high non-compliance rate to post bonds to cover future unpaid wages.

(d) Establish a provincial wage protection program.

(e) Provide the Ministry with the authority to revoke the operating licenses, liquor licenses, permits and driver's licenses to those who do not comply with orders to pay.

PART IV: CONCLUSION

In the Union's view, the implementation of the recommendations made in this submission constitute an important step in fulfilling the Special Advisors' mandate to "improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians".[36]

The package of changes proposed in this submission, including the elimination of barriers to organization and collective bargaining for workers in the province, and improvements to our minimum standards legislation are necessary if this government is to fulfill its goal of providing decent work to all Ontarians.

[36] *Ibid*, at pg. 10.

PART V: SUMMARY OF RECOMMENDATIONS

Ontario Labour Relations Act, 1995

RECOMMENDATION 1: Scope and Coverage of the LRA

Review and eliminate the existing occupational exclusions under the LRA for the purposes of ensuring broad access to collective bargaining, including:

(d) permitting access to collective bargaining by employees who are members of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity;

(e) permitting access to collective bargaining by domestic workers; and

(f) eliminating the LRA exclusion for agricultural and horticultural workers and repealing the AEPA for agricultural workers.

RECOMMENDATION 2: Related and Joint Employers

Remove the requirement for a finding of "common control and direction" from section 1(4) of the LRA.

Create a rebuttable presumption of relatedness in the case of franchisor/franchisee relationships.

RECOMMENDATION 3: Card-based Certification

Return the card-based certification regime which was in place in Ontario between 1993 and 1995 in the industrial sector, and that is currently in place in Ontario for those employees working in the construction industry.

Permit the Board to accept electronically collected membership evidence.

In the event the Special Advisors determine not to recommend the return of card-based certification to the LRA, repeal section 8.1 of the LRA.

RECOMMENDATION 4: Access to Employee List

Contact information, as well as an employee's job title, and a workplace organizational chart be included in the information required to be provided by an employer where a campaign to establish bargaining rights is underway. The employer should update the information provided where changes occur on a bi-weekly basis for a period of two months or until an application for certification is filed, whichever is sooner.

RECOMMENDATION 5: Off-site, Telephone and Internet Voting

Use off-site, telephone and internet representation votes in appropriate cases at the request of the trade union or the discretion of the Board.

RECOMMENDATION 6: Remedial Certification

Remove the requirement to:

(c) consider whether a second vote is likely to reflect the true wishes of employees; and

(d) consider whether the union has adequate membership support for bargaining.

Give the Board the power to order that a contract be settled by interest arbitration in cases where a remedial certification order has been granted.

RECOMMENDATION 7: First Contract Arbitration

Provide for "automatic" access to first contract arbitration on application by the union or the employer where the parties have been in a legal strike lock-out position for a defined period of time.

In the alternative, amend the LRA to provide for automatic first contract arbitration where the OLRB made an order for remedial certification.

Prohibit a decertification or displacement application while an application for first contract arbitration is pending.

RECOMMENDATION 8: Successor Rights

Expand coverage of the successor rights provision (similar to the law in place between 1993 and 1995) to apply to those in the contract services sector.

Preserve a union's bargaining rights when an employer's business or undertaking is sold, or changes its activities, such that it becomes subject to the LRA.

RECOMMENDATION 9: Consolidation of Bargaining Units

Give the Board the power to consolidate bargaining units akin to what existed in the LRA from the period 1993-1995.

RECOMMENDATION 10: Replacement Workers

Reintroduce a general prohibition on the use of replacement workers.

RECOMMENDATION 11: Right of Striking Employees to Return to Work

Remove the six-month reference in the current section 80 of the LRA.

Guarantee employees a right to reinstatement at the conclusion of a strike in preference to replacement workers, and guarantee if insufficient work exists, the employer be required to reinstate employees as work becomes available.

RECOMMENDATION 12: Renewal Agreement Arbitration

Implement a Manitoba-style renewal arbitration provision once a strike has lasted for a certain period of time (i.e. six months).

In addition, allow the Board to order interest arbitration as a remedy following a finding of bargaining in bad faith.

RECOMMENDATION 13: Interim Orders and Expedited Hearings

Restore the power of the Board to issue interim orders and decisions pursuant to section 16.1(1) of the SPPA, and require the Board to expedite hearings for interim relief by establishing prescribed statutory time limits so that hearings proceed without unnecessary delays.

RECOMMENDATION 14: Just Cause Protection

Provide protection against unjust dismissal for bargaining unit employees after certification but before the effective date of a first contract.

RECOMMENDATION 15: Prosecution and Penalties

Allow the Board to award triple wages to an employee who has been unlawfully terminated during a union organizing campaign.

In addition, eliminate prosecutions in the court and give the OLRB the authority to impose administrative penalties along the lines of Ontario Securities Commission.

RECOMMENDATION 16: Broader-based Bargaining Structures

Provide for greater sectoral certification/bargaining, as follows:

(d) Adopt a sectoral certification process, defined by industry and geography, which provides for the negotiation of a single multi-employer master agreement and permits newly organized sites to attach to the sectoral agreement so that, over time, collective bargaining could expand within the sector, following the Baigent-Ready model.

(e) Amend the LRA to provide a specific certification process for franchise operations of a single parent franchisor with accompanying franchisees.

(f) Engage in consultations with stakeholders in the media, arts, home and domestic care sectors in order to fashion models of organizing and collective bargaining in those industries

that would facilitate the right of individuals working in those industries to exercise their right to bargain collectively.

RECOMMENDATION 17: Employee Voice

Protect the right of employees to engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection as is currently the case in section 7 of the American *National Labour Relations Act*.

Employment Standards Act, 2000

RECOMMENDATION 1: Expand the definition of employee under the Act

Expand the definition of employee to explicitly include dependent contractors, and that the definition should be as expansive as possible to capture all workers in an economically dependent position.

Establish a presumption of employees status.

Develop strategic programs for enforcement with appropriate entities such as the Canada Revenue Agency and the Employment Insurance program to map sectors where misclassification is growing.

Publicize the names of companies that misclassify workers.

Produce clear and comprehensive guidelines on employee misclassification that can be used by stakeholders in ensure consistency of application and enforcement.

RECOMMENDATION 2: Who is the Employer and Scope of Liability

Make all employers jointly and severally liable for the ESA obligations of their contractors, subcontractors, and other intermediaries.

Create a "joint employer" test similar to that developed by the U.S. Department of Labour.

Make franchisors jointly and severally liable for the employment standards obligations of their franchises in all circumstances.

Repeal the "intent or effect" requirement in Section 4 of the ESA "related employer" provision.

Enable the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA.

RECOMMENDATION 3: Exemptions, Special Rules, and General Process

In respect of Category 1, eliminate all identified exemptions.

In respect of Category 2, undertake a new review of these exemptions/rules, for the reasons elucidated in the WAC/PCLS submission.

With respect to Category 3, review these remaining exclusions as set out in Option #2 at page 162 of the Interim Report.

RECOMMENDATION 4: Hours of Work and Overtime Pay

Reduce the weekly overtime pay trigger from 44 to 40 hours per week.

RECOMMENDATION 5: Scheduling

Increase in the minimum hours of reporting pay from three hours at minimum wage to four hours' of regular pay or length of the cancelled shift, whichever amount is less.

Prevent an employer from scheduling an employee for a shift of less than three hours per day.

Provides employees with the job-protected right to request changes to schedules without penalty.

Require employers to post employees' schedules two weeks in advance.

Require employers to pay employees more for last-minute changes to employees' schedules (i.e. employees receive the equivalent of one hour's pay if the schedule is changed with less than two days' notice and four hours' pay for schedule changes made with less than twenty-four hours' notice).

Require that employers offer additional hours of work to existing part-time employees before hiring new employees or using staffing agencies or contractors to perform additional work.

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

Require that employers provide new employees with a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts.

Require that employers pay for on-call shifts. If an employee is required to be "on call" but is not called in to work, require that the employer pay the employee a premium of two or four hours of pay at the employee's regular hourly rate (depending on the amount of notice and the length of the shift).

RECOMMENDATION 6: Public Holidays

Revert to the former ESA's public holiday calculation for employees who work regular hours (i.e. the amount would be their regular wages for the day).

Provide that employees with irregular hours be paid the greater of the average of the employee's daily earnings over a period of the 13 work weeks' preceding the public holiday, or the total amount of wages earned and vacation pay payable to the employee in the 4 work weeks before the work week in which the public holiday occurred, divided by 20.

RECOMMENDATION 7: Paid Vacation

Increase the amount of paid vacation to three weeks for all employees.

RECOMMENDATION 8: Paid Sick Days

Provide employees in Ontario with the right to accrue paid sick leave at a rate of one hour for every thirty-five hours worked to a maximum of seven days per year.

RECOMMENDATION 9: Personal Emergency Leave

Repeal the exemption to PEL for employers with 49 employees or less in the province.

Remove the requirement that employees provide employers with evidence of entitlement to take PEL days.

Introduce a provision confirming that employers are prohibited from requiring evidence that employees are entitled to take a PEL.

RECOMMENDATION 10: Other Leaves

Introduce paid domestic or sexual violence leave for a set number of days followed by a period of unpaid leave.

Introduce a death of the child leave for up to 52 weeks.

RECOMMENDATION 11: Part-Time and Temporary Work – Wages and Benefits

Require that part-time, temporary and casual employees receive the same wages and working conditions as full-time employees in the same establishment unless difference in qualifications, skills, seniority or experience or other objective factors justify the difference.

Require employers to provide benefits to part-time, temporary and casual employees in establishments where they are provided to other workers, on a pro rata basis or in a lump sum equal value amount where providing such benefits on a pro rata basis is unfeasible.

Limit the number of fixed term contracts an employer can enter into with an employee to one year. In addition, provide that contract workers replaced by another worker at the end of their contract have just cause protection as a disincentive to employers turning over contract workers at the end of the one-year period as a means of avoiding service-based entitlements.

RECOMMENDATION 12: Termination of Employment

Eliminate the three month eligibility requirement for termination pay.

Provide notice of termination based on total length of an employee's employment, not just for the most recent period worked, consistent with the calculation of length of service under the severance pay provisions of the ESA.

RECOMMENDATION 13: Severance Pay

Eliminate the 50-employee threshold.

Eliminate the payroll threshold.

Reduce the 5-year condition for entitlement to severance to twelve months, as in the federal jurisdiction.

Eliminate the 26-week cap.

In the event that the Special Advisors recommend the retention of a payroll threshold for entitlement to severance pay, clarify that the calculation should be based on an employer's total payroll, and not just the payroll for its operations inside of Ontario.

RECOMMENDATION 14: Just Cause

Provide Ontario workers with just cause protection.

RECOMMENDATION 15: Temporary Help Agencies

Adopt the recommendations in respect of temporary help agencies set out at pages 40-46 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*.

RECOMMENDATION 16: Greater Right or Benefit

Maintain the current section 5(2) of the ESA.

RECOMMENDATION 17: Enforcement and Administration

Adopt the recommendations in respect of enforcement and administration set out at pages 50-53 of the WAC/PCLS submission *Building Decent Jobs from the Ground Up*.

RECOMMENDATION 18: Initiating a Claim and Reprisals

Remove the provision allowing the Director to require that an employee must first contact the employer before being permitted to make a complaint to the Ministry.

Allow anonymous claims so long as the facts of an alleged violation are disclosed to permit an informed response.

Require employment standards officers (ESOs) to investigate and decide reprisal claims expeditiously where there has been a termination of employment (and other urgent cases such as those involving an alleged failure to reinstate an employee after a leave).

Require the OLRB to hear applications for review of decisions in reprisal on an expedited basis if the employee seeks reinstatement.

RECOMMENDATION 19: Strategic Enforcement – Inspections

Maintain the requirement that all individual claims of employment be investigated.

Target proactive inspections in workplaces where misclassification takes place and increase inspections in workplaces where migrant and other vulnerable and precarious workers are employed.

End the practice of giving notice of targeted blitz inspections to employers.

RECOMMENDATION 20: Remedies and Penalties

Require that Part III prosecutions take place for repeat or intentional violators, or where there is non-payment of an Order.

Require that Notice of Contravention fines be imposed in all cases of confirmed ESA violations. In the alternative, increase the frequency of use of Notices of Contravention by Employment Standards Program by requiring employers to pay an amount equal to the administrative monetary penalty into trust to have a NOC reviewed by the Board and removing the "reverse onus" provision that applies to the Director of Employment Standards when a NOC is being reviewed at the Board.

Increase in the dollar value of NOC fines.

Require that employers pay a financial penalty equal to twice an employee's unpaid wages where the employer has violated an employee's rights under the ESA.

Increase in the administrative fee payable when a restitution order is made, to include the costs of investigations and inspections.

Use the existing authority of an ESO to require employers to post notices in the workplace where employers are found to have violated the ESA.

Amend the ESA to require employers to pay interest on unpaid wages.

Make government procurement contracts conditional on a clean ESA record.

Grant the OLRB jurisdiction to impose administrative monetary penalties.

RECOMMENDATION 21: Applications for Review

Provide employers and employees with all documentation they relied on when reaching the decision under review.

Provide that on a review, 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 and should be overturned, modified or amended.

Increase regional access to the review process by appointing part-time vice chairs in various cities around the province to conduct reviews on a local basis.

Create explanatory materials for unrepresented parties.

Increase support for unrepresented workers through increased funding and an expanded mandate for the Office of the Worker Advisor (OWA). In addition, the Government should consider increased funding for employment law in community legal clinics and community-based worker advocacy groups.

RECOMMENDATION 22: Collections

Amend the ESA to allow collection processes to be streamlined and to provide additional collection powers in order to increase the speed and rate of recovery of unpaid orders.

Amend the ESA to allow the Ministry to impose a wage lien on an employer's property upon the filing of an employment standards claim for unpaid wages.

Require employers with a history of contraventions or that operate in sectors with a high non-compliance rate to post bonds to cover future unpaid wages.

Establish a provincial wage protection program.

Provide the Ministry with the authority to revoke the operating licenses, liquor licenses, permits and driver's licenses to those who do not comply with orders to pay.

APPENDIX A

ONTARIO'S CHANGING WORKPLACES REVIEW

SUBMISSION BY THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) REGARDING THE PERSONAL EMERGENCY LEAVE PROVISIONS OF THE *EMPLOYMENT STANDARDS ACT*

August 31, 2016

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The United Steelworkers (the "Union" or the "USW" or the "Steelworkers) has now had an opportunity to review your Interim Report (the "Report" or "Interim Report") which considers potential amendments to the Ontario *Employment Standards Act* (the "ESA") and the *Labour Relations Act, 1995* (the "LRA") in the context of Ontario's changing workplaces. While we intend to provide comprehensive submissions on the options presented in your Report, we write today in answer to your call for advance comments on the section of the Report dealing with the personal emergency leave ("PEL") provisions of the ESA.

I. PERSONAL EMERGENCY LEAVE – CURRENT LEGISLATIVE PROVISION

Under the current provisions of the ESA, employees in Ontario working for an employer with 50 or more employees in the province are entitled to take up to 10 days of unpaid job-protected PEL. The leave may be used to deal with an employee's personal illness, injury or medical emergency, or the death, illness, injury, medical emergency or other urgent matter of certain proscribed family members, including the employee's spouse, parent, child, brother or sister, or grandparent.

II. ORIGINAL USW SUBMISSION

In our original submission to you in respect of this Review, the USW sought the removal of the 50 employee threshold for entitlement to PEL, and the repeal of the requirement that employees provide evidence "reasonable in the circumstances" to satisfy the employer the employee is entitled to take a PEL.[37] Instead, the USW sought the introduction of a provision which would prohibit employers from requiring evidence that employees are entitled to take a PEL.

III. SUBMISSION ON THE INTERIM REPORT REGARDING PEL

(a) Changes to the PEL provisions should not be made in advance of the delivery of your Final Report

The USW assumes that the Government has sought advance submissions on the PEL provisions of the ESA as a result of the commitment in its 2015 Fall Economic Statement to "lower business costs through modernized regulations."[38] In that document, the Government indicated that it would be seeking advice from you to resolve concerns raised by business regarding the application of the PEL provisions of the ESA. The Government indicates in its economic statement that "the advice is to be received in the spring of 2016 and the resolution implemented in 2016."[39]

The USW is concerned about the Government's request that you consider and make recommendation in respect of the PEL provisions in advance of your Final Report. In our view, changes to the PEL provisions of the ESA should be considered together with other changes to the ESA (i.e. paid sick days, small business exemptions from leaves) and LRA as part of a

[37] See section 50(7) of the current ESA.
[38] http://www.fin.gov.on.ca/en/budget/fallstatement/2015/chapter1a.html
[39] http://www.fin.gov.on.ca/en/budget/fallstatement/2015/chapter1a.html#s1a-3

comprehensive set of amendments which operate to fulfill your mandate to tackle the need for legislative amendments to address issues facing vulnerable workers in precarious jobs. As a result, the United Steelworkers recommends that the PEL provisions be reviewed together with the remainder of the options presented in your Interim Report, and that recommendations and amendments to the PEL provisions not be "fast-tracked" by Government in advance of the delivery of that report.

(b) The USW supports the removal of the 50-employee threshold for entitlement to PEL (Option 2)

The USW has reviewed the options in respect of the PEL provisions set out in your Interim Report. The USW supports the implementation of Option 2 of the Report, which would remove the 50-employee threshold for entitlement to PEL days.

Personal emergencies, such as the illness or injury of an employee or an employee's family member are not restricted to those working for large employers. The kinds of emergencies to which the PEL provisions are directed happen to all employees in Ontario, regardless of the size of the workplace. Indeed, smaller workplaces are the norm, not the exception, in Ontario. As your Interim Report notes, in 2015, 87% of workplaces in Ontario had fewer than 20 employees and around 30% of all employees worked in such establishments.[40] This means that over a million Ontario employees currently do not have access to the benefits of job-protected leave when personal emergencies arise that require their attention, like the illness of a child, parent or spouse.[41] These employees must rely solely on the goodwill of their employer to keep their jobs where an illness or injury arises for them, or in their families, solely by virtue of the fact they work for a smaller employer, rather than a larger one. In the USW's submission, such an outcome places an undue and unfair burden on these workers and their loved ones.

Further, the exclusion of those working in smaller workplaces from the protection provided by PEL only serves to increase the vulnerability of workers who are already in a highly vulnerable position. Statistics show that those employees working in smaller workplaces in Ontario are more likely to be engaged in part-time and temporary work, more likely to be earning lower wages, and are less likely to be unionized or have access to unionization.[42] This means that those who would most benefit from the protection afforded by the PEL provisions of the ESA are the very individuals currently excluded from its application.

We also know that certain social groups, like women, racialized persons and single parents with children under 25 (the majority of whom are women) are overrepresented amongst precarious

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[40] Ministry of Labour, *Changing Workplaces Review: Special Advisors Interim Report*, p. 32.
[41] See Leah Vosko, Andrea Noack, and Mark Thomas, *How Far Does the Employment Standards Act, 2000, Extend And What Are The Gaps In Coverage? An Empirical Analysis of Archival And Statistical Data*, (March 2016), https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf, p. 27
[42] *Ibid*, p. 61

workers.[43] As a result, we can expect that the absence of PEL protection will have a disproportionately negative effect on these social groups who already experience greater job insecurity and high rates of wage inequity as a result of structural societal discrimination. The USW notes that the Ontario Government has specifically sought to address the gender wage gap through the establishment of the Gender Wage Gap Strategy Steering Committee. That Committee's Final Report includes recommendations which would require the Government to, among other things, promote gender equality at work and increase women's ability to participate fully in the workforce.[44] The USW submits that increasing the number of workers who can benefit from job-protected PEL is consistent both with your mandate to reduce issues facing vulnerable workers and the Government's commitment to address the gender wage gap in Ontario workplaces.

Finally, the elimination of the 50-employee threshold for access to PEL days would bring Ontario in line with other provinces in Canada, none of which currently have a threshold for entitlement for unpaid leaves under minimum standards legislation.

(c) The USW rejects Options 1, 3 and 4

The USW rejects Options 1, 3 and 4 as set out in your Interim Report. The USW submits that the maintenance of the status quo (Option 1) is not acceptable or consistent with your mandate to address employment and labour issues arising from the increase in precarious work in the province.

Further, the USW rejects Options 3 and 4, which would break up the existing 10-day PEL provision into separate leave categories without increasing the total amount of leave (Option 3) or completely eliminate the 50-employee threshold provision allowing all employees in Ontario to access PEL days (Option 4).

The focus of both Options 3 and 4 appears to be on the splitting of the current 10-day PEL provision into separate leave categories based on employer concerns that employees should not be able to access employer-provided paid leave days and the unpaid PEL provisions in the ESA. The employer community has referred to their concern as preventing employees from "doubling up" on leave benefits[45]. However, our experience in this area suggests that employer concerns are less about "doubling-up" on such benefits and more about restricting employee leave entitlements. If employees are able to take advantage of PEL where an employer has paid (or unpaid) leave policies, they are able to do so because employer leave policies are narrower, and fail to cover all of the contingencies provided for under PEL. As a result, the issue is not about employees receiving twice the benefit to which they are otherwise entitled, as asserted by the employer community, but rather the employer failing to ensure that their leave policies meet the requirements set out in the ESA.

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[43] Ministry of Labour, *Changing Workplaces Review: Special Advisors Interim Report*, p. 34.

[44] Minister of Labour; Minister Responsible for Women's Issues; *Final Report and Recommendations of the Gender Wage Gap Strategy Steering Committee*, https://www.ontario.ca/page/final-report-and-recommendations-gender-wage-gap-strategy-steering-committee?_ga=1.243955782.2119732228.1472580180, p. 8-11.

[45] http://keepontarioworking.ca/recommendations/minimum-standards#more

To the extent that employers are seeking to "opt-out" of the ESA in this area by suggesting that the ESA be amended to clarify that where the employer has existing leave entitlements (paid or unpaid) that equal 10 days the PEL provisions not apply, the USW urges you to reject that proposal. Such a move would reduce the circumstances under which employees in the province could access job-protected leave, and eliminate flexibility with respect to employee leave entitlement, one of the current benefits of the PEL leave for employees. For the same reason, the USW asks you to reject the splitting of the current 10-day PEL provision into separate leave categories in the ESA. Again, the result of splitting the current PEL leave provision would be to eliminate the flexibility inherent in the current language, a flexibility which is of significant benefit to workers in the province, and to vulnerable workers in particular.

Finally, the USW continues to advocate for the repeal of the provision which requires employees who take advantage of PEL to provide evidence that they are entitled to such leave. Such a requirement creates an impediment to employees accessing such leave, by requiring them to pay the cost of obtaining medical notes, but also places an additional (needless) burden on our already over-burdened public health care system.

IV. CONCLUSION

This Review has the potential to make important and significant improvements in the working lives of Ontarians.

As a result, we urge you to:

- consider the PEL provisions of the ESA in the context of the entire Changing Workplace Review process, and not in advance or isolation from it;

- recommend the repeal of the exemption to PEL for employers with 49 employees or less in the province;

- remove the requirement that employees provide employers with evidence of entitlement to take PEL days; and

- recommend the introduction of a provision confirming that employers are prohibited from requiring evidence that employees are entitled to take a PEL.

We thank you for the time to consider our submission. We are available to meet with you to discuss any questions or comments you may have in regard to any of the above.

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