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# MAINTAINING ONTARIO'S COMPETITIVE EDGE: THE BUSINESS PERSPECTIVE ON LABOUR REFORM

Submission to the Special Advisors of the Changing Workplaces Review

**SEPTEMBER 2015**

## Acknowledgements

This submission reflects the input received by the Ontario Chamber of Commerce (OCC) over the course of several months. The recommendations herein reflect the consensus positions of our membership.

## About the Ontario Chamber of Commerce

For more than a century, the Ontario Chamber of Commerce (OCC) has been the independent, non-partisan voice of Ontario business. Our mission is to support economic growth in Ontario by defending business priorities at Queen's Park on behalf of our network's diverse 60,000 members.

From innovative SMEs to established multi-national corporations and industry associations, the OCC is committed to working with our members to improve business competitiveness across all sectors. We represent local chambers of commerce and boards of trade in over 135 communities across Ontario, steering public policy conversations provincially and within local communities. Through our focused programs and services, we enable companies to grow at home and in export markets.

The OCC provides exclusive support, networking opportunities, and access to innovative insight and analysis for our members. Through our export programs, we have approved over 1,300 applications, and companies have reported results of over $250 million in export sales.

The OCC is Ontario's business advocate.

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September 17, 2015

Special Advisors C. Michael Mitchell and Hon. John C. Murray,

Thank you for the opportunity to respond to the Ontario Ministry of Labour's Changing Workplaces Review Consultation Paper, released in May 2015.

As you know, any changes to the Ontario *Labour Relations Act* and the *Employment Standards Act* would have profound implications for Ontario's economy. As such, we are pleased to be able to provide you with the business community's perspective on a series of proposed labour legislation reforms that have dominated the public conversation over the past several months. We hope that this submission acts as an informed and evidence-based counter-balance to the many recommendations you have received from non-employer organizations.

Building a 21st century workforce is a core component of the Ontario Chamber of Commerce's (OCC) five year *Emerging Stronger* economic agenda. Ontario's highly skilled workforce provides the province with a competitive advantage and contributes to our position as a leading North American destination for foreign investment.

Despite this impressive distinction, new stresses have been placed on employers and employees, decisions that threaten our status as an investment destination of choice. Over the course of the coming years, Ontario will implement a new mandatory pension plan and a cap-and-trade system—both of which will raise the cost of doing business in Ontario.

Throughout our submission, we urge you to consider the economic consequences of any proposed changes to the *Labour Relations Act* and the *Employment Standards Act*. We also urge you to consider the structural changes that the global economy has undergone over the past few decades and to consider the manner in which Ontario's labour laws should—or should not—be used to counteract those changes.

Thank you for taking the time to review this submission. We look forward to working with you over the coming weeks and months as we work collectively to make Ontario the best place in which to live, work, and invest.

Sincerely,

Allan O'Dette
President and CEO
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*Below follows the coalition of signatories that endorse our position.*

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# SUMMARY OF RECOMMENDATIONS

The following represents the consensus recommendations of Ontario's business community in response to the Ministry of Labour's review of the *Labour Relations Act* and the *Employment Standards Act*.

## Labour Relations Act – Union Certification Rules

**Recommendation 1:** Ensure transparency in the union certification process. Maintain the *Labour Relations Act* requirement for a secret ballot when attempting to certify or decertify a union.

**Recommendation 2:** The *Labour Relations Act* should be amended to require that the list of employees provided in response to a certification application not be used for any other purpose than for the present application for certification.

## Labour Relations Act – Card-Based Certification for Small Construction Employers

**Recommendation 3:** Eliminate the card-based certification system for small construction employers and require employees to be employed for at least three months before having the right to participate in a certification vote or be considered for the purpose of a certification application.

**Recommendation 4:** Require the Ontario Labour Relations Board to make a bottom-line decision (with reasons to follow) on certification applications or status disputes within thirty days of the matter being remitted to the Board for decision.

## Labour Relations Act – Open Tendering Rules

**Recommendation 5:** Public sector employers should be given the flexibility to tender construction contracts in a manner that maximizes taxpayer dollars. The *Labour Relations Act* should be amended so that municipalities are no longer classified as 'construction employers'.

## Employment Standards Act – Greater Contractual or Statutory Right

**Recommendation 6:** Recognize that the *Employment Standards Act* is not intended to act as a mechanism that allows workers to double up on benefits. Maintain the Greater Contractual or Statutory Right provision in the *Employment Standards Act*.

## Employment Standards Act – Exemptions

**Recommendation 7:** Continue to take into account sectoral differences in the organization of work and its cost. Maintain *Employment Standards Act* sector and sub-sector exemptions.

## Employment Standards Act – Scheduling and Refusal of Work

**Recommendation 8:** Recognize different sectors' abilities to foresee future capacity requirements. Do not amend the *Employment Standards Act* to include specific provisions around employers' scheduling obligations.

**Recommendation 9:** Provide employers with the flexibility they require to respond to shifting demand for goods and services by maintaining the *Employment Standards Act*'s provision for the number of hours workers can work in a day or week (8 hours per day or 48 hours a week) and when overtime must be paid (after 44 hours in a week).

## Employment Standards Act – Non-Standard Employment

**Recommendation 10:** Canadian governments should take a broader and more effective approach to the growth of non-standard work by considering innovative solutions that would provide all workers with access to the benefits of the social safety net. The Guaranteed Annual Income (GAI) is one proposal worth further study.

**Recommendation 11:** Consider the broader economic and fiscal impacts of any proposed changes to the *Employment Standards Act* that would mandate private and public sector employers to fundamentally restructure their employment relationships with their contracted workers.

**Recommendation 12:** Do not establish, through the *Employment Standards Act*, a reverse onus on employee status, where a worker is presumed to be an employee unless the employer demonstrates otherwise.

## Employment Standards Act – Unpaid Leave of Absence

**Recommendation 13:** Amend the *Employment Standards Act* to clarify that in those cases where the employer has existing leave entitlements (paid or unpaid) that equal or exceed 10 days (through policy or a collective agreement), those leave entitlements, however allocated, represent a greater right or benefit regardless of whether the leave days provided are as wide in scope as the emergency leave provisions set out in the Act.

**Recommendation 14:** Amend the *Employment Standards Act* by dividing the 10 unpaid sick leave days into three clear categories, with each category having 3 or 4 days allotted to it.

# LABOUR RELATIONS ACT – UNION CERTIFICATION RULES

The union certification process is outlined in the *Labour Relations Act* (LRA), which sets out the means by which workers can establish bargaining rights through certification. Generally, this process involves an application demonstrating at least 40 percent support among workers followed by a supervised secret ballot vote.

Some groups are calling for reforms to the LRA that would allow workers to unionize by simply signing a union card (without the need for a secret vote). This would mark a substantial change from the existing process and would serve only to make the union certification process less transparent.

The secret vote is an essential component of the union certification process. It provides workers with the opportunity to make decisions free of interference and external pressures. It is the reason why the federal government recently passed the *Employees' Voting Rights Act* which mandates that a secret ballot be held in every case of an application for certification.

Further, the premise upon which proponents of major reforms to union certification rules base their recommendations is flawed. Many groups repeat a refrain that declining unionization rates in Ontario merit special rules for this province. This assertion is false; Ontario's unionization rate has remained largely static since the secret ballot was first introduced in the mid-1990s (Statistics Canada, 2012).

Finally, it is important to note that over the last 20 years, there have only been a handful of instances where the outcome of the card-based certification vote was not reflected in the secret ballot. This is ample proof that the current system does not provide employers with "undue influence" on the certification process, as some would suggest.

The current union certification system in Ontario is efficient, fair, and transparent. It should remain so.

**RECOMMENDATION 1**
Ensure transparency in the union certification process. Maintain the *Labour Relations Act* requirement for a secret ballot when attempting to certify or decertify a union.

Employers have also raised concerns over the process through which they are obligated to produce an employee list. Once a certification application has been submitted, the employer must produce a list of its employees who fall within the union's proposed bargaining unit. This list is used to determine whether the applicant union has the requisite 40 percent signed certification cards that would trigger a vote. The production of this list in the course of the certification process has sometimes raised concerns from employers.

Some unions will file a certification, get the list of employees and then withdraw the application before the vote has occurred. In some of these cases, it is clear that the intention was never to certify the union, but rather to obtain the employee list to aid as research in their ongoing efforts to organize the workplace.

Some organizations have called on government to reform the LRA so that a business must hand over a list of employee names once the union has hit a 20 percent threshold of signed cards. This request is consistent with some groups' efforts to use the LRA list production process as a way to drive their own agenda. The spirit of the LRA is not to assist with increasing the rate of unionization, but rather to provide an impartial process for union certification.

**RECOMMENDATION 2**
The Labour Relations Act should be amended to require that the list of employees provided in response to a certification application not be used for any other purpose than for the present application for certification.

## LABOUR RELATIONS ACT – CARD-BASED CERTIFICATION FOR SMALL CONSTRUCTION EMPLOYERS

In June, 2005, Ontario passed Bill 144, the *Labour Relations Statute Law Amendment Act*. This bill re-established the card-based certification system for the construction sector, in addition to the existing vote system. The card-based system means that certification of a union may be ordered by the Ontario Labour Relations Board, without a certification vote, where more than 55 percent of the employees have signed membership cards to join a union. This amendment only applies to the construction industry.

As stated previously, certification based on membership cards removes the employee's right to vote on whether or not they choose a union. Secret ballot voting safeguards employees from external pressures and helps ensure their true opinion is represented. While a secret ballot vote is conducted in a neutral environment by the Labour Relations Board, the collection of signatures on union membership cards is controlled entirely by union leadership.

Card-based certification also eliminates an employer's opportunity to communicate with their employees about the union certification application prior to a vote. In a card-based certification, the employer is usually unaware that a union organizing drive is taking place, until the application date has passed, at which time the cards are signed and cannot be revoked.

Once a workplace is certified by a construction union, the employer will become automatically subject to a province-wide collective agreement, which provides for a high level of wages and benefits for its members, particularly in the industrial, commercial and institutional sector (non-residential). The business loses its ability to negotiate individually with its employees or to negotiate its own collective agreement with the union.

As a result of Bill 144, there exists in effect a legal regime in Ontario that unduly favours certification of construction employers by construction trade unions. Small construction employers without specialized knowledge of labour law are at a particular disadvantage relative to large union organizers. Additionally, delays in Labour Relations Board decisions on certification or status disputes can cause further uncertainty for small business as well as interruptions into their daily business activities.

The system creates a disincentive for tradespeople to enter into business and can result in the out-migration of tradespeople from the province.

**RECOMMENDATION 3**
Eliminate the card-based certification system for small construction employers and require employees to be employed for at least three months before having the right to participate in a certification vote or be considered for the purpose of a certification application.

**RECOMMENDATION 4**
Require the Ontario Labour Relations Board to make a bottom-line decision (with reasons to follow) on certification applications or status disputes within thirty days of the matter being remitted to the Board for decision.

## LABOUR RELATIONS ACT – OPEN TENDERING RULES

Public sector employers, specifically municipalities, are treated as businesses under the LRA. As a result of this classification, the Ontario Labour Relations Board has been applying collective-bargaining rules for construction companies to municipalities and school boards.

The current system has created monopolies in some of the province's largest municipalities, including Toronto, Hamilton, and Sault Ste. Marie. These monopolies limit the number of companies that can be considered for jobs, and thereby restrict otherwise qualified candidates from bidding on jobs. This system stifles competition and often results in unnecessarily high infrastructure costs.

Fair and open tendering would free public employers, like municipalities, from restrictive agreements that prevent them from maximizing tax dollars. Public employers should be able to openly tender projects to all eligible bidders.

**RECOMMENDATION 5**
Public sector employers should be given the flexibility to tender construction contracts in a manner that maximizes taxpayer dollars. The *Labour Relations Act* should be amended so that municipalities are no longer classified as 'construction employers'.

# EMPLOYMENT STANDARDS ACT – GREATER CONTRACTUAL OR STATUTORY RIGHT

Section 5 (2) of the *Employment Standards Act* (ESA) states that if one or more provisions in an employment contract or in another Act provide a greater benefit to an employee than the employment standard identified in the ESA, the provision or provisions in the contract or Act apply and the employment standard does not (2000). Put simply, if an employer offers a benefit to an employee (whether pay, working hours, personal days, etc.) that is more generous than the minimum standards defined in the ESA, then the ESA does not apply to that employee, in that particular circumstance.

The provision is a logical one: it recognizes that employers often offer their employees workplace standards that exceed the ESA standards, and the Act ensures those employers are not subject to needless regulation.

However, some groups are advocating for an end to the Greater Contractual or Statutory Right provision, arguing that a streamlined ESA will ensure a common standard for all workers in Ontario.

We believe the elimination of this provision could have grave consequences for employers, and could create a scenario where workers are allowed to "top-up" their workplace benefits with ESA benefits. For example, an employer may offer a certain number of unpaid leave days per year for personal or family emergencies. The ESA also provides for unpaid leave days. The elimination of the greater contractual or statutory right provision could, in theory, allow employees to use both unpaid leave day allotments (see recommendation 13 for more).

**RECOMMENDATION 6**
Recognize that the *Employment Standards Act* is not intended to act as a mechanism that allows workers to double up on benefits. Maintain the Greater Contractual or Statutory Right provision in the *Employment Standards Act*.

# EMPLOYMENT STANDARDS ACT – EXEMPTIONS

The ESA sets out the minimum rights and responsibilities that apply to workers and employers in most Ontario workplaces. In 2000, the ESA went through a review to modernize and clarify its provisions. Since then, there have been additional changes (e.g., averaging of hours of work approvals, rules around temporary help agency employment, minimum wage changes).

The current ESA sets out core standards, who they apply to, and provides tools to the Ministry of Labour to deal with those who break the law (Ministry of Labour, 2015). The ESA also outlines a series of exemptions that apply to certain sectors, including many agricultural sub-sectors. These exemptions apply to various standards under the Act, including the minimum wage, overtime pay, and public holidays (Ministry of Labour, 2009).

Some workers' rights groups argue for the abolishment of all exemptions (Workers' Action Centre, 2015). Abolishing sector exemptions would mark a significant change from Ontario's long-standing approach to Employment Standards legislation, which takes into account sectoral differences in the organization of work and its cost (Thomas et al., 2015).
It is broadly recognized, for example, that in knowledge-based occupations like those in the

Information Technology sector, the requirements of previous versions of the ESA, particularly in relation to payment of wages and hours of work/overtime, were inconsistent with the way work is typically carried out and compensated (CATA Alliance, 2000). Those rules have since been changed in a manner that recognizes the entrepreneurial culture of high-tech industries.

Similarly, exemptions in agricultural sub-sectors (including hours of work) recognize the unique nature of agricultural production. Agricultural production is highly dependent on external factors including weather and the perishable nature of agricultural products (OFA 2015). Many agricultural companies also operate in the global marketplace, where goods command the lowest price. The agricultural sector—along with other sectors that have unique needs—requires legislated workplace standards that are sufficiently flexible to balance the challenges of agricultural production with the needs of farm workers.

**RECOMMENDATION 7**
Continue to take into account sectoral differences in the organization of work and its cost. Maintain *Employment Standards Act* sector and sub-sector exemptions.

## EMPLOYMENT STANDARDS ACT – SCHEDULING AND REFUSAL OF WORK

Some groups are calling for provisions in the ESA that would require employers to post work schedules two weeks in advance (Workers' Action Centre, 2015). As it stands, the *Employment Standards Act* does not include any explicit provisions on scheduling.

Many employers with unionized workforces have established provisions under their collective bargaining agreement that outline the employer's obligations as they relate to scheduling. Loblaws, for example, recently reached an agreement with the United Food and Commercial Workers to introduce a series of pilots that will provide part-time workers with 10 days advance notice on scheduling (Mojtehedzadeh, 2015).

This type of scheduling arrangement is not a replicable model for all sectors, however. Many businesses in the manufacturing sector, for example, must constantly adjust production in order to meet demand. For example, a mid-sized agri-food manufacturer must be prepared to adjust capacity to respond to shifting demand. Any legislated requirement that limits that manufacturer's flexibility will hurt their competitiveness—and by extension, Ontario's competitiveness.

The need for flexible scheduling is not limited to the manufacturing sector. The health sector is subject to surges in demand which must be met with an equivalent increase in staffing. Many employers in the sector noted it is impossible to predict how demand for health services will increase day-to-day, let alone two weeks in advance.

Some groups are also proposing that the ESA be amended to grant employees the right to refuse work beyond 40 hours (Workers' Action Centre, 2015).

This proposal ignores the shifting nature of demand for goods and services. Consider businesses in the tourism sector, for example, which often require greater staffing capacity over the summer months and during long weekends. Limiting those businesses' ability to use overtime hours could have a detrimental impact on the economies of many small and rural towns that rely on seasonal tourism.

**RECOMMENDATION 8**
Recognize different sectors' abilities to foresee future capacity requirements. Do not amend the *Employment Standards Act* to include specific provisions around employers' scheduling obligations.

**RECOMMENDATION 9**
Provide employers with the flexibility they require to respond to shifting demand for goods and services by maintaining the *Employment Standards Act*'s provision for the number of hours workers can work in a day or week (8 hours per day or 48 hours a week) and when overtime must be paid (after 44 hours in a week).

## EMPLOYMENT STANDARDS ACT – NON-STANDARD EMPLOYMENT

Non-standard employment refers to a number of non-traditional employment relationships, including temporary employment, self-employment without paid help, part-time employment where workers want more hours, and employment characterized by workers who hold multiple jobs but whose total earnings fall below the median wage (Ministry of Labour, 2015). According to the Ministry of Labour, non-standard employment has grown almost twice as fast as standard employment since 1997 (2015).

The increase in non-standard employment is largely the result of the major restructuring that Ontario's economy has undergone over the past several decades, including the shift away from manufacturing and the growth in service industries (Ministry of Labour, 2015). This is not unique to Ontario; our competitors in the United States and in the rest of Canada have witnessed a similar trend.

While non-standard workers have greater flexibility, they do not qualify for many of the benefits typically afforded to employees in a traditional employment relationship. This means that, for example, they do not have access to key components of the social safety net, including Employment Insurance (EI) and the Canada Pension Plan (CPP), or workplace benefits including health benefits.

The shift away from the traditional employment relationship is reflective of structural changes in the global economy and requires a much more thoughtful and broader response. Little will be accomplished by imposing onerous rules on Ontario employers through reforms to the ESA. Rather, Canadian governments should consider innovative ways to detach the benefits of the social safety net from traditional employment. The Guaranteed Annual Income (GAI), for example, is one proposal worth further study. A GAI provides those with no income with a basic entitlement. As earned income increases, the benefit declines, but less than proportionately. The result is a system that creates an incentive to work, as people who work are always better off than they would be if they did not (Forget and Roos, 2015).

**RECOMMENDATION 10**
Canadian governments should take a broader and more effective approach to the growth of non-standard work by considering innovative solutions that would provide all workers with access to the benefits of the social safety net. The Guaranteed Annual Income (GAI) is one proposal worth further study.

Some groups argue that the government should implement, through the ESA, a system of "reverse onus on employee status", where a worker must be presumed to be an employee unless the employer demonstrates otherwise (Ontario Federation of Labour, 2015). This proposal is in response to what some groups perceive as the intentional misclassification of workers by employers (Ontario Federation of Labour, 2015, Workers' Coalition Centre, 2015).

The implications of the introduction of a reverse onus classification system—or an employment framework that creates hurdles to contract employment—are substantial.

Contracting is a fundamental part of many employers' business models. Employers frequently rely on third parties to provide services in areas including logistics, janitorial services, security, sanitation and waste, among others. Any explicit provisions in the ESA that would force businesses to change the nature of their relationships with their contract employees could raise the cost of doing business in Ontario. This would have an especially detrimental impact on businesses in the manufacturing sector, who operate in a supply chain that uses a mix of permanent and contract employees. It is the many small- and medium-sized businesses within that supply chain that would bear the brunt of such changes.

There are also tremendous implications for the broader public sector. Many public entities, including universities, colleges, hospitals, and municipalities, rely on a mixed permanent/contract workforce. Forcing these institutions to cease the use of contract employment would almost certainly have a negative impact on the taxpayer.

**RECOMMENDATION 11**
Consider the broader economic and fiscal impacts of any proposed changes to the *Employment Standards Act* that would mandate private and public sector employers to fundamentally restructure their employment relationships with their contracted workers.

**RECOMMENDATION 12**
Do not establish, through the *Employment Standards Act*, a reverse onus on employee status where a worker is presumed to be an employee unless the employer demonstrates otherwise.

# EMPLOYMENT STANDARDS ACT – UNPAID LEAVE OF ABSENCE

Under the *Employment Standards Act*, an employee whose employer employs 50 or more employees is entitled to an unpaid leave of absence of up to 10 days per year because of any of the following:

- A personal illness, injury or medical emergency;
- The death, illness, injury or medical emergency of certain relatives; or
- An urgent matter that concerns certain relatives.

Many businesses who employ a unionized workforce are bound to similar paid and unpaid leave obligations under their collective bargaining agreements, in the form of sick days and personal days. For example, an auto parts maker may include a provision for 12 unpaid leave days per year for personal or family emergencies. Problematically, some have interpreted the Act as providing workers with both the unpaid leave days provided by the ESA and the unpaid leave days provided by their collective bargaining agreement (in the case of the aforementioned auto maker, 22 total unpaid leave days).

We do not believe that this interpretation of the ESA is in keeping with its intent. Collective bargaining agreements must have as good or better provisions for workers than the ESA—they are not intended to act as a mechanism that allows workers to double up on benefits.

**RECOMMENDATION 13**

Amend the *Employment Standards Act* to clarify that in those cases where the employer has existing leave entitlements (paid or unpaid) that equal or exceed 10 days (through policy or a collective agreement) those leave entitlements, however allocated, represent a greater right or benefit regardless of whether the leave days provided are as wide in scope as the emergency leave provisions set out in the Act.

The misuse of unpaid leaves of absence was frequently highlighted by those employers we spoke with. Problematically, there is little recourse available to an employer who suspects an employee of abusing the system.

As such, many employers favour an unpaid leave provision in the ESA that divides the 10 unpaid leave days into three clear categories, each category with three of four days allotted to it. These categories are already defined in the Act: a personal illness, injury or medical emergency; the death, illness, injury or medical emergency of certain relatives; and an urgent matter that concerns certain relatives.

**RECOMMENDATION 14**

Amend the *Employment Standards Act* by dividing the 10 unpaid sick leave days into three clear categories, with each category having 3 or 4 days allotted to it.

# CONCLUSION

The purpose of this submission is to provide the Special Advisors with the business perspective on proposed changes to the *Labour Relations Act* and the *Employment Standards Act*.

Any recommendations to government should consider the broader economic context and the economic impacts of any proposed changes to the *Labour Relations Act* and the *Employment Standards Act*. Recommendations must also reflect a balance between a desire to counteract the structural changes that our workforce has undergone over the past few decades, and the need to maintain a healthy business climate.

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