Changing Workplaces Review

SPECIAL ADVISORS’ INTERIM REPORT

Ministry of Labour

Special Advisors
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Introduction

Purpose of the Interim Report

Our chief purpose in issuing this Interim Report is to advise Ontarians of the range of issues that have been identified and the options for change that we are being asked to consider.

The Changing Workplaces Review has generated much interest. In 12 days of public hearings around the province we have heard from over 200 organizations and individuals and received more than 300 written submissions. We have also met with a variety of stakeholder representatives, ordinary citizens and experts. Before making final recommendations to the government, we felt it advisable to report on the issues identified and the proposals for change that have been suggested so that interested parties will have a chance to make further submissions.

This Review is the first independent review commissioned by the Ontario Government seeking recommendations for legislative change of the Employment Standards Act, 2000 (ESA) and the Labour Relations Act, 1995 (LRA) in more than a generation. It is the first independent review of the two Acts undertaken together, focusing on changes in the workplace as an integrated problem in both the unionized and the non-unionized workplaces.

This Review is occurring after a lengthy period of significant changes in the economy of Ontario and in its workplaces. Not surprisingly, because of the breadth of the Review, combined with the scope of change, there is a very large number of issues for us to canvass. Of necessity, we must prioritize and be selective with respect to the issues that we examine in depth.

The scope of our Review is very broad and, while we intend to deal with a variety of matters, in keeping with our mandate, our key focus will be on vulnerable workers
in precarious jobs and the need for legislative amendments to address some of the
issues facing these workers. At the same time, we will be mindful of the interests
of employers and the potential impact of any proposed change and will carefully
consider changes being sought by employers that could impact employees.

The Interim Report is comprised of 5 Chapters: Chapter 1 (Introduction), Chapter 2
(Guiding Principles, Values and Objectives), Chapter 3 (Changing Pressures and
Trends), Chapter 4 (Labour Relations) and Chapter 5 (Employment Standards).

We invite the constructive views of Ontarians on the issues and the options set out
in the Interim Report. We expect that submissions will be thoughtful, constructive
and informative. We encourage interested parties to provide comments in writing
as soon as is practicable, in line with the consultation period as posted on the
Ontario Ministry of Labour website. We will continue to accept written submissions
until the deadline but, practically speaking, the earlier we receive them the better.
We strongly encourage stakeholders not to wait until the last minute to make
their submissions.

Some caution should be exercised before jumping to any conclusions about
the options canvassed in the Interim Report. With perhaps one exception in
Chapter 5 – in the section on exemptions to the ESA – we have not yet come to
any conclusions about our recommendations and we have an open mind on all
issues. The options canvassed are purposively inclusive and sometimes contain
proposals that are conflicting or contradictory. In almost every case, the status
quo is an option.

While we have made an effort to be expansive in the listing of options, we
cannot be limited in the end result to only the listed options. We may receive
new good ideas in the balance of our consultation process, or we may think
of additional options ourselves. Having said that, we certainly wish to avoid, to
the extent possible, anyone being taken by surprise by the substance of the
recommendations we ultimately will make.

In the “Guide to Consultations” paper, we asked for the views of the community
as to the values and principles we should employ in coming to our recom-
mendations, and we received comments and ideas from many sources. We
take this opportunity to advise the community as to our views of the appropriate
principles and objectives as well as some of the considerations that will guide
our recommendations.
In addition, we have heard and read much, some of it contradictory and controversial, about the nature of the changes in the Ontario economy – in the workforce and workplace – that have occasioned this Review. As best we can, we have summarized some of the most important changes and who has been affected.

In order to assist us in our work, we have commissioned research from independent researchers, some of whom have reported on the academic literature on subjects that concern us. Others have researched specific areas. A list of research papers that we have commissioned will be made available to the public concurrently with this Interim Report. Opinions or conclusions expressed by the researchers are theirs and, at this stage, are part of a broad range of facts and opinion that that we need to consider in coming to our recommendations.

**The Perspective of the Parties**

Employers, unions, employees and social commentators have joined this discussion with strong, diverse perspectives. In our report, we endeavour to summarize and report what we heard about specific issues and the options for change that we have been asked to consider.

The fact that this Review is taking place is strong evidence of a broad societal concern over the changes that have taken place in the workplace and the fact that for many there has been a long-standing trend of deteriorating working conditions for a growing number of workers. At the same time, the mandate from the Minister of Labour to recommend changes that will support business (also reflected in our Terms of Reference) is recognition that change cannot take place without taking into account its impact on business and that keeping the economy strong is a priority for everyone.

We have found that stakeholders are generally well aware of the legitimate competing interests of others. However, the fundamental starting points of each side are rooted in their own experience and perspectives and these are important to understand.

Employers come to this discussion having to compete in a new, highly competitive, dynamic, and changing economy. This economy and the changes in it move at lightning speed, and in this environment, employers have to adapt and be flexible.
There are many employers in Ontario who provide “good jobs”, with decent wages, benefits, and reasonable hours of work for their employees where there is an opportunity for self-fulfillment and participation in the workplace. These employers know that there are vulnerable workers and precarious “bad jobs” in parts of the economy, but they are concerned that changes designed to address those workers if applied to all employers will negatively impact their businesses and undermine their competitive position.

There are also employers who operate in very competitive markets who feel that they cannot afford to provide higher wages or benefits and still remain competitive. They are required to serve the demands of their customers by providing good value and competitive pricing and they need flexibility in deploying their workforce. Some tend to see legislative change as a threat that may interfere with their competitiveness and profitability and therefore the number of jobs they provide and/or their ability or willingness to create new jobs.

Moreover, among employers in the non-unionized private and public sector, there is little appreciation of – and perhaps little sympathy for – the constitutional right of Canadians to: freedom of association, the right to join a union, the right to engage in meaningful collective bargaining, and the right to strike. There is little enthusiasm for changes to the law that may make it easier for employees to organize a union or to bargain effectively. The employer community has suggested no change to the LRA and, indeed, all the options for change to the LRA canvassed in this report will likely be seen as changes supporting unions even if some are employer friendly or if their purpose is to remove obstacles to unionization and give effect to constitutional rights.

Employers generally would like to have as much independence as possible to operate their business in a responsible, fair and efficient manner. Although they are very supportive of government enforcing the law and pursuing employers who contravene the rules, they would strongly urge a minimum of statutory or regulatory interference in the operation of their enterprises. In a world of intense competition, business needs to be in a position to operate with maximum flexibility to meet the challenges of the marketplace. Flexibility in a global economy includes the ability to decide the terms and conditions of employment and the working conditions for employees that enable employers to attract and retain the workforce they need in order to succeed. This concern about the need for flexibility informs a general concern about the adverse impact of some of the proposals for change that we have been asked to consider.
Probably the most significant employer concern expressed to us relates to hours of work and the limitations on scheduling that are currently in the ESA. Employers have also expressed concern about the complexity of the ESA and the difficulty in understanding and in applying it. Some, mostly larger, employers have raised concerns about the personal emergency leave provisions of the ESA, asserting that they are unfairly additive to generous leave and benefit packages provided to their employees and that they get insufficient credit for them. Furthermore, they believe that personal emergency leave provisions are often abused, causing excessive absenteeism that impairs productivity and efficiency.

On the other hand, worker advocates, unions, many non-government organizations, policy institutes, academics and individuals see in the current situation of vulnerable and precarious workers an urgent and serious threat to the well-being, not only of a significant number of workers in Ontario, but also to their families and to Ontario society. There is widespread agreement in this group that significant and growing numbers of workers – particularly women (but also increasing numbers of men), members of racial and ethnic minorities, immigrants, youth – are working in low wage jobs, many of them temporary, many of them unstable with little or no security, and mostly without benefits. They argue this is occurring in many retail businesses and in service industries such as food service, home care, child-care, and custodial services as well as in agriculture and for the increasing number of workers working through temporary help agencies in manufacturing.

This group of vulnerable employees is seen largely as being unable to control their work schedules and being at the mercy of the scheduling whims of their employers where too little account is taken of the employee need for predictability in their lives. The argument is made that there is a greater degree of social isolation in this vulnerable population and that the uncertainty and anxiety over their situation interferes with their personal lives and their ability to make commitments to relationships and to having children. The combination of low income, uncertainty, lack of control over scheduling, lack of benefits such as sick leave, and stress, is said to create great anxiety in many workers and their families. Many assert that this results in a disproportionately high level of mental health issues in this population as well as a deterioration in their overall physical health.

A common perception among this group of stakeholders – reinforced by a series of studies, articles and publications – is that precarious work is a major and growing problem. In addition, the growth in numbers of so-called “self-employed”
individuals is seen as reflecting not only the lack of availability of good jobs but also the misclassification of employees as independent contractors by employers in order to save money and avoid contributions to basic government programs like the Canada Pension Plan and Employment Insurance.

In Ontario, 86% of the private sector workforce is now non-union. The decline in unionization and the absence of any credible threat of unionization is said by these stakeholders to contribute to a deterioration in wages and benefits and to a great imbalance in bargaining power where employees have little, if any, voice. Employees are said to be fearful of complaining about violations of the law and certainly fearful of engaging in any attempts to organize. Labour laws are criticized as putting obstacles in the path of possible unionization and as not being severe enough on employers who commit illegal unfair labour practices that interfere with the constitutional right of employees to organize.

For these stakeholders the ESA is often seen as ineffective for the most vulnerable employees and does not provide sufficient enforcement tools to deal with non-compliant employers. In very broad brush strokes – without the nuance that would likely be a fairer characterization of the views of some of the stakeholders – this is the attitudinal backdrop which we have discerned.

We are grateful for the constructive advice and comments we have received and we look forward to hearing more from stakeholders.
Guiding Principles, Values and Objectives

Our Terms of Reference state that the objective of this Review is to improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians. We are directed to:

…consider the broader issues affecting the workplace and assess how the current labour and employment law framework addresses these trends and issues with a focus on the LRA and the ESA. In particular, the Special Advisors will seek to determine what changes, if any, should be made to the legislation in light of the changing nature of the workforce, the workplace, and the economy itself, particularly in light of relevant trends and factors operating on our society, including, globalization, trade liberalization, technological change, the growth of the service sector, and changes in the prevalence and characteristics of standard employment relationships.¹

An important focus is on vulnerable workers in precarious jobs in the context of employment standards and labour relations. It is trite to observe that effective protection of workers under both statutes depends on the education of employees and employers concerning:

• their respective legal rights and obligations;
• respect for the law;
• consistent enforcement; and
• effective compliance strategies.

This focus on vulnerable workers in precarious jobs requires us to address:

- minimum standards of work;
- the labour relations framework; and
- whether the current legal framework effectively protects the rights of such workers.

Our mandate is to make recommendations on how the Employment Standards Act, 2000 and the Labour Relations Act, 1995 might be reformed to better protect workers while supporting businesses in our changing economy. We must determine what changes, if any, should be made to the legislation in light of the changing nature of the workforce, the workplace, and the economy.

Before turning to principles, values and objectives, we would like to mention two contextual and overarching themes. The first is the importance of work to all Ontarians. In this regard, we can do no better than to quote the former Chief Justice of the Supreme Court of Canada Brian Dickson on the central importance of work:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.\(^2\)

Recognition of the central importance of work is the context in which we articulate the principles guiding our recommendations.

A second important contextual factor is the inherent power imbalance and inequality of bargaining power between employer and employee, or what the Supreme Court has stated to be “the presumptive imbalance between the employer’s economic power and the relative vulnerability of the individual worker.”\(^3\) 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

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\(^2\) Reference Re Public Service Employee Relations Act (Alta.), (1987) 1 SCR 313, para 91.
\(^3\) Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, (2013) SCC 62, 3 SCR 733, para 32.
workplace goals with their more powerful employers.” 4 A recognition of this power imbalance has always informed the need for and the content of legislation of 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.

In the first phase of our consultations we asked for, and received, advice on the principles, values and objectives that should guide our work. We now briefly outline those key principles, values and objectives that will govern us in recommending those improvements.

**Decency at Work**

In *Fairness at Work*, Professor Harry Arthurs stated that labour standards “should ensure that, no matter how limited his or her bargaining power, no worker... is offered, accepts or works under conditions that Canadians would not regard as ‘decent’”. 5

We believe that decency at work is a fundamental and principled commitment that Ontario should accept as a basis for enacting all of its laws governing the workplace.

Not only does the concept of decency at work relate to minimum acceptable workplace standards, but it also applies to the furtherance of decency through the expression of a collective voice and the facilitating of harmonious labour relations between employers and employees.

The International Labour Organization’s describes decent work as follows:

> Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.

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It is beyond the scope of our mandate and of labour standards laws to legislate decent work. Creating the conditions for decent work necessarily involve numerous stakeholders – government, employers, employees and their representatives – working together to ensure working environments where the dignity of employees is respected, in conditions which do not keep employees or their families in poverty, in which the potential inherent in every employee can be realized, and which do not put at risk employee health and safety. Ideally, actions of government and of workplace stakeholders will focus on making changes that not only eliminate poor employment practices but also which seek to change the conditions that produce such practices.

This focus will of necessity involve:

- education;
- increased training and skills development;
- efforts to eliminate discrimination; and
- efforts to consistently enforce employee rights.

Some, but not all, of these objectives are within the scope of this Review.

We are committed to making recommendations for minimum terms and conditions of employment and for a labour relations system that are consistent with – and will help pave the way to – the ultimate objective of creating decent work for Ontarians, particularly for those who have been made vulnerable by changes to our economy and workplaces. Furthermore, we are committed to do this within an overall framework that respects employer needs.

**Respect for the Law and a Culture of Compliance: Meaningful Enforcement**

We regard as critically important that there be a respect by all Ontarians for the laws of the workplace, and that we as a society recognize the importance of compliance with the law. We need to foster a culture where compliance with minimum terms and conditions of employment – together with respect for the rights of employees to organize and to bargain collectively – is widespread. Rules that are easy to understand and administer, and that provide workplace parties with compliance tools, together with enforcement that is consistent, are key to achieving these objectives.
In the absence of respect and general compliance with the laws governing the workplace, together with a meaningful ability to enforce those laws and to gain access to justice, the passage of laws by itself is relatively meaningless. There is probably nothing that causes more long term disrespect for the law than laws which are widely disregarded, exist only on paper and have no meaningful impact on people’s lives. We agree that:

> Ontarians also live in a society that strives to maximize access to justice for its citizens. Sophisticated and highly evolved rights and obligations are of little value if they cannot be asserted or enforced effectively and economically.  

### Access to Justice

The Chief Justice of Canada has spoken on the importance of access to justice stating that: “In order to maintain confidence in our legal system, it must be, and must be seen to be accessible to Canadians.”

Access to justice has both procedural and substantive components. Especially in the employment arena, complaint procedures must afford ordinary Ontarians the opportunity for fair and just adjudication and enforcement of their rights. Such opportunity for dispute resolution should be efficient, proportionate and accessible to self-represented individuals.

Our recommendations should recognize and attempt to reduce barriers to access to justice. Procedural efficiency and timely adjudication, if achievable, are designed to minimize or eliminate an economic barrier. But as the Supreme Court has reminded us, an economic barrier to access to justice is not the only barrier that should concern legislators; this is particularly true when the barriers have such profound implications for many vulnerable working Ontarians.

We agree with the Court and with many commentators in this field that the barriers can be psychological or social (such as lack of knowledge of the availability of substantive rights) and may also include factors such as limited language skills, the elderly or young age of claimants, minority status of all kinds, gender, immigration

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6 Advisory Committee on Class Action Reform, Report of the Attorney General’s Advisory Committee on Class Action Reform (Toronto: Ontario Ministry of the Attorney General, 1990), 16.  
7 Bourgoin v. Quellette et al., (2009) 343 NBR (2d) 58.  
status and fear of reprisals. While the availability of resources and the uniqueness of individual circumstances may – as a practical matter – impair the ability of government to respond in a meaningful way to every barrier a claimant might face, we must be sensitive to the barriers and consider recommendations that may ameliorate them.

Consistent Enforcement and Compliance and a Level Playing Field

Consistency in the law is a value that in the labour and employment context means – among other things – consistent enforcement. Consistent enforcement means not only a level playing field for employers and business; it is also necessary for the law to be reputable. As Professor Arthurs observed:

*Labour standards ultimately succeed or fail on the issue of compliance. Widespread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law.*  

Consistent enforcement and encouraging a culture of compliance will ensure a level playing field for all business. A level playing field “ensures that all those who are similarly situated should be regulated according to the same rules, and that the law should guarantee equal protection for all its intended beneficiaries.” Consistent enforcement “serves to protect not only workers but also the majority of fair-minded employers who wish to meet their legal obligations without the risk of being undercut by those who do not. Clear laws, effective oversight, consistent interpretation and certainty of enforcement are critical to ensuring observance of the level playing field principle.”

Policies designed to encourage compliance and remedies designed to sanction the illegal behaviour of non-compliant parties are necessary. To encourage compliance, viable enforcement proceedings and strategies must be available and fines and penalties sufficient to deter non-compliance must be an integral part of achieving a culture where the law is respected and compliance is normative.

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9 Arthurs, 53.
10 Ibid., 53.
Freedom of Association and Collective Bargaining

In previous reviews of labour law in the province of Ontario, freedom of association for the purpose of collective bargaining and the right to strike had not yet been fully and forcefully established as a constitutional right. This is the first review of the Labour Relations Act where account must be taken by government that in Canada the right to meaningful collective bargaining is a critically important constitutional right. The source of this right is The Canadian Charter of Rights and Freedoms that contains the guarantee of freedom of association in section 2(d).

The Supreme Court of Canada has provided significant jurisprudence relating to freedom of association under section 2(d) of the Charter that has, in the main, developed with respect to labour relations. The Court has given freedom of association a robust and purposive interpretation that is binding on all governments in Canada. In numerous cases, the Court has unambiguously set out the importance of the constitutional right that is protected. In the Mounted Police Association case, the Court said:

\[ \textit{Freedom of association … stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.} \]

As in other labour cases, the Court, in Mounted Police, made it clear that in the employment context, freedom of association guarantees the right of employees to “meaningfully associate in the pursuit of collective workplace goals” and furthermore “includes a right to collective bargaining.”

\[ \textit{Without the right to pursue workplace goals collectively, workers may be left essentially powerless in dealing with their employer or influencing their employment conditions. This idea is not new. As the United States Supreme Court stated in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), at page 33:} \]

\[ \textit{Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself} \]

and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment... [Emphasis added.]

On numerous occasions the Court has recognized the importance of freedom of association in responding to the imbalance between the employer and its economic power and the relative vulnerability of individual workers:  

... section 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of section 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

In Mounted Police, the Court emphasized that collective bargaining is a fundamental aspect of Canadian society that enhances human dignity, liberty and the autonomy of workers:

Collective bargaining constitutes a fundamental aspect of Canadian society which "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (Health Services, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.

The Court has emphasized that to be meaningful the process of collective bargaining must provide a process for employees to pursue their goals:

The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in

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a meaningful way (Health Services; Fraser). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in Health Services: “One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees …” (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees’ negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d).”15

Creating an Environment Supportive of Business in our Changing Economy

As highlighted in the “Guide to Consultations” paper, current labour and employment standards legislation were introduced in the context of an expanding labour market anchored in the manufacturing and resource sectors. These often featured a relatively large, stable workforce consisting primarily of full-time workers whose jobs were protected by tariffs and limited international competition.

The shift away from manufacturing to service and retail industries has changed the nature of work for many. Some workplaces are now smaller, more flexible and leaner, requiring more highly skilled workers and flatter hierarchies. Ontario businesses face an increasingly competitive global environment where capital is mobile. As the Guide states:

Canada is one of the most open and “globalized” jurisdictions in the world. According to the federal government, trade is linked to one in five Canadian jobs. In Ontario, exports and imports of goods make up nearly two-thirds of gross domestic product (GDP). Over half of the province’s manufacturing output is exported. Therefore, fostering an innovative, globally competitive economy is a priority for Ontario.16

Technological change continues to alter the nature of work and the skills required by employers; it will continue to affect the competitiveness of employers. In some important manufacturing sectors, just-in-time manufacturing has had a significant impact not only on manufacturing processes and the high quality of goods

manufactured but also on suppliers’ response time. The growth of “the sharing economy” continues to challenge business, to lawmakers and to regulators.

Ontario’s market economy must compete for business and investment. In addition to decent standards of work for employees, we must be sensitive to the legitimate concerns of business regarding its need for flexibility and reduced administrative burden to compete successfully. Every change regulated by government has some impact on employer flexibility. The day is long gone where employers could operate without regard for decency, safety, appropriate minimum terms and conditions of employment, and the rights of employees to associate and to bargain collectively. It is important to encourage a level playing field by helping employers to understand and meet their obligations.

We must recognize the diversity of the Ontario economy, its businesses, and the competition they face. A “one-size-fits-all” regulatory solution to a problem in a sector or an industry could have negative consequences if applied to all employers. The unique requirements of some businesses and/or of some employees may – in appropriate circumstances – support differentiation by sector or by industry rather than province-wide regulation.

Professor Gunderson has said that: “… any policy initiatives must consider their effect on business costs and competitiveness especially given the increased competitive global pressures, the North-South re-orientation and the increased mobility of capital.” We agree that there is a need for “smart regulations” that can foster equity and fairness and at the same time also foster conditions that support the needs of the employers for efficiency and competitiveness.

The regulation of labour and employment law must not be so burdensome as to impair unnecessarily the competitiveness of Ontario business. We must be aware of regulatory regimes in competing jurisdictions – particularly in other Canadian provinces, American states and other developed countries. This is not to suggest that Ontario should abandon the goal of decent standards or embrace any concept of a “race to the bottom” because some Ontario business is required to compete with jurisdictions where standards are unacceptable to us or where acceptable and decent standards are not enforced. With these important caveats, we recognize that the regulation of the workplace in other jurisdictions may provide useful information, experience and guidance.
Stability and Balance

We recognize as two objectives of our Review, the need for balance in our recommendations and for stability in bringing change to the workplace.

In the last twenty years, Ontarians have seen significant alterations to The Labour Relations Act accompanying changes in the governing political party.

Ideally, changing political ideology or the strength of a lobby should not drive fundamental change in legislation to enable employees’ to exercise their fundamental constitutional rights. These rights are entrenched and should remain relatively constant. Politicization of laws relating to the manner of exercise of an individual’s constitutional rights leads to unpredictability, uncertainty and, in all likelihood, to dissatisfaction and mistrust. While changes in the law may well be required to respond to changing conditions and circumstances, the law should not undergo rapid “pendulum” swings if it is to produce stable expectations of what is required Ontarians – particularly when it comes to their exercise of fundamental Charter rights. In Seeking a Balance, the Sims Task Force (relating to Part 1 of the Canada Labour Code) made the point:

Our approach has been to seek balance.... We seek a stable structure within which free collective bargaining will work. We want legislation that is sound, enactable and lasting. We see the too frequent swinging of the political pendulum as being counterproductive to sound labour relations. We looked for reforms that would allow labour and management to adjust and thrive in the increasingly global workplace.\(^{17}\)

We will endeavour to craft recommendations for change that are balanced and, if implemented, will have a reasonable likelihood of being sustained by subsequent governments differently composed.

On the other hand, we recognize that laws change to meet the evolving needs of society. They must. Indeed, it is the radically altered nature of the workplace over many years that has informed this Review and which will require a meaningful response. We will therefore consider ways to build in procedures to facilitate on-going review and change in the context of a changing workplace.

In making our recommendations we will do our best to find the appropriate balance.

Under our Terms of Reference, the objective of this Review “is to improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians in 2015.” This requires that we reflect on the pressures and changes that have been and are occurring, and identify those employees who have been made vulnerable by these changes and are working in precarious jobs. Most of the pressures we describe are the subject of much literature and analysis by experts. We can do no more here than describe them in the briefest of terms.

Our understanding of the economic pressures, how the workplace has changed in ways relevant to this Review and who are vulnerable workers in need of greater protection, is based on our own reading and on a number of academic papers prepared for us, and especially two background reports prepared for the Review – Morley Gunderson, Changing Pressures Affecting the Workplace, 2015, and Implications for Employment Standards and Labour Relations Legislation, 2015, from which we have borrowed significantly. However, the views expressed here are our own.

Definitions and Terminology: Precarious and Vulnerable; Non-standard Employment

We have a broad mandate to recommend changes to the Employment Standards Act, 2000 (ESA) and the Labour Relations Act, 1995 (LRA), and we are not limited in that mandate by any particular concerns. Indeed, we are to consider in the broadest terms – what changes, if any, should be made to the legislation in light of the changing nature of:
• the workforce;
• the workplace; and
• the overall economy.

We have considered relevant trends and factors affecting our society, including:
• globalization;
• trade liberalization;
• technological change;
• growth of the service sector; and
• changes in the prevalence and characteristics of standard employment relationships.

Our Terms of Reference provide a lens through which we are to recommend changes “to improve the security and opportunity” for those who have been “made vulnerable” by the changes: “far too many workers are experiencing greater precariousness” today in Ontario. To fulfill our mandate, we must understand what is meant by “vulnerable workers” and identify those employees who are experiencing greater precariousness.

Before we describe pressures and begin our analysis, we must first acknowledge that there are important differences in how concepts such as “precarious employment” and “vulnerable workers” are used by scholars and commentators, and differences in the way that categories of standard and non-standard employment relate to these concepts.

These important differences may affect policy goals (i.e., who certain measures are designed to assist and the objective of the policy change). For example, we need to ask whether particular proposals are to be aimed only at those who are engaged in non-standard employment or whether we are concerned with a broader group of workers, including some who work in jobs that are considered standard employment. It is also vital to understand how concepts are being used in order to know whether we are talking in one case about jobs (precariousness) and on the other about people (vulnerability).

It is important to understand the differing usages of the terminology as they may affect our understanding of the magnitude of a particular problem. It is confusing when commentators use the same terminology but mean different things.
For some, precarious employment entails some form of contingency that is not present in standard employment, and the term is often used interchangeably to mean atypical employment, or employment which is non-standard. In looking at the issues, some might confine themselves to looking at the various categories of non-standard employment (such as part-time, temporary, casual, contract, on-call, etc.), asking what, if anything, should be done about the conditions of those working such jobs, but not looking at issues facing those performing standard work (i.e., full-time and some part-time employees who may be vulnerable for other reasons, such as low income and lack of benefits).

Precarious employment is defined by some in broader terms; they describe the character of precarious jobs “as work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements.”

Although this definition encompasses an element of uncertainty over continuing work, precarious employment in this understanding is not treated synonymously with “contingent” or “non-standard” work. Rather, precarious employment can transcend the standard/non-standard work distinction such that forms of employment that are technically full-time or part-time, permanent or temporary, may be characterized by precariousness. In other words, this definition recognizes that some “non-standard work” is highly paid, secure and not precarious, while some “standard” or full-time permanent work is poorly paid and is precarious.

Without equating the concept of non-standard jobs to precarious jobs, our Terms of Reference recognize a correlation – that is, that the growth of non-standard work has put many workers in more precarious circumstances.

“Vulnerable workers” describes people, not work or jobs. It is used in many contexts to denote social groups who are defined by their “social location,” that is, by their ethnicity, race, sex, ability, age and/or immigration status. In other contexts, however, the term “vulnerable workers” denote groups of workers who have greater exposure to certain risks than other groups, regardless of their social location. In the latter context, the term “vulnerable” describes all those (regardless of the social group(s) to which they belong) whose conditions of employment make it difficult to earn a decent income and thereby puts them at risk in materials ways including all the undesirable aspects of life that go hand-in-hand with insecurity, poverty and lower incomes. We believe that our Terms of Reference in describing the objective of this Review as improving the security and opportunity of vulnerable workers, is intended to have us consider the position of all vulnerable workers in this latter sense.

We understand that our mandate requires us to consider all workers in Ontario whose employment:

- makes it difficult to earn a decent income;
- interferes with their opportunities to enjoy decent working conditions; and/or
- puts them at risk in material ways.

This mandate thus includes many workers whose employment is uncertain (or temporary) but also workers, such as those in full-time permanent low-paid employment, many without benefits, who would not be counted in the non-standard employment category, and thus might not be considered by some to be employed in precarious jobs. Indeed, we do not think it would make public policy sense to limit our inquiry to only non-standard employment, and not to ask whether, and how, the changing workplace has affected vulnerable employees working in jobs that are considered to be standard employment.

**Introduction**

This Chapter discusses the inter-related factors that have contributed to the changing workplace, and identifies the vulnerable workers in precarious jobs who are the subject matter of this Review.

The starting point is to recognize that the basic structural and conceptual framework for the two Acts we are reviewing was set decades ago. While these Acts have been significantly amended over the years, the basic conceptual frameworks and approach for each of them has remained. Accordingly, we must evaluate how well they are operating to meet the needs of vulnerable workers today, and potentially develop new approaches that may be required in light of workplaces that have changed over a long period and continue to change.

If this Review must re-evaluate the laws and regulations that were designed for an earlier time, it must be recognized that the existing framework of both Acts was designed largely for an economy dominated by large fixed-location worksites, where the work was male-dominated and blue-collar, especially in manufacturing. In that sector, large employers were often protected by tariffs and limited competition, and union coverage was far higher. Today the economic landscape is vastly different for both employers and employees; over many years the manufacturing sector in Ontario has shrunk significantly, while the service sector has grown significantly.
Pressures Affecting Employers and the Demand for Labour

Globalization

Markets for products and services are increasingly globalized and are often outsourced to foreign firms. Tariff reductions, free-trade agreements and reductions in transportation and communication costs have encouraged this trend. Companies in some sectors, notably manufacturing, previously protected by tariffs, are now subject to intense international competition, especially from imports from low-wage developing countries.

A related pressure is the trend to offshore outsourcing of business services, which is now made possible by the internet, computer technology, and software for global networking. Businesses can send their requests at the end of their business day to another time zone and have the responses the next day. Within business services, the trend has been to outsourcing increasingly sophisticated services.

In addition to global competitive pressures, Canada has experienced a re-orientation from east-west trade within Canada towards north-south trade between Canada and the United States as well as Mexico, largely as a result of free trade agreements. New trade agreements with Europe and/or with Asia (which include the United States and Mexico, such as the Trans-Pacific Partnership) are likely, if ratified, to further diminish the importance of internal east-west trade. The reorientation to external trade (much of it north-south) makes it likely that Canadian business will increasingly compete with United States businesses, which tend to have fewer labour regulations and restrictions.

With the increasing mobility of capital, some firms may have a credible threat to relocate their plants and investments into jurisdictions that have lower regulatory costs. One significant concern is that such competition for investment will lead to a “race to the bottom” or “harmonization to the lowest common denominator” in employment and labour relations law, and that this would discourage any efforts to improve conditions for Ontario workers.

The fear of workers, their communities, and policy makers of losing new investments or having plants relocate out of the province is real. The evidence of what actually influences business on this issue, however, tends to be inconclusive and controversial as shown in the research commissioned for this Review.19

Many businesses in Ontario are not affected by these considerations because their businesses are in non-tradable services. Moreover, many employers will not follow a strategy of relocation or investing in the lowest-wage or least-regulated jurisdiction because there are a host of factors that inform these decisions and make Ontario attractive – positive factors such as its educated, skilled and reliable workforce, its tax structure, the public funding of its health care system, and many others. However, Ontario must consider the effect of its polices on business costs and competitiveness, especially in light of increased competitive global pressures, the north-south re-orientation and the increased mobility of capital. There is a need for “smart regulation” that can foster not only equity and fairness, but also conditions that support business.

**Technological Change**

Skill-based technological change and the transformation to the knowledge economy have had profound effects on the kind of workforce that is needed today and has facilitated many other trends, including global networking and trade, and offshore outsourcing (including the outsourcing of business services). These changes associated with the computer and the internet, are facilitating changes in manufacturing and distribution such as just-in-time-delivery systems, robotics, 3-D manufacturing, movie streaming, bar-code scanning systems and the new so called “sharing economy” manifested by such companies as Uber or Airbnb.

**Changing from Manufacturing to Services**

One of the major consequences of these competitive global pressures, along with the industrial restructuring that has taken place in Ontario, is the shift from manufacturing to services. From 1976 to 2015, for example, manufacturing’s share of total employment fell from 23.2% to 10.8%, a decrease of 12.4 percentage points. Over that same period, the service sector’s share increased from 64.5% to 79.8%, an increase of 15.3 percentage points. The increase in the service sector, however, was polarized, with the largest increases occurring in higher paying professional, scientific, technical and business services combined (from 4.6% to 13.2%) and lower paying accommodation and food services (from 3.9% to 6.4%).20 Together with other factors, this has had a profound impact on Ontario workplaces.

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This shift in the labour market has resulted in a “hollowing out” or “disappearing middle” of the skill and wage distribution, often involving job losses for older workers in relatively well-paid, blue-collar jobs in manufacturing. These displaced workers generally do not have the specific skills to move up to the growing number of higher-end jobs in business, financial and professional services. Their skills are often industry-specific (e.g., steel, auto manufacturing, pulp-and-paper) and not transferable to other industries. Many are middle-age workers who are often regarded as too old to retrain or relocate, but too young to retire. They often wind up in low-wage, non-union jobs in personal services. The “disappearing middle” of the occupational distribution also means that it is more difficult for persons at the bottom of the distribution to train and move up the occupational ladder since those “middle steps” are now missing. They are often trapped at the bottom with little or no opportunity for upward occupational mobility.

These developments are an obvious source of growing wage and income inequality.

**Changes in Business Strategy and Organization:**

**Fissured Workplaces**

In an effort to explain how, in the last twenty-or-so years, workplaces have fundamentally (in his view) worsened, David Weil described the “fissuring” process where lead companies in many industries reduced their own large workforces in favour of a complicated network of smaller employers. New businesses are also being built on this same model. Weil describes the American economy, but the application to many countries around the world has been noted and commented upon in the academic literature. To some extent this trend has contributed to the labour market that we find today in Ontario.

In his book, Weil describes how lead companies, through contracting and outsourcing, reduce costs and place themselves in a position where they are not responsible for the indirect employment they create as they shift liability and cost to others. He describes how this shift to smaller companies that provide lead companies with products and services is a deliberate strategy to create intense competition at the level of employers below the lead company, and causes significant downward pressure on compensation while shifting responsibility for working conditions to third parties. Weil shows how this has created increasingly

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precarious jobs for employees who perform work for contractors and often for many levels of subcontractors.

Fissuring has occurred, in Weil’s view, as a result of operationalizing several distinct business strategies, one focused on revenue, another on costs and a third, which he describes as “the glue” which binds these strategies together. On the revenue side, a lead company will focus on building its brand and creating important new and innovative goods and services, while also coordinating the supply chains that make these possible. On the cost side, lead companies contract out or outsource activities that used to be done internally, creating intense competition among potential suppliers and contractors to provide the lead company with products or services.

The critical factor which allows the revenue and costs strategies to be integrated and which makes the overall business strategy successful is that the lead company can control the product and services provided by the contractors and subcontractors through new information and communication technology. That technology makes possible the creation of detailed complex standards to which contractors must abide, and also makes it possible for the lead companies to control and enforce all the standards on product quality, delivery, and other services that the contractors and subcontractors provide. Thus, contractors of the lead company, often in fierce competition with other similar companies, must comply with the rigorous supervision of the lead company. Under this strategy, the lead company avoids the legal responsibility that goes with directly employing the employees of the contractors and subcontractors, and any statutory or bargaining responsibility that goes with it. The smaller employers are therefore less stable themselves and often have more uncertain relationships with their own workers.

Franchising in some industries is another example of a business strategy where the lead company, as franchisor, avoids liability for the employees involved in the execution of the strategy and direct selling of the product, which is the core of its brand. The franchisor at the top of the supply chain may or may not be removed from the everyday operation of the business where issues of compliance with employment standards arise. However, most franchisors write and enforce detailed contracts, including legally binding manuals for franchisees that are constantly changing and relate to virtually every aspect of the business. Regulating the contractors and small companies that compete in various industries for the work of the lead companies can be difficult. The business model set up by the franchisor
may squeeze profit margins, putting pressure on franchisees not to comply with minimum standards. Moreover, unlike larger companies, these smaller businesses generally do not have a sophisticated human resource department that will ensure compliance with the law.

Clearly, the resources of government to monitor compliance are stretched in any event, and stretched even further by the number of small employers, especially if a meaningful number of small employers do not comply with employment standards. The low risk of complaints from employees, particularly from those with little or no bargaining power, combined with the low risk of inspection and low penalties by the government, makes noncompliance for some small employers simply a part of a business strategy.

In any event, fissuring is a worldwide phenomenon, and jurisdictions everywhere are struggling to find mechanisms as to how the law can respond effectively and appropriately. Our jurisdiction is no exception.

**Changing Workplaces as a Result of a Changing Workforce**

Changing pressures have also arisen from changing demographics and the changing nature of the workforce. The workforce in Ontario has become much more diverse with more women, visible minorities, new immigrants, Aboriginal persons and people with disabilities. Many workers in these groups are likely to be vulnerable and to live in persistent poverty.

Although it has levelled off in recent years, there has been a dramatic increase in the labour force participation of women (and particularly married women, including those with children). The participation of women in the workforce is now close to that of men. The two-earner family is now the norm and not the exception. There are also many single parents with child-care responsibilities. This has led to very important issues of work-life balance, and has important implications with respect to many workplace issues, including gender inequality in compensation, compensation for part-time work as compared to full-time work, irregular work scheduling, and the right to refuse overtime.

In addition, the workforce in Canada is both ageing and living longer and the trend towards earlier retirement reversed in the later 1990s, especially for males. As
larger portions of the workforce will be older, there will be higher age-related costs such as pensions and health related benefits as well as difficulties in retraining older workers for new jobs if the old jobs become obsolete. Many older workers who retire will later return to the labour force to non-standard jobs. Some will choose do so because they want the flexibility, especially if they already have a pension, but many will do so out of necessity because that is all that is available.

Immigration is especially important to Ontario where the majority of immigrants to Canada settle. Unfortunately, there is difficulty in integrating immigrants into the Canadian labour market in the sense that immigrants are unlikely to catch-up to the earnings of domestic-born workers who otherwise are similarly situated. The problem is getting more difficult for the more recent cohorts of immigrants who may never expect to fully catch up to the earnings of their comparable Canadian born workers. This has contributed to the increasing poverty rate amongst newly-arrived immigrants.

New immigrants are particularly likely to be vulnerable in the workplace because language barriers may keep them from knowing and exercising their rights. New immigrants may be less likely to complain about employment standards violations because they are economically vulnerable and fear reprisals. They are also less likely to work in unionized industries where the working conditions tend to be better and to be policed.

There continues to be a problem in Canada of students transitioning from school to work. Many students drop-out and this often has very negative implications for their employability and earnings. This has been especially true for Aboriginal youth. The problem of youth finding it difficult to successfully transition from school to work is compounded by the fact that the initial negative experience of not being able to get a job when first leaving school can lead to a longer run legacy of permanent negative “scarring” effects which can lead to lower lifetime earnings. Young people may react negatively to a society and labour market that will not accommodate them, and employers react negatively to the prospect of hiring young people who have a large gap in employment between their leaving school and their first job.
The Decline of Unions in the Private Sector

Union coverage rates have declined in Ontario from 29.9% in 1997 to 26.8% in 2015 for the public and private sectors combined. The decline in union coverage in the private sector has been particularly pronounced, falling from 19.2% in 1997 to 14.3% in 2015, whereas union coverage in the public sector has remained substantially higher and more stable (69.7% in 1997 and 70.7% in 2015). In Ontario’s private sector, the decline in union coverage has occurred primarily for men – it fell from 23.8% in 1997 to 16.0% in 2015; for women, there has been a smaller decline in union coverage, from 13.7% in 1997 to 12.3% in 2015. The decline in union coverage and density in the province is consistent with trends across all provinces. It has also occurred across all developed economies; in fact, the decline in Canada has been small relative to many other developed countries and especially the United States.

Much of the decline in the private sector is attributed to the movement of jobs away from industries and occupations with high union density (e.g., blue-collar work in manufacturing) to ones of low union density such as white-collar work (e.g., professional, technical and administrative) and service jobs. Some of the other alleged causes of the decline were the subject of many of the submissions to us. Some saw the decline as a result of greater employer resistance to unions, some as the result of specific changes to labour legislation that were detrimental to organizing, some as due to the union movement’s failure to modernize, adapt, and communicate effectively, while many others, especially in the academic community, point to the current law and the industrial relations system itself, which is based essentially on a “Wagner Act” model of bargaining and union organization by workplace. This model is criticized as largely irrelevant to the workplaces of the very large number of small employers which makes organizing, bargaining, and administering a collective agreement at the individual employer unit level not only inefficient but virtually impossible to effect.

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22 Statistics Canada, CANSIM Table 279-0025 – Number of Unionized Workers, Employees and Union Density, by Sex and Province (Ottawa: Statistics Canada, 2016); Statistics Canada, CANSIM Table 282-0078 – Labour Force Survey Estimates, Employees by Union Coverage, North American Industry Classification System, Sex and Age Group (Ottawa: Statistics Canada, 2016); Statistics Canada, CANSIM Table 282-0220 – Labour Force Survey Estimates, Employees by Union Status, Sex and Age Group, Canada and Provinces (Ottawa: Statistics Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on data from Statistics Canada’s Labour Force Survey. Union density refers to the proportion of employed workers who are union members, whereas union coverage includes both employees who are union members and employees who are not members of a union but who are covered by a collective agreement or a union contract. Overall union coverage rates are about two percentage points higher than union density rates.
In 2015, 87% of workplaces (defined as business establishments with employees) in Ontario had fewer than 20 employees and around 30% of all employees worked in such establishments.\(^\text{23}\) To the extent that it is impractical to organize, administer and bargain a collective agreement for so many small units of fewer than 20 employees (union coverage in such establishments in the private sector was only 7.2% in 2015), this means that about 87% of workplaces and almost 30% of the workforce are practically ineligible for unionization (not including construction).\(^\text{24}\)

The decline in the number of unionized employees and in the role of unions in the private sector makes the employment standards regime even more important for the future, as that is the regime that applies minimum standards today to 86% of workers in the private sector. This is even more the case if in the future there is a lack of practical possibility of union representation for many employees.

We must also consider whether the decline means that the structure of the industrial relations system has to be revised or rethought, including the rules governing organizing and the rules regarding the certification of unions. We must consider whether the existing system makes the expression of freedom of association through collective bargaining a meaningful possibility for very large numbers of private sector employees, or whether broader bargaining structures need to be considered.

Finally, we have to consider whether forms of employee voice other than unionization should be structured or made possible in the new workplaces of today.

**Who are the Vulnerable Workers and Where do They Work?**

Studies use the terms “precarious” and “vulnerable” in different ways. For example, the Law Commission of Ontario (LCO), which studied the need for reform of the ESA, used the term “vulnerable” to mean “those whose work can be described as ‘precarious’ and whose vulnerability is underlined by their ‘social location’ (that is, by their ethnicity, race, sex, ability and immigration status”). In other words, the

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24 Data on union coverage by establishment size was derived from Statistics Canada’s Labour Force Survey, upon special request by Ontario Ministry of Labour.
LCO restricted the use of the term “vulnerable” to a subcategory of precarious workers with particular characteristics determined by their social location.

While we do not criticize the LCO for their use of the term “vulnerable,” we also do not believe that the word “vulnerable” was used in our Terms of Reference in any such narrow sense. Indeed, we think “vulnerable” is used in our Terms of Reference to include workers who are, for example, low paid, full-time, without benefits and whose vulnerable status is not at all associated with their social condition. We think the term potentially includes low wage, full-time, non-ethnic, non-racialized, male, Canadian-born workers, who have no disability.

We understand that technically, for some, “precarious” employment means all work that has an element of contingency, and therefore it includes employees who are well paid, sometimes precisely because of the uncertainty inherent in their work. However, the LCO did not use the term in that way, and excluded from the category of “precarious” workers those who performed temporary work and were high earners, and did not exclude those who were full-time or voluntary part-time if they were in precarious employment by virtue of other factors such as low pay without benefits.

We agree with the LCO that, for our purposes, the term “precarious” should be restricted to include only those whose work is low paid. We agree with the LCO that low wages are a necessary condition for those who are considered precarious for the purposes of needing protection and we agree that we must include some employees in standard employment categories.

We believe that the lack of security inherent in a poorly paid full-time non-union minimum wage job without benefits often creates uncertainty and insecurity for the worker that justifies calling it precarious employment. Accordingly, we find that vulnerable workers for the purposes of this Review include those who are:

- working full-time for low wages, with minimal or no benefits, (such as no pension plan); or
- working for low wages without any or minimal benefits such as without a pension plan; and who:
  - work part-time involuntarily because they want more hours – about 30% of all part-timers;25 (referred to in the literature as involuntary part-time);

25 These are calculations made by the Ontario Ministry of Finance based on data from Statistics Canada's Labour Force Survey.
– work part-time voluntarily, in the sense that they do not want, or cannot avail themselves of, more hours;
– work for temporary help agencies or on a temporary basis directly for employers;
– work on term or contract;
– are seasonal workers or casual workers;
– are solo self-employed with no employees;
– are multiple jobs holders where the primary job pays less than the median hourly rate.

We have not yet attempted to quantify the number of workers in these categories, nor have we defined “low wages,” although we will attempt to do both before we issue our Final Report. However, we have no difficulty in concluding that there is a substantial number of vulnerable workers in precarious jobs in Ontario in need of protection.

What Social Groups are Overrepresented Among Vulnerable Workers?

A study for the LCO based on 2008 data identified social groups more likely to be found in precarious jobs in Ontario. It identified the relative proportions of precarious workers in different populations. Although that study used different definitions to determine who was precarious, we find that its results were in keeping with the literature, and more important, the general picture it paints is useful for us for policy purposes in broadly identifying the populations that most concern us.

The populations that are overrepresented in precarious jobs, in descending order, relative to the overall average of 33.1% according to Noack and Vosko’s definition of precarious jobs are:

- workers with less than high school diploma (61.4%);
- single parents with children under 25 (51.7%);
- recent immigrants (40.7%);
- women (39.1%);
- visible minorities (34.4%).

27 Ibid., 28.
Non-standard Employment

Non-standard employment as a category does not take into account aspects of precariousness or labour market insecurity such as low income, control over the labour process, and limited access to regulatory protection. However, there is an obvious correlation between the two, and non-standard employment as a category of employment is what is often written about and measured when precarious jobs are discussed and analysed. It is useful, therefore, to consider the nature and size in Ontario of non-standard employment and its component forms.

Components of non-standard work used in the literature, often in different combinations, include: temporary work (including term/contract, seasonal, and casual/other), solo self-employment (i.e., without paid help), part-time work, and/or multiple jobholding. Sometimes measures of non-standard employment involve a low-wage cut-off (e.g., encompass only those earning less than the median wage). At other times, they include persons at all pay levels. Some commentators include in the definition both those who work in part-time jobs voluntarily and those who involuntarily occupy such jobs because they want more hours or full-time work. Other commentators exclude voluntary part-timers, often acknowledging that the voluntary/involuntary distinction is murky as when people are constrained by pressures such as family responsibilities for childcare or eldercare.28

Some non-standard work is well paid, sometimes to compensate for the uncertainty of the work. Some workers prefer higher cash wages to fringe benefits since they already receive fringe benefits as the children or spouses of other workers. Some non-standard jobs are temporary stepping stones into more permanent jobs.

These differences and different analytical approaches to the definition of non-standard employment make it difficult to determine the exact extent of the phenomenon and the extent to which it has changed over time.

28 The distinction between voluntary and involuntary part-time work and whether it is meaningful is important in some contexts because involuntary part-time employment is often counted as part of non-standard work and voluntary part-time employment is often counted as part of standard employment. This distinction is not particularly relevant for us, however, since our conceptual approach to vulnerable workers in precarious jobs transcends that distinction.

Take for example two “voluntary” regularly scheduled part-timers, both single mothers, with eldercare family responsibilities. One is a tenured professional of eight years of service working in a unionized workplace 28 hours a week at an hourly rate over $44.00 plus pay in lieu of benefits of 15%. The second mother in equivalent circumstances works regularly 28 hours a week at a minimum wage job with no benefits. Both are working voluntarily in their jobs because of their childcare and eldercare responsibilities, but one is clearly vulnerable while the other is not. In this example the voluntariness or involuntariness of the employment is not particularly relevant.
In the literature the negative aspects of non-standard employment are well-documented. Such employment is generally characterized by low pay and low fringe benefits, little or no job security, limited training, few opportunities for career development and advancement, little control over one’s work environment, uncertainty over work scheduling, and little or no protection through unions. It can include large numbers of people who are recently unemployed, women, and members of visible minority groups, immigrants and youth. Also, some secure non-standard forms of employment also have a negative aspect such as, for example, poorly paid permanent part-time work.

Non-standard employment in Ontario constitutes more than a quarter of Ontario’s workforce: 26.6% in 2015. This type of employment comprises temporary employees (including term/contract, seasonal, and casual/other), solo self-employment (i.e., without paid help), involuntary part-time employees (i.e., part-time workers who say that they want full-time work, and/or multiple job-holding (where the main job pays less than the median wage).

Non-standard employment has grown over time, rising from 23.1% in 1997 to 26.6% in 2015.

From 1997 to 2015, non-standard employment grew at an average annual rate of 2.3% per year, nearly twice as fast as standard employment (1.2%).

Temporary employment grew at an annual rate of 3.5% from 1997 to 2015 – faster than the other component of non-standard employment.

Compared to workers in standard employment, those with non-standard jobs tend to have lower wages, lower job tenure, higher poverty rates, less education and fewer workplace benefits.

Poverty rates of workers in non-standard employment are two to three times higher than the poverty rates of workers in standard employment.

Real median hourly wages were about $24 for workers in standard employment relationships and $15 for workers in non-standard forms of employment in 2015.

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29 These are calculations made by the Ontario Ministry of Finance based on data from Statistics Canada’s Labour Force Survey, unless otherwise stated.
In 2011 most workers in standard employment had medical insurance (74.3%), dental coverage (75.7%), and life or disability insurance (68.1%), or a pension plan (53.8%). In comparison, less than one-quarter of workers in non-standard employment relationships had job benefits such as medical insurance (23.0%) or dental coverage (22.8%), while only 17.5% were covered by life and/or disability insurance or had an employer pension plan (16.6%).

In 2015, the median job tenure in non-standard employment was 32 months, less than half the tenure of standard jobs (79 months). The median length of time in temporary jobs was 13 months in 2014.

The industries with the highest incidence or concentration of workers in non-standard employment, in descending order of the percentage of employment in the industry in non-standard employment (relative to the average incidence of 26.6%) are:

- arts, entertainment and recreation (57.7%);
- agriculture (48.9%);
- real estate and rental and leasing (42.9%);
- business, building and other support services (40.0%);
- social assistance (35.7%);
- construction (33.8%);
- professional, scientific and technical services (32.9%);
- other services (32.6%);
- educational services (31.3%);
- accommodation and food services (30.2%);
- transportation and warehousing (28.6%); and
- retail trade (26.9%).

The distribution or share of non-standard employment by industry in descending order for 2015 is:

- retail trade (11.1%);
- professional, scientific and technical services (10.4%);
• construction (8.9%);
• educational services (8.7%);
• health care (8.4%);
• accommodation and food services (7.3%);
• business, building and other support services (7.2%);
• transportation and warehousing (5.0%);
• arts, entertainment and recreation (5.0%).

We now turn to consider in detail some specific aspects of non-standard employment and their characteristics in Ontario.

**Part-time Work**

It has long been the case that the standard five-day work week and permanent 35 to 40 hour job is not as common as it once was. For many years, businesses have been expected to be open longer and sometimes around the clock as they have to meet the demand for goods and services. Employers need part-time workers to staff business that have peaks and valleys of demand for goods and services. Part-time work is often sought by those who need to balance work with family responsibilities, or students going to school or older workers who want to remain active labour force participants or may not have enough money to live comfortably in retirement.

Between 1976 and 2015 part-time’s share of total employment increased from 13.5% to nearly 20% (19%) with almost all of that increase occurring in the earlier period between 1976 and 1993. A little under a third of these (30% of part-time employees and 5.6% of all employees), referred to as involuntary part-time employees, had to compromise and to accept part-time jobs because they could not find the full-time positions they wanted. Part-time work is highly concentrated in the retail trades and accommodation and food services industries.

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30 The distribution or share of non-standard employment refers to how non-standard employment is distributed across different industries. It reflects both the incidence of non-standard employment as well as the size of the industry. The arts, entertainment and recreation industry, for example, has the highest incidence of non-standard employment (57.7%) but because it is a small industry, it has a small share of non-standard employment (5%).

31 These are calculations made by the Ontario Ministry of Finance based on data from Statistics Canada’s Labour Force Survey.
There are now many more women in the workplace and work-life balance issues are of great importance especially to those with child and family responsibilities. While this affects many men as well, women comprise two-thirds of the part-time workforce and are therefore disproportionately affected by any negative impacts that arise from part-time work and scheduling issues. In 2015, median hourly rates for part-timers were $12.50, which is only slightly more than half of the $24.04 for full-timers, although these are not comparisons between workers in the same job and same establishment (we lack the relevant data).

This wage difference does not take into account that health and other benefits (which are mostly non-taxable compensation), that are often not available to part-time employees where they are available to full-time employees in the same establishment.

The dramatic inequality in rates of pay between full-time and part-time employees, especially when they do similar work in the same establishment, together with the lack of benefits available to part-timers have also created policy issues we must consider carefully.

Today, employers’ need for part-time workers to deal with fluctuating demand dovetails with the preference of many in the workforce for that type of work. However, the employers’ need to schedule work according to fluctuations in demand often conflicts with the need of employees for predictability in their work lives. There is tension between the employer need for flexibility and the employee need for predictability, including those having to work on-call or who are subject to last minute changes in work schedules. There is also a need to consider the employer need for flexibility and part-time employees with the employee need for flexibility in being able to move more easily from one status to another. All these issues need to be examined in our Review.


**Temporary, Casual and Seasonal Work**

The share of temporary employment in Ontario in 2015 was 10.8%, more than doubling from just under 5% in 1989. Temporary employment, including limited-term contracts, has been the fastest growing component of non-standard employment, expanding at an annual rate of 3.5% between 1997 and 2015.

Issues have been raised around the insecurity of limited-term contracts. Sometimes there is no issue regarding renewal because the contracts are genuinely for short duration, as in the case of a single project. Often they are renewed (sometimes automatically or consistently) over many years so that they appear to be almost permanent. Nevertheless, in many situations there is uncertainty and anxiety about whether there will be renewal, and in some professions and disciplines, permanent employment with the salaries, benefits, and security that come with it seems remote and impossible to attain.

Over the last twenty or more years in Ontario, temporary help agencies which provide staffing services and “assignment workers” to clients have become ubiquitous, giving rise to a host of concerns, among them the phenomenon of “permatemps,” and sometimes even situations where the entire workforce of a particular business is composed of “temporary” assignment workers. There have been concerns identified over the economic incentives for clients to use temporary workers for more dangerous work, and the lack of meaningful requirements to reintegrate those injured workers into the workplace. Indeed, this category of workers are part of an inherently insecure triangular relationship between agencies, clients and the assignment workers where they generally receive lower pay than others performing the same work, face immediate removal from the workplace, and constant uncertainty. Although Ontario made legislative changes in 2009 to regulate temporary help agencies, many important issues and problems remain.

There has always been a segment of the work force that has provided their services on a casual basis, and issues of pay and scheduling are raised for

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36 The available data does not enable separating out temporary agency assignment workers from temporary, casual, and seasonal workers in general.
this group as they are for part-timers. Also, there has always been a part of
the workforce that works on a seasonal basis in certain industries such as
construction and agriculture where precarious work and vulnerable workers are
often found.

Finally, there are also workers holding multiple jobs, often because their main job
does not pay sufficient wages. The number of multiple job holders accounts for
about 5.3% of the workforce in 2014, up from 2.2% in 1976. Three out of every five
multiple job holders (62%) report earnings below the median hourly wage. Women
are more likely than men to be in multiple jobs (59.3%) and in jobs with multiple
non-standard characteristics (58.4%).

Self-employment

There are two categories of self-employment, one category of workers who have
their own paid help and the other category where the person has no paid help.
The entire category grew from 10.5% in 1976 to 16.1% in 1997 remaining roughly
constant to 15.7% by 2015. Most of the growth was in self-employment without
paid help, and that group was 6% of the workforce in 1976, 10.6% in 1997, and
10.9% in 2015. Self-employment with paid help has been fairly constant over the
full period, increasing slightly from 4.4% in 1976 to 5.5% in 1997, then declining
slightly to 4.8% in 2015.

Solo self-employment is classified as non-standard employment; self-employment
with paid help is categorized as standard employment. Some of this growth is
genuinely a result of entrepreneurial efforts by persons who start small business
and employ others, while many are genuine entrepreneurial efforts by solo
consultants and “freelancers.” Many workers now work from home or remotely,
and/or are deemed by those to whom they provide services to be independent
contractors; therefore they do not have access to benefit plans, or statutory
benefits like maternity and paternity leave.

Some of the growth in self-employment is tied to the growth in project work, or to
a growth in technological expertise by individuals who can provide their specialized

37 These are calculations made by the Ontario Ministry of Finance based on data from Statistics
38 Statistics Canada, CANSIM Table 282-0012 – Labour Force Survey Estimates, Employment
by Class of Worker, North American Industry Classification System and Sex (Ottawa: Statistics
Canada, 2016). These are calculations made by the Ontario Ministry of Labour based on
Statistics Canada’s Labour Force Survey. The self-employed without paid help category
includes unpaid family workers.
services to many businesses. Some of the growth is the result of the fact that many employers do not want to make permanent commitments to employees. Some of the growth is the result of cyclical tough economic times and represents for many of the self-employed a poor second choice reflecting the absence of good employment opportunities. Some of the growth also represents a natural change in practices in some industries where people can now work online at home, and “freelance.”

In contrast, some of the growth in self-employment is the result of deliberate misclassification by businesses that do not wish to incur liability for employees and wish to shed liability for mandatory deductions and contributions to public pensions, employment insurance, and workers compensation schemes, together with shedding responsibility for employment standards such as maternity and parental leaves. Also, some of the growth is from a genuine desire by the providers of the service to get tax advantages that might not be available if they operated as employees, despite the fact that the dependency inherent in the relationship makes the providers of the service much closer to being employees than to being really in business for themselves. Some of this growth is highly controversial with changes in industry practice (such as the change from employed taxi drivers to allegedly independent providers who provide services to Uber).

**Tenure of Employment in the New Workplace**

Expected long tenure with one employer may be high for incumbent older workers, but many new entrants to the workforce cannot expect to have “lifetime” long-tenured jobs and a semblance of job stability with the same, often unionized, employer as did earlier generations. Younger workers can expect to start off in limited-term contracts or in internships (sometimes unpaid), or self-employment, and can expect to change careers often working for different employers.

**Conclusions**

Clearly there is a wide array of pressures and trends that are affecting the workplace. These were articulated to us in the various hearings and submissions provided across the province and in the research commissioned for this Review.

In many cases these pressures conflict, as when employer needs for flexibility in work scheduling conflicts with employee needs for some certainty in scheduling to facilitate work-life balance. In other cases, the pressures had the potential to benefit both employers and employees, as when some elements of non-standard
employment met the needs of employers for flexibility and the needs of some workers to balance work and other personal or family commitments.

These various trends and pressures on the workplace highlight the need for reform of employment standards and labour relations legislation and especially to provide protection to vulnerable workers and those in precarious work situations. But they also highlight the complex trade-offs that are involved and the difficulties in navigating them.
Purpose of the Labour Relations Act

The Supreme Court of Canada has often noted that freedom of association protects the rights of employees to associate for the meaningful pursuit of collective workplace goals. The purpose of freedom of association in the workplace is “to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties.”

The Labour Relations Act, 1995 (LRA) is the primary statute regulating labour relations for most Ontario private and public sector workplaces. The LRA contains provisions pertaining to:

- the certification and decertification of unions;
- the negotiation, content and operation of collective agreements; and
- the regulation of legal strikes and lock-outs.

These issues are important both to the parties directly involved in collective bargaining and to the public.

4.1 Legislative History of the LRA

The North American model of labour relations is based on the National Labor Relations Act (NLRA), better known as the “Wagner Act”, enacted in the United States in 1935. The essential features of the Wagner Act model have been described as follows:

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The Wagner Act model of labour relations permits a sufficiently large sector of employees to choose to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of “bargaining units” and the processes of certification and decertification – all under the supervision of an independent labour relations board – ensure that an employer deals with the association most representative of its employees.40

In 1943, Ontario enacted the Collective Bargaining Act, which adopted certain Wagner Act features (such as a process for union certification). The Collective Bargaining Act was in effect for only six months before being displaced by the federal Wartime Labour Relations Regulations – Order in Council P.C. 1003 – which was introduced in early 1944 under the War Measures Act. This federal cabinet order contained a comprehensive framework for recognizing unions, which informs our laws to this day. Influenced by the Wagner Act, the central features of this framework were the following:

- non-managerial employees (other than excluded categories) were given the right to form and join unions;
- actions by employers against employees exercising the right to unionize were prohibited;
- labour boards, not courts, were authorized to certify unions as bargaining representatives for appropriate bargaining units, on proof of majority support;
- once certified, a union became the exclusive bargaining representative of all employees in the bargaining unit, whether or not they were union members;
- employers had to bargain in good faith;
- before resorting to economic sanctions, the parties were required to participate in government-sponsored conciliation; and
- during the term of a collective agreement, the parties could not engage in strikes or lock-outs, but instead were required to submit differences arising under the collective agreement to a neutral third party for grievance arbitration.

Following WWII, each province introduced its own legislation, based on the P.C. 1003 model. In 1950, Ontario introduced the *Labour Relations Act*. This legislation, building on P.C. 1003, established the legal foundation for collective bargaining in the province.

Post-war, labour relations in Canada tried to balance the interests of capital and labour within a free market system. The resulting legal compromises, sometimes controversial, provided the foundation for expanded workers’ rights. Generally the approach after 1950 featured incremental changes.

Initially, the Ontario Labour Relations Board (OLRB) had no enforcement mechanism, other than to grant consent to prosecute. In 1960, however, amendments to the Act gave the OLRB authority to order the reinstatement of employees terminated as a result of unfair labour practices. In 1970, further reforms included the union’s duty of fair representation and the OLRB’s accompanying remedial power to respond to complaints that a union had breached this duty. The level of support required for unions to obtain certification without a vote was increased at this time from 55% to 65%.

In 1975, legislative amendments included:

- a reduction in the membership evidence requirements for card-based certification (to 55% from 65%);
- provision for interim certification;
- the reversal of the legal onus in unfair labour practice complaints;
- the reversal of the evidentiary onus in successor and related employer applications;
- an expansion of the OLRB’s remedial authority in dealing with unfair labour practices and unlawful work stoppages; and
- an extension of bargaining rights to dependent contractors.

In the early 1990s, a former Chair of the OLRB observed that up to then “Ontario [had] never been the leader of labour law reform and has been content to let other jurisdictions do the experimentation. On the other hand, once it was clear that such experiments did not result in industrial chaos, Ontario was prepared to move reasonably quickly to adopt such reforms.” 41

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41 Donald D. Carter, *Labour Law Reform: Radical Departure or Natural Evolution?* (Kingston: Industrial Relations Centre, Queen’s University, 1992), 6.
Although prior to 1993, there were occasional amendments addressing specific issues, major changes to the LRA were introduced in 1993 and 1995 and, most recently, in 2005. Over this period, the most significant changes to the legislation have accompanied changes in the governing political party.

**1993 Amendments**

Following the 1990 election, the Ontario government announced that it planned to reform labour legislation to “ensure that workers can freely exercise their right to organize”. An outside committee of advisors representing management and labour, and chaired by a neutral arbitrator, was formed. The committee was asked to consider a number of issues within a one-month time frame. The management and labour representatives on the committee were not able to reach consensus. As a result, separate reports were filed. Subsequently, the government released a Discussion Paper on labour law reform, which included 41 preferred options for reform, as well as additional options that were set out for discussion, without indicating a preferred position. The Minister of Labour then held hearings in 11 cities, meeting over 300 groups and receiving 447 written briefs. Legislation was introduced in June 1992 and took effect in January 1993.

In the 1993 amendments, the key features were:

- the LRA’s coverage was expanded to include domestic workers and certain professionals (e.g., lawyers, architects, dentists);
- full- and part-time employees were to be included in the same bargaining unit at the time of certification;
- the OLRB was given the power to consolidate bargaining units of the same employer represented by the same union;
- expedited hearings were provided for complaints arising from discipline or discharge during organizing campaigns, and the OLRB was given the power to issue interim orders;
- limited access to third party property (e.g., shopping malls, industrial parks) for organizing and picketing purposes;
- access to remedial certification was expanded, whereby the union no longer had to demonstrate adequate collective bargaining support in

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42 For example, amendments were introduced providing for expedited arbitration (1979), compulsory check-off of union dues and employer initiated last-offer votes (1980), the prohibition of professional strike breakers (1983), and first agreement arbitration (1986).
order to trigger the remedy in circumstances where the employer, through a violation of the Act, had made it unlikely that the true wishes of the employees could be ascertained;

- the use of replacement workers was prohibited;
- employees were given just cause protection in cases of disciplinary action or dismissal before the effective date of a first collective agreement following certification;
- employees were given just cause protection during strikes, lock-outs, or the open period until a renewal collective agreement was in operation or until the union was decertified;
- employers and unions were required to bargain an adjustment plan in cases of mass terminations or plant closures; and
- after a strike, employers were required to reinstate returning employees to their former positions, giving striking employees priority over anyone who performed the work during the strike.

**1995 Amendments**

Following the change in government in 1995, the LRA was again extensively revised. A letter was sent to union and employer stakeholders asking them to respond in writing to a limited number of issues. Subsequent legislation repealed all of the substantive changes introduced in 1993 and introduced significant amendments including:

- replacing the card-based certification process by compulsory certification votes;
- lowering the threshold for employees to apply to decertify a bargaining agent;
- introducing requirements for strike and ratification votes; and
- removing successor rights for crown employees (restored in 2006).

**Further Amendments in 1998 and 2000**

In 1998, additional changes were made that:

- removed the OLRB’s power to grant remedial certification and remedial dismissal and added the power to order a second representation vote;
permitted employers, in an application for certification, to challenge a union’s estimate of the number of employees in a proposed bargaining unit; and

amended the OLRB’s interim order powers to oust the application of the 
Statutory Powers and Procedure Act.

In 2000, changes to the LRA were made that:

required employers to post and distribute information on the decertification process;

introduced union salary disclosure for all union officials and employees earning more than $100,000 annually;

created a mandatory certification bar of one year, applicable to any union, with respect to the same jobs or positions;

extended the “open period” for decertification;

required the OLRB to deal with decertification applications before dealing with, or continuing to deal with, applications for first contract arbitration; and

required separate strike and ratification votes in first contract situations.

2005 Amendments

After a change in government, amendments to the LRA in 2005 included:

reintroducing the OLRB’s power to certify a union where an employer has violated the LRA during a union organizing campaign;

reintroducing the OLRB’s power to make certain types of substantive interim orders; and

repealing the union salary disclosure provisions of the LRA and the requirement that unionized employers post and distribute information on the decertification process to their employees.
4.2 Scope and Coverage of the LRA

4.2.1 Coverage and Exclusions

**Background**

The LRA does not apply to:

- a domestic worker employed in a private home;
- a person employed in hunting or trapping;
- an agricultural employee (covered by the *Agricultural Employees Protection Act, 2002*);
- a person employed in horticulture (subject to certain conditions and exceptions);
- a provincial judge; or
- a person employed as a labour mediator or labour conciliator.

In addition, the LRA provides that no person shall be deemed to be an employee:

- who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity; or
- who, in the opinion of the OLRB, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

Finally, the LRA either does not apply at all to, or its application is modified for, certain groups of employees in the public sector who are covered by specialized legislation. In particular:

- police (covered by the *Police Services Act and the Ontario Provincial Police Collective Bargaining Act, 2006*);
- professional firefighters (covered by the *Fire Protection and Prevention Act, 1997*);
- employees of colleges of applied arts and technology (covered by the *Colleges Collective Bargaining Act, 2008*);
- employees in teacher bargaining units (covered by the *School Boards Collective Bargaining Act, 2014*); and
- crown employees (covered by the *Crown Employees Collective Bargaining Act, 1993*).
These public sector employees have separate labour relations legislation falling outside the scope of this Review.

The issues related to agricultural and horticultural employees are addressed separately, below.

In the late 1960s, the Task Force on Labour Relations (better known as the Woods Task Force) reviewed the exclusions that then existed under the federal legislation (broadly similar to what exists in the LRA today) and could find no justification for any of them when measured against the principle of freedom of association.\(^{43}\) The Woods Task Force recommended that the statutory right to bargain collectively should be extended to:

- supervisory and junior managerial employees;
- employees working in a confidential capacity in matters relating to labour relations;
- licensed professionals;
- dependent contractors\(^ {44}\);
- agricultural workers; and
- domestic workers.

When the *Canada Labour Code* was subsequently enacted in 1973, it generally reflected this advice, providing an expansive definition of “employee”.

In 1993, the *Ontario Labour Relations Act* was amended and the list of exclusions under the legislation was revised. The new law allowed architects, dentists, land surveyors, legal professionals and some doctors\(^ {45}\) to apply for certification. A bargaining unit consisting solely of employees who were members of the same profession was deemed to be appropriate for collective bargaining, but the OLRB could include professionals in a bargaining unit with other employees if it was satisfied that a majority wished to be included in a broader unit. The 1993 amendments also repealed the exclusion of domestic workers from the Act. The amendments did not change the requirement that in order to be certified, a union

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\(^{44}\) Note that dependent contractors are covered as employees under the LRA.

\(^{45}\) With respect to doctors, the 1993 amendment did not apply to a physician subject to the *Ontario Medical Association Dues Act, 1991* or to an intern or resident as defined in that Act.
must represent a bargaining unit of more than one person working for a single employer.

In addition, changes to the law in 1993 and 1994 addressed labour relations for agricultural workers, as discussed in more detail, below.

In 1995, the law was changed again, and the previously existing exclusions, including those for professionals and domestic workers, were reintroduced.

In reviewing the exclusions within the LRA, the circumstances with respect to each group need to be carefully considered. For example, the situation of domestic workers is unique. That workforce is overwhelmingly female, comprising many women who have come to Canada from low-income regions, and who face inherent vulnerability in the labour market. The historical exclusion of this group was apparently based on the belief that domestic workers formed an intimate social bond with the private households they worked for, and that the possibility of unionization would be an inappropriate barrier to this necessary bond.46

The situation of professionals such as doctors and lawyers is quite different. Professionals were seen as having adequate protection through their self-regulated professional bodies. As well, their exclusion seemed appropriate given the conflict between a professional’s continuing duty and obligation to his or her patients or clients and the right to strike.

Certainly, many question whether the historical rationales for excluding these groups from the LRA continue to be relevant. There are, for example, 19 non-health professions and 27 regulated health professions in Ontario; however, only architectural, dental, land surveying, legal and medical professions are excluded under the LRA.

In the case of managerial employees, different issues and considerations arise. The traditional and prevailing reason for excluding this group of employees from collective bargaining has been to ensure that the employer can effectively direct the functions of the enterprise. Managers, who have responsibility to direct and control employees, would have a conflict of interest if included in bargaining units. For bargaining unit employees, the exclusion of managers ensures that the union remains independent of employer influence.

In 1993, no changes were made to the managerial exclusion notwithstanding that a Ministry of Labour Discussion Paper released in 1991 had proposed an amendment to permit supervisory employees to bargain collectively in bargaining units separate from those of other employees.

The exclusion of “persons employed in a confidential capacity in matters relating to labour relations” has attracted little commentary.

**Other Jurisdictions**

All Canadian jurisdictions exempt those performing management functions or those employed in a confidential capacity in matters relating to labour relations from the definition of “employee” under their respective labour legislation (although there is some variation in the scope of the managerial exclusion).

The exclusion of hunters and trappers is unique to Ontario; the reason for this is unclear. The exclusion of land surveyors is also unique to Ontario. In other Canadian provinces, only Alberta, Nova Scotia and Prince Edward Island exclude regulated professions in a manner similar to Ontario,47 and only Alberta and New Brunswick exclude domestic workers.

**Submissions**

Any review of current exclusions must be informed by the recent jurisprudence from the Supreme Court of Canada regarding freedom of association under the Charter (described in more detail in the Chapter on Guiding Principles, Values and Objectives). Suffice it to say that in *Mounted Police Association of Ontario v. Canada (Attorney General)*,48 the Court made it clear that freedom of association protects:

- the right to join with others and form associations;
- the right to join with others in the pursuit of other constitutional rights; and
- the right to join with others to meet the power and strength of other groups or entities on more equal terms.

In the context of labour relations, the Court made it clear that these principles apply to all individuals and operate to guarantee the right of employees to

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47 Legal professionals are excluded in Quebec. Alberta also excludes nurse practitioners.

associate meaningfully in pursuit of collective workplace goals, including collective bargaining.

With the exception of agricultural and horticultural workers (see below), the LRA exclusions have not been a dominant issue in our consultations.

The submissions received regarding the LRA exclusions can be summarized as follows:

- some lawyers working for Legal Aid Ontario would like to have the ability to bargain collectively with their employer;
- several labour organizations were of the opinion that the exclusions in the LRA, not already subject to a separate collective bargaining regime, should be abolished;
- a number of stakeholders suggested removing the exclusion of domestic workers from the LRA; and
- labour organizations would generally support expanding the coverage of the LRA but agree that managers and persons employed in a confidential capacity in matters related to labour relations ought to remain excluded.

**Options:**

1. Maintain the status quo.
2. Eliminate some or most of the current exclusions in order to provide the broadest possible spectrum of employees access to collective bargaining by, for example:
   a) permitting access to collective bargaining by employees who are members of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity; and
   b) permitting access to collective bargaining by domestic workers employed in a private home.\(^{49}\)

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\(^{49}\) It is understood that for domestic workers, a collective bargaining model that is different than the *Wagner Act* model may have to be put in place to give them meaningful access to collective bargaining. There is some discussion of other models in the section below on broader-based bargaining.
4.2.1.1 Agricultural and Horticultural Employees

**Background**

The LRA does not apply to:

- agricultural employees within the meaning of the *Agricultural Employees Protection Act, 2002*; or

- a person who is employed in horticulture by an employer whose primary business is agriculture or horticulture.50 (“Horticulture” is not defined in the LRA, but has been interpreted by the OLRB to include activities such as gardening, landscaping, nurseries, growing trees, etc.)

**The Agricultural Labour Relations Act, 1994**

Until 1994, agricultural and horticultural workers were excluded from Ontario’s labour relations regime. In 1994, the *Agricultural Labour Relations Act, 1994* (ALRA), was enacted by the government following the recommendations in the reports of the Task Force on Agricultural Labour Relations, namely, the Report to the Minister of Labour (June 1992) and the Second Report to the Minister of Labour (November 1992).

The government adopted most of the Task Force’s recommendations in developing the ALRA. Provisions of the ALRA included:

- a preamble indicating that it was in the public interest to extend collective bargaining rights to the sector and that agriculture and horticulture sectors have certain “unique characteristics” (e.g., seasonal production, climate and time sensitivity, perishable nature of agricultural and horticultural products, the need to maintain continuous processes to ensure the care and survival of animal and plant life);

- a prohibition against work stoppages (bargaining disputes that could not be resolved in bargaining or mediation were referred to final offer selection or, with the agreement of the parties, to voluntary interest arbitration);

- incorporation by reference of many key provisions of the LRA (subject to certain modifications), including provisions relating to:
  - certification and decertification of bargaining agents;

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50 This exclusion does not capture horticultural employees who are employed by a municipality or who are employed in silviculture.
– duty to bargain in good faith;
– successor rights;
– unfair labour practices; and
– enforcement by a special agriculture industry division of the OLRB;

• restrictions on the certification of bargaining units containing seasonal workers (such bargaining units could be certified only if a regulation allowed it and the unit contained only seasonal employees); and

• protections to ensure that family members could perform work for the employer, despite any provisions in a collective agreement, a union constitution, the ALRA, or the LRA, as it then was.

The ALRA was in effect from June 1994 to November 1995. During that period, the United Food and Commercial Workers Union was certified as the bargaining agent for a single bargaining unit in Leamington, Ontario, and filed two other certification applications.

In 1995, the ALRA was repealed in its entirety and the Labour Relations and Employment Statute Law Amendment Act (Bill 7) was enacted. In addition to terminating any agreements reached under the ALRA, Bill 7 terminated any certification rights of unions. Bill 7 was enacted pursuant to an initiative of the government and repealed the only statute ever to extend union and collective bargaining rights to Ontario’s agricultural workers. The net effect of Bill 7 was that agricultural and horticultural workers were again excluded.

Constitutionality of Agricultural Exclusion – Dunmore v. Ontario (Attorney General)

In Dunmore v. Ontario (Attorney General), the Supreme Court of Canada considered the constitutionality of the exclusion of agricultural workers from the LRA. In Dunmore, farm workers challenged the exclusion as a violation of their freedom of association under the Canadian Charter of Rights and Freedoms. They argued that Bill 7, combined with section 3(b) of the LRA, prevented them from establishing, joining and participating in the lawful activities of a union, denying them a statutory protection enjoyed by most occupational groups in Ontario.

The Court quoted from the lower court decision in which Justice Sharpe stated that the government of Ontario has:

…“a very different perspective from that of its predecessor on appropriate economic and labour policy” and, indeed, rejects any attempt to include agricultural workers in its labour relations regime. Moreover, the affidavit evidence in this case “presents in stark contrast two conflicting views of an appropriate labour relations regime for agricultural workers in Ontario,” one denying the existence of any “industrial relations rationale” for the current exclusion, and the other maintaining that the collective bargaining model of the ALRA or the LRA would unduly threaten the province’s farm economy (pages 201-2). This latter view is evidently shared by the Legislature of Alberta, which is the only other Canadian province to exclude agricultural workers from its labour relations regime.

In Dunmore, in discussing the scope of state responsibility with respect to freedom of association, the Court asked whether:

…it is reasonable to conclude that the exclusion of agricultural workers from the LRA substantially interferes with their fundamental freedom to organize. The inherent difficulties of organizing farm workers, combined with the threats of economic reprisal from employers, form only part of the reason why association is all but impossible in the agricultural sector in Ontario. Equally important is the message sent by section 3(b) of the LRA, which delegitimizes associational activity and thereby ensures its ultimate failure. Given these known and foreseeable effects of section 3(b), I conclude that the provision infringes the freedom to organize and thus violates section 2(d) of the Charter.
The Court declared the exclusion of agricultural workers from the LRA to be invalid and gave the government eighteen months to implement amending legislation if the government saw fit to do so. In providing this remedy, the Court neither required nor forbade the inclusion of agricultural workers in a full collective bargaining regime, whether in the LRA or a special regime applicable only to agricultural workers such as the ALRA. In deferring to the Legislature, the Court stated that the “question of whether agricultural workers have the right to strike is one better left to the legislature, especially given that this right was withheld in the ALRA.” (See paragraph 68).

In 2002, in response to Dunmore, the Ontario Legislature enacted the Agricultural Employees Protection Act, 2002 that came into force on June 17, 2003.

**The Agricultural Employees Protection Act, 2002**

Employees employed in agriculture are covered by the Agricultural Employees Protection Act, 2002 (AEPA). Horticultural workers remain excluded from the LRA but have no separate labour relations regime.

Agriculture is defined in the AEPA as including:

> …farming in all its branches, including dairying, beekeeping, aquaculture, the raising of livestock including non-traditional livestock, furbearing animals and poultry, the production, cultivation, growing and harvesting of agricultural commodities, including eggs, maple products, mushrooms and tobacco, and any practices performed as an integral part of an agricultural operation, but does not include anything that was not or would not have been determined to be agriculture under section 2 of the predecessor to the LRA as it read on June 22, 1994.

An employer under the AEPA is defined as “(a) the employer of an employee, and (b) any other person who, acting on behalf of the employer, has control or direction of, or is directly or indirectly responsible for, the employment of the employee.”

The AEPA creates a separate labour relations regime for agricultural workers. The AEPA grants agricultural workers the right to form and join an employees’ association, to participate in its activities, to assemble, to make representations to their employers through their association on their terms and conditions of employment and the right to be protected against interference, coercion and discrimination in the exercise of their rights. The employer must give an association
the opportunity to make representations respecting terms and conditions of employment and the employer must listen to those representations or read them. Complaints under the AEPA can be filed with the Agriculture, Food and Rural Affairs Appeals Tribunal. The Act falls under the purview of the Ministry of Agriculture, Food and Rural Affairs.

The AEPA does not contain a statutory requirement for the employer to bargain in good faith with an employees’ association. However, it should be noted that in Ontario (Attorney General) v. Fraser, a majority of the Supreme Court of Canada held that section 5 of the AEPA, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer.\textsuperscript{52} The AEPA does not provide for strikes, lock-outs or for any other dispute resolution mechanism.

\textit{Constitutionality of the AEPA – Ontario (Attorney General) v. Fraser}

The constitutionality of the AEPA was upheld by the Supreme Court of Canada in Fraser. In doing so, the Court noted that no effort had been made to resort to the Agriculture, Food and Rural Affairs Appeals Tribunal and that the Tribunal “should be given a fair opportunity to demonstrate its ability to appropriately handle the function given to it by the AEPA.” At paragraph 112, the Court stated:

\begin{quote}
Section 11 of the AEPA specifically empowers the Tribunal to make a determination that there has been a contravention of the Act, and to grant an order or remedy with respect to that contravention. The Tribunal may be expected to interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way.
\end{quote}

In Fraser, the Court reaffirmed that section 2(d) of the Charter confers the right to a meaningful process of collective bargaining, understood as meaningful association in pursuit of workplace goals, and explained that such a process includes the employees’ rights to join together, to make collective representations to the employer, and to have those representations considered in good faith.

The Court also reaffirmed that a meaningful process of collective bargaining guarantees a process rather than an outcome or access to a particular model of labour relations. In other words, the Wagner Act is a particular model of collective

\textsuperscript{52} Ontario (Attorney General) v. Fraser, (2011) 2 SCR 3, paras 102-106.
bargaining but not a necessary model, to ensure the right of employees to meaningfully associate in pursuit of collective workplace goals.

**Right to Strike – Saskatchewan Federation of Labour v. Saskatchewan**

In *Saskatchewan Federation of Labour v. Saskatchewan*, the Supreme Court of Canada further elaborated on what is meant by the *Charter* guarantee in section 2(d) to a meaningful process of collective bargaining.

The Court was required to deal with the question of whether designated employees could be prohibited by legislation from striking. In deciding this issue, the Court relied on numerous international obligations including Canada’s international human rights obligations, about which the court stated, at paragraph 62:

> Canada’s international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. These obligations led Dickson C.J. to observe that:

> …there is a clear consensus amongst the [International Labour Organization] adjudicative bodies that [Convention (No. 87) concerning freedom of association and protection of the right to organize (68 U.N.T.S. 17 (1948))] goes beyond merely protecting the formation of labour unions and provides protection of their essential activities – that is of collective bargaining and the freedom to strike. [Alberta Reference, at page 359].

The Court held that the right to strike is an essential part of meaningful collective bargaining and concluded that while public sector employees who provide essential services may perform functions which, arguably, should be afforded a less disruptive mechanism for the resolution of collective-bargaining disputes, because the Legislature abrogated the right to strike and provided no alternate dispute resolution mechanism, the prohibition was unconstitutional. At paragraphs 25 and 81, the Court stated:

> Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative

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mechanism, it would more likely be justified under s. 1 of the Charter. In my view, the failure of any such mechanism in the PSESA is what ultimately renders its limitations constitutionally impermissible.

The trial judge concluded that the provisions of the PSESA “go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike”. I agree. The unilateral authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the trial judge’s conclusion that the PSESA impairs the section 2(d) rights more than is necessary [Emphasis in original].

Right to Strike – Post Saskatchewan Federation of Labour v. Saskatchewan

The AEPA neither prohibits nor provides a right for agricultural workers to strike and does not provide for any alternate dispute resolution if their “discussions” reach an impasse.

It is obvious that strikes by agricultural workers could have significant adverse impact on planting, growing and harvesting, on animal health and safety, on bio-security and on a host of other important interests. In Dunmore, it will be recalled that the Supreme Court of Canada stated: “the question of whether agricultural workers have the right to strike is one better left to the legislature…” (See paragraph 68).

Other Jurisdictions

For the most part, other Canadian jurisdictions include agricultural and horticultural workers under their general labour relations statutes.

Alberta has recently passed legislation that will extend labour relations coverage to agricultural workers (these changes are not yet in effect). Our understanding is that the Alberta government intends to consult with stakeholders in the sector with a view to developing sector-specific regulations.

Before 2014, Quebec’s Labour Code provided, in section 21, that: “Persons employed in the operation of a farm shall not be deemed to be employees for the purposes of this division unless at least three of such persons are ordinarily and continuously so employed.” The alleged purpose of this provision was to exempt
small farms from the provisions of the Code. However, the effect of section 21 of the Code was that, on a farm that employed two full-time workers and many seasonal employees, the seasonal workers were not covered by the provisions of the Code and, therefore, were effectively denied the benefits of organizing and of collective bargaining. Section 21 of the Code was challenged in the Quebec Superior Court and was found to be unconstitutional.

In response to the Superior Court decision, in 2014, the current government amended the Code implementing “Special Provisions Applicable to Farming Businesses”. The Special Provisions are modeled after the Ontario AEPA. They are applicable to agriculture operations where fewer than three full-time employees are ordinarily and continuously employed. The Special Provisions require an employer to give an association of employees of the farming business a reasonable opportunity to make representations about the conditions of employment of its members. The employer must examine the representations and discuss them with the association’s representatives. If representations are made in writing, the employer must give the association of employees a written acknowledgement of having read them. Diligence and good faith must govern the parties’ conduct at all times. As with the AEPA, there are no provisions for a strike or lock-out and no other dispute resolution mechanism is provided.

In farming businesses where three or more employees are ordinarily and continuously employed, the general provisions of the Labour Code apply allowing for certification of bargaining agents and collective bargaining. As with the former section 21 of the Code, the fact that many seasonal workers may be employed in a farm business does not trigger the application of the general provisions of the Code relating to the rights of employees to join a union and engage in collective bargaining. Those rights are triggered only where three full-time employees are ordinarily and continuously employed.

**Submissions**

The exclusion of agricultural employees from the LRA was the focus of significant attention during the consultations.

Labour and employee advocacy groups contend that the AEPA is ineffective and that agricultural employees should be covered by the LRA. They contend that access to traditional collective bargaining is necessary to give meaning to their constitutional rights under section 2(d) of the Charter. Unions and worker advocates assert that access to collective bargaining is essential if working
conditions for vulnerable agricultural employees are to improve. Some groups also recommended that the exclusion of horticultural employees from the LRA should be eliminated.

We heard from employers that the status quo should be maintained. They argue that the Supreme Court of Canada in Fraser upheld the constitutionality of the AEPA and that there is no reason to change that model for agricultural employees. They contend that the LRA model of collective bargaining, with the right to strike, should not be applied to the agricultural sector whose unique characteristics remain constant. As outlined in the ALRA, 1994, these unique characteristics include:

- seasonal production;
- climate and time sensitivity;
- the perishable nature of agricultural and horticultural products; and
- the need to maintain continuous processes to ensure the care and survival of animal and plant life.

Given the unique nature of the agricultural business, some employer stakeholders expressed that extending LRA coverage to employees in the sector would tip the balance of power in favour of employees and unions at the expense of employers who are uniquely vulnerable to strike action. Employers asserted that farmers are price-takers, not price-makers and that competition from outside Canada is already a threat to Canadian farmers and to the economic viability of farming operations in Ontario. Employers submit that extended coverage under the LRA for agricultural workers will worsen their competitiveness and unduly threaten Ontario’s important farm economy.

**Options:**

1. Maintain the status quo by leaving the existing LRA exemption for agricultural and horticultural employees in place and maintaining the AEPA for agricultural workers.

2. Eliminate the LRA exclusions for agricultural and horticultural sectors under the LRA and repeal the AEPA for agricultural workers.

3. Enact new legislation, perhaps like the ALRA, for agricultural workers.

4. Include horticultural workers in any legislation covering agricultural workers.
4.2.2 Related and Joint Employers

Background

In an increasing range of circumstances, it has become important to determine, for the purposes of the LRA:

- which of two entities is the employer;
- whether a number of entities are a related employer; or
- whether entities are joint employers.

Increasingly, organizations do not always operate as a single employer that directly hires its workforce and controls all aspects of its business. For example, it is common for businesses to supplement, and even replace, some or all of their regular workforces by engaging workers from a temporary help agency (THA) or labour broker.

Businesses may subcontract supervision for particular parts of an operation to a contractor together with the staffing responsibility for that part of the operation. Or an enterprise may be organized in such a way that different entities have responsibility for different facets of the business. It may not be clear who the employer is. An entity with real influence and control on the terms and conditions of employment may appear not to be an employer at all.

Similarly, franchisees must comply with the franchise agreement and the requirements of a franchisor, which could affect the manner in which they manage their workforce or operate their business. Some franchisors may exert more control or less control over the business of a franchisee and over terms and conditions of employment.

Several policy questions arise in these situations, including whether a collective bargaining relationship can be effective or stable if parties who also impact the employment relationship are not at the bargaining table. Another question is how to distinguish between different situations where part of a business is contracted-out. For example, where the lead business has no involvement in highly specialized work performed by a subcontractor, then involving the lead business in bargaining with respect to the subcontractor and imposing employer obligations on the lead business would arguably be unfair and excessive. However, this may be different from situations where the lead business is closely involved or has ultimate authority on an on-going basis with the core work performed by a contractor or franchisee.
True Employer

Where there is more than one potential employer for a group of employees under the LRA, the OLRB will determine which employer is the “true employer” on a case-by-case basis, weighing various factors to determine which choice appears to be consistent with the statutory and labour relations framework.

The OLRB has wrestled with the issue of determining the true employer. The analysis has evolved over the years as the context has changed and as these triangular relationships have become common. Historically, the Board has considered numerous factors such as whether a party:

- exercises direction and control over the employees;
- has authority to dismiss employees;
- is perceived by the employees to be the employer; and
- whether there exists an intention to create an employer-employee relationship.\textsuperscript{54}

The Board now emphasizes that it makes a purposive and contextual analysis.\textsuperscript{55} There is no single factor that is determinative and no exhaustive list of factors to apply mechanically to a particular situation. The question to be asked is, “having regard to all of the facts of the specific case, which entity should the union be required to bargain with and represent the employees with so that collective bargaining can be as effective and stable as possible?”\textsuperscript{56}

The OLRB has considered the non-exhaustive factors in determining the true employer identified by the Supreme Court of Canada in Pointe-Claire (City) v. Québec (Labour Court), including: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.\textsuperscript{57}

Accordingly, unlike the ESA, the OLRB typically does not treat assignment workers as employees of the THA. Instead, the question of who is the employer is determined on a case-by-case basis. Most often, the issue of who is the employer arises in certification applications.

\textsuperscript{54} Labourers’ International Union of North America, Local 183 v. York Condominium Corporation Number 46, (1977) CanLII 1008, ON LRB.
\textsuperscript{56} Ibid.
\textsuperscript{57} Pointe-Claire (City) v. Québec (Labour Court), (1997) 1 SCR 1015.
If the OLRB determines that the assignment workers are employees of the client, they may be included in a proposed bargaining unit and count for the purposes of a representation vote at the client workplace, but such workers have also been excluded on occasion at the request of the union because of the difficulty in organizing them. However, if assignment workers are found to be employees of the THA and not of the client, they would be unable to unionize at the client workplace.

Although labour relations legislation technically enables THA workers to organize at the level of the THA, there are numerous challenges, and unionization at the agency level is almost non-existent in Canada.58

In certification applications that involve THA workers, there is often prolonged litigation at the OLRB to determine the true employer and, most frequently, the client has been found to be the employer by the OLRB.59 However, in at least two certification applications, the OLRB has exercised its discretion to make a related employer declaration pursuant to section 1(4) of the LRA, and the temporary help agency and client business were both found to be the employer.60

Related Employer

The OLRB has the power to treat related or associated businesses as a single employer for the purposes of the LRA, where they carry on associated or related activities under common control or direction. These activities need not be carried on simultaneously and there is no need to establish that the businesses were structured for anti-union purposes.

Pursuant to the related employer provision under the LRA, the OLRB may “pierce the corporate veil” where more than one legal entity carries out economic activity that gives rise to employment or collective bargaining relationships regulated by the LRA.61 The OLRB has stated that the purpose of this provision is to prevent mischief, by protecting the bargaining rights of a union from being deliberately or inadvertently eroded by the commercial operations of related employers.62

62 Carpenters and Allied Workers Local 27 v. Toronto (City), (2000) CanLII 7860, paras 19-20, ON LRB.
As indicated above, section 1(4), the related employer section, has been applied in certification applications to find that a temporary help agency and client business were carrying on associated or related activities under common control and direction. In distinguishing between those subcontracting arrangements where section 1(4) would apply and those where it would not, the OLRB has distinguished between situations where the subcontracting was legitimate and those where it was not. In general, the OLRB would be less likely to find that two entities are related in situations where the subcontracted work was not for core functions, was less permanent, and was more subject to the control of the subcontractor.63

The OLRB has also been asked to treat franchisors and franchisees as related employers and, depending on the context, has done so on some occasions but not others.64

**Other Jurisdictions**

In a recent case in the United States that has attracted much attention and controversy and is currently being appealed in the courts, the National Labor Relations Board (NLRB) held that, in light of the prevalence of THA employees, its common-law joint employer standard had failed to keep pace with changes in the workplace and economic circumstances.65

A majority of the NLRB held that a client business and staffing agency were joint employers, and that two or more entities may be joint employers of a common workplace, if:

- both entities are employers within the meaning of the common law; and
- they share or co-determine those matters governing the essential terms and conditions of employment.

In deciding whether an employer possesses sufficient control over employees to qualify as a joint employer, the NLRB will, among other things, consider if the employer has exercised control indirectly through an intermediary, or whether it has the right to do so. It is not necessary for the control to be exercised “directly and immediately.”

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63 PPG Canada Inc., supra note 60 at para 113; Metro Waste Paper Recovery Inc., supra note 60.
Submissions

Unions have told us that the LRA needs to be amended to ensure that bargaining structures reflect who funds and controls the work, and to ensure that bargaining takes place with the real parties that have primary economic interest and ultimate control over the business. Their recommendations include:

- creating a rebuttable presumption that an entity directly benefiting from a worker’s labour is the employer of that worker for the purposes of the LRA;
- deeming that any individual engaged in performing work for the benefit of an entity is an “employee” of that entity, regardless of the form of the relationship, unless the individual earns more than $150,000 per year from that entity; and
- allowing the OLRB to provide for certification of common bargaining structures across groups of franchise-based operations associated with a given parent firm operating in a specific geographic area.

In the case of THAs, the point was raised that extensive litigation at the OLRB in every case in which there are assignment workers in an enterprise puts strain on the resources of all parties and that clear rules are required.

In the case of franchise operations, it was argued that where the franchisor exercises influence or control over the operations, it should be considered the employer of the franchisee’s employees. Alternatively, it was argued that regardless of the amount of actual control exercised by the franchisor over the operations of the franchisee, collective bargaining cannot be effective unless the real economic players in the enterprise are required to bargain with the employees. Accordingly, it was argued that both the franchisor and franchisee must be present at the bargaining table and be joint employers for labour relations purposes.

Employers and employer associations have told us that the current LRA provisions regarding related employers, franchises and THAs should be maintained or revised to exclude certain relationships. They emphasized the importance of certainty and noted that any changes could threaten established business models. It was argued that, by and large, franchisors have little if any authority over a franchisee’s employees, and that the franchisee is the entity that exercises control over terms and conditions of employment and is the real employer in a franchise’s day-to-day operation. It was argued that the franchisor should not be dragged into the labour relations world unless it takes an actual hands-on role in the franchise’s operation.
Their recommendations include:

- maintaining the status quo for bargaining under the LRA;
- expressly excluding franchise relationships from the LRA;
- establishing clear statutory criteria for a related employer declaration, particularly in a franchise context; and
- requiring the OLRB to consider whether an entity exercises control over labour and employment issues before making a related employer declaration.

Many stakeholders raised issues respecting THAs and temporary workers that will be addressed under the Employment Standards Chapter of this Interim Report, which could affect collective bargaining. For example, labour and employee organizations recommended that temporary workers engaged through a THA be provided with the same wages, benefits and working conditions as workers hired directly by the client business. At least one employer association stated that temporary workers engaged through a THA should not be provided with the same working conditions as other workers, which conditions could include lay-off procedures under a collective agreement and defeat the purpose of engaging temporary workers.

**Options:**

1. Maintain the status quo.

2. Add a separate general provision, in addition to section 1(4), providing that the OLRB may declare two or more entities to be “joint employers” and specify the criteria that should be applied (e.g., where there are associated or related activities between two businesses and where a declaration is required in order for collective bargaining to be effective, without imposing a requirement that there be common control and direction between the businesses).

3. Amend or expand the related employer provision by:
   a) providing that the OLRB may make a related employer declaration where an entity has the power to carry on associated or related activities with another entity under common control or direction, even if that power is not actually exercised; and
   b) stating which factors should be considered when determining whether a declaration should be made.
4. Instead of a general joint employer provision, enact specific joint employer provisions such as the following:

a) regarding THAs and their client businesses:
   i. create a rebuttable presumption that an entity directly benefitting from a worker’s labour (the client business) is the employer of that worker for the purposes of the LRA; and
   ii. declare that the client business and the THA are joint employers;

b) regarding franchises, create a model for certification that applies specifically to franchisors and franchisees (see Option 3 in section 4.6.1, Broader-based Bargaining Structures, below), and introduce a new joint employer provision whereby:
   i. the franchisor and franchisee could be declared joint employers for all those working in the franchisee’s operations; or,
   ii. the franchisor and franchisee could be declared joint employers for all those working in the franchisee’s operations only in certain industries or sectors where there are large numbers of vulnerable workers in precarious jobs.

4.3 Access to Collective Bargaining and Maintenance of Collective Bargaining

4.3.1 The Certification Process

Background

The LRA sets out the means by which workers can organize into unions and establish bargaining rights through certification.

Generally, this process involves the union making an application to the OLRB and demonstrating at least 40% support from the appropriate bargaining unit of workers (typically in a single workplace), followed by an OLRB-supervised secret ballot vote. The LRA requires that this vote normally be conducted within five working days of the application. Unfair labour practices (such as interference or opinions on unionization expressed by employers having undue influence on employees, or intimidation by either employers or unions) in the course of this process are prohibited.
4.3.1.1 Card-based Certification

Between 1950 and 1995, all sectors covered by the LRA operated under a card-based certification system. This model allowed for automatic certification by the OLRB if more than a certain percentage of employees in the proposed bargaining unit signed membership cards. For most of this period, the threshold for card certification was 55%; however, from 1970 to 1975, the threshold was 65%.

For most of this period, the practice was for the OLRB to set a “terminal date” following the certification application. Up to the terminal date, employees could submit petitions indicating opposition to, or support of, the union. So, for example, a worker who had signed a union card would have the opportunity to withdraw his or her support by signing a petition opposing the union. If there was sufficient overlap between the names on a petition and the union membership cards, the OLRB generally ordered a vote. The OLRB would hold a hearing to determine whether a petition was signed voluntarily.

Frequently, the OLRB found that petitioners were unable to prove the petitions were voluntary. The workers’ signatures, both on union membership cards and on any petition opposing the union, were confidential within the OLRB process.

In 1993, Bill 40 amended the Labour Relations Act, requiring the OLRB to consider employee support as of the “certification application date.” The OLRB was expressly prohibited from considering post-application membership evidence either for or against the union. This basically eliminated petitions in all cases and eliminated votes where the union met the threshold of 55% support.

In 1995, Bill 7 eliminated card-based certification and introduced the mandatory vote model. Certification occurs where a majority of ballots cast are in favour of the union.

In 2005, the Bill 40 model of card-based certification was essentially restored in the construction industry. The OLRB must determine an application for certification without a vote in the construction industry “as of the date the application is filed” and based only on the material filed by the union and the employer’s response.

Note that recommending changes to the construction industry provisions of the LRA is beyond our mandate.
Other Jurisdictions

Card-based certification is available in Quebec, New Brunswick and Prince Edward Island, and the federal government has introduced a bill to bring it back. The threshold required to achieve certification based on membership cards ranges from over 50% to 60%. In Manitoba, a bill has been introduced to end card-based certification. In all other Canadian jurisdictions, certification votes are generally required.

We are releasing to the public, concurrent with this Interim Report, a list of research projects commissioned for this Review, including a report on collective bargaining. 66 This report assessed the research literature on the topic of certification models and noted that: “These studies consistently find that the presence of [a mandatory vote certification model rather than a card-based certification] procedure is associated with a statistically significant reduction in certification application activity, including success rates.” 67 Two aspects of the vote model identified by these studies as inhibiting certification are the greater opportunity for delay and the related greater opportunity for employer unfair labour practices to occur, as compared with card-based procedures.

4.3.1.2 Electronic Membership Evidence

An issue was raised that employees should be able to “sign” membership cards online and not be required to sign paper cards.

Under the current OLRB rules, and LRA section 9.2, there is a requirement that membership cards be in writing, signed by the employee, and dated; this would appear to preclude, or at least not to contemplate, electronic membership evidence. There is no current legal requirement for someone to witness a person signing a card, although most unions follow this practice.

A union is required to file a membership declaration with the OLRB confirming to the OLRB that it has made inquiries and can declare that each card was signed by the people whose name is on the card. The person signing the declaration should be able to trace information back to someone who saw the person sign the card.

Mailed membership, where there is no witness to the signing, is permitted by the OLRB provided there is compliance with certain safeguards. For example, a

67 Ibid., 11.
union official would be expected to check with the person who mailed the card to confirm that the person signed the card and mailed it, and also, to disclose this to the OLRB in the declaration.

**Submissions**

The appropriate model for certification is a polarizing issue. In the course of our consultations, unions have strongly favoured card-based certification. They heavily criticize the current vote-based system as unfair because they claim there is extensive direct and indirect employer interference or undue influence in the process, particularly between the application and the holding of the vote, resulting in employee support for the union dissolving. In this era, where union coverage has declined so significantly in the private sector, it is argued that it is necessary to make it easier for employees to have access to collective bargaining and to remove measures that continue to ensure the ongoing decline.

Employer stakeholders strongly oppose card-based certification asserting that the secret ballot vote is the most democratic.

It is argued that in the current online world most transactions that previously were done in writing are now done electronically and that, not accommodating electronic transactions hinders organizing as it generally requires one-on-one personal contact. It is argued that if safeguards can be found for mailed membership evidence to assure the Board of its authenticity, similar devices or other electronic methods can be found to reassure the OLRB that electronic evidence is genuine.

On the other hand, it is argued that anything other than an actual signature raises doubt about the authenticity of the commitment and permits fraud or irregularities. Since current technology does not easily permit an actual electronic signature, it is argued that this should not be permitted.

**Options:**

1. Maintain the status quo.
2. Return to the card-based system in place from 1950 to 1993, possibly adjusting thresholds (e.g., to 65% from 55%).
3. Return to the Bill 40 and current construction industry model.
4. Permit some form of electronic membership evidence.
4.3.1.3 Access to Employee Lists

**Background**

Currently, when a union files an application for certification the employer must, in its response to the application, provide a list of employees in its proposed bargaining unit. Unions are not entitled to get a list of employees before the application is filed. Other than information they can ascertain from employees, unions do not have any other access to employer information, including the number of employees or employee contact information, such as addresses or emails. Unions have no right to campaign inside a workplace or to have access to employees inside a workplace; employees can engage in organizing activity during lunches and breaks but not during actual work time. Employers know how many employees there are, where they work, and their contact information.

It does not appear that any other Canadian jurisdiction requires that employers provide employee lists in the context of certification campaigns. In the United States, where an election in the workplaces is ordered under the NLRA, unions receive address and email information for the employees on the voters list.

**Submissions**

Unions have argued that it is often difficult for them to know how many employees are in a workplace and where they work, particularly if it is a large employer spread out over a large geographic area, such as a university or a large manufacturing plant with staggered shifts. Some unions say that they have spent large amounts of time and resources organizing, only to find out at the time of the application that there were many more employees than they knew about. Unions claim the practice of having workers assigned to a client by temporary help agencies compounds this problem, as the workforce fluctuates and turns over.

Unions also argue that whatever system is used for employees to express their choice, card-based or secret ballot, the union should be able to easily communicate with employees and therefore have some access to voters. It is said that the lack of practical methods of communication with employees impedes the right to organize and freedom of association.

Labour groups have proposed that where an organizing campaign is under way and the union meets the threshold of, for example, 20%, the union could apply to the OLRB for an order requiring the employer to provide a list of employees in the union’s proposed bargaining unit. The lists could include names and job
information, such as which department employees work in, and/or personal information, such as home addresses or other contact information.

Regarding the proposal that they might be compelled to provide a union with employee information, employers have raised concerns about:

- employers effectively helping employees to organize;
- the privacy implications for employees;
- the potential for unions to “game the system” in order to obtain information that would help them organize;
- the union’s obligation to prove that it had met a threshold;
- the OLRB’s criteria for deciding whether a threshold had been met; and
- the possibility of extensive litigation over these issues.

**Options:**

1. Maintain the status quo.

2. Subject to certain thresholds or triggers, provide a union with access to employee lists with or without contact information (the use of the lists could be subject to rules, conditions and limitations). A right to access employee lists could also be provided with respect to applications for decertification.

### 4.3.1.4 Off-site, Telephone and Internet Voting

**Background**

Secret ballot certification votes are generally cast in person at the workplace. The OLRB conducts the vote, and both the employer and the union are entitled to have representatives present to act as “scrutineers”.

Currently, the LRA does not indicate where or how representation votes must be conducted. The OLRB determines this pursuant to its general powers. The OLRB may already have the power under the current legislation to experiment with different voting techniques. Generally, it is has been acknowledged that a long interval between a vote order and the holding of the vote is usually detrimental to the union. At present, the OLRB normally conducts a vote within five working days.
**Other Jurisdictions**

So far in Canada, there is very limited experience with alternative methods of voting in certification applications. The Canada Industrial Relations Board, for example, has conducted several certification votes using telephone and internet methods. The practice of off-site voting also appears uncommon. Some labour boards (including the OLRB) have used mail-in ballots, but it appears that this method of voting is used only occasionally (as in cases involving a geographically dispersed workforce). Some unions use private sector providers to conduct secret ballot ratification votes via the internet or telephone.

**Submissions**

Labour groups have told us that having employees vote at the workplace allows for undue influence by the employer. For example, it is said that a ballot box placed outside a supervisor’s office, or another non-neutral location, can discourage employees from freely expressing their will. There is a concern, particularly in smaller workplaces, that it is quite possible for the employer to deduce, or for employees to believe that the employer can deduce, who is sympathetic to the union. This, in turn, leads to ballots being cast against the union. It is said to be hard for employees to vote for the union while having to line up and vote in the employer’s workplace. In short, employees are said to be intimidated by the fact of, and the circumstances surrounding, the holding of the vote in the employer’s premises.

To address this concern, labour groups have proposed that certification votes be held at a neutral location, away from the employer’s premises (e.g., a public library) or that votes be conducted by telephone or other electronic means.

It has been proposed, for example, that the LRA be amended to give the OLRB specific discretion to order that a certification vote take place at a “neutral” site that is not on the employer’s premises, be conducted by telephone or electronic means, or be conducted through a combination of both.

In response, many employers argue that the employer’s premises is the most convenient and cost-efficient location for the vote to take place and where turnout and the opportunity to vote will be the highest. It was also argued that voting at another location would reduce the number of anti-union voters, as only those most committed to voting would take the time to vote and the union would ensure its supporters went to the outside location. On the other hand, some employers supported electronic voting subject to appropriate safeguards.
Regarding telephone and internet voting, some of the issues expressed by employers are:

- the potential for fraud or misconduct;
- the method for distributing ballot information to employees;
- the criteria for employers or unions to challenge a particular employee’s participation in the vote;
- the ability to maintain the secrecy of the ballot;
- the costs associated with implementing different voting methods; and
- a possible delay beyond five working days to organize electronic or telephone voting.

**Options:**

1. Maintain the status quo.
2. Explicitly provide for alternative voting procedures outside the workplace and/or greater use of off-site, telephone and internet voting.

### 4.3.1.5 Remedial Certification

**Background**

The OLRB can certify a union without a vote if the employer has contravened the LRA in a way that makes it unlikely that the true wishes of the employees can be ascertained. The provision applies both to cases where the union was unable to attain the 40% membership support needed to trigger a representation vote or where the union loses the vote. The OLRB can certify the union only if “no other remedy would be sufficient to counter the effects of the contravention.” The OLRB may consider the results of a previous representation vote and whether the union has “adequate membership support” for collective bargaining.

This provision has undergone significant legislative change over the years. The original *Labour Relations Act* enacted in Ontario in 1950 allowed the OLRB to certify a union on a remedial basis where the union had at least 50% membership.

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68 The LRA also includes a parallel provision for remedial dismissal to address cases where a union has contravened the LRA such that the true wishes of the employees are not likely to be ascertained. This last provision aimed at coercive actions by unions has rarely been the subject of proceedings.
The law was criticized on the basis that the effect of the 50% membership requirement was that an employer could prevent a union from acquiring sufficient membership evidence simply by committing severe misconduct early in the organizing campaign. As a result the LRA was amended in 1975 to provide that the OLRB could exercise its discretion to certify without a vote, provided the union had adequate support for collective bargaining without stating a specific percentage figure. The rationale for maintaining the requirement for adequate support was that it was believed little purpose would be served by certifying a union that could not bargain effectively because it would have no realistic chance of getting enough support to mount an effective strike.

While the OLRB stated that there was no “minimum figure” required to constitute adequate membership support, in practice, it rarely exercised its discretion to certify the union unless there was at least 30% support. Critics then, as now, complained that unlawful conduct often paid off because, in the face of unlawful conduct by the employer, employees were discouraged from joining the union and the more egregious the misconduct, the less likely the union would be able to show adequate support.

Further amendments introduced in 1993 removed the requirement of adequate membership support, but these amendments were repealed in 1995. Under the 1995 law, the OLRB had to find that no remedy short of certification, including a second representation vote, was sufficient to counter the effects of the employer’s violation.

In 1998, the LRA was amended to remove the OLRB’s power to grant remedial certification altogether and replaced it with the power to order a second representation vote. Then, in 2005, amendments to the LRA restored the OLRB’s power to order remedial certification, allowing the OLRB to certify the union if “no other remedy would be sufficient to counter the effects of the contravention,” considering the results of a previous representation vote and whether the union has “adequate membership support” for collective bargaining.

The OLRB does not often exercise its discretion to award remedial certification.

**Other Jurisdictions**

Remedial certification is available in seven provinces and the federal jurisdiction. Key features of this remedy vary. In some jurisdictions, for example, remedial certification is available only where the union can establish a minimum level of membership support:
• in Newfoundland and Labrador, the majority of employees must be union members;
• in Nova Scotia, the union must have at least 40% membership support (i.e., the same level of support required to trigger a representation vote);
• in Manitoba and New Brunswick, the union must have “adequate” membership support for the purposes of collective bargaining; and
• in British Columbia and the federal jurisdiction, remedial certification requires a finding that the union would have won the representation vote if not for the contravention.

Submissions

Unions argue that the balance in the present legislation strongly favours a second representation vote over remedial certification without a vote, and that this is harmful and not genuinely remedial because once the employer breaches the LRA in such a way that the true wishes of employees cannot be ascertained, it is virtually impossible to redress the situation and make a second vote meaningful.

In essence, the argument is that ordering a second representation vote where the employer has engaged in serious intimidation and coercion is a useless remedy – like trying to unscramble an egg. In addition, including adequate membership support for bargaining as a consideration is said to reward employers who attack the union early in the organizing process, making it impossible for the union to attract support because of the employer’s threats and coercion.

Some employers have criticized remedial certification (and strongly opposed its reintroduction in 2005), arguing that it threatens the principles of workplace democracy by removing the right of employees to vote on whether they wish to have a union in the workplace. Removing the requirement for adequate support for bargaining is said to merely create a weak unit that cannot accomplish anything substantive for its members.

Options:

1. Maintain the status quo.
2. Make remedial certification more likely to be invoked by removing the requirement to consider whether a second vote is likely to reflect the true wishes of the employees.
3. Remove the requirement to consider whether the union has adequate membership support for bargaining.

4.3.2 First Contract Arbitration

Background

The LRA provides that parties may apply to the OLRB for a direction that a first collective agreement be resolved by binding interest arbitration. The applicant must demonstrate that collective bargaining has been unsuccessful as a result of:

- the refusal of the employer to recognize the bargaining authority of the union;
- the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; and
- any other reason the OLRB considers relevant.

First contract arbitration now addresses situations in which, following certification, employers refuse to accept the right of their employees to engage in collective bargaining. It ends the immediate dispute and engages the parties in a “trial marriage” through an imposed agreement, aiming both parties to establish mature and enduring bargaining relationships. It may also act as a deterrent to bargaining in bad faith. In addition, it recognizes that first contract negotiations may be particularly difficult and anticipates that negotiations for the renewal of the agreement will likely be made easier.

First contract arbitration was introduced in 1986. In 1993, the law was amended to provide that, in addition to an application to the OLRB, a party could also apply for arbitration to the Minister of Labour where thirty days had elapsed after the parties were in a strike or lock-out position. There were no legislated factors (e.g., related to failure of bargaining) that were required to be considered.

The legislation was amended again in 1995 to restore the previous first contact arbitration provision; “automatic” access to this process (through an application to the Minister) was removed.

In 2000, further amendments made it mandatory for the OLRB to deal with decertification and displacement applications before dealing with or continuing
to deal with applications for first contract arbitration. If the decertification or displacement application is granted, the first contract arbitration application must be dismissed. This reversed previous labour relations policy where, if first contract arbitration was justified, the relationship would be allowed the opportunity to take hold before applications for decertification or applications by competing unions would be considered.

**Other Jurisdictions**

Access to first contract arbitration is available in the federal jurisdiction, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec and Saskatchewan. Manitoba has “automatic” access to first contract arbitration, based only on undergoing the conciliation process and the passage of a certain amount of time. All the other jurisdictions require that other substantive conditions be present before first contract arbitration is ordered.

British Columbia has a unique “mediation-intensive” model, introduced in 1993, which treats first contract arbitration as part of the collective bargaining process and not as a remedy. Upon application, a mediator is appointed. If mediation-assisted bargaining does not succeed, the mediator recommends either first contract terms for the parties’ consideration, or a process for settling the agreement, including one or more of: mediation-arbitration, arbitration by an arbitrator or the British Columbia Labour Relations Board, or permitting the parties to engage in a work stoppage.

**Submissions**

Labour organizations consistently argue in favour of “automatic” access to first contract arbitration, complaining that the existing provisions are too restrictive. They argue that effective access to first contract arbitration is required as part and parcel of policies needed to reverse the decline in private-sector union density. First contract arbitration would make unionization more attractive to workers in that they would know that a first collective agreement is achievable through arbitration and not through strike action. Accordingly, unions favour the “automatic” access model, requiring only that sufficient time has elapsed since certification and that the conciliation requirement has been met; there would be no other filtering mechanism and no need to find bargaining breakdown or fault.

Alternatively, unions favour broadening the explicit circumstances in which first contract arbitration can be ordered (e.g., where there has been a remedial
Labour groups would also recommend repealing the LRA requirement that the OLRB deal with decertification and displacement applications before dealing with applications for first contract arbitration. They argue that because first contract arbitration is remedial in nature and designed to address some employer misconduct or unreasonableness, it is unfair and inappropriate to allow for decertification or an application by a different union when a first collective agreement has not had a chance to operate and there has been no opportunity to stabilize the relationship.

Many employers have historically opposed first contract arbitration, arguing that imposing contracts is contrary to the entire idea of free collective bargaining, adversely impacting employers who engage in tough, but legal, “hard bargaining”. Moreover, employers argue that it creates uncertainty for businesses by putting key decisions into the hands of a third party, and that having automatic first contract arbitration available undermines any need for the union to bargain realistically, since the union can just wait for time to elapse and ask for arbitration.

**Options:**

1. Maintain the status quo.
2. Provide for “automatic” access to first contract arbitration upon the application of a party to the OLRB, after a defined time period (e.g., thirty days), in which the parties have been in a legal strike or lock-out position, has elapsed.
3. Provide for first contract arbitration on either an automatic or discretionary basis in circumstances where the OLRB has ordered remedial certification without a vote.
4. Introduce a “mediation-intensive” model similar to that utilized in British Columbia.
5. Not permit decertification or displacement applications while an application for first contract arbitration is pending.

**4.3.3 Successor Rights**

**Background**

The successor rights provision of the LRA protects employee and union rights where there is a sale of a business, providing that bargaining rights and collective
agreement obligations of the original employer generally flow through to the new successor employer. The term “sale” is very broadly defined and in most situations where the business is transferred, the bargaining rights and all the rights of workers under the collective agreement flow into the relationship with the new employer.

One major exception is that the section has generally not been applied to contracting out or contract tendering situations, in which a lead company contracts out its work to a subcontractor or, more typically, the contract is re-tendered and one subcontractor service provider replaces another. Examples would be where security or cleaning services are moved from one subcontractor to another by re-tendering the contract.

Currently, the bargaining rights and the obligations under the collective agreement normally do not flow from one service provider to the next. This means that the union not only loses its bargaining rights each time a new contractor is selected by the lead company but also (subject to the termination pay provisions of the ESA in the building service provider sector) the employees lose their jobs and their rights and benefits under the collective agreement and may well not be hired by the new employer. Even if the successor subcontractor hires many of the same employees to perform the same work in the same location, the union loses its bargaining rights and the employees lose whatever rights they have under the agreement. If the union can certify again, it has to start bargaining all over again with the new employer.

From 1993 to 1995, this situation changed briefly, as the scope of successor rights was extended to apply to one class of service contracts only, namely, building services contracts. The Labour Relations Act provided that successor rights applied where contracting out and re-tendering occurred with respect to building services (including cleaning services, food services and security services). The Act deemed that a sale of business had occurred where a building services contract was entered into by a lead company or re-tendered. The purpose of this provision was to ensure that bargaining rights and the rights of building cleaners, security staff, and food services employees were continued under successor contractors or subcontractors. This provision was repealed in 1995.

Labour relations legislation in all Canadian jurisdictions protects successor rights where there is a sale of a business. However, such legislation does not extend successor rights to contract service situations. There is one exception: the Canada Labour Code has provided, since 1999, that a successor employer in
one specific contract for service situation may not decrease the remuneration of the employees. This provision applies only to “pre-board security screening services” in relation to a “federal work, undertaking or business” and thus generally applies to airport security screening. It also applies to any other service that may be designated by regulation, but there has been no extension of this provision to other sectors.

**Submissions**

Labour groups have proposed that successor rights be extended to ensure that employee rights are maintained when a building service contract changes firms. Union stakeholders have argued that employees in the building service sectors are generally vulnerable low-wage workers and that the loss of job security and all other entitlements every time a contract is re-tendered or contracted out has potentially devastating effects on workers. Moreover, they argue that it is extremely difficult for employees to organize and maintain collective bargaining rights in sectors dominated by the practice of contract tendering. Each time the contract for services is awarded to a new contractor, additional resources are expended as unions attempt to re-organize workers and, if successful, the parties have to re-negotiate a new collective agreement and start all over again.

Unions have also suggested that successor rights in the homecare industry would improve continuity of care for patients. A transit union has asked that they be included in the protection of this provision, arguing that contracting out of transit services in some municipalities has resulted in a significant loss of jobs and rights for employees.

Employers appear generally to see all contracting out as a legitimate and necessary means of creating and maintaining efficiencies and argue that it is simply a different situation from a sale of a business, since the lead firm is not permanently divesting itself of a part of its business but is simply having a part of it performed by a specialist contractor more cheaply and/or better than it could itself. They argue that contracting out business services is no different in principle from any other contracting out and that the extension of successor rights to these situations would increase costs and undercut competitiveness and flexibility.

**Options:**

1. Maintain the status quo.

2. Expand coverage of the successor rights provision, similar to the law in place between 1993 and 1995, to apply, for example, to:
a) building services (e.g., security, cleaning and food services);
b) home care (e.g., housekeeping, personal support services); and
c) other services, possibly by a regulation-making authority.

3. Impose other requirements or prohibitions on the successor employer in a contract for service situation (e.g., provisions to maintain employment, employee remuneration, benefits and/or other terms of employment; a requirement that the union representing the employees under the former employer be provided with automatic access to the new employee list or other information).

### 4.3.4 Consolidation of Bargaining Units

**Background**

The OLRB has the authority to determine the appropriate bargaining unit with respect to each application for certification. Historically, the most common bargaining unit definition has comprised a single workplace of a specific employer at a particular geographic location. There are separate policies for employers with multiple locations within a municipality. There may be further subdivisions (e.g., separate bargaining units for “office” and “plant” employees). At one time, the Board certified part-time and full-time employees separately, and had various practices for determining multiple appropriate bargaining units in various sectors, such as hospitals, municipalities, universities, newspapers, etc. Over time, a single employer could wind up with many different bargaining units and many sets of collective bargaining with the same or with different unions.

The OLRB has historically taken the position that after it has issued a certificate and the parties have entered into a collective agreement, the certificate is “spent” and the OLRB has no general jurisdiction to reconsider or revise it, except where specifically authorized by the Act.⁶⁹ Thus, with minor exceptions, as bargaining units are added over time, the only way to change the configuration of bargaining units now is for parties to voluntarily agree to changes. While the parties are free to expand or to reduce the scope of bargaining units, it is an unfair labour practice to take such issues to impasse (i.e., to make such a dispute the subject of a strike or lock-out). This is an effective bar to changing the bargaining unit structure where one party resists it.

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⁶⁹ As, for example, after a sale of business pursuant to s. 68(6) of the LRA, or to remedy an unfair labour practice as suggested in *Sunnylea Foods Ltd.*, (1981) CanLII 988, para 23.
The issue, therefore, is whether there ought to be an explicit power to revise, amend and consolidate bargaining units for the rationalization or modernization of bargaining unit structures in circumstances where the original bargaining structure is no longer appropriate, where bargaining units are overly fragmented, or for other industrial relations reasons.

The power to revise and revamp bargaining units involves not only the issue of the rationalization and modernization of bargaining unit structures, but also the possible tension and interplay between organizing and bargaining in areas of the economy that have been traditionally difficult to organize, such as where employers have many smaller retail locations, in which cases it may only be possible to organize in smaller units. However, a small unit is likely to have little bargaining power; viable, effective and stable bargaining may be possible only where there is a larger unit. If units can be organized on a smaller basis and then consolidated afterwards, this could make collective bargaining in those industries viable.

In some other jurisdictions, including several provinces and the federal jurisdiction, labour relations boards have a general power to amend a bargaining unit or certification order after a union has been certified.

The Labour Relations Act, as it was in 1993 and 1995, included a provision allowing the OLRB, upon application of either party, to consolidate separate bargaining units with respect to the same (or a related) employer represented by the same union at either the same location or in multi-location situations. This provision did not restrict either the type of units to be consolidated (e.g., office and production units) or the timing of the consolidation application. However, it did exclude the possibility of consolidating bargaining units of the same employer that were represented by different unions, which is currently permitted in other jurisdictions.

In Ontario, from 1993 to 1995, in exercising its discretion to consolidate units, the OLRB was required to consider whether the proposed consolidation would: facilitate viable and stable collective bargaining; reduce fragmentation of bargaining units; or cause serious labour relations problems. With respect to manufacturing operations, the OLRB was prohibited from combining bargaining units at geographically separate locations if the employer established that this would interfere with the employer’s ability to continue significantly different methods of operation or production at each location or the employer’s ability to continue to operate these places as viable and independent businesses.
This consolidation provision was repealed in 1995. In addition, bargaining units that had been consolidated were divided back into separate bargaining units, unless the employer and the union agreed in writing that the unit should not be divided.

The Commission on the Reform of Ontario’s Public Services, known as the “Drummond Commission”, included in its final report the recommendation that the Ontario government, “Consider expanding the authority of the OLRB to facilitate the establishment of effective and rationalized bargaining structures that support the delivery of quality and effective public services.” The Drummond Commission made this recommendation as a response to what the Commission described as an overly fragmented collective bargaining structure in Ontario’s broader public sector.

**Other Jurisdictions**

It appears that labour boards have an express, general power to redefine bargaining units (which could include consolidating existing units) in British Columbia, Alberta, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Nova Scotia, and the federal jurisdiction.

The test for applications to redefine bargaining units varies among jurisdictions. For example, the power of the federal labour relations board to consolidate bargaining units was previously quite broad until the Sims Task Force recommended, and Parliament accepted, that bargaining unit reviews should be restricted to situations where there are serious problems with bargaining unit structures, barring which, the employees’ choice of bargaining agent should prevail. The Canada Labour Code was subsequently amended in 1999 to provide that, in order for a review to take place, the Board must now be satisfied that the existing bargaining unit structures are no longer appropriate for collective bargaining.

Even if the corresponding labour legislation does not expressly provide the power to amend a bargaining unit, some labour relations boards may modify the bargaining unit or certification order pursuant to their general powers. The OLRB, however, has maintained consistently that it does not have the jurisdiction to do so.

**Submissions**

Unions have told us that they support the introduction of a consolidation provision in the LRA like the one in place between 1993 and 1995. From the labour

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movement’s perspective, the goal of having a consolidation provision is to ensure that smaller units, once certified, can be combined together into more rational, long-term bargaining structures. At the same time, a structure whereby the OLRB could merge and reconfigure bargaining units, especially where different unions are involved, might be viewed as a heavy-handed, top-down approach that could force change against the wishes of a significant number of employees.

Employers opposed the previous introduction of a consolidation provision, describing its purpose as being simply to boost union bargaining power in situations where the union’s presence is weak. In some cases, however, employers, too, have described the benefits of giving the OLRB the authority to restructure and rationalize bargaining units and have recognized that there is no other effective way to modernize, particularly in circumstances where the existing bargaining structure may be fragmented and antiquated.

**Options:**

1. Maintain the status quo.

2. Reintroduce a consolidation provision from the previous LRA where only one union is involved.

3. Introduce a consolidation provision with a narrow test (e.g., allowing it only in cases where the existing bargaining unit structure has been demonstrated to be no longer appropriate).

4. Introduce a consolidation provision with a test that is less restrictive than proving that the existing bargaining unit is no longer appropriate. This provision could be broad enough to allow for the federal labour relations board’s previous practice under the *Canada Labour Code*, as it was prior to the incorporation of the amendments recommended by the Sims Task Force in Chapter 6 of “Seeking a Balance: *Canada Labour Code*, Part I” with respect to bargaining unit reviews.71

5. Amend section 114 of the LRA to provide the OLRB with the explicit general power to alter a bargaining unit in a certificate or in a collective agreement.

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71 Human Resources Development Canada, Seeking a Balance.
4.4 The Bargaining Process

4.4.1 Replacement Workers

Background

The term “replacement workers” is typically understood to refer to workers hired to fulfill some or all of the functions of workers who are either engaged in a legal strike or who have been locked out by the employer.

In Ontario, the LRA, except from 1993 to 1995, has not prohibited the use of replacement workers by employers during a lawful strike or lock-out; the Act does not place any restrictions on this ability.

The vast majority (over 95%) of negotiations for a new or for a renewal collective agreement are resolved without a strike by employees or a lock-out by the employer. In addition, replacement workers are used by employers in a small minority of those labour disputes where a strike or lock-out occurs. However, it is generally accepted by labour relations experts that using replacement workers adversely affects the progress of collective bargaining and can prolong labour disputes. The use of replacement workers has been contentious in some recent labour disputes.

The use of replacement workers does not disentitle an employee who is engaged in a lawful strike from making an unconditional application to the employer to return to work within six months from the start of the lawful strike. The employer is required to reinstate such an employee in the employee’s former employment on terms that the employer and employee may agree upon. The employer is prohibited from discriminating against the employee for exercising or having exercised any rights under the LRA.

Other Jurisdictions

The use of replacement workers during a legal strike is prohibited only in British Columbia and Quebec. No other jurisdictions in Canada prohibit the use of replacement workers during the course of a legal strike. The Canada Labour Code, while not prohibiting the use of replacement workers, provides that employers cannot use replacement workers for the “purpose of undermining a trade union’s representational capacity rather than the pursuit of legitimate bargaining objectives.”
Submissions

Unions generally strongly support a legislative ban on the use of replacement workers. When employees engage in a strike, a picket line is a physical assertion of the strikers’ position that employees or others should not cross the picket line and work or do business with the struck employer.

The picket line serves as an expression of one of the core union values of solidarity with the strikers. When replacement workers are called in to perform the work of the bargaining unit, it is seen as fundamentally threatening the success of the strike and as a repudiation of the request for solidarity represented by the picket line. This can provoke heated interactions. In light of recent jurisprudence on freedom of association, the use of replacement workers is now also seen by unions as an inappropriate interference with the constitutional right to strike. Labour groups also argue that the use of replacement workers increases the risk of violence on picket lines, prolongs the duration of strikes and undermines the integrity of the collective bargaining process.

Employer organizations very strongly oppose a legislative ban on the use of replacement workers. Small- and medium-sized employers, in particular, assert that being able to operate during a strike is necessary to protect the viability of the enterprise, and that keeping the business going during a strike protects the jobs of striking employees. Employers argue that sometimes they have no choice but to keep operating if faced with a strike and with what they perceive to be unreasonable bargaining demands by a union.

The ability to use replacement workers is seen as a necessary counterbalance to the actual or possible imposition of economic sanctions by the union. The right to operate during a strike, using replacement workers if necessary, is seen by the employer community as a core component of the industrial relations system in Ontario.

Options:

1. Maintain the status quo.
2. Reintroduce a general prohibition on the use of replacement workers.
3. Adopt an approach similar to the Canada Labour Code, whereby the use of replacement workers would not be prohibited except if used for the “purpose of undermining a trade union’s representational capacity.”
4.4.2 Right of Striking Employees to Return to Work

Submissions have been made to the Special Advisors in support of making a change in two circumstances:

1) where an employee who is engaged in a legal strike makes an application to return to work after the expiration of the six-month period from the beginning of the strike; and

2) where the employer refuses to reinstate an employee at the end of a labour dispute and the refusal to reinstate is not an unfair labour practice.

We deal with these two points separately.

4.4.2.1 Application to Return to Work After Six Months From the Beginning of a Legal Strike

Background

The LRA provides, subject to certain conditions, that an employee engaging in a legal strike may make an unconditional application to return to work within six months of the commencement of the strike. If the employee does apply to return to work, the employer is required to reinstate the employee in the employee’s former employment on such terms as the employer and employee may agree upon and the employer, in offering terms of employment, is prohibited from discriminating against the employee for exercising or having exercised any rights under the LRA. Practically, this means that the employee cannot be discriminated against by the employer for striking, engaging in lawful picketing activity or being engaged in any other union activities during a legal strike. The employer is not obligated to reinstate a striking employee if the employer no longer has persons engaged in work that is the same or similar to that which the employee performed before the strike, or where there has been a suspension or discontinuance for cause of an employer’s operations or any part of the operations.

If the employer resumes operations, the employer is required to reinstate the employees who have made an application within the six-month period.

Striking employees who make an application to return to work typically do so when they conclude that the strike in which they are engaged is not likely to settle or where there is no end in sight. This most often occurs when an employer continues to operate during the course of a legal strike by using replacement
workers. Simply put, employees may conclude that they are unlikely to have an opportunity to return to work unless they make an application within the six-month period.

**Other Jurisdictions**

Legislation in the federal jurisdiction, Alberta, Manitoba, Ontario, Prince Edward Island, Quebec and Saskatchewan include provisions dealing with the reinstatement of employees following a work stoppage.

Similar to the LRA in Ontario, legislation in Alberta and Prince Edward Island provides that employers are not required to reinstate employees in circumstances where:

- the employer no longer has persons engaged in performing the same or similar work that the employee performed prior to the work stoppage; or

- the employer’s operations or some part of them, have been suspended or discontinued (but if the employer resumes such operations, the employer will reinstate those employees who wish to return to their jobs).

Legislation in Manitoba and Saskatchewan requires that seniority be considered in reinstatement protocols in circumstances where no agreement respecting the reinstatement of employees is reached between the employer and the union.

The federal, Quebec and Prince Edward Island legislation also specifically gives striking employees priority over replacement workers hired during the strike.

Ontario is the only jurisdiction that mandates a time period within which a striking employee must make an application to return to work during the currency of a strike.

**Submissions**

We have heard submissions from unions that the six-month period should be removed from the current legislation. Elimination of the six-month period would allow a striking employee to make an application to return to work at any time during the currency of a legal strike. Unions submit that the six-month limitation on a striking employee’s right to return to work undermines the effectiveness of a legal strike and may provide an incentive to employers to lengthen the strike. The right to strike is embodied in section 2(d) of the *Charter*, which also protects the
workers’ right to collective bargaining. Unions assert that workers should not be threatened with job loss for exercising their constitutional right to strike and that section 80 of the LRA effectively operates as a restriction on this fundamental constitutional right by capping the right of reinstatement at six months.

No employer group raised this issue in their written submissions to the Changing Workplaces Review.

_Options:_

1. Maintain the status quo.
2. Remove the six-month time reference in the current LRA section but leave the provision otherwise the same.

4.4.2.2 Refusal of Employers to Reinstall Employees Following a Legal Strike or Lock-out

_Background_

A very contentious issue regarding the efforts to settle a labour dispute can be the refusal by the employer to reinstall certain employees. Often the refusal to reinstall is based on alleged misconduct on the picket line or other misconduct by the employee, related to the labour dispute.

Since no collective agreement is in operation during a legal strike and or lock-out, employees whom the employer wishes to terminate, or who have been terminated because of alleged misconduct during the strike and or lock-out, have no access to a grievance and arbitration procedure. When employers refuse to reinstall employees for strike-related misconduct and refuse to submit these disputes to arbitration, such as, in situations where just cause for termination is disputed by the union, this often creates a problem that is very difficult to resolve. There are often disputed facts and disagreement about whether cause for termination or other discipline exists. Typically, unions are not prepared to agree to the settlement of a labour dispute where the employer refuses to reinstall some employees and where just cause for termination is in dispute. Disagreement about reinstatement of employees may prolong a labour dispute even though the parties have agreed on all terms of a collective agreement.
Other Jurisdictions

In Manitoba, the law requires the employer, at the conclusion of a strike or lock-out, to reinstate employees in accordance with the agreement reached between the union and the employer or, where no agreement is reached, in accordance with the seniority of the employee at the time the strike or lock-out commenced. The refusal to reinstate an employee is an unfair labour practice unless the Labour Board is satisfied that the employer refused to reinstate the employee because the employee’s strike- or lock-out-related conduct resulted in a conviction for an offence under the Criminal Code (Canada) and, in the opinion of the Board, would be considered just cause for dismissal of the employee even in the context of a strike or lock-out.

In Saskatchewan, the legislation provides that striking employees are entitled to replace replacement workers at the conclusion of the labour dispute and it provides for a return-to-work protocol in the event that the union and the employer are unable to agree. The Saskatchewan legislation also provides for arbitration of the discipline or discharge of any employee when there is no collective bargaining agreement in force after certification of the union. Since a refusal to reinstate is tantamount to a discharge, employees who are refused reinstatement have protection against unjust dismissal through arbitration.

In British Columbia, striking or locked out employees who are terminated or disciplined by the employer for activities during a strike or lock-out have access to arbitration in order to determine whether the termination or other discipline is for just cause.

Submissions

Unions submit that in the absence of an unfair labour practice, the LRA does not provide sufficient recourse for an employee whom the employer refuses to reinstate at the conclusion of a labour dispute. Generally, unions feel their members should not be vulnerable to unilateral decision-making by an employer based on alleged misconduct during a labour dispute. While it is not disputed that some misconduct may warrant termination, unions do not want to leave the decision about what is cause for dismissal to the employer, without any capacity to have that decision reviewed by a neutral third-party adjudicator. Quite apart from alleged misconduct on the picket line, unions assert that an employer should not be allowed to use a strike or a lock-out as an opportunity to “clean house” by refusing to reinstate employees it unilaterally decides should not return to the workplace.
At least one union has suggested that Ontario adopt an approach similar to that of Manitoba or Saskatchewan, both of which provide protection for employees whom the employer refuses to reinstate during the course of a legal strike.

No employer group raised this issue in their written submissions to the Changing Workplaces Review. We expect that employers generally would oppose broader legislative reinstatement provisions proposed by labour stakeholders because:

- the LRA protects employees who exercise their legal right to strike from reprisals by the employer; and
- the OLRB is in the best position to determine whether a refusal to reinstate an employee, based on alleged misconduct during the labour dispute, is an unfair labour practice.

**Options:**

1. Maintain the status quo.

2. Provide for arbitration:
   a) of any discipline or termination of an employee by an employer during the course of a legal strike or lock-out; or
   b) of the refusal to reinstate an employee at the conclusion of a strike or lock-out.

3. As in Manitoba, provide that the refusal to reinstate an employee at the conclusion of a legal strike or lock-out is an unfair labour practice, unless the refusal was because the employee’s conduct:
   a) was related to the strike or lock-out;
   b) resulted in a conviction for an offence under the *Criminal Code* (Canada); and
   c) would, in the opinion of the OLRB, be just cause for dismissal of the employee even in the context of a strike or lock-out.

4. Adopt an approach similar to the LRA, as it was in 1993 to 1995, providing that at the end of a strike or lock-out:
   a) the employer is required to reinstate each striking employee to the position he or she held when the strike began;
b) striking employees generally have a right to displace anyone who performed the work during the strike; and

c) if there is insufficient work, the employer is required to reinstate employees as work becomes available, based on seniority.

### 4.4.3 Renewal Agreement Arbitration

#### Background

Unions and employers may, at any time following notice to bargain, agree to refer all matters remaining in dispute between them to interest arbitration. Voluntary interest arbitration is always available to the parties in any collective bargaining dispute, whether for a first collective agreement or for a renewal collective agreement.

The LRA currently provides that either party negotiating a first collective agreement may apply to the OLRB to direct the settlement or have the collective agreement settled through binding interest arbitration. The OLRB will direct settlement if the applicant can establish that collective bargaining has been unsuccessful for the reasons enumerated in the LRA.

The LRA does not allow a party to apply to the OLRB for the referral of a collective bargaining dispute to binding interest arbitration when the party is in the process of collective bargaining in relation to a renewal collective agreement.

#### Other Jurisdictions

Under Manitoba’s *Labour Relations Act*, where a collective agreement has expired, and a strike or lock-out has commenced, either the employer or the union may bring an application requesting the Manitoba Labour Board to direct the settlement of the collective agreement by means of interest arbitration. The legislation sets out a number of conditions that must be met before an application can be made:

- the previous collective agreement must have expired;
- sixty days must have elapsed since the commencement of a strike or lock-out; and
- the parties have had the assistance of a conciliation officer or mediator for at least thirty days during that period of the strike or lock-out.
On receiving an application for subsequent renewal interest arbitration, the labour board is required to determine whether the parties are bargaining in good faith and whether they are likely to conclude a collective agreement within thirty days of continued bargaining. The labour board can delay its decision until it is satisfied that the party making the application has bargained sufficiently with respect to those provisions of the collective agreement that are in dispute.

If the board is satisfied that the parties are bargaining in good faith and are likely to conclude a collective agreement within thirty days, arbitration will not be ordered and the board may appoint a board representative, or request the minister to appoint a conciliation officer, to confer with the parties to assist them in settling the provisions of a collective agreement.

If the board determines that the party making an application is bargaining in good faith but that a new collective agreement is unlikely to be concluded within thirty days of continued bargaining, the strike or lock-out must end immediately and the terms of the collective agreement will be settled by an arbitrator or by the board. These provisions, enacted in 2000, have rarely been used.

In British Columbia, while there is no statutory provision for the referral of a dispute to interest arbitration to resolve terms and conditions of a renewal collective agreement, the Labour Relations Code provides for a “mediation intensive” model for the resolution of collective bargaining disputes. Under this model, mediators, special mediators and fact-finders may be appointed to confer with the parties to assist them in concluding a collective agreement. If either party requests, or if the Minister directs, a mediation officer must provide a report, which may include recommended terms of settlement. If a fact-finder is appointed, the fact-finder may report to the associate chair, setting out the matters agreed to and the matters remaining in dispute and may also include in the report, findings with respect to any matter relevant to the making of a collective agreement. The associate chair may make the report public if it is considered advisable to do so.

Submissions

Some unions have advocated amending the LRA to provide for interest arbitration in the case of bargaining for renewal collective agreements. Unions submit that even mature bargaining relationships can result in intractable disputes, resulting in lengthy strikes or lock-outs, and high human and financial costs to both sides. They argue that arbitration should be available in cases of lengthy strikes or lock-outs (e.g., perhaps six months’ long). At least one union, pointing to experience under the Manitoba model, observed that the availability of interest arbitration
after a significant period of strike or lock-out appears neither to encourage long disputes in order to get access to interest arbitration nor to create a disincentive to negotiating a settlement.

Employers generally oppose interest arbitration as a dispute resolution mechanism in collective bargaining, whether for a first contract or for a renewal collective bargaining agreement.

Employers believe that a third-party arbitrator cannot be expected to understand the business and operational needs and interests of the enterprise and are not in a position to make decisions that could have a significant impact on the on-going competitiveness and viability of the business. Arbitrators cannot be expected to be knowledgeable about competitive market demands and the impact of globalization, technology and other factors that may impact employer decision-making. Arbitrators have no responsibility for, and no stake in, the success of the business.

The parties to the collective bargaining dispute, namely, the union and the employer, are, or should be, the most knowledgeable when it comes to protecting their interests and balancing them with the interests of the other party. Disagreements should not be resolved in arbitration, which is a trial-like, adversarial environment, but should be the product of good faith bargaining by both parties even if economic sanctions are imposed on one side or the other for a long time. The employer and the union should have the ultimate responsibility for making a workable collective agreement that takes into account the legitimate interests of both parties.

Employers assert that collective bargaining disputes should be resolved at the bargaining table by the parties unless they voluntarily agree to have some or all disputed matters resolved by a third-party.

**Options:**

1. Maintain the status quo.

2. As in Manitoba, provide for access to arbitration after a specified time following the commencement of a strike or lock-out provided that:
   a) certain conciliation and/or mediation steps have been followed;
   b) the applicant for interest arbitration has bargained in good faith; and
   c) it appears that the parties are unlikely to reach a settlement.
3. Empower the OLRB to order interest arbitration as a remedy following a finding of bargaining in bad faith after the commencement of a strike or lock-out, provided that:

a) certain conciliation and/or mediation steps have been followed;

b) the applicant for interest arbitration has bargained in good faith; and

c) it appears that the parties are unlikely to reach a settlement.

4. As in British Columbia, provide for a mediation-intensive dispute resolution process which does not involve interest arbitration or mediation/arbitration, unless agreed to by the parties, but does provide a number of tools to facilitate dispute resolution, including the making of recommendations by a mediator or fact finder.

4.5 Remedial Powers of the OLRB

4.5.1 Interim Orders and Expedited Hearings

Background

Before 1993, the Labour Relations Act expressly provided the OLRB with the power to grant interim orders in limited circumstances, such as jurisdictional disputes. Although the OLRB did not have the express power to make interim orders with respect to other substantive or procedural matters, it appears to have done so on occasion, pursuant to its general powers.

Amendments in 1993 to the LRA provided the OLRB with a broad power to make substantive interim orders. Interim relief could be requested with respect to any “pending or intended proceeding” (i.e., even if the main application had not yet been filed) and was not limited to unfair labour practice complaints in the certification context. The OLRB was empowered to consider a variety of applications seeking interim relief with respect to hiring, workplace postings, union recognition, operation of a subcontracting clause, scheduling changes, permission to choose vacation time, prohibiting work stoppages, and other matters.

The 1993 amendments also introduced a provision for expedited hearings in cases where a worker was disciplined or terminated in the context of a union organizing drive. Upon request by the union, the OLRB was required to begin its inquiry into the complaint within fifteen days of the application, and to continue hearing the
complaint on consecutive days from Mondays to Thursdays until the hearing was completed. The OLRB was then required to render its decision within two days.

In 1995, the 1993 provisions regarding interim orders and expedited hearings were repealed. The OLRB retained the power to make interim orders with respect to procedural matters, but was expressly prohibited from ordering the interim reinstatement of an employee.

In 1998, the LRA was further amended to provide that the provisions of the Statutory Powers Procedure Act, permitting administrative tribunals to make interim decisions and orders, did not apply to the OLRB.

In 2005, the LRA was amended to restore the OLRB’s power to make interim orders where workers are terminated or disciplined during an organizing campaign. Currently, the OLRB is empowered to make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate. Furthermore, the OLRB may make interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated, but whose terms and conditions of employment have been altered, or who has been subject to reprisal, penalty or discipline by the employer.

The power to make such interim orders is dependent on the OLRB being satisfied that the applicant has established:

- the circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was under way;
- there is a serious issue to be decided in the pending proceeding;
- the interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives;
- the balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.

The OLRB is prohibited from exercising its powers to order interim relief if it appears that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights by an employee under the LRA.

The Chair of the OLRB also has the power to make rules for expedited proceedings where interim relief is requested.
The LRA does not impose on the OLRB a specific timeframe for commencing proceedings in relation to interim orders or for rendering a decision. However, the OLRB has issued guidelines providing for the scheduling of hearings of applications for interim relief within four to six days after filing. Additional filing requirements and timelines are set out in the OLRB’s Rules of Procedure.

**Other Jurisdictions**

Ontario appears to have taken a unique approach by expressly setting out in the LRA the conditions in which the OLRB can make substantive interim orders. In every jurisdiction where the labour relations board or commission is expressly provided with a general power to make interim or provisional orders (i.e., Alberta, British Columbia, Manitoba, New Brunswick, Quebec, Saskatchewan and the federal jurisdiction), the test for application has been developed by the board or commission rather than set out in legislation.

With the exception of Newfoundland and Labrador, all Canadian provinces and the federal jurisdiction expressly provide that labour relations boards have the power to make interim or provisional orders. The scope of this power varies depending on the jurisdiction and is not always restricted to circumstances where workers are terminated or disciplined during an organizing campaign.

In six provinces (Alberta, British Columbia, Manitoba, New Brunswick, Quebec, and Saskatchewan) and the federal jurisdiction, labour relations boards are expressly provided with a general power to make interim or provisional orders where there has been an alleged contravention of their labour legislation or unfair labour practice, or to protect the rights of a party.

In Nova Scotia and Prince Edward Island (as well as Ontario, as described above), the power of the labour relations board to provide interim relief is expressly limited to certain circumstances. In Nova Scotia, the board may make interim orders regarding ongoing and potential work stoppages caused by unlawful lock-outs or strikes or by jurisdictional disputes. In Prince Edward Island, the board may issue an interim order regarding the assignment of work in a jurisdictional dispute.

The jurisprudence developed by boards and commissions varies by jurisdiction; some grant interim relief if the applicant meets the three-part common law test established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada*
(Attorney General), which requires an applicant for interlocutory injunctive relief in Court to demonstrate that:

- there is a serious question to be tried;
- irreparable harm will result if the relief is not granted; and
- the balance of inconvenience favours the order.

The courts have a residual discretionary power to grant interlocutory relief, such as an injunction. This power flows both from various statutes and from the inherent jurisdiction of the courts over interlocutory matters. Likewise, administrative tribunals are often granted the authority to provide interim relief, either by their enabling statutes or by virtue of section 16.1(1) of the Statutory Powers Procedure Act (or an equivalent statutory provision in other jurisdictions), which gives certain tribunals the power to make interim decisions and orders.

Submissions

Unions argue that unfair labour practices committed by employers in the context of a union certification campaign can cause irreparable harm to the campaign and interfere with, and frustrate, the exercise of the employees' constitutional rights to join a union and engage in collective bargaining. Unions assert that, too often in organizing campaigns, they are placed at a significant disadvantage when employers “hit hard and fast” in an effort to derail the organization of its employees, including acting in ways that are currently prohibited by the LRA. Unions generally agree that too many employers are prepared to risk being found in violation of the LRA in order to achieve an immediate result. They further argue that the adverse impact of employer misconduct can be profound and that organizing efforts are further disadvantaged without expedited hearings before the OLRB.

Union stakeholders support expanding the OLRB’s power to issue substantive interim orders on “such terms as the Board considers appropriate” in any case where unfair labour practices are alleged, and provided that evidence is adduced by the applicant to establish a factual foundation sufficient to meet the test for the granting of interim relief. It is argued that such interim relief power is a useful and

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72 RJR MacDonald Inc. v. Canada (Attorney General), (1994) 1 SCR 311.
necessary element of the OLRB's remedial toolkit that, from 1993 to 1995, was used effectively by the OLRB to stabilize the workplace, pending an adjudication of an unfair labour practice complaint.

In addition, unions have asserted that the current statutory test requiring the applicant to prove irreparable harm should be eliminated and the granting of interim relief should be decided on a less stringent legal test.

Employers tend to oppose broader substantive interim order powers on the basis that interim orders grant a remedy before a violation of the LRA has been found by the OLRB.

**Options:**

1. Maintain the status quo.

2. Implement one or more of the following:

   a) restore the power of the OLRB to issue interim orders and decisions pursuant to section 16.1(1) of the Statutory Powers Procedure Act;

   b) broaden the scope of the OLRB's remedial power by providing the OLRB, in cases of alleged unfair labour practices, with the ability to grant interim relief on “such terms as the Board considers appropriate”;

   c) eliminate the requirement that an applicant for interim relief prove that the relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives, and/or substitute less demanding standards;

   d) eliminate statutory requirements that must be met by an applicant for interim relief and leave it to the OLRB to develop its own jurisprudence about when it will issue interim orders; and

   e) require that the OLRB expedite hearings for interim relief by establishing prescribed statutory time limits so that hearings proceed without unnecessary delays.
4.5.2 Just Cause Protection

Certification to First Collective Agreement

Background

The focus of this discussion is whether there should be protection against unjust termination of employees from the time a union is certified or voluntarily recognized until the effective date of the first collective agreement. In first contract negotiations, this protection would extend to employees who are engaged in a strike or who are locked out by the employer before implementation of the first collective agreement.

A similar issue arises after the expiry of a collective agreement, during negotiations for a renewal collective agreement, when the union is in a legal strike position and the employer is entitled to lock out employees. Under the current LRA, employees are vulnerable to termination without cause by an employer unless such termination is the result of an unfair labour practice. This issue is dealt with separately in section 4.4.2.2 of this Interim Report.

Statutory “just cause” protection for employees generally provides protection for employees from unjust discharge by an employer. Commonly, such statutory protection allows an employee who asserts that there was no cause for termination to bring a complaint of unjust dismissal before a neutral third party adjudicator with jurisdiction to determine the issue. In such proceedings, the legal burden to prove just cause falls on the employer who must prove, on a balance of probabilities, that such action was justified. The adjudicator has jurisdiction to decide whether just cause exists and the dismissal is warranted and, where no cause is proven, to order an appropriate remedy (including damages and reinstatement) or to substitute a lesser penalty if there was wrongdoing by the employee but the discipline imposed by the employer was excessive.

The goal of a just cause provision is to ensure that employees are not treated unjustly by the exercise of management’s authority to terminate employees. Virtually without exception, collective agreements in Ontario contain provisions permitting the grievance and arbitration of employee discipline cases. Arbitrators may determine whether an employee has been discharged or otherwise disciplined for cause and may substitute another penalty for the discharge or discipline that the arbitrator deems just and reasonable.

Pursuant to the provisions of the LRA, an employer is prohibited from dismissing, threatening to dismiss or imposing any other penalty if the purpose is to prevent
an employee from joining a union or from exercising any rights under the Act. As a result, the OLRB has jurisdiction to protect employees from unjust discipline or discharge only if they are discharged or disciplined for exercising their rights under the LRA, (e.g., because they have joined a union or participated in other lawful activities related to organizing or certification of a union, including participating in collective bargaining). If the OLRB finds an employer has terminated or disciplined an employee because of the exercise by the employee of his or her rights under the LRA, it has jurisdiction to award damages, and to reinstate the employee in cases of termination. In such cases, the burden of proving that the employer did not act contrary to the LRA lies on the employer.

In practical terms, this means that after certification, but before a first collective agreement is in place, an employee has no protection against unjust termination by the employer unless the termination is motivated in whole or in part by the employee’s exercise of rights under the LRA.

Once the first collective bargaining agreement is effective, employees will have protection against unjust dismissal or discipline because of the just cause provisions contained in virtually all collective agreements. Even after the expiry of a collective agreement, employees in the bargaining unit will have protection against unjust dismissal or discipline because the terms and conditions of employment are frozen until the union and the employer are in a position to engage in a legal strike or lock-out.

Amendments to the *Labour Relations Act*, introduced in 1993, provided that a just cause provision was deemed to be in effect during:

- the interval following certification or voluntary recognition and before a first collective agreement was entered into;
- the course of the collective agreement; and
- strikes, lock-outs, the open period before a new collective agreement was in operation, or until the union was decertified.

The legislation allowed for a lesser standard for “cause” to apply during an employee’s probationary period. These provisions were repealed in 1995.

**Other Jurisdictions**

Three Canadian labour relations statutes contain just cause protections during periods where no collective agreement is in force. The federal jurisdiction provides
just cause protection during the period from the date of certification to the date when a first collective agreement is implemented. British Columbia’s legislation provides that an employer may not discharge, suspend, transfer, lay-off or discipline an employee except for proper cause when a union is conducting a certification campaign. Saskatchewan’s law states that, in circumstances where no collective agreement is in force, the board has certified a union, and an employee is terminated or suspended for a cause other than a shortage of work, an arbitrator may determine whether there is just cause for the termination.

**Submissions**

Unions have supported the restoration of a provision for just cause protection during the period subsequent to certification and prior to the first collective agreement. They argue that because employees do not have such protection until the collective agreement is in place, some employers “clean house” and terminate employees where cause for termination does not exist. Not only can such conduct erode the confidence of employees in the newly certified bargaining agent but it will likely also create issues that are very difficult to resolve in collective bargaining. Access to just cause protection will help to ensure stability in the workplace during the critical period following certification until implementation of a first contract.

Employers did not comment on this specific LRA issue in their written submissions with respect to this Review. However, we expect that employers would generally take the position that: the existing provisions of the LRA are sufficient to protect employees who exercise their rights under the LRA, including the right to organize and participate in collective bargaining; that before concluding the collective agreement, employers should not have their rights to manage the enterprise curtailed; and that unions are in a position to resolve issues relating to the termination of employees as part of the collective bargaining process, all while conceding that, like other collective bargaining issues, just cause issues can be very difficult to resolve.

**Options:**

1. Maintain the status quo.
2. Provide for protection against unjust dismissal for bargaining unit employees after certification but before the effective date of the first contract.
4.5.3 Prosecutions and Penalties

Background

In Ontario, anyone who contravenes the LRA may be subject to OLRB orders and prosecution before the provincial courts. However, it is important to evaluate whether these provisions act as a sufficient deterrent for unlawful activity.

The OLRB has broad general remedial powers to provide compensatory relief where there has been unlawful activity under the LRA. For example, the OLRB has previously ordered awards for damages, benefits, interest, organizing and negotiating costs, harassment and indignity, and prospective losses. However, the OLRB does not make orders that are primarily intended as deterrence or to punish the wrongdoer.

A prosecution for a violation of the LRA may be commenced before the Ontario Court of Justice but only with the prior written consent of the OLRB. The applicant has a heavy onus to persuade the OLRB that nothing else would resolve the issue and that prosecution is consistent with the promotion of good labour relations in the province.\(^{75}\) If the OLRB grants consent, the applicant may initiate a private prosecution against the alleged wrongdoer.

Upon conviction of an offence, individuals can be fined up to $2,000 and corporations and unions can be fined up to $25,000. Each day that a contravention continues may constitute a separate offence. These maximum amounts have not changed since 1990.

Prosecutions under the LRA are very rare. In the period from 2004-2014, the OLRB dealt with thousands of unfair labour practice complaints, but only received 29 applications for consent to prosecute, and only three were granted.

Some illegal activity under the LRA could result in penal consequences, where parties are found in contempt for disobeying court orders or orders of the Board filed in court and enforced as an order of the court. For example, engaging in an illegal strike has been and is still the most serious of illegal activities in the labour law field. If unions or employees engage in illegal strikes, especially in essential services such as health care, or in sensitive areas such as transportation or education, there is a risk of severe consequences. Where public safety is threatened, the consequence for unions and their members of defying legislation or court orders prohibiting illegal strike activity or directing employees to return to work can and has resulted in fines and even imprisonment.

\(^{75}\) *Ontario Hospital Assn. v. Ontario Public Service Employees’ Union*, (2004) CanLII 14343, ON LRB.
Other Jurisdictions

All Canadian provinces and the federal jurisdiction have taken a similar approach. Labour relations boards or commissions have general remedial powers and offences are prosecuted before the courts. However, there are some differences. For example, the Manitoba Labour Board is expressly permitted to order monetary awards of up to $2,000 for an unfair labour practice, even where the unlawful activity has not resulted in any monetary damages or loss. Consent to prosecute is not required in British Columbia and Quebec, whereas all other jurisdictions require some form of consent unless an exemption applies. The maximum fines for conviction of a general offence also vary depending on the jurisdiction, ranging from $100 to $5,000 for individuals and $500 to $100,000 for employers, corporations, and unions. Prince Edward Island also mandates minimum fines. Many jurisdictions, such as Quebec, set out different fines for certain types of contraventions, such as unlawful work stoppages.

In the United States, the approach under the National Labor Relations Act (NLRA) is similar to Ontario. The National Labor Relations Board (NLRB) has broad remedial powers but the prosecution of offenses is before the courts. The right of an individual to initiate a private prosecution in the courts was removed following a 1981 decision by the United States Supreme Court.

In 2015 in the United States, the Workplace Action for a Growing Economy (WAGE) Act was introduced. Although the WAGE Act is unlikely to be made into law, it proposes several amendments that could deter unfair labor practices, including:

- triple back pay for workers who are unlawfully terminated or face retaliation;
- civil penalties up to a maximum of $50,000 per violation and doubled penalties (maximum $100,000) for repeat violations;
- private civil actions for workers injured by an unfair labor practice;
- personal liability for officers and directors in certain circumstances; and
- joint and several liability for employers where violations of the NLRA involve employees supplied by another employer.

76 Depending on the jurisdiction, consent may be required from a labour relations board, Minister of Labour (or equivalent) or Attorney General. In Prince Edward Island, Nova Scotia and Manitoba, consent is not required where the prosecution is instituted by the Minister or the Attorney General. In New Brunswick, consent is not required where the prosecution is instituted by the Attorney General. The procedures for private prosecutions also vary depending on the jurisdiction.

77 The minimum fine for individuals is $100 and the minimum fine for employers, unions and employers’ organizations is $500.


Submissions

No submissions were made to us on this precise issue although a strong general theme of all the submissions to us from the worker advocate community and unions was that there was a widespread disregard for the law as evidenced by allegations of non-compliance with the ESA and LRA. Employer illegal activity during organizing campaigns and the need for effective action to stop it was a pervasive theme in the submissions of many unions.

General Options:

In the ESA sections of the Interim report, there is a discussion about the desirability of dispensing with prosecutions in the courts and giving the OLRB the authority to impose administrative monetary penalties of up to $100,000 per infraction where violations of the legislation are found to have occurred. If the OLRB were given jurisdiction to impose similar administrative monetary penalties for violations of the LRA, the same model could apply. Concurrently the ability to commence prosecutions before the courts could be removed.

The OLRB has stated that there are good reasons for the Board not being responsible for imposing penalties because if it did, it could be difficult for it to maintain its “accommodative and settlement role”:

There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating The Labour Relations Act. But the Legislature did not provide the Board with this role and probably with good reason. Section 85 of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. … This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment. If it were otherwise, the Board’s accommodative and settlement role under section 79 and more generally would be a most difficult one to maintain. Offenders would be wary of compromise lest their candor be subsequently met by stiff penalties issued by the very agency that encouraged an informal and early resolution of a complaint. 80

80 United Steelworkers of America v. Radio Shack, (1979) CanLII 817, para 94, ON LRB. [References omitted.]
In one of the few cases where consent to prosecute was granted, the OLRB recognized that there is “a useful labour relations principle to be served in deterring parties from acting as if they are simply free to ‘opt out’ of the collective bargaining regime and the [LRA] and its provisions.”

Since the 1975 amendments to the LRA which gave the OLRB broad remedial powers, it appears to be a near universal consensus in labour law circles is that the approach which stresses the importance of the relationship between the parties as opposed to “punishment” is the better one. A defining feature of labour law has been that the search for appropriate remediation should trump concerns over deterrence.

In recent years, these views have been increasingly challenged. In the United States, as seen above, the general approach until now has mirrored the approach in Canada but there has been widespread criticism from organized labour (the AFL-CIO) and some members of United States Congress over the lack of penalties for employers who violate the law. A former chairman and member of the NLRB (1997-2011) has questioned the fact that there are no penalties in labour law for employers who illegally retaliate against workers, and argues that greater penalties and higher and consequential damages are required.

A criticism of the existing system in Ontario is that there is no credible threat of prosecution for violations of the LRA and no real deterrence (except in the case of illegal strikes) and that, as a result, serious unfair labour practices occur too regularly. The costs of violating the LRA – legal fees, compensatory remedies and a slap on the wrist by the OLRB – could be viewed by some as a cost of doing business and a small investment in achieving the ultimate objective of being able to operate a business without a union. The same can be said about union breaches of the duty of fair representation where the consequences of not arbitrating an employee grievance can be very serious for the employee and yet carry little if any meaningful consequences for the union which fails to process the grievance properly. Absent deterrence, is breaking the law simply part of the game- like a flagrant foul in basketball or serious fighting in hockey? The policy question is whether there can be an effective system of law in any area, especially one as adversarial as labour law, without any deterrent to help ensure that conduct stays within the mandated rules.

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Underpinning the architecture of the existing system may be a policy bias against the prosecution of offences by private parties. There are jurisdictions that do not permit private parties to prosecute violations of the applicable labour legislation. Indeed, if violation of the LRA could result in the imposition of significant monetary penalties and private prosecutions were permitted, then there would be a risk that unions, employees or employers would use the threat of or the initiation of prosecutions for improper purposes and not in the public interest.

If the OLRB were given the jurisdiction to impose administrative monetary penalties for violations of the LRA, it is not suggested that private parties would also have standing to ask the OLRB to impose such a penalty. Rather, complaints might be initiated or existing complaints joined by the Ministry of Labour or by the Ministry of the Attorney General whose role would be to represent the public interest. In this model, only the government would have standing before the OLRB to ask for the imposition of an administrative monetary penalty where violations are found to have occurred.

For purposes of enforcement of both the LRA and the ESA, perhaps the Province would consider the creation of a new position, a Director of Labour Enforcement, whose responsibility would be to determine if and when the state would seek the imposition of administrative monetary penalties under either statute. Unions, employees and employers could refer complaints of unlawful activity to the Director, who would determine if there is a public policy interest in achieving an outcome that would better reflect the seriousness of the violation(s) alleged.

The employer, union, employee, or other respondent would know at the outset the potential risk arising from the Ministry proceeding or participating in a hearing before the OLRB. If the Director of Enforcement were going to seek an administrative monetary penalty, over and above a remedy for the complainant(s) or other employees whose rights have been violated, the respondent would be advised not only of the details of the alleged violations but also of the amount of the administrative monetary penalty being sought by the Director.

The current complaints driven process is essentially a two-party process with the complainant and a respondent being the parties in a position to resolve their own litigation. If the Director participated in the litigation as a party, a settlement by other parties could not bar the Director from pursuing a case at the OLRB for purposes of seeking an administrative monetary penalty. In a case where the Director of Enforcement sought the imposition of an administrative monetary
penalty, the participation of the Director of Enforcement would not preclude a settlement on the question of the amount of the administrative penalty – perhaps subject always to the approval of the OLRB. The Director will be in the best position to assess the strengths and weaknesses of a case, to assess how best to serve the public interest and to take into account the views and the rights of the parties in deciding whether and on what terms to settle.

If the OLRB were to be given an expanded jurisdiction to impose significant monetary sanctions up to $100,000 per infraction, there is also reason to consider giving the OLRB jurisdiction to order an unsuccessful respondent to pay the cost of the investigation and the costs of the hearing incurred by the Director of Enforcement.

Similarly, it may be prudent to consider stipulating that revenue generated from the exercise of a power conferred or a duty imposed on the OLRB does not form part of the Consolidated Revenue Fund but could be used for various purposes including educating employees and employers about their rights and obligations under the LRA, or similar purposes.

Under this option, a Director of Enforcement could also have responsibility for ESA prosecutions, and/or for Occupational Health and Safety Act (OHSA) matters.

**Specific Options:**

1. Maintain the status quo.
2. Increase the penalties under the LRA.
3. Eliminate the requirement for consent to prosecute and allow private prosecutions for breaches of the LRA in the courts.
4. Eliminate the requirement for consent to prosecute and do not permit private prosecutions for breaches of the LRA, but only prosecution by the state.
5. Eliminate prosecutions in the court and give the OLRB the authority to impose administrative penalties as per the model of the Ontario Securities Commission.
6. Create a position of Director of Enforcement, situated in the Ministry of Labour, or in the Ministry of the Attorney General.
4.6 Other Models

4.6.1 Broader-based Bargaining Structures

Background

Many commentators have criticized the current industrial relations model set out in the LRA and administered through policies established by the OLRB. It is said that the current system, based on the 1940s United States Wagner Act model, is unable to respond to the modern labour market, characterized by growing employment in small workplaces and non-standard work. It is said that the Wagner Act model limits access to collective bargaining to many thousands of workers because there is no practical way for collective bargaining to operate in much of the present economy. This is seen to affect vulnerable workers in precarious work, especially in industries where such workers feature prominently, such as in restaurants (particularly fast-food), accommodation, retail, and other service industries. While this is generally seen as a private sector problem, it is said to also occur in the public sector (e.g., in home care).

“Broader-based bargaining” (also referred to as “sectoral bargaining”) is advocated as a necessary alternative or addition to the old industrial relations model. However, detailed recommendations for new bargaining structures are often not spelled out and the application and boundaries of the concept have remained ill-defined.

Generally, labour relations in Canada are highly decentralized. While broader-based bargaining arrangements are the exception, they have nonetheless featured prominently in the past in some areas, with either formal centralized bargaining or pattern bargaining. However, the default arrangement in our system is for collective bargaining to take place between a union representing a group of employees at a particular workplace and their employer, particularly in the private sector (with the exception of the construction industry, as noted below).

The LRA vests the OLRB with the discretion to determine the appropriate bargaining unit with respect to each application for certification. The most common bargaining unit definition comprises a single workplace of a specific employer at a geographic location. There may be further subdivisions (e.g., separate bargaining units for “office” and “plant” employees).

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These criticisms are discussed in two background papers prepared for Ontario Ministry of Labour to support the Changing Workplaces Review: Sara Slinn, Collective Bargaining (2015); Rafael Gomez, Employee Voice and Representation in the New World of Work: Issues and Options for Ontario (2015).
Unions assert that bargaining separate individual agreements with many small employers, or separate agreements for each small location of a larger employer, is inefficient, uneconomic and burdensome. The costs of organizing (including costs of legal proceedings) and representing small units one-by-one are too high and effectively deter organization.

In the context of the Wagner Act model, workers have found it difficult to organize into unions in sectors characterized by small workplaces (typically also associated with high rates of part-time, temporary and contract jobs). The union coverage rate in the private sector is approximately 24% among workplaces with more than 500 employees, but below 7% in workplaces with fewer than 20 employees.  

Moreover, unions recognize that there is a difficult trade-off in arguing for broader bargaining units. Narrower units (e.g., individual stores in a retail chain) are easier to organize, but have little bargaining power. Broader units (e.g., all of the stores in a retail chain) will have greater bargaining leverage, but may be difficult to organize. The OLRB has recognized the dilemma of organizing smaller units and the need for flexibility in organizing and certifying “an appropriate bargaining unit” (as opposed to the most appropriate bargaining unit), particularly in industries where there is little history of organization. The dimensions of this issue are also discussed above, in section 4.3.4, in Consolidation of Bargaining Units.

Under the existing law, and outside the construction industry, more centralized bargaining relationships (i.e., multi-employer bargaining) cannot be imposed by either side or by the OLRB, but can be established only by agreement between each participating employer and each participating bargaining agent. This kind of sectoral bargaining has taken place in some industries such as printing, nursing homes, and hospitals. However, it is not the norm.

Even in unionized parts of the private sector economy, collective bargaining has become more decentralized. There has been a general shift away from pattern or central bargaining in various industries towards bargaining at the enterprise level. This is an international trend, and appears to be linked to a decline in union bargaining power and an emphasis on the ability of individual enterprises to pay.

84 See trends discussed in Chapter 3, “Changing Pressures and Trends”.
85 Union of Bank Employees (Ontario), Local 2104 v. National Trust, (1986) OLRB Rep. February 250; See also United Steelworkers of America v. TD Canada Trust in the City of Greater Sudbury, Ontario, (2005) CIRB No. 316, where the approach of the Canada Industrial Relations Board was reviewed.
86 There are exceptions to this in regard to the construction industry, as well as separate public sector labour relations legislative regimes relating to bargaining structure for certain groups (e.g., college employees, school board employees) that engage in centralized bargaining.
Models of Broader-based Bargaining

There are, various models for broader or sector-wide bargaining in Canada.

Construction Sector

In the construction industry, for example, reforms of the industrial relations system came at the request of employers to counter strong unions that were seen as engaging in bargaining tactics known as “whipsawing” and “leapfrogging” to advance pay and benefits. In this context, a multitude of employers with weak bargaining power as individual companies sought structural industrial relations relief to permit them to band together and force the union to bargain with one employer entity.

Multi-employer bargaining along trade lines has existed under Ontario’s labour relations legislation for the construction industry since the 1970s and on a compulsory basis in the industrial, commercial and institutional (ICI) sector since 1977. The accreditation and province-wide bargaining provisions in the ICI sector were employer initiatives designed to equalize bargaining power with then-stronger unions. Unlike the general approach under the LRA, construction industry certificates include all of the operations of a single employer in either the province and/or geographic areas set by the OLRB in construction industry certification cases (“Board Area”).

In the case of the ICI sector of the construction industry, the LRA imposes a system of single-trade, multi-employer, province-wide bargaining. The Minister of Labour designates employee bargaining agents and employer bargaining agents (representing all unionized employers in the province with respect to a single trade). There can be only one provincial agreement between these parties (bargaining outside the designated structures is prohibited). All provincial agreements have a common duration and a common expiry date. When a new bargaining unit is certified for a non-union employer, the parties automatically become bound to the provincial agreement.

The accreditation of a multi-employer bargaining agency is designed to offset the power of the unions and compel a union in a sector to bargain with the single employer bargaining agency rather than individual employers.
**Arts Sector**

The federal *Status of the Artist Act* (SAA)*87* provides another example of sectoral or multi-employer approaches to collective employee representation and bargaining. The SAA permits a broad array of professional artists in the federally regulated cultural sector to form associations and bargain collectively with the producers who engage their services. It allows for the certification of artists’ associations that meet certain criteria,*88* in sectors within this industry that are considered suitable for bargaining. It is not necessary for an artists’ association to provide proof that it represents more than 50% of artists working in a given sector (recognizing that it is often difficult or impossible to determine the exact size of the sector).

In addition, the SAA allows for the creation of producers’ associations for bargaining with artists’ associations. Certification gives an artists’ association the exclusive authority to bargain a scale agreement on behalf of the artists in the sector.

Scale agreements are different from other collective agreements in that they establish only the minimum terms and conditions of engagement. Private negotiations between employees and employers for terms and conditions above and beyond scale agreements are permitted. This reflects the unique situation of the cultural industry, including the varying talent levels of individuals in the broadcasting industry. It appears that this practice has generally worked well in other sectors, such as in the areas of sports and entertainment.*89*

The SAA model holds the potential to extend collective bargaining to types of workers who may not conventionally be thought of as “employees”. It aims to create a safety net for the majority of working artists while not depriving artists of the ability to bargain better terms. A weakness of the legislation is that producers are not required to form associations for bargaining, potentially leaving artists’ associations with no sector-wide group with which to bargain. Only producers

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*87* Quebec is the only province that has enacted similar legislation providing access to collective bargaining for artists. Note that the *Status of Ontario’s Artists Act, 2007* does not address collective bargaining, and while this legislation does not fall within our review, the labour relations and employment issues concerning artists and performers do come within the terms of the review.

*88* In order to become certified an artists’ association must adopt by-laws and establish membership requirements, give its regular members the right to take part and vote in the meetings and to participate in ratification votes on any scale agreements that affect them, and provide their members with the right of access to a copy of a certified financial statement of affairs of the associations. After these prerequisites are met, the association is eligible to apply to the Board and have it determine eligibility for certification. The Board considers the “sector” and the “representativeness” of an association.

*89* Minimum terms and conditions of employment supplemented by individual agreements negotiated by individual employees are also common in faculty agreements, newspapers and other industries.
bound to the agreement are subject to the terms and conditions established by scale agreements, and there is no process for binding a producer not voluntarily bound to the scale agreement.

Primarily as a result of the artists’ and performers’ need or desire to have independent contractor status for tax purposes, the performers are presumed not to be employees under the LRA and, therefore, the sector is not governed by the Act. As such, the agreements appear to fall outside the scope of the LRA. If there is no provision for binding individual producers to a scale agreement, and if the LRA does not apply, a producer who is not a party to an agreement cannot be compelled to negotiate with the association or sign the scale or other agreement.

**Other Sector Arrangements**

Another approach, common in Europe but generally absent in North America (except for the decree system in Quebec, which is much smaller in its application today than previously), is to institute a system by which certain terms (negotiated through a collective agreement or at a sectoral table) can be extended by decree to cover all workers, both union and non-union, within a specific sector. An example of this approach is Ontario’s *Industrial Standards Act* (ISA), which was introduced in 1935 and repealed in 2000.

The ISA provided a mechanism for establishing a schedule of wages and working conditions that was binding on all employers and employees in a particular industry across a given geographical zone. Employers or employees in a particular industry could petition the Minister of Labour to call a conference of employers and employees in that industry, for the purposes of negotiating a schedule of minimum standards, including wages, hours of work, holiday pay, and overtime. The schedule would be submitted to the Minister, who could approve it if it had been agreed to by a “proper and sufficient representation of employers and employees.” An approved schedule would be made as a regulation and would be binding across the entire industrial sector.

The ISA largely fell into disuse after the ESA was introduced in 1968. By 2000, when it was repealed, there were only two ISA schedules remaining, covering subsectors within the garment industry in Toronto.

Over the years, various proposals have come forward in relation to the concept of broader based bargaining. One that is frequently cited is a proposal put forward
by a majority of special advisors appointed by the British Columbia government in 1992 to review the province’s *Industrial Relations Act*. In its report, a majority of the sub-committee endorsed the introduction of a form of sectoral certification for “those small enterprises where employees have been historically underrepresented by trade unions”.  

The sectoral certification model proposed in British Columbia would be available only in sectors that were determined by the Labour Relations Board to be historically underrepresented by unions and where the average number of employees at work locations within the sector was fewer than 50. To determine whether a sector met these criteria, the Labour Relations Board would be required to hold public hearings and accept submissions not only from the parties but other employers and unions within the sector.

Sectors under this model would be defined by two characteristics – geographical area and similar enterprises – with employees performing similar tasks within that geographic area. For example, a sector could comprise “employees working in fast food outlets” in a city.

The recommendation stated that a union with the requisite support (e.g., 45% of employees) at more than one work location within a sector could apply for certification of the employees at those locations. To be certified, the union would have to establish majority support at each location and, in a representation vote, win majority support among all employees at the work locations where certification was being sought.

Once the union obtained a sectoral certificate under the British Columbia model, collective bargaining would take place between the union and the various employers subject to the certificate. A standard agreement would be worked out and, subsequently, if the union could demonstrate sufficient support at additional locations within the sector, it would be entitled to a variance of its bargaining certificate to encompass the new employees. Although the standard agreement would then apply to the new employees, the Labour Relations Board would have the option of tailoring this agreement to the exigencies of any particular location. Once a sector had been declared “historically underrepresented,” any union would be able to apply for certification within the sector. The authors of the proposal

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91 Ibid., 31.
point out that under their model, three or four different unions could end up representing employees within a sector or geographic area, each administering its own collective agreement. No union would have a “monopoly” on representation rights within a sector.92

The management representative on the committee opposed this recommendation and the proposal was not adopted by the British Columbia government.

Submissions

It is argued that the LRA is not only irrelevant for a very large number of employees, but also that if it does not provide for meaningful opportunities for collective bargaining for large groups of employees because of structural difficulties, then the Charter of Rights’ guarantee of freedom of association has little practical meaning for many.

It is also argued that sectoral arrangements, like those in the construction and arts sectors, are intended to – and in some respects do – address the undesirable features of unstable employment and temporary work that feature prominently in the construction and arts sectors.

It is further argued that, not only does sectoral bargaining provide a more balanced framework for employers and employees, but also, multi-employer arrangements have generated training and benefit structures that have improved the skills of employees, and provided pension, health, welfare and other benefits that are hallmarks of “good jobs.” For example, single-employer pension plans have become increasingly rare in the private sector but fixed-cost multi-employer pension arrangements are available to construction sector employers and employees and are an important source of investment capital in Ontario.

Also, it is argued that multi-employer bargaining in lower wage industries – like nursing homes – have provided benefit and pension plans to those employees, which could not have been possible in the context of single employers dealing with a single local union.

Some academics and unions have recommended the opening of new opportunities for broader-based bargaining. Some urged that the British Columbia proposal be adopted in some form. As discussed above, the British Columbia

92 Sub-committee of Special Advisors, Recommendations for Labour Law Reform, 31.
special advisor proposal was one in which unions could organize some parts of a sector, and then add to the certification over time, with a single master agreement applying to individual employers and bargaining units. The proposal also accommodated multiple unions.

Another option for sectoral bargaining is a model which permits an application for certification for bargaining rights for multiple employers in an entire sector, defined by industry and geography, in which multi-employer bargaining would take place with a union or council of unions and a designated employer bargaining agency in a sector. In this scenario, the collective agreement would apply to the entire sector. Some possible features of this option are discussed below.

Another proposal is to expand the application of negotiated provisions in a sector through employment standards legislation at the sectoral level and pursuant to a complex system of sectoral agreements and councils. This would essentially provide the OLRB with authority to prescribe certain minimum terms and conditions of employment within an entire sector, but with significant employer and employee input.93

Other specific proposals were made regarding franchise operations and the creation of geographic and industry sector-wide bargaining for the operations of a particular franchisor, consisting of both the franchisor and its franchisees.94 As discussed above, in section 4.2.2, Related and Joint Employers, the identification of the appropriate employer is a long standing issue in labour relations law. As also noted in that section, the National Labor Relations Board has, in a recent decision, updated its approach to this issue finding that, in certain situations, two or more entities may be joint employers of a common workplace.95

There was also a specific proposal to allow for the certification of multi-employer bargaining units in a sector based upon sectoral standard provisions that the OLRB has prescribed. Interested parties may wish to review these proposals.96

A number of organizations, active in representing artists and performers, asked to have their scale agreements, described above, protected under the LRA, and for the ability to compel producers to bargain with them. A union seeking to represent

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94 Ibid., 105.
96 Unifor, Building Balance, Fairness, and Opportunity in Ontario’s Labour Market, 127.
freelancers with multiple producers in the television industry, particularly in the production of reality TV, asked for a sectoral bargaining structure for that sector.

Employers generally did not raise the issue of broader-based bargaining during our consultations. They may be wary of losing autonomy by having to bargain through a multi-employer bargaining agent. However, it is noteworthy that the multi-employer model in construction came at the instance of employers wishing to provide a counterweight to strong unions and, as noted above, to avoid the problem of unions constantly “whipsawing” and “leapfrogging” employers, which could otherwise happen in a single-employer collective bargaining regime. Put simply, employers in the construction sector who do business in a very competitive market and whose product, or a similar one, can be purchased from numerous contractors at the same or similar price, felt vulnerable in a single-employer collective bargaining regime. Multi-employer bargaining was seen as providing the best chance for creating a level playing field for all unionized employers in the sector.

In this regard, a model has been discussed that would primarily serve employer interests in industries where unions or multiple unions refuse to bargain on a sectoral basis and, instead, insist on bargaining with individual employers. This model would permit an application by an employers’ organization to accredit an employer bargaining agency along the same general lines as in the construction industry, and require that a union, or council of unions, bargain with the employer bargaining agency instead of individual employers.

Any model that would significantly expand the scope of sectoral collective bargaining to franchisors and franchisees, or multi-employer bargaining, both of which involve different employers bargaining together at the same table, will interest the employer community. Based on the employer reaction to proposals for sectoral bargaining in British Columbia, it is anticipated that the employer community will express a preference for enterprise-based bargaining, because of its concern that the needs and realities of specific enterprises will not be reflected adequately in a sectoral bargaining process.

Employers in British Columbia argued that the application of collective agreements, negotiated by others, on a newly certified employer is inconsistent with sound business and economic practices and deprives employers and employees of the necessary control over their own workplaces. In their view, only enterprise-based collective bargaining ensures a focus by both parties on the needs and circumstances of individual businesses. One British Columbia employer submission put it this way:
Only through enterprise-based bargaining can we ensure that collective agreements reflect the needs and circumstances of individual businesses, allowing them to remain flexible, competitive and successful in the modern economy, thereby encouraging further investment and job creation in our province. Further, only through enterprise-based bargaining do employees of a given enterprise have a direct voice in the terms and conditions which will govern their employment, which is the ultimate objective of collective bargaining.97

Options:

Introduction to Options

We have been asked to consider a number of broader-based bargaining models and – as with other options set out in this report – have not yet decided which, if any, to recommend. We have not listed these in order of importance, nor does the order reflect that we are considering some more carefully than others.

Option 2 can be called an extension model, where negotiated provisions are extended to an entire sector but are, perhaps, limited geographically, akin to models in Quebec or in Europe or in the old ISA framework in Ontario. We have been provided with a very detailed proposal in this regard, which we do not set out but to which interested parties can refer.98

Option 3 deals with single franchisor/franchisee and single-employer, multi-location certification and bargaining. It contemplates a location-by-location approach to certification and a broad, multi-location approach to bargaining.

Options 4 and 5 deal with multi-employer, multi-location certification and bargaining but, whereas the acquisition of bargaining rights in 4 is incremental, the acquisition of bargaining rights in 5 is with respect to an entire sector.

Option 4, based on the British Columbia proposal, contemplates single-employer, location-by-location, certification and multi-employer sectoral bargaining. Because it was the subject of a specific detailed proposal in British Columbia and was the subject of much debate in British Columbia, we saw no need to model it in greater detail.

98 Unifor, Building Balance, Fairness, and Opportunity in Ontario’s Labour Market, 120.
Option 5 is a new idea for the acquisition of bargaining rights at one time for an entire sector and geographical area, followed by multi-employer bargaining across the entire sector. Since it was a new idea, we felt it was wise to try to model it in detail, to see if it was practical and also so that it could be evaluated. This accounts for the extensive detail regarding this option, below.

Options 3, 4 and 5 are not mutually exclusive in the sense that only one would necessarily be recommended. All three models could be applied generally or they could be limited only to particular industries and sectors where collective bargaining has not taken root and/or where there are a large number of vulnerable workers and precarious jobs. All or none could be recommended and all three could co-exist under the LRA.

Option 6 is a new idea to support employer interests in broader bargaining structures where these might exist. Since it is modeled on an existing accreditation model in the construction industry, where there is already a wholly formed legislative scheme, we felt no need to model it in detail.

Option 7 addresses specific situations involving vulnerable workers in precarious jobs where it is not clear if collective bargaining, as currently structured, works effectively (e.g., home care), or how it could or would work if existing exemptions were eliminated (e.g., domestic, agriculture, and horticulture workers).

Option 8 considers the appropriateness and practicability of applying the artist-type model to freelancers and dependent contractors.

Option 9 considers dealing with the media industry and the groups affected by the Status of the Artist Act in separate provisions of the LRA that would apply exclusively to them; these could address the issues and difficulties described above.

Summary of Options

1. Maintain the status quo.

2. Adopt a model that allows for certain standards to be negotiated and is then extended to all workplaces within a sector and within a particular geographic region, etc. This could be some form of the ISA model or variations on this approach that have been proposed in a very detailed way (as discussed above).
3. Adopt a model that would allow for certification of a unit or units of franchise operations of a single parent franchisor with accompanying franchisees; units could be initially single sites with accretions so that subsequent sites could be brought under the initial agreement automatically, or by some other mechanism.

4. Adopt a model that would allow for certification at a sectoral level, defined by industry and geography, and for the negotiation of a single multi-employer master agreement, allowing newly organized sites to attach to the sectoral agreement so that, over time, collective bargaining could expand within the sector, along the lines of the model proposed in British Columbia.

5. Adopt a model that would allow for multi-employer certification and bargaining in an entire appropriate sector and geographic area, as defined by the OLRB (e.g., all hotels in Windsor or all fast-food restaurants in North Bay). The model would be a master collective agreement that applied to each employer’s separate place of business, like the British Columbia proposal, but organizing, voting, and bargaining would take place on a sectoral, multi-employer basis. Like the British Columbia proposal, this might perhaps apply only in industries where unionization has been historically difficult, for whatever reason, or where there are a large number of locations or a large number of small employers, and, perhaps only with the consent of the OLRB.

The following could be the technical details.

a) A sectoral determination by the OLRB would precede any application for certification.

b) To trigger a sectoral determination by the OLRB, itself a serious undertaking, a union (or council of unions), would have to demonstrate a serious intention and commitment to organize the sector, including a significant financial commitment.

c) The OLRB would be required to define an appropriate sector, both by industry and geography, or could find that there was no appropriate sector. All interested parties could make representations on the appropriateness of the sector (e.g., all hotels in Windsor, or all fast-food outlets in North Bay).

d) Employers in the sector would be required, at some stage of the sectoral proceedings, to produce employee lists to demonstrate the scope of the proposed sector and the union’s apparent strength, or lack thereof.
e) A secret ballot vote and a majority of ballots cast (the current rule) would be required for certification.

f) Instead of the double majorities that could be required in the British Columbia model, this model would require only a single majority of employees because, as a result of the certification, all employers in the sector would be covered by the master agreement, whereas in the British Columbia-based proposal, almost by definition, there would be a non-union portion of the sector.

g) In the special case of an application for an entire sector in a large, multi-employer constituency, given the difficulties inherent in determining an accurate constituency as of any given date and, therefore, whether a numerical threshold to trigger a vote has been met, the union(s) in this model would not be required to meet a numerical threshold to be entitled to a vote. Rather, to be entitled, the union(s) would be required to persuade the OLRB that it had significant and sufficient broad support in the sector. The union would have the obligation to make full, confidential, disclosure to the OLRB, as is required now, with respect to its membership evidence, including all of its information on the size of the unit, the number of employers, etc. Any effort to misrepresent the size of the unit could lead to the dismissal of the application.

h) Cards could be signed electronically, with the same safeguards now used by the OLRB for mailed membership evidence.

i) An OLRB-supervised secret ballot vote would take place electronically. Voters would “register,” at the time they voted, listing their employer, work and home address, last hours worked, etc. The OLRB would have the authority and responsibility to quickly and administratively determine the eligibility of voters, including any status issues, and ensure that only eligible voters voted.

j) Such applications could only be brought at fixed intervals, and, if unsuccessful, could not be brought again, either by the same applicant or by any other applicant, for a period of one or two years.

k) If the union was certified, the OLRB would have the authority to accredit an employers’ organization to represent the employers and to conduct the bargaining, directing that dues be paid from each employer on a pro-rata, per-employee basis.

99 In most certification applications today there are status issues which the OLRB must resolve to determine if the union has met the threshold to entitle it to a vote. Keeping this requirement in a large multi-employer certification would bog the process down for years and make it impossible to determine.
6. Create an accreditation model that would allow for employer bargaining agencies in sectors and geographic areas defined by the OLRB (e.g., in industries like hospitals, grocery stores, hotels, or nursing homes), either province-wide, if appropriate, or in smaller geographic areas. This model is intended for industries where unionization is now more widespread, but bargaining is fragmented. Employers could compel a union to bargain a master collective agreement on a sectoral basis through an employers’ organization, and be certified by an accreditation-type of model, similar to the construction industry accreditation model. This might be desirable for employers in industries where unions decline to bargain on a sectoral basis, and where the union could otherwise take advantage of its size, vis-à-vis smaller or fragmented employers, to “whipsaw” and “leapfrog.”

7. Create specific and unique models of bargaining for specific industries where the Wagner Act model is unlikely to be effective or appropriate because of the structure or history of the industry, (e.g., home care, domestic, agriculture, or horticulture workers, if these industries were included in the LRA).

8. Create a model of bargaining for freelancers, and/or dependent contractors, and/or artists based on the Status of the Artist Act model.

9. Apply the provisions of the LRA to the media industry as special provisions affecting artists and performers.

4.6.2 Employee Voice

Background

As recognized in our discussion of the Guiding Principles, Values and Objectives for this Review, work is a fundamental aspect of our lives. It is natural for everyone to want to participate in and to influence his or her working environment. As noted in the “Guide to Consultations” paper, voice, together with efficiency and equity is one of the objectives of the employment relationship. By voice, we mean the right to participate in decision-making in some dimension, be it through the right to speak, or to be consulted, or to vote, because “participation in decision making is an end in itself for rational human beings in a democratic society.”

Underpinning this view is the belief held by many that every worker should, as a matter of principle, be afforded some system of employee voice. The absence of employee voice disproportionately impacts those social groups who face greater vulnerability in the labour market, including racial and ethnic minorities, recent immigrants, women, and youth.

Recognition of the importance of voice can be seen in the evolving jurisprudence of the Supreme Court of Canada, in a number of cases, some of which we quoted in our chapter on Guiding Principles, Values and Objectives.101 Taken together, they recognize the value of employee voice, as seen, for example, in the court’s discussion of the rights to organize in pursuit of common goals, to make representations and engage in meaningful dialogue, and to exercise real influence over the establishment of workplace rules.

There is little doubt that effective employee voice can make workplaces function better. In our many years as practitioners we have seen, directly, that the most successful workplaces are those in which the parties work together, embracing opportunities for voice by fostering open dialogue, problem-solving and innovation.

Research on workplace trends has emphasized that our modern, knowledge-based economy requires a high level of trust and cooperation at work, relationships that foster teamwork, networking, information-sharing, high commitment, and good customer service. The absence of employee voice, on the other hand, tends to produce high-conflict/low-trust employment relations and underperforming enterprises.102

About ten years ago, a published study by American researchers Richard Freeman and Joel Rogers identified the so-called “representation gap”, based on a large-scale survey of both American and Canadian private-sector workers.103 The picture painted by these authors, arising from these survey results, was that: “given a choice, workers want ‘more’”, including more say in the workplace decisions that


103 Richard Freeman and Joel Rogers, What Workers Want, rev. ed. (Ithaca: Cornell University Press, 2006). Known as the “Worker Representation and Participation Survey” (WRPS), the survey was conducted in the mid-1990s and updated in 2005. The authors surveyed 2,300 Americans and 1,100 Canadians, although their analysis is based primarily on the American results.
affect their lives, more employee involvement in their firms, more legal protection at the workplace, and more opportunities for collective representation.\textsuperscript{104}

We are releasing to the public, concurrent with this Interim Report, a list of research projects that we commissioned for this Review, including a research report on employee voice.\textsuperscript{105} The report reviews the decline of unionization in the private sector and the fact that unions may well not be able to attain a meaningful presence there. It argues that there is a vacuum in Ontario, created by a lack of meaningful ways for employees to express their voice in the vast majority of non-union workplaces.

That paper canvasses alternatives to the Ontario model of labour relations, called the \textit{Wagner Act} model, including concepts about minority unionism put forward in the United States and in Canada, while also outlining how European jurisdictions, including the United Kingdom and Germany, deal with this. The paper examines, in depth, the potential positive and negative attributes of these models.

We will consider those models as part of this Review, and we urge interested parties to examine the paper and the models, and to comment to us in writing as they may find appropriate.

We make some brief comments on some of these issues, below.

Germany, in the latter half of the 20th century, developed a system of “co-determination,” including a legislated requirement for the establishment of works councils. These bodies have substantial powers, extending to the effective right of veto on some issues. Participation rights allow for joint decision-making jurisdiction over a wide variety of issues, including hours, occupational health and safety, training, job classification, and individual and mass dismissals. They are not unions (although union members normally play a key role in them). German works councils are closely tied to a co-operative industrial relations model in which the value of employee voice is widely recognized at all levels (e.g., worker representation on the supervisory boards of larger corporations and extensive tripartite collaboration between labour, business and government at the policy level).

\textsuperscript{104} Freeman and Rogers, 154.
During our consultations, no one suggested that a model such as this, though not uncommon in European jurisdictions, could be transplanted root-and-branch to Ontario. Examining such models simply illustrates that there are different paths for achieving employee participation in the workplace.

The Law Commission of Ontario (LCO), in its report, *Vulnerable Workers and Precarious Work* (2012), did advocate the introduction of a “works council” model as a means of increasing employee participation and knowledge, initiating discussions between employers and employees on ESA matters and for potentially resolving disputes. If effectively implemented, the LCO suggested that the existence of such councils would reduce worker isolation by creating a system of support and representation in the workplace. The LCO noted, however, that there was a “mixed reaction” to this idea among members of their project advisory group.\(^\text{106}\)

In a similar vein, the review of the *Canada Labour Code* Part III (the Arthurs Review, 2006)\(^\text{107}\) recommended that the federal law be amended to facilitate consultation between employers and workers concerning any statutorily-permitted variation from working time standards. Under this proposal, where no union held bargaining rights, workers would be represented by a new body, the Workplace Consultative Committee (WCC). Among other things, the WCC would hear and consider all proposals put forward by the employer (e.g., regarding variations to working time standards) and be entitled to request and receive relevant information concerning the need for and consequences of the employer’s proposals. It would also be able to offer its own suggestions concerning the matters under discussion. Part III of the Canada Labour Code was not reformed following the recommendations in this report.\(^\text{108}\)

We note that the legal and historical situation in Canada and the United States is different. In the United States, a series of decisions and interpretations of the NLRA have severely limited the scope of non-union employee representation systems by finding them to be employer-dominated labour organizations which are unlawful.

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under the NLRA. By contrast, in Canada, non-union voice is neither banned nor encouraged by legislation. A representative group of non-union employees can negotiate with their employer over terms and conditions of employment, including wages and benefits.

While not widespread, there have been some cases in which very sophisticated employee representation systems have been developed within Canadian firms.\(^{109}\) In some cases, these systems have ultimately transitioned to conventional union/collective bargaining relationships.\(^{110}\) It should be noted, however, that Canadian unions are generally wary that employee representation systems in non-union enterprises provide, at best, a very poor substitute, and at worst, an impediment, to the genuine, autonomous expression of worker voice that unionism provides.\(^{111}\)

The situation in the United States and Canada differs in another important respect. In the United States, employees, who are not unionized but who are covered by the NLRA, have the right to engage in “concerted activity” under section 7 of the NLRA. This has been deemed to mean, for example, that any group of workers may make demands on the employer and, if not satisfied with the response, may engage in a legal work stoppage (or other types of activity). There is no similar provision under Canadian law. As a general rule, only unionized employees have the legal right to strike after engaging in good faith bargaining and conciliation. After the decision by the Supreme Court of Canada in Saskatchewan Federation of Labour v. Saskatchewan, (2015) S.C.J. No. 4 it is an open question whether concerted activity by non-union employees is protected under the Charter and whether it would carry with it a right to strike.

In the United States, because the NLRA protects “concerted activity” by non-union employees, there is somewhat greater scope for the concept of “minority

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111 The Supreme Court discussed the issue of independence from management in the *Mounted Police* decision, noting (at para 88): “The function of collective bargaining is not served by a process which is dominated by or under the influence of management. This is why a meaningful process of collective bargaining protects the right of employees to form and join associations that are independent of management.” The court added (at para 95 and 97) that: “The Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. ...The search is not for an “ideal” model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue.”
unionism.” A group of employees, falling short of a majority within the workplace, can engage in different types of actions in an effort to organize workers, provide advocacy and influence management within a context where there is some legal protection for these activities.

The emerging importance of organized non-union voice in the United States was evident at the recent (October 7, 2015) White House Summit on Worker Voice. Background information provided on the White House website notes the growing importance in that country of alternate forms of worker bargaining or activity to improve conditions at their workplace.

As technology and other trends have changed the structure of our labor market in recent decades, alternative forms of worker bargaining have arisen to help workers, particularly those not eligible to collectively bargain through a union, express their collective voice. Parallelizing the efforts of organized labor, workers themselves have come together to advocate for better wages and working conditions, utilizing resources such as online platforms to amplify their message.

Large advocacy campaigns have had success in improving the workplace policies of large companies, sometimes by enlisting consumers as allies...

In all, unions and other forms of worker voice continue to play a key role in promoting higher wages, benefits, and workplace safety, ensuring that the benefits of economic growth are broadly shared.

Canada often lags behind developments in the United States, sometimes for very good reason, as these developments do not necessarily fit within our cultural and political context. Our industrial relations systems are similar, however, unions in the United States are perceived to be even weaker than they are here. Given the fact that these developments have taken place in that country in order to replace union certification and bargaining activity there, it would be surprising if this same kind of employee activity did not become more commonplace in Canada.

Submissions

What we heard through our consultations tends to generally reinforce the conclusions of the researchers noted above. While individuals and groups that met with us typically did not frame their submissions within the terminology of “voice,” it is clear that there is a real desire coming from a range of workplace contexts for workers to have greater input and influence with regard to the issues that affect them at work. This emerged strongly from the submissions made by labour and employee advocacy groups, as well as many individuals.

One concrete expression of this desire is the recommendation that Ontario adopt a provision similar to the American NLRA’s protection of “concerted activity” section for the purpose of “mutual aid or protection.” It was submitted that:

There is no similarly broadly stated protection in Ontario for collective expressive activity on the part of unorganized workers. If we as a Province are serious about allowing workers true protected space to exercise their voice, and conduct legitimate protest, then we should adopt a rule similar to section 7 of the NLRA prohibiting any adverse treatment of workers collectively and publicly contesting, and communicating about their working conditions.114

This submission is in aid of ensuring “protected space” for organizing, demonstrations, and campaigns among fast food, retail and warehouse workers in the United States, resulting in wage increases in some cases, as well as bringing attention to shift scheduling and work hour issues.

On the management side, considerable caution was advised with regard to making any major changes to our system, particularly in relation to the LRA. Employer groups generally indicated major concerns that any expansion of our collective bargaining model could upset the current balance and negatively affect Ontario’s competitiveness.

In this regard, there would likely be concerns raised about any new legislatively-imposed mechanism for ensuring employee voice. For example, the Human Resources Professional Association noted that:

114  Unifor, Building Balance, Fairness, and Opportunity in Ontario’s Labour Market, 103.
The majority of HR professionals felt additional representation was not required. They believed that with good management, and a proper approach to employee relations, companies don’t need additional structures in place. … Most senior HR professionals interviewed did not believe new forms of representation like worker councils found in Germany would be a good fit for Ontario. …. One professional feared that implementing worker councils “would make (Ontario) far less competitive.” Another HR professional who worked with these types of councils in Italy said they were cumbersome to deal with, and very bureaucratic. While another who also had experience working directly with councils said “they were debilitating to the business,” and “would be vehemently opposed to this in Ontario.” 115

Options:

1. Maintain the status quo.
2. Enact a model in which there is some form of minority unionism.
3. Enact a model in which there is some institutional mechanism for the expression of employee interests in the plans and policies of employers.
4. Enact some variant of the models set out in the research report.
5. Enact legislation protecting concerted activity along the lines set out in the United States NLRA.

4.7 Additional LRA Issues

During the consultations, a number of additional features of the LRA were raised as being in need of reform. This section highlights specific issues that merit additional attention. However, stakeholders remain welcome to raise any other specific provisions in the LRA for consideration in our second stage of consultation.

Ability of Arbitrators to Extend Arbitration Time Limits

Before 1995, the LRA had included a provision stating that an arbitrator “may extend the time for any step in the grievance or arbitration procedure under a collective agreement” if the arbitrator believed that there were reasonable grounds

for the extension and the opposite party would not be substantially prejudiced. In 1995, the legislation was extensively amended. The provision introduced in 1995 (section 48(16) of the LRA) which is still in place reads: “Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement”. As a result of this change, it appears that arbitrators no longer have the authority to extend time limits in the arbitration procedure (e.g., the time limit for referral to arbitration). Some stakeholders assert that the result of this situation is that potentially meritorious grievances can be defeated on technical grounds. This could be addressed through an amendment to the LRA. We invite comments on this point.

**Conciliation Boards**

Under the LRA, parties must go through the conciliation process before a strike or lock-out would be legal. If a conciliation officer is unable to effect a collective agreement, the Minister has the option of either appointing a conciliation board or issuing a notice in writing, informing each of the parties that he or she does not consider it advisable to appoint a conciliation board. This is known as a “no board” report. In practice, it appears that conciliation boards are never appointed. It is not clear when this mechanism fell generally into disuse. From the perspective of labour relations practitioners, there seems to be little point in having detailed procedures set out in the legislation that are simply not used in practice. The process requirements of the LRA could potentially be simplified by eliminating the reference to conciliation boards. We invite comments on this point.

**Excluded Submission**

One submission was excluded from our consideration. One union submitted recommendations relating to statutory expedited arbitration and the mandatory strike vote under the LRA. Due to a potential conflict of interest, these recommendations have been referred to the Ministry of Labour to be considered separately from the review process.
Employment Standards

Overview

This section gives a brief overview not only of the present Act, the Employment Standards Act, 2000 (ESA), but also of its evolution.

The Act sets out minimum rights and responsibilities that apply to employees and employers in most Ontario workplaces in such areas as:

- hours of work and overtime pay;
- minimum wage;
- job-protected leave;
- public holidays;
- vacation;
- termination and severance of employment;
- equal pay for equal work; and
- temporary help agencies.

These core standards are described in section 5.3.116

Employers and employees cannot contract out of, or waive, minimum standards under the ESA. Any such agreements are null and void. Employers can, however, offer greater rights or benefits than the ESA’s minimum standards. If a provision in an agreement gives an employee a greater right or benefit than a minimum employment standard under the ESA, that provision applies to the employee instead of the employment standard.

116 Changes regarding the process to set minimum wage and the minimum wage rate are outside the scope of this Review.
As set out in section 5.2, a central feature of the Act and regulations is a complex web of more than 85 exemptions, partial exemptions, qualifying conditions, etc., which limit its application.

5.1 Legislative History of the ESA

Ontario’s first comprehensive employment standards legislation – the Employment Standards Act, 1968 – was proclaimed into force in 1969. This law consolidated a number of Acts dealing with different types of employment standards.

Sections below highlight key changes made to employment standards legislation over the past four decades. Note that this is not an exhaustive list of amendments and does not identify all details relating to a particular change (e.g., exemptions from, or qualifying conditions for, a particular standard).

Pre-1969

Related predecessor legislation to the Employment Standards Act, 1968 included the following Acts:

- the Ontario Factories Act of 1884 was Ontario’s first statute to regulate hours of work. That Act applied to the manufacturing industry and set maximum hours of work for boys, girls and women at 10 hours per day and 60 hours per week;

- in 1920, the Minimum Wage Act authorized a Board to establish a weekly minimum wage in a particular trade, industry or business. Initially the Act applied only to female employees, but was extended to male employees in the 1930s. The Board was also given authority to establish minimum hourly rates for overtime. In the early 1960s, hourly minimum wage rates replaced the weekly rates; and

- in 1944, the Hours of Work and Vacations with Pay Act set maximum hours of work at 8 hours per day and 48 per week in certain industrial undertakings, the same general standard that prevails today. A Board was authorized to order longer hours where both the employer and employees agreed. Also:
  - the Act provided for 1 week of vacation with 2% vacation pay after each year of service; in the mid-1960s employees with 3 or more years of service became entitled to 2 weeks’ vacation and 4% of their total wages as vacation pay; and
– meal break requirements were introduced into the Act in the mid-1960s.

1968 and 1969

The separate statutes described above were replaced with the Employment Standards Act, 1968. In addition to setting out maximum hours of work, vacation with pay and minimum wage entitlements, the 1968 Act:

- set overtime pay at 1.5 times the regular rate for hours of work in excess of 48 hours a week (the employer and employee (with the approval of the Director of Employment Standards) could agree to average hours of work for the purposes of determining the employee’s entitlement to overtime pay);
- incorporated provisions that were in the Ontario Human Rights Code concerning equal pay for female workers doing the same work as male workers in the same establishment; and
- provided for premium pay for hours worked on one of the four public holidays – Good Friday, Dominion Day (now Canada Day), Labour Day and Christmas Day.

1970 to 1999

Key amendments to the Act in the 1970s:

- instituted written notice of termination and provided for termination pay where notice was not given; created rules around mass terminations;
- incorporated pregnancy leave entitlements that were in the Women’s Equal Employment Opportunity Act;
- lowered the overtime pay threshold from 48 to 44 hours of work in a week; and
- added 3 more public holidays – New Year’s Day, Victoria Day and Thanksgiving Day.

Key amendments to the Act in the 1980s:

- introduced entitlement to severance pay;
- introduced the lie detector provisions;
- altered the length of required notice of termination; and
- added a public holiday – December 26 (Boxing Day).
Key amendments to the Act in the 1990s:

- introduced parental leave (in 1990); and
- created the Employee Wage Protection Program (EWPP) (in 1991; narrowed in 1995; and discontinued in 1997).\(^\text{117}\)

The following were introduced after the change in government in 1995:

- a $10,000 cap on an order to pay issued by an Employment Standards Officer (ESO);
- a shorter time limit for recovery of unpaid wages;
- permission for the Director of Employment Standards to appoint private sector collectors;
- a general prohibition against unionized employees filing complaints under the Act (enforcement put under collective agreements); and
- jurisdiction to hear applications for review transferred from the Office of Adjudication to the Ontario Labour Relations Board (OLRB).

**2000**


Key changes included:

- hours of work – the permit system for excess hours was eliminated; an employee’s agreement to work excess hours now had to be in writing; approval by the Director of Employment Standards for excess hours was required only after 60 hours in a week, not 48 hours;
- rest periods – daily, weekly/bi-weekly and between shift rest periods were introduced;
- overtime – agreements to average overtime over a period of up to 4 weeks no longer required the approval of the Director of Employment Standards; the Director’s approval was still required to average overtime for a period

\(^{117}\) The Employee Wage Protection Program compensated employees, to up $5,000, for wages, vacation pay, termination and severance pay claims in cases of employers’ bankruptcy, abandonment or failure to pay. In 1995, the maximum amount that could be recovered was lowered from $5,000 to $2,500, and the ability to recover unpaid termination or severance pay was eliminated. The program was discontinued in 1997.
longer than 4 weeks. Employers and employees could agree in writing that overtime will be taken as paid time off in lieu of overtime pay;

• job-protected leave – personal emergency leave (PEL) was introduced for employers with 50 or more employees; the length of parental leave was extended;

• posting information – required employers to post information about the ESA in the workplace;

• reprisals – introduced a general anti-reprisal provision enforceable by an ESO through orders for reinstatement and/or compensation. Burden placed on the employer to show there was no reprisal; and

• enforcement tools – authorized ESOs to issue Notices of Contravention (NOCs) and compliance orders. Provided for escalating maximum fines for corporations and increased the maximum jail term.

Post-ESA, 2000

Additional changes to the Act that generally focused on a specific issue, rather than a full review of the Act.

Excess hours of work and overtime averaging (2005):

Public consultations on the scheme for excess daily and weekly hours led to the following changes:

• the Director of Employment Standards must approve all agreements between employers and employees to work excess weekly hours (i.e., more than 48 hours in a week rather than just those above 60 hours a week);

• employers are required to give to an employee agreeing to work excess daily or weekly hours an information document, prepared by the Director of Employment Standards, that describes employees’ rights under the hours of work and overtime pay provisions; and

• the Director of Employment Standards must approve all agreements between employers and employees to average hours of work for the purposes of determining the employee’s entitlement to overtime – rather than just those agreements that average hours beyond a 4-week period.
New job-protected leaves:

- family medical leave was introduced in 2004;
- reservist leave was introduced in 2007; and
- organ donor leave was introduced in 2009.

New public holiday:

- Family Day was added beginning February 2008.

Temporary help agencies:

- extensive amendments relating to temporary help agency (THA) employment were introduced in 2009 (see section 5.3.9 for details).

Changes to the claims process (2010):

- provided that the Director of Employment Standards generally would not assign a claim to an ESO unless the employee takes certain steps identified by the Director (one such step established by the Director is that, generally, the employee must contact his or her employer to try to resolve the issue before she or he files a claim); and
- provided that an ESO assigned to investigate a claim can attempt to effect a settlement between the parties; and
- provided that an ESO can give notice requiring an employee or employer to supply evidence or submissions within a specified timeframe, failing which, the ESO can make a decision based on the best available evidence.

2014 and 2015

The most recent changes to the ESA came into force in 2014 and 2015:

- cap and time period for recovering wages – the $10,000 cap on orders to pay wages was eliminated and the time limit for recovery of unpaid wages was extended from six (or twelve months in certain cases) to two years;
- minimum wage – beginning October 1, 2015, annual adjustments to the minimum wage became based on changes in the Consumer Price Index. A review of the minimum wage and the process for adjusting it must commence before October 1, 2020;
• employment standards poster – employers are now required to provide employees with a copy of the most recent version of the employment standards poster;
• temporary help agencies (THAs) – introduced joint and several liability between THAs and their clients for the failure to pay certain unpaid wages and premium pay; and
• new job-protected leaves – family caregiver leave, critically ill child care leave, and crime-related child death or disappearance leaves were enacted.

5.2 Scope and Coverage of the ESA

5.2.1 Definition of Employee

Background

There are two issues that have been raised consistently:

1) the misclassification of employees as independent contractors; and
2) the current definition of employee in the ESA.

Misclassification of Employees

Workers who are employees under the ESA definition are sometimes “misclassified” by their employers – intentionally or unintentionally – as independent contractors not covered by the ESA.

Currently, 12% of the total Ontario workforce of 5.25 million is reported as “own account self-employed” (i.e., self-employed individuals without paid employees). The experience of the Ministry of Labour in enforcement and significant anecdotal evidence suggests that a portion of these “own account self-employed” workers are misclassified as they are actually employees within the meaning of the ESA but are treated by their employers as independent contractors. The US Department of Labor (DOL) has said that “the misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers and the entire economy.”

Businesses that misclassify employees as independent contractors avoid the direct financial costs of compliance with the ESA and other legislation. These costs include:

- 4% vacation pay;
- approximately 3.7% of wages for public holiday pay;
- overtime pay;
- termination pay;
- severance pay; and
- premiums for Employment Insurance (EI) and the Canada Pension Plan.

Additionally, employees who are misclassified as independent contractors are denied benefit coverage where such coverage is available to employees. In sum, misclassification has significant adverse impact on those Ontario workers who are labelled independent contractors and not treated as employees.

The Law Commission of Ontario (LCO) recognized the problem of misclassification and has expressed the opinion that part of the solution is greater use of proactive enforcement:

*In the LCO's view, the most straightforward approach would be to target the actual issue, the practice of misclassifying employees, through improved enforcement procedures, policy development, ESO training and public awareness. This would protect the most vulnerable without negatively impacting those who benefit from self-employment. The advantages of compliance and enforcement practices such as proactive inspections and expanded investigations outlined earlier are equally applicable to the situation of identifying cases of misclassification. The most effective enforcement activities would be those directed at industries known to be at high-risk for practices of misclassification such as trucking, cleaning and catering, as well as identification and proactive monitoring of industries populated by workers known to be disproportionately affected.*

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Misclassification is said by the US DOL to be a broad and significant problem, presenting:

…one of the most serious problems facing affected workers, employers and the entire economy. Misclassified employees often are denied access to critical benefits and protections to which they are entitled, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers’ compensation funds. It hurts taxpayers and undermines the economy.121

Underscoring the importance of the misclassification issue, the DOL has allocated significant resources to the issue by prosecuted cases in federal court, and by signing partnership agreements with numerous states to encourage detection and prosecution of misclassification cases. In 2015 the DOL’s investigations resulted in more than $74 million in back wages for more than 102,000 workers in industries such as the janitorial, temporary help, food service, day care, hospitality and garment industries.122 It has also been reported that misclassification cases, which are described by the DOL as cases of workplace fraud, are the subject of numerous profitable class action cases.123

**Definition of Employee in the ESA**

The ESA applies to “employees” – workers who are in an employment relationship with an employer. Independent contractors are not employees.

The ESA currently defines “employee” as including:

- a person, including an officer of a corporation, who performs work for an employer for wages;
- a person who supplies services to an employer for wages;

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121 “Misclassification of Employees as Independent Contractors,” United States Department of Labor.
122 Ibid.
123 Ibid. The DOL is working with other state and federal agencies on misclassification issues. The Wage and Hour division notes on its website that “Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers’ compensation funds.” To build partnerships, the Wage and Hour Division has entered into a memorandum of understanding with the Internal Revenue Service and into partnerships with a number of states.
• a person who receives training from a person who is an employer, as set out in subsection (2); or
• a person who is a homeworker; and
• includes a person who was an employee.

Similar definitions have appeared in previous versions of the ESA. The current definition has been in place since 2001. In conjunction with the statutory definition, various common law tests are used when determining whether a worker is an employee. These tests have evolved and become more expansive of workers as employees over the years.

Over time, the Ontario economy has grown more sophisticated, workplaces have fissured and a spectrum of relationships and arrangements has evolved between workers and employers ranging from standard employment relationships at one end of the spectrum to independent contractors at the other (see Chapter 3). The result of these changing relationships is that the old definitions are not well suited to the modern workplace. Not every worker fits neatly into the category of employee or independent contractor. Within this spectrum, there are those whose relationship is more like a traditional employment relationship than that of an independent contractor and who are deprived of the protection of the ESA.

The common law has long recognized that there is a category of worker who is not a traditional employee and is not an independent contractor but who is entitled to some of the common law protections of an employee such as reasonable notice of termination of employment. The Ontario Court of Appeal\(^{124}\) has concluded that an intermediate category between employee and independent contractor exists, “which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as ‘dependent contractors’ and they are owed reasonable notice upon termination.” The Court noted that the recognition of an intermediate category based on economic dependency accords with the statutorily provided category of “dependent contractor” in the Labour Relations Act, 1995 (LRA).

\(^{124}\) McKee v. Reid’s Heritage Homes Ltd., (2009) ONCA 916.
The LRA provides that an “employee” includes a “dependent contractor” defined as:

*a person who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.*

There is no provision in the ESA equivalent to the dependent contractor provision of the LRA that specifically defines “employee” for purposes of the Act as including a dependent contractor.

A further issue that has been raised by some is that independent contractors should also be included in the Act. A 2002 study for the Law Commission of Canada argued that although there were good reasons to include independent contractors under the ESA, because of the complexity of applying all standards to independent contractors, further study was required. In 2012, the LCO, however, essentially rejected including independent contractors under the ESA.

Under the US *Fair Labor Standards Act* (FLSA), to determine if a worker qualifies as an employee, the law focuses on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for her/himself. Detailed interpretations of the tests to be applied in determining economic dependency have been issued by the Administrator.

**Submissions**

Both issues discussed above were the subject of submissions by unions and employee advocates.


126 Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, 94. The report states, “It is difficult to understand the justification for regulating the work of those who are legitimately self-employed. Furthermore, we are of the view that implementation of such a policy would have feasibility challenges. For example, should self-employed individuals be required to limit themselves to a certain number of hours per week or be required to pay themselves a certain wage? Such regulation would not only be unenforceable but also undesirable. Furthermore, how would the responsibility for a 2-week vacation be divided among an independent contractor’s multiple clients? In our view, the real issue is how to identify and remedy the situation of workers erroneously misclassified as self-employed when an employment relationship actually exists. A secondary issue is whether additional protections should be put in place to protect self-employed workers in dependent working relationships (i.e., low-wage workers with only one client), while allowing for other self-employed persons to benefit from flexibility and choice in self-determination of working conditions.”

Employee advocates asserted that too many employees are misclassified by employers as independent contractors. Such misclassification results in employees being required to work in substandard working conditions and in their being denied their statutory rights and protections. Their concern about misclassification was not limited to one business or sector, but was expressed as likely more prevalent in certain segments of the economy including: the “gig” or “sharing” economy, cleaning, trucking, food delivery and information technology – to name but a few.

Employee advocates suggest that misclassification occurs because of ignorance of the law by both employers and employees, because of the perceived benefit to employees of the ability to deduct business expenses from income (which may increase the willingness of employees to be treated as independent contractors) and because of intentional avoidance by employers of their legal obligations and the savings that result from non-compliance.

With respect to the second issue, unions and employee advocates submitted that the ESA should specifically be made applicable to dependent contractors. A few employee advocates suggested that the ESA coverage should be extended to independent contractors, but in the main, submissions focussed on the merits of amending the ESA to provide that dependent contractors have the protection of the Act. These advocates suggested that the current ESA operates as an incentive to fissuring and encourages business to structure their workplaces so that work is performed without employees, thus avoiding the obligations of an employer under the ESA and effectively negating the workplace rights of vulnerable workers.

Finally, employee advocates asserted that in cases where there is a dispute as to whether a person is an employee, the burden of proof to establish on a balance of probabilities that the person is not an employee should be on the employer.

Harry Arthurs, in Fairness at Work recommended an “autonomous worker” provision that was conceptually similar to a dependent contractor provision in the Canada Labour Code (CLC).128 While the LCO rejected the inclusion of independent contractors under the ESA,129 it did recognize that legislative

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128 The recommendation essentially dealt with truck –drivers carrying on as owner-operators, and he recommended it in part for their protection and in part because omitting them would undermine others who were employees. However, many did not want to be covered by all of the statutory protections and he recommended sectoral exemption or special applications as required.

provision for extending protection to dependent contractors should be explored, recommending that the Ontario government consider extending some ESA protections to self-employed persons in dependent working relationships with one client, focussing on low wage earners, and/or identifying other options for responding to their need for employment standards protection.\textsuperscript{130}

The 1994 Thompson Commission Report on the British Columbia Employment Standards Act recommended that dependent contractors as the term is used in the Labour Relations Code be included in the definition of “employee” in the ESA. The government did not adopt that recommendation.

Some employers commented on both of the two main issues canvassed above. Employers often have the need to use independent contractors whose unique expertise, cost, efficiency and availability cannot be duplicated by their own employees and would oppose challenges that these are dependent contractors. Employers would also point out that there may be sections of the ESA such as hours of work and overtime pay that are difficult to apply to particular workers, even if they are dependent, where the workers themselves tend to set their own hours of work.

**Options:**

**Misclassification of Employees**

1. Maintain the status quo.

2. Increase education of workers and employers with respect to rights and obligations.

\textsuperscript{130} Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, 95. The report states, “Beyond considerations of consistency, extending protection to workers in relationships of dependency (i.e., low-wage contractors with one client) presents unique challenges. For example, a state of dependency may be fluid in that some such workers may be dependent upon one client at one point in time and have several clients at another time. Consideration of a definition of “employee” that extends itself to include such workers would need to take into account the needs of independent and/or self-employed persons who benefit from flexibility and control over their working arrangements. It would also have to respond to concerns expressed by employee representatives that have, in the past, suggested that such measures could cause employers “who already mislabel workers to do so with respect to newly-protected dependent contractors, i.e., labeling them as ‘independent’ contractors.” In other words, it could make things worse instead of better. These would have to be considered in carefully drafting any new standard and it should also leave room for the recognition of new and emerging forms of employment with a range of individual situations. Recognizing that such changes cannot anticipate all impacts, any such policy and legislation should be evaluated after a reasonable period of time to determine effectiveness and whether adjustments are required.”
3. Focus proactive enforcement activities on the identification and rectification of cases of misclassification.

4. Provide in the ESA that in any case where there is a dispute about whether a person is an employee, the employer has the burden of proving that the person is not an employee covered by the ESA and/or has an obligation, similar to section 1(5) of the LRA in relation to related employers, to adduce all relevant evidence with regard to the matter.

**Definition of Employee in the ESA**

5. Maintain the status quo.

6. Include a dependent contractor provision in the ESA, and consider making clear that regulations could be passed, if necessary, to exempt particular dependent contractors from a regulation or to create a different standard that would apply to some dependent contractors.

**5.2.2 Who is the Employer and Scope of Liability**

**Background**

Determining the appropriate employer(s), as well as other parties who ought to be liable for providing minimum terms and conditions of employment for employees in a business, is fundamental to maintaining a viable system for ensuring compliance with employment standards. The issue is which entities ought to share liability and responsibility for compliance with employment standards.

Currently, entities and persons who are liable in addition to the direct employer are:

- directors of corporate employers, who can be held personally liable for certain wages (not including termination or severance pay) that the corporate employer failed to pay. These liabilities generally mirror those in the Ontario *Business Corporations Act* (OBCA) but, unlike the OBCA’s directors’ liability provisions, may be enforced through administrative action under the ESA rather than through protracted and expensive civil proceedings;

- clients of THAs can be held liable for certain types of wages that the agency fails to pay to its employees (THAs are dealt with in section 5.3.9); and
• “related employers”: ESA section 4 allows separate, but associated or related, legal entities to be treated as one employer if certain statutory criteria are met. One of the criteria for treating separate legal entities as one employer is that the intent or effect of employers and persons carrying on related companies or activities is to defeat the intent and purpose of the Act.

The issue is whether any of these categories require change and whether other categories should be added.

When establishing liability for compliance with employment standards legislation, statutory definitions and enforcement mechanisms have traditionally focussed on the entity that directly employs the employee. However, in what has been called the “fissuring” of employment relationships, many companies have shifted away from direct employment through a wide variety of organizational methods such as subcontracting, outsourcing, franchising, and the use of THA workers (see Chapter 3 for a description of “fissuring.”) Some of these activities are for organizational business reasons and some are for the express purpose of insulating and shielding the higher level business – which benefits from the labour – from responsibility and liability for employment standards. Some of these activities are undertaken for a complex mix of reasons.

Non-compliance in many industries may be driven by the practices of organizations at higher levels of an industry structure. The higher level company may, for example, control the economic model that dictates whether the entity with responsibility for running the business or providing the goods or services can even afford to conform to minimum standards. An example is a franchisor whose economic model makes it problematic for the franchisee to comply with minimum standards. Also a business needing a particular service may create fierce competition among subordinate businesses with whom it contracts by constantly retendering. Or, it may set pricing policies that make ESA compliance by the subordinate businesses difficult. Sometimes there is a contracting chain with multiple levels of subcontractors, with the actual work being performed at the lowest level.

Assigning liability to the higher level entities could well cause them to change their strategies with the effect of improving the compliance rates by subordinate employers further down the supply chain or change the economic model so that compliance with minimum terms and conditions of employment is attainable by the business performing the service or providing the goods.
Also, businesses may be structured into more than one corporate vehicle with one corporation primarily having assets – while the other corporate vehicle primarily has liabilities – thereby attempting to insulate one from the other. Measures to pierce the corporate veil are common to make corporate directors liable for the employer’s failure to pay or to make related companies liable for flouting minimum standards of all related companies.

**Other Jurisdictions**

**Canada**

Across Canada, “related employer” provisions are common. Of the eight Canadian jurisdictions whose employment standards legislation contains a related employer provision, only Ontario requires a finding that the intent or effect of the corporate structure be to defeat the purpose of the Act.

The employment standards legislation in 3 provinces – Quebec, British Columbia and Saskatchewan – contain provisions that extend liability for unpaid wages beyond the direct and related employers in certain circumstances where employers contract out work.

Quebec’s *An Act Respecting Labour Standards* provides that an employer who enters into a contract with a subcontractor, directly or through an intermediary, is responsible jointly and severally with that subcontractor and that intermediary for their pecuniary obligations under the Act. This provision has been in place for decades but is seldom used. It can only be enforced through the courts, and only at the instance of the Labour Standards Commission.

Saskatchewan’s *Employment Act* (section 2-69) has a similar provision that states that if an employer or contractor contracts with any other person for the performance of all or part of the employer’s or contractor’s work, the employer or contractor must provide by the contract that the employees of that other person must be paid the wages they are entitled to receive. If the person fails to pay, the employer or contractor is liable. Like Quebec, this provision has been in place for many years and is used as a last resort.

British Columbia’s *Employment Standards Act* (section 30) holds farm producers who use farm labour contractors liable for the wages of the contractor’s employees if the contractor was not licensed or if the producer did not pay the contractor for the work performed.
## United States (US)

California has what is referred to as a “brother’s keeper” law, aimed at deterring firms from entering into arrangements that are likely to lead to wage violations. It holds contracting firms liable for subcontractor’s wage and hours violations in the construction, farm labour, garment, janitorial and security guard industry if the contracting firm knew, or should have known, that the contract does not contain sufficient funds for the subcontractor to comply with employment laws.

In January 2016, the US DOL issued a new interpretation of what it described as the increasing frequency of joint employment in the economy. The concept of joint liability in the US is based upon an expansive definition of employer which is designed to define the employment relationship as broadly as possible. When joint employment exists, all of the joint employers are jointly and severally liable for compliance with the Act. The interpretation described two forms of joint employment:

1) horizontal joint employment – exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. A horizontal joint employment relationship will be found, for example, where there are arrangements between employers to share an employee’s services, or where one employer acts directly or indirectly in the interests of another employer regarding an employee, or where employers share direct or indirect control of an employee by virtue of the fact that one employer is controlled by (or under common ownership with) the other employer, where there is an intermingling of the joint employers’ operations, and many others; and

2) vertical joint employment – exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee’s labor, would be the potential joint employer. Where there is

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131 **California Labor Code**, Section 2810.


133 Ibid.
potential vertical joint employment, the analysis focuses on the economic realities of the working relationship between the employee and the potential joint employer.

In examining the “economic realities”, the Department looks at:

- who is directing, controlling or supervising the work;
- who is controlling employment conditions;
- the permanency and duration of the relationship;
- the repetitive and rote nature of the work;
- whether the work is integral to the business;
- whether the work is performed on premises owned or controlled by the potential joint employer; and
- who is performing the administrative functions commonly performed by employers.

The DOL interpretation has been strongly criticized by some US employers.

**Submissions**

It is argued that it is fair that lead companies or employers who contract out, or in some cases individual directors of companies, should have some liability and responsibility for employment standards of the employees in the business from which they benefit. It is said that entities that benefit or derive profits from the particular labour should share responsibility to ensure that minimum statutory standards are being met in the production of goods and services used in that business. It is argued it is fair and appropriate for lead companies who direct and dictate the terms of the supply of goods and services to bear responsibility for compliance with employment standards in the production and provision of those goods and services.

In the case of franchisors, it is said that their overall control of the brand, the business model, and all the details of how the business must operate, make it appropriate for it to have responsibility for compliance with employment standards legislation, together with the franchisee. This argument would apply regardless of the amount of control over the terms and conditions of employment of the franchisee’s employees is exercised by the franchisor. Alternatively, franchisors could be held liable only when they exercised a sufficient degree of control that they should be considered to be a joint employer.
Accordingly, employee advocates and some academics have suggested that additional provisions are required to create obligations on businesses higher up the chain of contracting, or the supply chain, to address non-compliance by employers lower down the chain or by subcontractors. Specifically, some or all of the following have been recommended:

- amending the ESA to make companies jointly and severally liable for the ESA obligations of their subcontractors and other intermediaries, similar to the laws in Quebec and Saskatchewan;
- adopting a statutory joint employer test similar to the policy adopted by the DOL in the US;
- amending the ESA to make franchisors and franchisees jointly and severally liable for minimum standards;
- enacting a provision similar to the provision under the American FLSA to allow the placement of an embargo or lien on goods manufactured in violation of the Act (it was argued that if penalties are felt by all parties along the chain of production, the parties in that chain, and particularly the lead company at the top of it, would ensure that minimum standards were observed all along the chain);
- adopting a “brother’s keeper” law similar to the one in California to require companies in low-wage sectors to know that sufficient funds exist in the contract with subcontractors to permit compliance with the ESA; and
- establishing a provincial fair wage policy for government procurement of goods and contracts for work or service that would require adherence to minimum employment standards and industry norms.

In addition, employee and labour groups suggested that the existing “related employer” provisions are too narrowly confined. In particular, submissions focus on the narrow interpretation that has been given to the second criterion of section 4 – the “intent or effect” requirement – establishing a test that is extremely difficult to meet and rendering section 4 ineffective for assigning liability to other entities that, in fact – by satisfying the first criterion – are associated with, or related to, the direct employer. These groups cited examples of employers with unpaid orders who continue to operate other related businesses that are never pursued to satisfy those debts. One union submitted that this narrow interpretation has cost its members millions of dollars in lost wages, including termination and severance pay, and called for the repeal of the “intent or effect” criterion.
Employers argue that wide-ranging legislative provisions like those in Quebec and Saskatchewan – which make all businesses liable for the employment standards violations of their contractors – are too great an interference with the market where contracting is a legitimate business tool for organizing the production of goods and services. A strategy of lowering costs by creating competition for the provision of goods and services by contracting out work may be a necessary strategy to compete for business and maintaining viability. In any event it is argued that there is a difference between contracts where the business really closely controls the conditions under which the work is performed and deliberately fosters competition for the work and other situations where the entire point of hiring a contractor is to use the expertise of that entity to perform the work that is required. It is a perfectly normal business strategy to have the most efficient entity do the work. It is said to be impossible to distinguish between the two situations and that it is unfair to make companies responsible for the ESA violations of some of their contractors.

Representatives from the franchising industry strongly argue that making franchisors liable for franchisees’ ESA obligations is unnecessary, would be costly and burdensome, and could threaten the entire franchise model that contributes to employment and the Ontario economy. Their view is that the Act, through the related employer provision, already captures the atypical situation where a franchisor exerts a significant measure of control over, or direct involvement in, decisions concerning a franchisee’s employees. Franchisors also argue that the franchise model most commonly used makes employment the responsibility of franchisees who determine terms and conditions of employment of their employees.

**Options:**

1. Maintain the status quo.

2. Hold employers and/or contractors responsible for compliance with employment standards legislation of their contractors or subcontractors, requiring them to insert contractual clauses requiring compliance. This could apply in all industries or in certain industries only, such as industries where vulnerable employees and precarious work are commonplace.

3. Create a joint employer test akin to the policy developed by the DOL in the US as outlined above.

4. Make franchisors liable for the employment standards violations of their franchisees:
a) in all circumstances;
b) where the franchisor takes an active role;
c) in certain industries; or
d) in no circumstances.

5. Repeal the “intent or effect” requirement in section 4 (the “related employer” provision).

6. Enact a remedy similar in principle to the oppression remedy set out in the OBCA, but make it applicable to employment standards violations. It would apply when companies are insolvent or when assets are unavailable from one company to satisfy penalties and orders made under the Act, and the principal or related persons set up a second company or business, or have transferred assets to a third or related person. (Section 248(2) of the OBCA defines oppression as an act or omission which effects or threatens to effect a result which is oppressive, unfairly prejudicial or unfairly disregards the interests of, among others, a creditor or security holder of a corporation. Bad faith could or could not be an element of the activity complained of. Under the OBCA a court has broad remedial authority to take action it seems fit when it finds an action is oppressive, or unfairly prejudicial or unfairly disregards the interests of a creditor. This remedy could be sought in court or before the OLRB).

7. Introduce a provision that would allow the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA.

8. Encourage best practices for ensuring compliance by subordinate employers through government leading by example.

5.2.3 Exemptions, Special Rules and General Process

Background

The ESA is generally thought of as legislation designed to provide basic minimum terms and conditions of employment applicable to all employers and employees, providing basic floors and a fair competitive playing field where the rules are the same for everyone. Prima facie, exemptions are inconsistent with the principle of universality – which is that minimum terms and conditions set out in the Act should be applicable to all employees. We agree that the ESA should be applied to as many employees as possible and that departures from, or modifications to, the norm should be limited and justifiable.
As noted elsewhere in this Interim Report and in our mandate, work has changed for many people in recent years. Unwarranted or out-dated exemptions may have unintended adverse impact on employees in today’s workplaces. The concern is that many employees may be denied the protections under the ESA that are essential for them to be treated with minimum fairness and decency.

Business also has undergone fundamental change. Not only have many businesses faced significant technological change but also many have streamlined operations and made significant changes in the way they do business in order to meet the challenges of competitive markets. Many of these changes affect the work and the working conditions of employees. Unwarranted or out-dated exemptions could create unfairness if some employers gain competitive advantage over others because of such exemptions.

We know from our own experience that one size of regulation cannot fit every industry and every group of employees. Ontario’s evolving economy is very diverse and some degree of flexibility is important in furthering the particular needs and circumstances of particular industries, or occupational groups, and the employees whose jobs depend on the success of those industries. We cannot simply discount the potential negative impact of the wholesale elimination of exemptions without further careful review. While exemptions should be subject to scrutiny, we accept that a standard in the Act could be modified or amended in particular sectors without sacrificing fairness or the legitimate interests of employees where there are compelling reasons for differential treatment.

The ESA contains more than 85 complex exemptions and special rules. Also, provisions requiring PEL and severance pay apply only to larger employers (see sections 5.3.4 and 5.3.8 respectively). Exemptions operate to permit some employers not to pay minimum wage and from other provisions including not paying vacation and statutory holiday pay, and/or overtime pay. As a result, a significant number of employees are denied the protection of important provisions of the Act – typically limitations on hours of work and the payment of overtime. Many of those exemptions are in industries where there are vulnerable workers in precarious jobs. For example, it is estimated that only 29% of low income employees are fully covered by overtime provisions as opposed to approximately 70% of middle and higher income employees and so on in respect of many of the exemptions. 

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Some exemptions are decades old and have been present in some form since 1944. Many were introduced ad hoc over the years, largely as a result of lobbying by stakeholders in opaque processes and with no or little significant employee involvement.

The Ministry of Labour now has an internal policy framework for considering new exemptions and special rules. Since 2005 the Ministry has approved six of what it refers to as “Special Industry Rules” or (SIRs). SIRs were granted using principles and criteria developed by the Ministry for any new requests for exemptions. SIRs allow for modified standard for certain occupations in certain industries and have been granted in situations where an ESA standard arguably could not be met because of unique production issues, but where a modified version of the standard could reasonably apply. In developing these regulations, the Ministry consulted extensively with affected stakeholders. The ministry facilitated discussions between the affected parties including representatives of employees – generally the relevant unions – and developed modified rules that worked for the affected parties and met a set of consistent policy principles. These Ministry principles are set out below.

Most of the existing exemptions predate the development of that policy framework and have not been reviewed to see if they comply with it. Accordingly, these exemptions may not have a solid policy rationale or may be out-dated. The reasons for many existing exemptions are unclear. Some industries and occupations have modified standards. In other industries and occupations, there are broad exemptions where terms and conditions of employment such as hours of work are essentially unregulated. Overall, the existing exemptions do not fit into a consistent policy framework and constitute a disjointed patchwork of rules.

Accordingly, we are considering not only a process to review current exemptions but also a process that may be applied in the future for developing rules for unique situations and circumstances that may warrant special treatment. In short, a sectoral process may be appropriate in a variety of situations.

**Ministry of Labour Principles for Exemptions and Special Rules**

Below are the principles and criteria used by the Ministry for any new requests for exemptions:
Core Condition A:

The nature of work in an industry is such that it is impractical for a minimum standard to apply. Applying the standard would preclude a particular type of work from being done at all or would significantly alter its output; the work could not continue to exist in anything close to its present form. “Nature” of the work relates to the characteristics of the work itself. It does not relate to the quantity of work produced by a given number of employees.

Core Condition B:

Employers in an industry do not control working conditions that are relevant to the standard.

If one or both of the Core Conditions is met, a further Supplementary Condition must be met:

- supplementary condition – the work provides a social, labour market or economic contribution that argues for its continued existence in its present form, even in the absence of one or more minimum standards applying to it.

In addition to the above conditions, two other considerations are relevant to this issue:

- the employee group to whom the exemption or special rule would apply be readily identifiable, to prevent confusion and misapplication of the exemption/special rule; and

- both employees and employers in the industry agree that a special rule or exemption is desirable.

Submissions

During consultations, we heard from various organizations and individuals raising concerns with the number of exemptions in the Act or with specific exemptions for an occupation. There has been sustained criticism from many sources about the number and scope of the exemptions and that they are not only contrary to the implicit goal of universality but also that they are:

- out-dated;

- inconsistent;
• complex; and
• often lacking in rationale

and that they undermine the purpose of the Act to provide minimum terms and conditions of employment, denying basic employment standards to many workers.

It is argued that the cost of exemptions is borne not only by employees not covered by the Act who suffer lost income and insufficient time off, but also that there is a social cost to health and safety resulting from excessive overtime and long hours of work. It is argued that these costs are disproportionately borne by vulnerable and precarious workers.

Some organizations asked for existing exemptions to be maintained or broadened, explaining that they continue to be needed to maintain viability and competitiveness. These organizations argued that there are circumstances where a departure from a general rule is warranted and cautioned against a “one-size-fits-all” policy. For example, uncertainties in some industries may be caused by seasonal factors or unpredictable climate conditions necessitating more flexibility in hours of work.

We have not been asked directly by affected stakeholders to review the SIRs formulated after 2005 and, indeed, we have been asked by an affected employee group not to interfere with them.

**Options:**

Partial or full exemptions for a large part of the working population have been embedded in Ontario legislation and regulation for decades. Some may have been justified but are now out-dated and unwarranted. Some may never have been justified or subject to the careful scrutiny that any departure from employment standards should receive.

Although we have been reluctant at this stage of our Review to draw any firm conclusions on any of the issues because further consultations are still ahead of us, in order to make the remainder of the consultation process on this issue more helpful, we have decided that it would not be in the public interest to recommend a wholesale elimination of all the exemptions without further review. While some immediate changes may be warranted, the remainder of the current exemptions should not be eliminated, modified or amended without further careful assessment and consultation with those affected. Limitations on time and available resources,
however, mean that the implementation of a consultative process for a detailed review of exemptions is not practical as part of this Review. Thus we are likely to recommend that Ontario establish a new process of review to assess the merits of many of the exemptions to determine whether the exemptions are warranted or whether they should be modified or eliminated. The implementation of such a review process may lead to many further changes but only after a spotlight is put on each of the issues. The review process we will likely recommend would use fixed criteria for evaluation of exemptions and one that will invite the participation of workers and worker representatives as well as employers and other interested stakeholders. In any review of exemptions, a consistent policy framework informing such review is essential. So, too, is the recognition of the importance of equal protection and responsibility for employees and employers unless other treatment is clearly warranted.

Exemptions and special rules have the potential to recognize that the unique characteristics of some occupations and industries require a different approach from the norm. However, it must also be recognized that an exemption normally reduces employment rights. In our view, therefore, the burden of persuasion to maintain, extend or modify an exemption is high and ought to lie with those seeking to maintain the exemption. The proponents of an exemption should also try to balance the needs and interests of workers with the needs of the particular industry. Moreover, any reduction or modification of employee rights must involve consultation with those affected. To be clear, we view it as essential that worker representatives participate fully in this process so that employee interests can be heard and taken into account.

We outline below an approach to current exemptions by creating 3 categories:

1) exemptions where we may recommend elimination or alteration without further review beyond that which we will undertake in this review process;

2) exemptions that should continue without modification because they were approved pursuant to a policy framework for approving exemptions and special rules with appropriate consultation with affected stakeholders including employee representatives (these are the SIRs that were put into regulations since 2005); and

3) exemptions that should be subject to further review in a new process (i.e., those exemptions not in categories 1 and 2; this category covers most of the current exemptions).
Options:

Approach for Existing Exemptions

As noted above, existing exemptions are divided into 3 categories.

1) Existing exemptions that might be recommended for elimination or variation without a further review (see below for a detailed discussion on these exemptions and potential options for each).

For category 1 exemptions, we ask for submissions on whether there are reasons to maintain, modify or eliminate such exclusions. Our preliminary view is that these exemptions need not be subject to a subsequent review. If there are reasons why these exemptions should be referred to a subsequent review process and not be dealt with as part of the Changing Workplace Review, we invite stakeholders to make submissions on this issue as well. These exemptions are:

- information technology professionals;
- pharmacists;
- managers and supervisors;
- residential care workers;
- residential building superintendents, janitors and caretakers;
- special minimum wage rates for:
  - students under 18; and
  - liquor servers; and
- student exemption from the “three-hour rule” (see description below).

2) Exemptions that we do not currently think warrant review and which should be maintained.

Category 2 exemptions are recent modifications (i.e., SI Rs) created since 2005 in accordance with a policy framework and after a thorough consultative process involving stakeholder representation. Our preliminary view is that a current or subsequent review to consider the modification or elimination of these exemptions is not warranted. We ask for submissions from stakeholders on whether there are reasons to review these recent special rules at this time.
These exemptions are:

- public transit (2005);
- mining and mineral exploration (2005);
- live performances (2005);
- film and television industry (2005);
- automobile manufacturing (2006); and

3) Exemptions that should be reviewed in a new process.

Category 3 contains the remaining exemptions (see the end of section 5.2.3 for list of remaining exemptions) that we think should be reviewed using a transparent and consistent review process to determine whether an exemption is justifiable. For these exemptions, we seek submissions as to the proper process to be implemented for the review and assessment of the current exemptions as well as for the review of proposed new exemptions that may be proposed in the future. We have set out some options for such a review process below.

**Approaches for a New Process**

Option 1: Use the policy framework developed by the Ministry for the SIRs process described above and use the criteria developed by the Ministry in the SIRs process to evaluate the exemptions.

Option 2: Create a new statutory process to review exemptions with a view to making recommendations to the Minister for maintaining, amending or eliminating exemptions/special rules as follows:

- a review process would be initiated by the Ministry either on its own initiative or where the Ministry agrees with a request for a new exemption/special rule or a revision of an existing one;

- a sectoral, sub-sectoral or industry committee facilitated and chaired by a neutral person outside the Ministry would review the existing or any proposed new rules and make recommendations to the Minister;

- the Ministry’s current policy framework could be maintained or revised, and it would govern the parameters of the work of all committees; or, the statute would contain the criteria under which exemptions would be evaluated;
the onus of showing that existing exemptions/special rules or new proposed ones meet the criteria would be on the proponents of the exemption;

there would be representation from employers and employees –
  – there could be participation by unions in the sector, if any, and/or persons designated to represent employee interests; and
  – representatives of affected or related industries and interests could be invited to participate; for example, the grocery industry and consumer interests could be asked to participate in an agricultural committee;

the committee would have the flexibility to conduct surveys or votes among employees and or employers, if appropriate;

the Chair would seek and the Ministry fund, if appropriate, any needed independent expert advice as in the case of complex hours of work issues;

the Ministry would provide the parties with all available estimates of the costs of maintaining and eliminating the exemption;

the Chair of the Committee would try to fashion consensus recommendations, but would have the right to make recommendations to the Minister; and

the government would consider the recommendations in making its final decision on whether to maintain, amend or eliminate the exemption.

Option 3: Create a new statutory process where the OLRB would have the authority to extend terms and conditions in a collective agreement to a sector.

Essentially this option is one where the Cabinet’s power to enact terms and conditions of employment for an industry would be given to the OLRB:

provide authority to the OLRB to define an industry and prescribe for that industry one or more terms or conditions of employment that would apply to employers and employees in the industry (union and non-union) through “sectoral orders”;

sectoral orders by the OLRB would be implemented through the formation of “Sectoral Standards Agreements”, setting basic minimum conditions applied to all workplaces within an identified regional, occupation, or industrial labour market; and
• an application for a “Sectoral Standards Agreement” could be made by a trade union or group of trade unions, a Council of unions, an employer or group of employers.135

Existing Exemptions – Category 1

Existing exemptions that we might recommend for elimination or variation without a further review beyond the Changing Workplaces Review:

• information technology professionals (Issue 1);
• pharmacists (Issue 2);
• managers and supervisors (Issue 3);
• residential care workers (Issue 4);
• residential building superintendents, janitors and caretakers (Issue 5);
• special minimum wage rates for:
  – students under 18 (Issue 6a); and
  – liquor servers (Issue 6b); and
• student exemption from the “three-hour rule” (Issue 7).

Issue 1 – Information Technology Professionals

Background

“Information technology professional” is defined under ESA Regulation 285/01 as “an employee who is primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgment.”

Information technology professionals are exempt from all the hours of work rules (daily and weekly limits on hours of work, mandatory rest periods and eating periods) and overtime pay provisions. These exemptions have been in place since 2001 and were created in response to requests by industry stakeholders. It appears that the request for an exemption may have been made in conjunction

with fears over the possible instability of computer systems in conjunction with the “Y2K” issue. It is not clear to us that people who were employed in the industry were consulted.

Industry stakeholders argued that timely support from information technology professionals is often needed to preserve the integrity of information technology systems and to prevent problems or deficiencies in their operation from becoming worse.

The definition of information technology professionals was meant to be narrow and have limited application. The exemptions were intended to apply only to those employees who work with “information systems” and “use specialized knowledge and professional judgment in their work.” The exemptions are not intended to apply to employees who perform routine tasks that do not require specialized knowledge and professional judgment.

Alberta, British Columbia and Nova Scotia allow for exemptions for information technology related work. In Alberta, “information systems professionals” are exempt from maximum hours of work, rest periods, eating periods and overtime pay. In British Columbia, “high technology professionals” are exempt from rest periods, eating periods, overtime pay and public holiday pay. In Nova Scotia, information technology professionals are exempt from overtime pay.

**Submissions**

We heard from some individuals about this issue. The Ministry has also told us that concerns are often expressed to it.

The argument is made that it is not clear why this one industry is exempt from all of the ESA provisions dealing with hours of work and overtime. There are many other industries where urgent action or response is critical, and longer hours are required to fix equipment, ensure timely production, meet deadlines, etc. In most of these other industries the ordinary rules of the Act apply, so many critical areas, such as the provision and repair of power facilities, the operation and repair of power lines, emergency health care, stock exchanges, and many others are covered by the ESA. It is unclear what special factors justify this particular exclusion.
Assuming there is a justification for the exemption, information technology employees have repeatedly stated that the exemptions are being misused, either inadvertently or intentionally. Employees who appear to do routine computer support, maintenance and upgrading functions, or have jobs such as designing software for computer games, are complaining that they have been told they have no hours of work or overtime pay rights. It does not appear to us that the exemptions cover these types of work.

While a modified exemption may be justifiable, it is unclear to us why there is a wholesale exemption of all the hours of work rules including daily and weekly limits on hours of work, mandatory rest periods and eating periods, and overtime pay and why at least some limits are not appropriate.

It is argued that the definition of information technology professional is open to significant interpretation and is unclear, and thereby creates the risk of being applied in circumstances that were not intended.

Options:

1. Maintain the status quo.
2. Remove the exemption from overtime pay, or create a different rule.
3. Remove the exemption from hours of work and overtime pay, or create some different rule.
4. Amend the definition to try to make its scope clearer.

Issue 2 – Pharmacists

Background

The exemptions for “pharmacists” are in ESA Regulation 285/01 and apply to “persons employed as duly registered practitioners of pharmacy and students in training to become practitioners.”

Pharmacists are exempt from all the hours of work rules (daily and weekly limits on hours of work, mandatory rest periods and eating periods), overtime pay, PEL, public holidays, vacation with pay and minimum wage. It is assumed that, as professionals, pharmacists have an obligation to respond to patients’ needs,
and interruptions in their work for rest may not be possible at times and that exemptions were granted. Also, at the time this exemption was granted many more pharmacists were likely self-employed drugstore owners and it may not have appeared to have been a significant issue.

Pharmacists have the same exemptions as many other professions under the Act, such as physicians and surgeons, chiropractors, dentists and physiotherapists. Many of these exemptions for professions are longstanding and were granted as a result of requests from professional governing bodies. Each of the exempted professions is governed by a different professional body. Pharmacists are governed by the Ontario College of Pharmacists.

Manitoba and New Brunswick are the only other jurisdictions that allow for exemptions for pharmacists. In Manitoba, pharmacists are exempt from rest periods, eating periods, overtime pay, public holiday pay and minimum wage. In New Brunswick, pharmacists are exempt from public holiday pay.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Exemptions for Pharmacists</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario</td>
<td>All hours of work rules (daily and weekly limits on hours of work, mandatory rest periods and eating periods), overtime pay, public holidays, vacation with pay and minimum wage</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>—</td>
</tr>
<tr>
<td>Quebec</td>
<td>—</td>
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<tr>
<td>Newfoundland and Labrador</td>
<td>—</td>
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<tr>
<td>Prince Edward Island</td>
<td>—</td>
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<tr>
<td>New Brunswick</td>
<td>Public holiday pay</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>—</td>
</tr>
<tr>
<td>Alberta</td>
<td>—</td>
</tr>
<tr>
<td>British Columbia</td>
<td>—</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Rest periods, eating periods, overtime pay, public holiday pay and minimum wage</td>
</tr>
</tbody>
</table>
Submissions

During consultations we heard from several individual pharmacists regarding requirements to work excessive hours with no breaks and concerns about the safety and quality of pharmaceutical care because of these poor working conditions. The Ministry has also told us that they regularly receive correspondence on this issue.

We also heard during consultations that the nature of work and the work environment for pharmacists has changed drastically over the last decades. Many pharmacists are employees who have no control over their work environment and that it is not uncommon for pharmacists to have non-pharmacist employers. Corporately owned stores that commonly require shifts of 12 hours or more with no guaranteed breaks have replaced many independent pharmacies. The health consequences to individual pharmacists and the increased risk of medication dispensing errors are factors to be considered.

Options:

1. Maintain the status quo.
2. Remove the exemption from some of the provisions while retaining others.
3. Remove all exemptions.

Issue 3 – Managers and Supervisors

Background

Employees who are classified as managerial or supervisory are exempt from overtime pay and from the rules which govern maximum daily and weekly hours of work, daily and weekly/bi-weekly rest periods, and time off between shifts.

Managerial and supervisory employees are defined as those whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an “irregular or exceptional basis.” This means that the supervisor/manager exemption can apply even if the employee is not exclusively performing supervisory or managerial work.
“Exceptional” suggests that non-supervisory or non-managerial duties may be performed as long as they are outside the ordinary course of the employee’s duties. “Irregular” implies that although the performance of non-supervisory or non-managerial duties is not unusual or unexpected, their performance is unscheduled or sporadic; “irregular” may also depend on the frequency with which such duties are performed and the amount of time spent performing them.\(^\text{136}\)

The fact that an employer calls an employee a “supervisor” or “manager” does not mean that the exemption will automatically apply. The employee’s actual job duties would need to be assessed.

The number of workers in the labour force who report working in management occupations has remained relatively constant, and even declined over time, ranging from a high of 10.7% in the mid-1990s to a low of 8.5% in 2014.\(^\text{137}\)

**Other Jurisdictions**

Many provinces exempt managers from overtime pay (exceptions are New Brunswick, Newfoundland and Labrador, and Prince Edward Island). Most provinces also exempt managers from at least some hours-of-work rules. Alberta and British Columbia, for instance, exempt managers from rest period and eating period rules.\(^\text{138}\)

The American federal FLSA exempts certain executives and administrative employees from minimum wage and overtime requirements. The exemptions for executives and administrative employees are based on a “salary-plus-duties” test. The employee must perform certain specified duties and be paid a certain salary in order to be captured by the exemptions.

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138 Some jurisdictions do not have any rules in certain areas, for instance, maximum daily hours of work.
Executives
Exempt if the following conditions are met:139

- The employee must be compensated on a salary basis at a rate not less than $455 per week. [This equals $23,660 per year for a full-year worker.]
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.

AND

- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Employees
Exempt if the following conditions are met:140

- The employee must be compensated on a salary or fee basis at a rate not less than $455 per week. [This equals $23,660 per year for a full-year worker.]
- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.

AND

- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Highly Compensated Employees
Employees who perform office or non-manual work and are paid total annual compensation of $100,000 or more are exempt if they customarily and regularly perform at least one of the duties of an exempt executive or administrative employee identified above.

The DOL is updating the salary threshold for the exemptions. Under the new rule, which will come into effect on December 1, 2016, the standard salary level will be set at the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage census region (currently the south); this will be $913 per week ($47,476 annually for a full-year worker). The high income exemption will be set at the 90th percentile of earnings for full-time salaried workers nationally, which will be $134,004. Both salary figures will be automatically updated every three years, beginning on January 1, 2020.

The DOL estimates that, in the first year, 4.2 million currently exempt workers could be entitled to overtime. Similarly, it estimates that 65,000 workers currently exempt under the “highly compensated employees” category may become covered.

Submissions

It is argued that this exemption has a broad cost to workers amounting to $196 million per year in Ontario. It is said that the permission to work unlimited hours and unlimited amounts of overtime is a heavy burden to put on some supervisors and managers, especially those whose remuneration is not high. It is also argued that the interpretation of the term “exceptional” allows prolonged unpaid overtime, for example, the working of unpaid overtime by managers where workers are constantly away owing to a labour dispute.

While the exemption does not distinguish between supervisory and managerial employees, it is questioned whether there is a bona fide rationale for exempting supervisory personnel who generally are not part of a core management team. The question is not whether there is a conflict of interest between the supervisor and the employees they supervise, but whether supervisors controls their own hours of work, have any real bargaining power, or are paid enough to justify the exemption.

There is also a concern expressed about the growing misclassification of managers and supervisors, who often have a title that is used to exclude them unjustifiably because they are often lower-age staff who find themselves performing significant non-managerial functions without protection from working excessive hours of work and not being paid overtime. It could be argued many such employees also do not set or control their own hours and are exploited by the exemption.

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Rationales in favour of the exemptions include the ostensibly strong bargaining position of such employees, the ability of such employees to control their own hours of work and cost to the employer. Some employers have argued that the exemption should be broadened to look at the primary function of such persons by looking at their compensation levels and training and not take into account whether part of their work includes doing the work of non-managerial or non-supervisory employees. In retail, for example, it is argued that managers’ and supervisors’ serving customers as part of the team should not convert them into regular employees entitled to overtime. We also heard that the definition of manager/supervisor is too vague, can be difficult to apply properly, and that a minimum salary threshold for overtime eligibility should be considered.

**Options:**

1. Maintain the status quo.

2. Define the category generally by looking at the primary purpose of the job and not how often or in what circumstances non-managerial or non-supervisory work is performed.

3. Include in the definition of managers and supervisors those who:
   a) earn more than a certain amount in wages/salary; and/or
   b) managers only and not supervisors; and/or
   c) exempt only supervisors and managers who regularly direct the work of two or more full-time employees or their equivalent, or some other number (and the employee must have the authority to hire or fire other employees, or have an effective power of recommendation with respect to hiring, firing, advancement, promotion or any other change of status); or
   d) the employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; or
   e) the employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.
Issue 4 – Residential Care Workers

Background

Exemptions and special rules for “residential care workers” in ESA Regulation 285/01 have been in place since 1982.

A residential care worker is defined as “a person who is employed to supervise and care for children or developmentally handicapped persons in a family-type residential dwelling or cottage and who resides in the dwelling or cottage during work periods, but does not include a foster parent.”

According to the definition:

- the employee must supervise and care for children or developmentally handicapped persons;
- the employee must work in a family-type residential dwelling or cottage;
- the employee must reside in the dwelling or cottage during work periods.

Residential care workers are exempt from the hours of work and eating periods (daily and weekly limits on hours of work, mandatory rest periods and eating periods) and overtime pay provisions. However, they are entitled to 36 hours free time each work week. They have special rules regarding minimum wage entitlement, records of hours and rules defining when work is deemed to be performed.

At the time of the creation of this exemption, the government was implementing a de-institutionalization policy. This involved moving children and developmentally disabled adults out of large institutions and, in as many cases as possible, placing them in the community in home-like settings, preferably in a family-type group home.

The definition of residential care workers was meant to be narrow and apply only to those homes where the parent-model, with its continuity of supervision by the same persons, was of significance in the rehabilitation and well-being of the person being cared for. The “live-in” aspect of the position is also an important element in defining this model of care and in defining this category of worker.

\[142\] The Ontarians With Disabilities Act, 2001 amended the Ontario Human Rights Code by replacing the word “handicap” in the Code with the word “disability”. As Regulation 285/01 uses the word “handicap”, for consistency, we use this out-dated language.
The exemptions and special rules for residential care workers were intended to cover workers responsible for supervision and care of children or adults with developmental disabilities during the patients’/residents’ sleeping and eating periods as well as during entertainment and/or recreational periods inside or outside the home.

**Submissions**

The residential care workers exemption has been identified as potentially outdated and perhaps irrelevant. The strict definition of this type of worker reflects the intent in the 1980s – that the exemptions and special rules be narrowly applied to a specifically defined worker, serving a specifically defined client. The specific scenario that this regulation once applied to may no longer exist.

**Options:**

1. Maintain the status quo.
2. Remove the exemption and special rules.

**Issue 5 – Residential Building Superintendents, Janitors and Caretakers**

**Background**

The exemptions for “residential superintendents, janitors and caretakers” are in ESA Regulation 285/01 and apply to superintendents, janitors and caretakers of residential buildings who reside in the building. The individual must actually live in the building for which he or she is responsible or in another building in the same complex.

These occupations are exempt from some hours of work rules (daily and weekly limits on hours of work and mandatory rest periods), overtime pay, public holidays, and minimum wage. These exemptions have been in place at least since 1969. The exemption reflects the requirement to deal with frequent and unpredictable events or demands that arise from tenant concerns or emergencies. The result can be sometimes long and unpredictable hours of work.

The Residential Tenancies Act, 2006 (RTA) requires owners/landlords to maintain the property in a good state of repair. It is typical practice to answer maintenance requests in the order of their urgency, but all legitimate requests must be answered within a reasonable time. It does not require 24-hour site service.
British Columbia and Nova Scotia are the only other provinces that have exemptions for superintendents. However, their exemptions are narrower than those in Ontario. In British Columbia, superintendents are exempt from eating periods and overtime pay. They are also subject to a special minimum wage rule, under which they are entitled to a monthly base wage and a certain amount per unit supervised. In Nova Scotia, they are only exempt from overtime pay.

**Submissions**

We heard only a little during the consultations, but in addition the Ministry has told us that concerns on this issue are often expressed to it.

Letters received raise concern about the lack of employment rights. Generally, individuals have raised concerns about the long hours and the little, if any, free time available for individuals in these jobs. Employees suggest that they are expected to be available 24 hours a day, 7 days a week.

While the rationale for the exemptions is in part the difficulty in monitoring employees engaged in this type of work that is off-site from the employer, technology has changed dramatically and there may well be ways in which work hours can be monitored. The fact that most Canadian jurisdictions do not restrict the rights of such employees could suggest that the Ontario law needs to be reconsidered.

**Options:**

1. Maintain the status quo.
2. Remove or reform the exemption.

**Issue 6a – Minimum Wage Differential for Students Under 18**

**Background**

There is a separate minimum wage for students under 18 who work no more than 28 hours per week when school is in session, or work during a school break or summer holidays. For such employees the minimum wage is $10.55 instead of $11.25. Among students who are affected by the special rules for a student minimum wage, 52,000 (59%) report earning less than the general minimum wage,

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143 On October 1, 2016, the student minimum wage will increase to $10.70, while the general minimum wage will increase to $11.40.
suggesting that employers are using this provision. It has been estimated that the individual cost of this special rule is a median of $8 per week per employee, and the weekly cost to all student employees in Ontario is approximately $482,000.\textsuperscript{144}

Ontario is the only province with a lower minimum wage for students.\textsuperscript{145}

\textbf{Submissions}

The Ministry states that the rationale for the student minimum wage is “to facilitate the employment of younger persons, recognizing their competitive disadvantage in the job market relative to older students who generally have more work experience and may be perceived by employers as more productive.”\textsuperscript{146} Proponents of the lower rate believe it is necessary to give employers an incentive to hire younger workers and that youth employment would decline if the special rate was not there.

Student groups strongly sought the end of the special rate as it is considered purely discriminatory and the students need the higher income. Similarly, employee advocacy groups have recommended that the student minimum wage be eliminated.

\textbf{Options:}

1. Maintain the status quo.
2. Eliminate the lower rate.

\textbf{Issue 6b – Minimum Wage Differential for Liquor Servers}

\textbf{Background}

Liquor servers are covered by a minimum wage of $9.80 instead of the general minimum wage of $11.25.\textsuperscript{147} This is intended to recognize that such servers earn additional income from tips and gratuities. It is said that among the approximately 45,900 liquor servers in Ontario, about 9,000 (20\%) report earning less than the general minimum wage, even after reported tips and commissions. For these

\begin{itemize}
\item \textsuperscript{144} Vosko, Noack, and Thomas, \textit{How Far Does the Employment Standards Act, 2000 Extend and What Are the Gaps in Coverage.}\n\item \textsuperscript{145} Nova Scotia has a lower minimum wage for “inexperienced employees” – employees who have done a kind of work for less than 3 calendar months and has worked for the same employer for less than 3 calendar months.\n\item \textsuperscript{146} \textit{Employment Standards Act, 2000 Policy & Interpretation Manual} (Toronto: Carswell, 2001), section 13.5.1.
\item \textsuperscript{147} On October 1, 2016, the liquor servers’ minimum wage will increase to $9.90, while the general minimum wage will increase to $11.40.
\end{itemize}
employees, the median cost of this lower minimum wage – the difference between their reported wage and the general minimum wage – is approximately $21 a week, based on their usual hours of work. Across all liquor servers, the cost of this special rule was calculated at approximately $258,900 per week. \(^{148}\)

We note that the Ontario Legislature recently passed the *Protecting Employees’ Tips Act, 2015*, which prohibits employers from taking any portion of an employee’s tips or other gratuities, except in limited circumstances. The Act came into force on June 10, 2016. The impact this Act may have on liquor servers’ incomes remains to be seen.

Alberta and British Columbia are the only other provinces with a lower minimum wage for liquor servers. Quebec has a lower minimum wage for tipped employees.

**Submissions**

Employee advocacy groups recommended that the liquor servers’ minimum wage be eliminated.

**Options:**

1. Maintain the status quo.
2. Eliminate the lower rate.

**Issue 7 – Student Exemption from the “Three-hour Rule”**

*(Note: Issues regarding reporting pay are dealt with in section 5.3.2 on Scheduling).*

**Background**

Students of any age and with any hours of work are exempt from what is known as the “three-hour rule” or “reporting pay.” Under this rule, when an employee who regularly works more than 3 hours a day is required to report to work but works less than 3 hours, he or she must be paid the higher of:

- 3 hours at the minimum wage; or
- the employee’s regular wage for the time worked.

\(^{148}\) Vosko, Noack, and Thomas, 20.
**Other Jurisdictions**

Almost all Canadian jurisdictions have requirements concerning reporting pay; two have different rules that apply to certain students.

In Saskatchewan, there is a minimum call-out pay of 3 hours if an employee reports to work and there is no work or the employee works fewer than 3 hours. This rule does not apply to students in Grade 12 or lower during the school term; if these employees work, they are paid only for the time worked with a minimum of 1 hour.

In Alberta, there is a general “three-hour rule” when employees are required to report to work. However, certain employees only have to be paid for two hours; this includes adolescents (12-14 years of age) who work on a school day, but these employees are prohibited from working more than two hours a day on a school day in any event.

**Submissions**

It is said that this provision is unfair to all students who need the protection as much as anyone. The criticism is that the exemption subjects them to discriminatory and harsh scheduling practices by allowing employers to send students home without any payment beyond what was already worked. This provision incentivized employers to schedule students irresponsibly and adversely affected students compared to other workers. We did not receive submissions from the employer community on the student exemption specifically, although we did hear about the rule in the context of scheduling issues more broadly.

**Options:**

1. Maintain the status quo.
2. Remove the exemption.

**ESA Exemptions That Should be Reviewed Under a New Process – Category 3**

1. Architects
2. Chiropodists
3. Chiropractors
4. Dentists
5. Engineers
6. Lawyers
7. Massage Therapists
8. Naturopaths
9. Physicians and Surgeons
10. Physiotherapists
11. Psychologists
12. Public Accountants
13. Surveyors
14. Teachers
15. Veterinarians
16. Students In-Training in Professions
17. Ambulance Drivers, Ambulance Driver’s Helper or First-aid Attendant on an Ambulance
18. Canning, Processing, Packing or Distribution of Fresh Fruit or Vegetables (seasonal)
19. Continuous Operation Employees (Other than Retail Store Employees)
20. Domestic Workers (Employed by the Householder)
21. Commissioned Automobile Salesperson
22. Homemakers
23. Embalmers and Funeral Directors
24. Firefighters
25. Fishers – Commercial fishing
26. Highway Transport Truck Drivers (“For Hire” Businesses)
27. Local Cartage Drivers and Driver’s Helpers
28. Retail Business Employees
29. Hospital Employees
30. Hospitality Industry Employees (hotels, restaurants, taverns, etc.)
31. Hunting and Fishing Guides
32. Ontario Government and Ontario Government Agency Employees
33. Real Estate Salespersons and Brokers
34. Construction Employees (Other than Road Building and Sewer and Watermain Construction)

35. Road Construction

36. Sewer and Watermain Construction

37. Road Construction Sites – Work that is Not Construction Work

38. Road Maintenance – Work that is Not Maintenance Work

39. Sewer and Watermain Construction Site Guarding

40. Road Maintenance

41. Sewer and Watermain Maintenance

42. Maintenance (Other than Maintenance of Roads, Structures Related to Roads, Parking Lots and Sewers and Watermains)

43. Ship Building and Repair

44. Student Employee at Children’s Camp

45. Student Employee in Recreational Program Operated by a Charity

46. Student Employee Providing Instruction or Supervision of Children

47. Swimming Pool Installation and Maintenance

48. Taxi Cab Drivers

49. Travelling Salespersons (Commissioned)

Agricultural Exemptions:

50. Farm Employees – Primary Production

51. Harvesters of Fruit, Vegetables or Tobacco

52. Flower Growing

53. Growing Trees and Shrubs

54. Growing, Transporting and Laying Sod

55. Horse Boarding and Breeding

56. Keeping of Furbearing Mammals

57. Landscape Gardeners

58. Canning, Processing, Packing or Distribution of Fresh Fruit or Vegetables (seasonal)
5.2.4 Exclusions

5.2.4.1 Interns/Trainees

Background

In the past few years, there has been widespread reporting of the growth in unpaid internships.

The ESA provides an exclusion for “interns/trainees” (referred to as “person receiving training” under the Act). The conditions that must all be met for the exclusion to apply are as follows:

- training is similar to that of a vocational school;
- training is for the benefit of the individual;
- person providing the training derives little, if any, benefit from the activity of the individual while being trained;
- intern does not displace employees of the person providing the training;
- intern is not accorded a right to become an employee of the person providing the training; and
- intern is advised that he or she will receive no remuneration for the time spent in training.

In April 2014, and again in September 2015, the Ministry conducted proactive enforcement blitzes, focusing on interns at workplaces across the province. Ministry officers checked for contraventions of the ESA and whether those individuals are employees under the ESA and, therefore, entitled to be paid.

In the 2014 blitz, out of 31 employers who had internship positions, 13 employers were found to be in contravention of the Act.

In the 2015 blitz, out of the 77 workplaces that had internships, 18 employers were found to be in contravention of the Act.

The Act provides exclusions for secondary students who are participating in a board-approved work experience program and for approved programs provided by universities and colleges of applied arts and technology. We are not commenting on these exclusions.
Submissions

In the expectation of receiving training and valuable work experience, some individuals may be attracted to unpaid “intern/trainee” opportunities that will help them secure decent paid employment in the future. During consultations, it was asserted that some employers abuse the intern/trainee exclusion by using “interns/trainees” to perform unpaid work that would otherwise be performed by paid employees and where no training similar to that provided in a vocational school is provided. It is suggested that many intern/trainee positions do not comply with the ESA requirements and that some employers misuse the exception to benefit from free labour, with the result that many employees are misclassified as interns or trainees and are denied the minimum standards and the protections mandated by the Act.

Options:

1. Maintain the status quo.
2. Eliminate the trainee exclusion.
3. Provide that intern/trainee exemption is permitted only if a plan is filed by the employer and approved by the Director as complying with the Act and with reporting obligations as determined by the Director.

5.2.4.2 Crown Employees

Background

Only certain parts of the Act apply to employees of the Crown or a Crown agency, and to their employer. The term “Crown” refers to the government of Ontario. This exception dates back to 1968.

The following provisions of the ESA apply to Crown (i.e., Ontario government) employees and their employer:

- Part IV (Continuity of Employment);
- Section 14 (Priority of Claims);
- Part XII (Equal Pay for Equal Work);
- Part XIII (Benefit Plans);
- Part XIV (Leaves of Absence);
- Part XV (Termination and Severance of Employment);
Part XVI (Lie Detectors);
Part XVIII (Reprisal) except for subclause 74(1)(a)(vii) and clause 74(1)(b); and
Part XIX (Building Services Providers).

The provisions of the ESA that do not apply to Crown employees include:

- hours of work;
- overtime pay;
- minimum wage;
- public holidays; and
- vacation with pay.

Not all public sector employers fall within this exception, e.g., hospitals, municipalities, etc.

**Other Jurisdictions**

Ontario remains the outlier among its provincial counterparts owing to the breadth of the exclusion of Crown employees.

In Nova Scotia, only deputy ministers or other deputy heads of the civil service are exempt from the overtime provisions. Manitoba uses a salary-based overtime exclusion for Crown employees, which applies to those making above $34,497 per year. Several provinces – including Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan – explicitly provide that Crown employees are covered by employment standards legislation.

In the federal jurisdiction, most federal Crown corporations are covered by Part 111 of the CLC but the public service is not.

Several provinces stress inclusion – including Alberta, Manitoba, New Brunswick, Nova Scotia, and Saskatchewan – noting explicitly that Crown employees are covered by employment standards legislation.

**Submissions**

The exclusion of Crown employees in Ontario has been raised as an issue during consultations by labour groups who contend that there is no rational basis to exempt Crown employees from ESA protections. They assert that notwithstanding
high union density in the public sector, these exclusions affect Crown employees – particularly non-unionized and contract employees who may experience inequitable working conditions as a result.

**Options:**

1. Maintain the status quo.
2. Remove the exception.
3. Narrow the exception to only certain provisions such as hours of work and overtime pay.

### 5.3 Standards

#### 5.3.1 Hours of Work and Overtime Pay

**Background**

Limits on working hours in Ontario were originally designed to protect the health and safety of women, children and youths. Under the *Ontario Factories Act* of 1884, maximum hours of work were set at 10 hours in a day and 60 hours in a week. Subsequent legislation covered hours of work in shops and mines.

In 1944, the *Hours of Work and Vacations with Pay Act* established maximum hours of work of 8 hours in a day and 48 hours in a week for most employees. A primary policy objective was to create jobs by limiting hours of work and to spread work among armed forces personnel returning to the civilian labour force. These maximums still form the basis of hours of work limits today.

Under the ESA, hours of work regulate the number of hours an employee can be required to work in a day/week, and excess hours refer to daily hours over eight hours in a day or an established work day and weekly hours over 48. Overtime rules refer to pay. Overtime pay was introduced in 1969 and set as time-and-one-half premium for hours beyond 48 hours in a week. In 1975, the trigger point was reduced to 44 hours where it remains today.

In 1986, growing concern over what appeared to be excessive hours being worked by some while many others were without any work led the Minister of Labour to appoint the Ontario (Donner) Task Force to examine hours of work and
overtime rules. The report found that there was limited job creation potential in reducing hours of work and overtime. The report also found that a reduction in the standard work week after which overtime would be paid would increase the use of overtime. Among the report’s recommendations were: the standard work week should be reduced from 44 hours to 40; overtime after 40 hours per week should be voluntary and paid at time-and-a-half. These recommendations were not implemented.

Key changes to the hours of work and overtime pay rules were made in 2001. The ESA eliminated a long-standing permit system that had regulated hours of work after 48 hours in a week. The requirement for employee written agreement to work excess hours was introduced. Employees and employers could agree in writing to a work week of up to 60 hours without Ministry of Labour approval. Ministry approval was needed for agreements to work beyond 60 hours in a week. In addition, the current provisions for daily and weekly/biweekly rest periods and in between shifts were introduced (see below for an explanation of these).

The new Act also made changes with respect to overtime pay. Agreements to average overtime over a period of up to 4 weeks no longer required the approval of the Director of Employment Standards. The Director’s approval was still required to average overtime for a period longer than 4 weeks.

Changes were subsequently made in 2005 to require the Director of Employment Standards to approve all agreements between employers and employees to work excess weekly hours – i.e., more than 48 hours in a week – not just those above 60 hours a week. Similarly, the changes required the Director of Employment Standards to approve all agreements between employers and employees to average hours of work for the purposes of determining the employee’s entitlement to overtime – not just those that average hours beyond a 4-week period.

In general, the hours of work and overtime provisions of the ESA include limits on daily hours and weekly hours as well as rules regarding rest and eating periods and payment of overtime. In addition, there are rules permitting work beyond some limits provided there are written agreements between employers and employees and provided the employer has obtained approval from the Ministry of Labour Director of Employment Standards.

Exemptions to the hours of work and overtime provisions are commonplace, but their terms vary significantly with some containing different standards than in the
ESA and others containing no standard. Some were not arrived at in a transparent process or in consultation with employees. Exemptions are dealt with as a separate subject in section 5.2.3.

Approximately 78% of employees are estimated to be fully covered by the hours of work provisions, while an exemption or different rule applies to approximately 22% of employees in the province.\textsuperscript{149} About 15% of employees are exempt from the overtime provision.\textsuperscript{150}

\textit{Daily Hours}

The maximum number of hours employees can be required to work in a day is 8 hours or the number of hours in an established regular workday so long as the 11-hour daily rest period is complied with. The daily maximum of 8 hours or an established workday can be exceeded only when there is written agreement between the employee and employer. However, taking into account the 11-hour daily rest requirement, the absolute maximum regular workday that an employer can establish is 12 hours per day (which cannot be exceeded). For example, if the regular established work day is 9 hours per day, written agreement would be required for the employee to work beyond 9 hours per day, up to 12.

\textit{Weekly Hours}

The maximum number of hours an employee can be required to work in a week is 48. A written agreement with the employee is required to exceed this maximum as is an approval by the Director of Employment Standards. We understand that employer applications to schedule up to 60 hours per week are routinely approved by the Director of Employment Standards. Applications for hours beyond 60 are scrutinized.

\textit{Rest Periods – Daily Rest and Weekly/Biweekly Rest}

Rest periods are periods when an employee must be free from work.

\textit{Daily Rest}

An employee must receive at least 11 consecutive hours off work each day. An employee and an employer cannot agree to less than 11 consecutive hours off work each day. Therefore the maximum number of hours of work that can be

\textsuperscript{149} Vosko, Noack, and Thomas, 24.
\textsuperscript{150} Ibid., 21.
scheduled in 1 day is 12 hours of work because 1 hour for meal breaks is required if an employee is scheduled for 13 hours of work. An employee and an employer cannot agree to less, and there is no other way to modify it.

**Weekly/Biweekly Rest**

Employees must receive at least 24 consecutive hours off work in each workweek or 48 consecutive hours off work in every period of two consecutive workweeks. This means the effective maximum work week is 6 days. For example, a 6-day work week of 8 hours per day complies with the Act.

**Rest Between Shifts**

There is a requirement for 8 hours off work between shifts if the total time worked on successive shifts is more than 13 hours. An employer and employee can agree in writing that the employee will receive less than 8 hours off work between shifts.

**Eating Periods**

Employees are entitled to a meal break of 30 minutes scheduled by the employer at intervals that will result in the employee working no more than 5 consecutive hours without a meal break. A 30-minute eating period can be split into two periods within each 5-hour period, provided the employer and employee agree. This agreement can be oral or in writing.

**Overtime Pay**

There are two main components to the overtime pay provisions: overtime pay and overtime averaging for the purpose of calculating overtime pay.

Overtime pay is 1.5 times the employee’s regular rate of pay and is paid on weekly hours worked in excess of 44.

An employee and an employer can agree in writing that the employee will receive paid time off work instead of overtime pay. If an employee agrees to bank overtime hours, he/she must be given 1.5 hours of paid time off work for each hour of overtime worked.

Overtime averaging allows hours of work to be averaged over a specified period of 2 or more weeks for the purpose of calculating overtime pay. Overtime averaging is permitted if the employer and the employee agree in writing and if the employer obtains an approval from the Director of Employment Standards.
We understand that employer applications to permit overtime averaging over a period of 4 weeks or less are routinely approved by the Director of Employment Standards. Applications to permit overtime averaging over a period of more than 4 weeks are scrutinized.

There is no limit on the period over which overtime can be averaged.

**Employee Written Agreements Required for Excess Hours**

Section 17 of the ESA provides that an employer cannot require or permit an employee to work more than the daily or weekly limits unless there is employee agreement.

An employee can agree in writing to work more than eight hours a day – or more than the regular workday if it is more than eight hours – or to work more than 48 hours in a week. Employee agreement is not valid unless the employer has first provided the employee with a copy of a Ministry document outlining the rights of employees under the hours-of-work rules.

The Ministry’s Employment Standards (ES) Program policy allows for agreements between employers and employees to be made electronically. However there does not seem to be widespread knowledge that this is acceptable. Agreements made electronically are discussed in section 5.4.2.

In most cases, an employee can revoke the agreement by giving the employer two weeks’ written notice. An employer can also cancel the agreement by giving the employee reasonable notice.

In some cases, employee agreement is obtained at the time of hiring when the prospective employee may have little bargaining power if he/she wants the job. There is no evidence of how many employees refuse to grant consent at the time of hiring. Written consents are also obtained after hiring and there is no evidence as to how many employees decline to agree. Anecdotally we were told that in a plant where the culture lends itself to being able to refuse with confidence about 20% refuse to work excess hours. There is no evidence about the frequency of employee agreement being revoked by an employee once given although anecdotally it seems to be a rare occurrence.

In a unionized workplace, the Ministry recognizes that the trade union is the exclusive agent of employees in the bargaining unit and that the union can enter into an agreement with an employer on behalf of all bargaining unit employees.
wherever an agreement with an employee is required under the Act. There is
one reported case\textsuperscript{151} in which an arbitrator concluded that although the terms of
the collective agreement allowed the employer to require an employee to work
on a public holiday, the collective agreement could not override the employee's
individual statutory right to elect not to work. The Ministry has taken the position
that “this decision is inconsistent with the Program’s interpretation of s. 7 of the Act
and should not be followed.”\textsuperscript{152}

The Ministry also takes the position that, where an agreement is made between a
union and an employer, unilateral revocation by an employee is not possible during
the operation of a collective agreement.

With respect to agreements to average overtime, the Ministry also accepts that
for employees represented by a trade union, the written agreement may be
embodied in a collective agreement or a memorandum of agreement or other
written documentation signed by union representatives and that all bargaining unit
employees are bound by the agreement.

We are advised that union consent to work excess hours and to overtime
averaging is commonplace.

\textit{Relationship Between Hours of Work and the Human Rights Code}

Section 5 of the \textit{Human Rights Code} requires employers to provide their
employees with equal treatment without discrimination because of family status
and disability. Work requirements – including hours of work – that have an adverse
impact on employees because of their family status and/or disability could be
discriminatory unless the requirement is found to be reasonable and bona fide and
the employer has accommodated to the point of undue hardship.

\textit{Other Jurisdictions}

Most provinces’ standard daily workday is 8 hours and the standard workweek
ranges from 40 to 48 hours. All provinces mandate a minimum number of
consecutive hours off weekly (most require 24 consecutive hours off per week).
However, Ontario is the only province to require 11 consecutive hours off each day.
Ontario is the only Canadian jurisdictions to have daily rest rules mandating that
the longest an employee can be required to work in a day is 12 hours and where
no variations or extensions can be made. This is a hard cap on daily hours.

\textsuperscript{151} Collins and Aikman Plastics, Ltd. v. United Steelworkers, Local 9042, 128 LAC (4th) 438.
\textsuperscript{152} Employment Standards Act, 2000 Policy & Interpretation Manual (Toronto: Carswell, 2001),
section 7.6.1.
All provinces include provisions for overtime pay which is generally at time-and-a-half of regular hourly rate for all overtime hours worked. However, there are some variations in the trigger point at which overtime is paid. Nova Scotia, Saskatchewan, and British Columbia allow hours to be averaged.

**Hours of Work**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Daily Hours</th>
<th>Weekly Hours</th>
<th>Daily Rest Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario</td>
<td>8 hours</td>
<td>48</td>
<td>11 hours (hard cap; no variations possible)</td>
</tr>
<tr>
<td></td>
<td>or the hours in an established regular workday</td>
<td></td>
<td>8 hours between shifts (unless total time worked on successive shifts does not exceed 13 hours or unless the employer/employee agree otherwise)</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>—</td>
<td>48</td>
<td>—</td>
</tr>
<tr>
<td>Quebec</td>
<td>—</td>
<td>40</td>
<td>—</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>—</td>
<td>40</td>
<td>8 hours in a 24-hour period</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>—</td>
<td>48</td>
<td>—</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>8 hours</td>
<td>40</td>
<td>8 hours in a 24-hour period (exception for emergency circumstances)</td>
</tr>
<tr>
<td></td>
<td>or 10 hours (in a 4-day week)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>12 hours</td>
<td>44</td>
<td>8 hours between shifts</td>
</tr>
<tr>
<td></td>
<td>(hours of work must be confined within a period of 12 consecutive hours in any 1 work day, however, the Director can issue a permit authorizing extended hours of work)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>British Columbia</td>
<td>8 hours</td>
<td>40</td>
<td>8 hours between shifts</td>
</tr>
<tr>
<td>Manitoba</td>
<td>8 hours</td>
<td>40</td>
<td>—</td>
</tr>
<tr>
<td>Federal</td>
<td>8 hours</td>
<td>40</td>
<td>—</td>
</tr>
</tbody>
</table>
**Overtime Pay**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Overtime Pay Trigger</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario</td>
<td>After 44 hours</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>After 48 hours</td>
</tr>
<tr>
<td>Quebec</td>
<td>After 40 hours</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>After 40 hours</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>After 48 hours</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>After 44 hours</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>After 40 hours</td>
</tr>
<tr>
<td>Alberta</td>
<td>After 44 hours</td>
</tr>
<tr>
<td>British Columbia</td>
<td>After 40 hours in a week (at the rate of time-and-a-half). After 8 hours in a day (at the rate of time-and-a-half) for the next 4 hours worked. Double time for all hours worked in excess of 12 hours in a day.</td>
</tr>
<tr>
<td>Manitoba</td>
<td>After 40 hours</td>
</tr>
<tr>
<td>Federal</td>
<td>After 40 hours</td>
</tr>
</tbody>
</table>

**Right to Refuse Excess Hours**

It appears that only Ontario and four other provinces require employee agreement to work excess hours but the precise rules differ significantly and the rules in Ontario appear to be among the most stringent. The requirement for employee written agreement to work excess hours beyond eight hours a day or beyond the regular hours of work is only found in Ontario and in Manitoba.

If one were to ask where in Canada can the employer insist that employees work 1 to 4 excess hours on a given day – assuming the normal daily hours are 8 and the normal maximum weekly hours are 44 – the answer appears to be that the employer can insist\(^{153}\) on this everywhere except in Ontario and Manitoba.

Quebec and Alberta prohibit more than 4 excess hours in a day or 12 hours work on a day. Saskatchewan permits the scheduling of up to 4 excess hours on a day.

\(^{153}\) Subject to human rights considerations.
– assuming a regular 40-hour week – because although it has no daily maximum, it has a weekly maximum of 44 hours.

Ontario does permit flexibility to employers to have regular daily hours of work that are in excess of 8 hours as long as the total hours do not exceed 48 in a week.\(^\text{154}\) This means, for example, that an employer could schedule regular hours of work of 9 hours a day or four 9-hour days and one 8-hour day.\(^\text{155}\) However, in these circumstances, the employer could still not insist on the employee working 1 to 3 excess hours a week.\(^\text{156}\) There are nine provinces and the federal jurisdiction\(^\text{157}\) that appear to permit an employer to require a 9-hour a day, 5-day-a-week schedule,\(^\text{158}\) but of those, only Ontario and Saskatchewan permit an employee to refuse to work additional hours before they have worked 48 hours per week. Quebec allows employees to refuse after working 50 hours in a week and the other jurisdictions do not give employees the right to refuse to work hours above any weekly maximum.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Right to decline excess hours – daily</th>
<th>Right to decline excess hours – weekly</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario</td>
<td>Above 8, or above regular hours of work</td>
<td>Above 48</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Above 8</td>
<td>Above 40</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>–</td>
<td>Above 44</td>
</tr>
<tr>
<td>Alberta</td>
<td>Above 12</td>
<td>–</td>
</tr>
<tr>
<td>Quebec</td>
<td>Above 12</td>
<td>Above 50</td>
</tr>
<tr>
<td>British Columbia</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Federal</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

\(^{154}\) Unless there is written agreement to exceed 48 weekly hours. Additionally, the daily hours must provide for 11 hours of rest.

\(^{155}\) A work week made up of four 9-hour days and one 8-hour day is permissible as long as that is the regular schedule and does not vary from week to week. The employer would have to pay for regular hours of work up to 44 and overtime pay thereafter.

\(^{156}\) The difference between 48 and 45 hours per week.

\(^{157}\) Manitoba is the exception.

\(^{158}\) In Saskatchewan, 1 of the 5 days would have to be an 8-hour day.
In the US, many states have their own laws pertaining to hours of work and overtime pay. The standard work week is 40 hours under the FLSA. Also, the FLSA does not limit the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours. It does not allow for averaging agreements over 2 or more weeks. Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 hours in a workweek at a rate not less than time and one-half their regular rates of pay.

Submissions

During consultations, we heard most about scheduling of hours of work; however, the limitations on hours of work were not at the forefront of the debate. Scheduling is dealt with in section 5.3.2.

A very general concern raised by labour and employee advocacy groups is that the power imbalance between employers and employees potentially prevents employees from freely exercising their hours of work rights, particularly the right to refuse excess hours. Other criticisms from these groups were that excess hours approvals are not adequately reviewed or enforced and that some excess hours approvals are granted almost automatically without rigorous pre-approval scrutiny by the Ministry.

Employers, on the other hand, complained that the requirement for written consent from every employee was burdensome and that the consistent refusal to work excess hours by a significant minority within the workforce sometimes threatened the ability of business, especially manufacturers, to respond to urgent production issues.

We did hear from some businesses that generally all the different requirements and rules for hours of work create a very complex and unwieldy system that is difficult to track and follow. We also heard from employers that the hours of work rules need to be more flexible particularly regarding the daily rest period rules which require at least 11 hours free from work and cannot be overridden by consent. Employer groups point out that some workplaces, such as those in the manufacturing sector, require greater flexibility owing to just-in-time processes.

We did hear that the requirement for employee consent to work excess hours, (e.g., above 8 hours in a day and above the regular 48-hour week (which prevails in some parts of the automotive industry)) caused hardship to some employers
where employees in key jobs refuse to work excess hours, thus jeopardizing just-in-time production and delivery of goods.

Labour and employee advocacy groups called for a reduction in the weekly maximum hours of work to 40 hours and for the overtime pay trigger to also be reduced to 40 hours. They also argued for the elimination of overtime averaging on the basis that it reduces employees’ pay in some circumstances and that it gives employers an incentive to schedule excess hours. Limited scope to averaging would help to ensure that employees are not deprived of overtime pay rights. We found no data as to how much the averaging provision costs employees or saves employers.

During consultations, employer comments related to overtime focused on scheduling flexibility. Employers asked that both the 44-hour overtime pay trigger and the averaging provisions be maintained. Employers explained that many schedules run with many hours in a week and few hours in the next week, which is preferred by many employees. For example, averaging hours for purposes of calculating overtime pay allows flexible work arrangements such as compressed work weeks, “continental” shifts, and other arrangements that are becoming increasingly common. Employers contend that eliminating or tightening the rules on overtime averaging would probably reduce the number of these types of schedules and thus adversely affect the flexibility required to meet operational requirements.

**Summary of Current Law for Hours of Work and Overtime Pay**

- maximum daily hours: 8 hours, or the number of hours in an established regular workday;
- maximum weekly hours: 48 hours;
- need written employee consent to work more daily or weekly hours;
- also need ministry director approval to work more than 48 weekly hours;
- compulsory daily rest period of at least 11 hours, meaning an effective limit on workdays of 12 hours (no exceptions possible except by formal exemption);
- 8 hour rest required between two shifts of more than 13 hours combined duration;
- weekly/bi-weekly rest periods: 24 consecutive hours off per week or 48 consecutive hours off per 2 weeks;
• mandatory 30-minute eating period for every 5 hours worked;
• overtime pay after 44 hours at 1.5 times the regular rate; and
• overtime averaging permitted with employee written consent and ministry director approval.

Options:

1. Maintain status quo.

2. Eliminate the requirement for employee written consent to work longer than the daily or weekly maximums but spell out in the legislation the specific circumstances in which excess daily hours can be refused.

For example, in *Fairness at Work*, Professor Arthurs effectively recommended that employers should be able to require employees to work, without consent, up to 12 hours a day or 48 in a week (with exceptions where they could be required to work even longer) but that there should be an absolute right to refuse where: the employee has unavoidable and significant family-related commitments; scheduled educational commitments or a scheduling conflict with other employment (part-time workers only). This change would mean employers could require employees to work excess daily hours without consent as set out above.

3. Maintain the status quo employee consent requirement, but:

   a) in industries or businesses where excess hours are required to meet production needs as, for example, in the case of “just-in-time” operations, the need for individual consent would be replaced by collective secret ballot consent of a majority of all those required to work excess hours; and

   b) employees required to work excess hours as a result of (a), would still have a right to refuse if the employee has unavoidable and significant family-related commitments; scheduled educational commitments or a scheduling conflict with other employment (part-time workers only); or protected grounds under the *Human Rights Code* such as disability. This “right to refuse” would also apply to unionized employees.

4. The same as option 3, except that instead of a blanket legislative provision as in (3a), where a sector finds it difficult to comply with the daily hours provisions, exemptions could be contemplated in a new exemption process, the possibility of which is canvassed in section 5.2.3.
5. Eliminate daily maximum hours, but maintain the daily rest period requirement of 11 hours, and the weekly maximum hours of work of 48.

6. Eliminate or decrease the daily rest period below 11 hours which would effectively increase the potential length of the working day above 12 hours.

7. Enact a legislative provision similar to one in British Columbia that no one, including those who have a formal exemption from the hours of work provisions, can be required to work so many hours that their health is endangered.\textsuperscript{159}

8. Codify that employee written agreements can be electronic for excess hours of work approvals and overtime averaging.

9. Eliminate requirement for Ministry approval for excess hours (i.e., only above 48 hours in a week). Maintain requirement for employee written agreement.

10. Eliminate requirement for Ministry approval for excess weekly hours between 48 and 60 hours. Maintain requirement for Ministry approval for excess hours beyond 60 hours only. Maintain requirement for employee written agreement.

11. Reduce weekly overtime pay trigger from 44 to 40 hours.

12. Limit overtime averaging agreements – impose a cap on overtime averaging (e.g., allow averaging for up to a 2- or 4-week or some other multi-week period). Maintain requirement for employee written agreement. Ministry approval could (or could not) be required.

5.3.2 Scheduling

Background

The ESA does not include provisions regulating scheduling of work by employers. There is currently no provision in the ESA requiring an employer to provide advance notice of shift schedules or of last minute changes to existing schedules.

There is a “three-hour rule” providing that, when an employee who regularly works more than 3 hours a day is required to report to work but works less than 3 hours, he/she must be paid the higher of:

\textsuperscript{159} In British Columbia, for instance, an employer must not require or allow an employee to work excessive hours or hours harmful to the employee's health or safety.
Despite the numerous and varied responsibilities of many in today’s workforce, there are workers who often have very little ability to make changes to their work schedules when those changes are needed to accommodate family and other responsibilities.

Many low-wage workers not only have very little or no control over the timing of the hours they are scheduled to work but also receive their schedules with very little advance notice and work hours that vary significantly. Uncertainty can also include: last-minute call-in where no schedule is maintained and, where there is a schedule, last-minute notice to employees of changes in work hours, and “on-call” shifts where employees are expected to be available for work on short notice (i.e., less than 24 hours’ notice). Such practices make it difficult for employees to plan for child-care, undertake further training and education, maintain or search for a second job, make commuting arrangements, and plan other important activities. Consequently, uncertainty in scheduling practices may contribute to making work precarious.

**Other Jurisdictions**

**Canada**

Like Ontario, most Canadian and American jurisdictions have some reporting pay requirement that requires employers to compensate employees for a minimum number of hours when they report for work, but are sent home before the end of the scheduled shift. The amount of reporting pay required in such circumstances differs among jurisdictions, but generally ranges from 2 to 4 hours.\(^{161}\)

There are examples in Canada of schedule posting requirements. In Alberta, every employer must notify the employee of the time at which work starts and ends by posting notices where that can be seen by the employee, or by any other

\(^{160}\) The rule does not apply in some cases where the cause of the employee not being able to work at least 3 hours was beyond the employer’s control (e.g., fire, power failure).

\(^{161}\) The majority of provinces require employers to provide a minimum of 3 hours compensation to employees for on-call or regularly scheduled cancelled shifts. In British Columbia, for example, an employee scheduled for 8 hours or less must be paid for a minimum of 2 hours even if work less than 2 hours. An employee scheduled for more than 8 hours, must be paid for a minimum of 4 hours even if works less than 4 hours. Must be paid for if they report to work as scheduled, regardless of whether or not they start work. In addition to these reporting pay requirements, some American jurisdictions require that employees be scheduled for minimum shift lengths (i.e., a shift cannot be scheduled for less than 3 hours).
reasonable method. An employer must not require an employee to change from one shift to another without at least 24 hours’ written notice and 8 hours of rest between shifts. In Saskatchewan, employers must give employees notice of the work schedule at least 1 week in advance and must provide employees written notice of a schedule change 1 week in advance.

The federal government has also made a commitment that certain employees will be given the right to request flexible hours (in addition to an increased parental leave). For example, employees will have the legal right to ask their employers for flexibility in their start and finish times, as well as the ability to work from home.\footnote{162}

\textbf{United States (US)}

Scheduling has been the subject of much discussion across the US, in response to the issues raised here. Recent developments have included: predictable scheduling laws (i.e., advance notice provisions); enhanced employee flexibility laws (i.e., right to request provisions); and non-legislative approaches (e.g., retailers re-evaluating and updating existing practices in response to external pressures).

In 2014 San Francisco became the first US jurisdiction to pass legislation\footnote{163} penalizing the use on-call shifts. The San Francisco \textit{Retail Workers Bill of Rights} is intended to give hourly retail staffers more predictable schedules and priority access to extra hours of available work. It applies to retail chains with 20 or more locations nationally or worldwide and that have at least 20 employees in San Francisco under one management system. It is estimated that this law affects about 5% of the city’s workforce.

The ordinances require businesses to post workers’ schedules at least 2 weeks in advance. Workers receive compensation for last-minute schedule changes, “on-call” hours, and instances in which they are sent home before completing their assigned shifts. Specifically, workers receive 1 hour of pay at their regular rate of pay for schedule changes made with less than a week’s notice and 2 to 4 hours of pay for schedule changes made with less than 24 hours’ notice. Finally, it requires

\begin{itemize}
\item \footnote{163} It comprises two separate pieces of legislation – the “Hours and Retention Protections for Formula Retail Employees” and the “Fair Scheduling and Treatment of Formula Retail Employees.” Together, the ordinances contain five major provisions to curb abusive scheduling practices at corporate retailers.
\end{itemize}
employers to provide equal treatment to part-time employees, as compared to full-time employees at their same level, with respect to:

- starting hourly wage;
- access to employer-provided paid time off and unpaid time off; and
- eligibility for promotions.

Hourly wage differentials are permissible if they are based on reasons other than part-time status, such as seniority or merit systems. Further, employees' time-off allotments may be prorated according to hours worked. Issues around equal pay for part-time and temporary employees are addressed in section 5.3.7.

The Retail Workers Bill of Rights in San Francisco has generated a larger discussion in the US about the need for predictable and stable schedules for part-time employees. A number of state legislatures have introduced or enacted similar measures including Michigan in 2014, and Connecticut, California, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New York, Oregon, and Indiana in 2015.164

Some governments have passed (i.e., Vermont165 and San Francisco166) right to request provisions. Such a right to request is intended to protect those who choose to limit their work hours in order to address family duties, to promote continuance of working at one’s current job, and to accommodate the choice of parenthood even if labour force withdrawal is affordable. Moreover, such provisions protect against reprisals for requesting schedule changes for any number of reasons.

Two federal bills have been introduced which demonstrate the extent to which scheduling issues have begun to have greater prominence in the debate in the US over workplace rules.167

167 The Flexibility for Working Families Act would give employees a right to request from their employer a change to part-time hours, flex-time schedule, telework, and a right to request minimum time of notice for schedule changes. Similarly, the Schedules That Work Act of 2014 would provide employees in all organizations with 15 or more employees not only a right to request more flexible, predictable or stable hours but a “right to receive” schedule changes for those employees with caregiving or education responsibilities, unless the employer has bona fide business reasons for not doing so. This Bill is aimed at redressing the problems of unpredictable and unstable schedules in retail sales, food preparation and service, and building cleaning occupations.
Retailers are addressing scheduling issues on their own, with many publically speaking about existing or proposed changes. For example, Abercrombie & Fitch, Victoria’s Secret, and Gap Inc. pledged to make specific changes to their scheduling practices following inquiries by the New York Attorney General requesting information about their on-call scheduling practices questioning whether such practices were legal. Other large retailers in the US have voluntarily implemented predictable and stable scheduling regimes for part-time employees. In a unionized environment, Macy’s sets schedules for its employees as far as six months in advance for some of the shifts at its unionized stores in and around New York City. Some companies have instructed their local store managers to consider requests for making schedules more stable or consistent week-to-week, such as Starbucks and Ikea, which provide up to 3 weeks’ advance notice of upcoming schedules.

Outside North America, other jurisdictions have also implemented right to request legislation.

**European Union (EU)**

An EU directive on part-time work includes provisions facilitating movement from full-time to part-time status and vice versa, where employers are required to give consideration to requests from workers to transfer from one status to another. Some European countries allow requests for transfers for all employees, but in many cases these are limited to those with caregiving responsibilities. A wide entitlement to request a change in status is often accompanied by the right to refuse for any reason although there may be a requirement that the employer meet employees to discuss the matter and provide a rationale in writing within a fixed time.

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170 Clause 5 of the Part-time Directive states that as far as possible, employers should give consideration to:
   a) requests by workers to transfer from full-time to part-time work that becomes available in the establishment;
   b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise;
   c) the provision of timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfers from full-time to part-time or vice versa;
   d) measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions, and where appropriate, to facilitate access by part-time workers to vocational training to enhance career opportunities and occupational mobility;
   e) the provision of appropriate information to existing bodies representing workers about part-time working in the enterprise.
period of time if the request is rejected. Reprisals cannot be taken against workers for making the request. While employers have a broad right to refuse requests, there is evidence that employers are more likely to permit adjustments between full and part-time works when a statutory right to request the change is in place.

The Netherlands passed the *Part-Time Employment Act*, which gives workers the right to periodically request a change in their weekly work hours (either requesting more or fewer hours). In July 2014, the UK extended the legal right to request flexible work arrangements for those with caregiving responsibilities to all employees to request flexible work arrangements.\(^{171}\)

**Australia**

In Australia, caregivers have the right to request flexible work arrangements. It is available to any employee (with at least 12 months on a full-time or part-time experience with their employer) who has a child up to age 18 (or any caregiving responsibility for a member of his or her immediate family or household), has a disability, is experiencing domestic violence, or is age 55 or older.\(^{172}\)

Australia also deals with scheduling as there are 122 industry and occupation awards (including retail and hospitality sectors) that cover most workers. Among other standards, the system addresses scheduling practices (i.e., rostering) as they would be relevant to particular sectors (e.g., notice of schedule changes must be provided by advance written notice for part-time retail workers).\(^{173}\)

**Submissions**

Employee-representative bodies and advocacy groups expressed that vulnerable workers need predictable schedules, minimum shift requirements and that those workers should be compensated for being on-call (i.e., requirement to be available for a period of time during which the employer may require an employee to work but which is not compensated unless actually called into work) and for last minute changes. They are critical of the limited scheduling regulations in the ESA. For example, the current reporting pay requirement is relatively easy to circumvent through the scheduling of split shifts by employers.

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171 If the employee has been with a company for at least half a year. An employer can still deny a request if it has a good business reason for doing so.
173 Under the General Retail Industry Award 2010.
They suggested that scheduling uncertainty is most prevalent in the food, hospitality, retail, health care, and child-care sectors wherein hours of work and incomes tend to be unpredictable. These sectors predominantly comprise women, visible minorities, and recent immigrants.

The majority of submissions from these groups recommend: advance notice (i.e., posting) of employees schedules (e.g., 2 weeks); minimum shift requirements (e.g., 3 hours per day to 16-24 hours per week); compensation for last minute changes to schedules (e.g., 1 hour’s pay if schedule is changed less than a week’s notice, four hours’ pay if changed with less than 24 hours’ notice); the right to request provisions without reprisals; offering of shifts to part-timers prior to hiring new staff; and job-sharing provisions – to name a few. The rationale behind such recommendations is to address issues of the need for predictability in working hours, underemployment, financial uncertainty, and general precariousness in the labour market that scheduling uncertainty contributes to and exacerbates. Moreover, anecdotally – such provisions are said to reduce absenteeism, workforce turnover, and to increase employee morale and engagement.

Employer representative groups generally strongly oppose any mandatory scheduling provisions in the ESA that apply to all employers (i.e., provisions that are applicable irrespective of the size, location, and industry). As such, they have explicitly stated a one-size-fits-all approach for scheduling does not work and that no changes be made to current models of scheduling in the ESA.

Some unions have also supported this point of view. Employers and trade unions have both expressed that scheduling can sometimes be a very difficult and complex matter requiring research, negotiations, and (sometimes) pilot projects in an attempt to achieve workable scheduling practices that balance the interests of employers for flexibility and productivity with the employees’ interests in predictability.

Professor Harry Arthurs recommended that after 1 year of service, employees should have a right to request, in writing, that their employer decrease or increase their hours of work, give them a more flexible schedule or alter the location of their work. The employer would be required to give the employee an opportunity to discuss the issue and provide reasons in writing if the request is refused in whole or in part. There would be no appeal of an employer’s decision on the merits. The employer’s obligation to respond to an employee’s request would be limited to one request per calendar year, per employee.174

Options:

1. Maintain the status quo.

2. Expand or amend existing reporting pay rights in ESA:
   a) increase minimum hours of reporting pay from current 3 hours at minimum wage to 3 hours at regular pay;
   b) increase minimum hours of reporting pay from 3 hours at minimum wage to 4 hours at regular pay; or
   c) increase minimum hours of reporting pay from 3 hours at minimum wage to lesser of 3 or 4 hours at regular rate or length of cancelled shift.

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

4. Require all employers to provide advance notice in setting and changing work schedules to make them more predictable (e.g., San Francisco Retail Workers Bill of Rights). This may include (but is not limited) to:
   • require employers to post employee schedules in advance (e.g., at least 2 weeks);
   • require employers to pay employees more for last-minute changes to employees’ schedules (e.g., employees receive the equivalent of 1 hour’s pay if the schedule is changed with less than 2 days’ notice and 4 hours’ pay for schedule changes made with less than 24 hours’ notice);
   • require employers to offer additional hours of work to existing part-time employees before hiring new employees;
   • require employers to provide part-timers and full-timers equal access to scheduling and time-off requests;
   • require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted.

5. Sectoral regulation of scheduling – encourage sectors to come up with own arrangements:
Recognizing the need for predictable and stable schedules for employees in certain sectors, and the variability of scheduling requirements, the government would adopt a sectoral approach to scheduling as follows:

- the government would be given the legislative authority to deal with scheduling issues, including by sector;
- the policy of the government would be to strongly encourage sectors which required regulation to come up with their own scheduling regimes but within overall policy guidelines of best practices set by the Ministry;
- to develop the overall policy guidelines for scheduling, the government would appoint an advisory committee, comprising representatives from different sectors:
  - representatives of employers;
  - representatives of employees;
  - individuals with expertise in scheduling; and
  - others who may facilitate an educated discussion of the issues (e.g., representatives of community service agencies and academics with relevant expertise).

The advisory committee would be chaired and discussions facilitated by a neutral person from outside the Ministry of Labour. Once the guidelines were in place, sectoral committee structured as described in the exemptions section of this report (see section 5.2.3) could be established as required to advise the Minister on the scheduling issues in that sector.

5.3.3 Public Holidays and Paid Vacation

5.3.3.1 Public Holidays

Background

Ontario has nine public holidays that most employees are entitled to take off work with public holiday pay. This is in line with the number of public holidays in other Canadian provinces and the federal jurisdiction, which ranges from six to ten days.
Public holiday pay is equal to the total amount of regular 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. The proper calculation of public holiday pay is a common problem for employers. It is often pointed to as an example of unnecessary complexity in the Act.

Before 2001, if an employee’s work hours did not vary, the employee was paid a regular day’s pay for the public holiday. There was a requirement to calculate public holiday pay only for employees whose daily hours of work varied. Since 2001, employers are required to perform public holiday pay calculations for every employee, even those whose work hours do not vary.

In addition, those who work on a public holiday are entitled to be paid:

- public holiday pay plus premium pay of 1.5 times the employee’s regular rate of pay; or
- their regular rate for hours worked plus a substitute day off with public holiday pay.

There are special rules for public holidays that apply to construction employees. Such employees are not entitled to public holidays or public holiday pay if they receive 7.7% or more of their hourly wages for vacation or holiday pay.

**Submissions**

Current rules around public holidays (other than applicable exemptions) were not widely raised during our consultations. Some organizations suggested paid religious holidays that would mirror the two Christian-based public holidays (Good Friday and Christmas Day).

We heard from some organizations that they want public holiday pay to be simplified and more straightforward. For instance, the calculation could be more aligned with the applicable pay period. There could be greater clarity about whether bonuses and other similar payments form part of the calculation.

We also heard from small business that premium pay can impose a burden for retailers who need to be open on public holiday days.
Options:

1. Maintain status quo – maintain the current public holiday pay calculations – i.e., total amount of regular 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.

2. Revert to the former ESA's public holiday pay calculation –
   - Employees whose work hours do not vary: regular wages for the day;
   - Employees whose work hours differ from day to day/week-to-week (i.e., there is no set schedule of hours for each day of the week):
     - the average of the employee’s daily earnings (excluding overtime pay) over a period of 13 work weeks preceding the public holiday; or
     - the method set out under a collective agreement.

3. Combined calculation – revert to the former ESA's public holiday pay calculations for full-time employees and commission employees and maintain the current ESA's formula for part-time and casual employees –
   - Full-time and commission employees: regular wages for the day;
   - Part-time and casual employees: total amount of regular 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.

4. Set a specified percentage for public holiday pay – e.g., employees receive 3.7% of wages earned each pay period. This would be the equivalent of wages for 9 regular working days to reflect the 9 public holidays in a year. Under this option public holiday pay would essentially be “pre-paid” throughout the year – employees would not receive public holiday pay on each individual holiday and existing qualifying criteria would no longer apply.

Employees who worked on a public holiday would still be entitled to premium pay (or a substitute day off).

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175 For example, 3.7% of regular wages reflects 5 days/week multiplied by 50 weeks/year, less 9 public holidays, or 241; 9 equals 3.7% of 241.
176 Right now, employees generally qualify for the public holiday entitlement unless they fail without reasonable cause to work all of their last regularly scheduled day of work before the public holiday or all of their first regularly scheduled day of work after the public holiday (this is called the “Last and First Rule”).
5.3.3.2 Paid Vacation

Background

Employees are entitled to 2 weeks of vacation time after each 12-month vacation entitlement year. The ESA does not provide for any increases to the 2-week vacation time entitlement based on length of employment although a contract of employment or collective agreement might do so. There are rules around when vacation must be taken.

Vacation pay must be at least 4% of wages earned in the 12-month vacation entitlement year (or alternative period).

Compared to other Canadian provinces and the federal jurisdiction, Ontario has the least generous provisions with respect to vacation time and pay. Most other provinces and the federal jurisdiction start with 2 weeks of paid vacation, and increase it to 3 weeks after a certain period of employment, which ranges from 5 to 15 years. One province, Saskatchewan, starts with 3 weeks of paid vacation, and increases it to 4 weeks after 10 years of employment.

Submissions

Employee advocates and labour groups have said that vacation entitlements should be increased. Many suggested starting at 3 weeks of paid vacation, and increasing to 4 weeks after 5 years of employment. Some organizations suggested that employees get 3 weeks’ vacation after 5 years of employment; some suggested 3 weeks for everyone.

Some employer organizations said that the current entitlements around paid vacation should be maintained. Some want greater flexibility regarding when vacation pay is paid.

Options:

1. Maintain the status quo of 2 weeks.
2. Increase entitlement to 3 weeks after a certain period of employment with the same employer – either 5 or 8 years.
3. Increase entitlement to 3 weeks for all employees.
5.3.4 Personal Emergency Leave

(Note: Issues concerning paid sick days and doctors’ notes are addressed in section 5.3.5).

**Background**

Under the current legislation, employees whose employer regularly employs 50 or more employees are entitled to 10 days of unpaid PEL.

Section 50 of the ESA provides that an employee may use these days for a personal illness, injury or medical emergency or for the death, illness, injury or medical emergency or urgent matter concerning:

- the employee’s spouse;
- a parent, step-parent or foster parent of the employee or the employee’s spouse;
- a child, step-child or foster child of the employee or the employee’s spouse;
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee’s spouse;
- the spouse of a child of the employee;
- the employee’s brother or sister;
- a relative of the employee who is dependent on the employee for care or assistance.

Employees must inform their employers about their plans to take the leave either before or as soon as possible after they have begun the leave.

Overall, about three-quarters (74%) of Ontario employees are estimated to be fully covered by the PEL provisions of the ESA. About 8% of employees have special rules for emergency leave, largely professional employees who are not permitted to take PEL if doing so would constitute professional misconduct or dereliction of duty. An additional 971,000 employees – or 19% – are exempt from the PEL provisions, because they work in small firms.177

There were 442,659 businesses with employees in Ontario in 2014. Only 5% of businesses employed more than 50 employees while 95% of businesses

177 Vosko, Noack, and Thomas, 27.
employed 49 or less employees. More than half of these businesses (58%) employed less than five employees.\textsuperscript{178}

**Other Jurisdictions**

PEL is not easily compared to leave provisions in other jurisdictions because it combines a number of different leaves (sick, bereavement, and family responsibility leaves into one with an employer size threshold (50+)).

Whereas Ontario has 10 days that can be used for the purposes outlined above, every other Canadian jurisdiction except for Alberta (which does not have any leaves for sickness, bereavement, and/or family responsibility) has a specific number of days for each categorized leave. For example, New Brunswick has sick leave of up to 5 days, family responsibility leave of up to 3 days, and bereavement leave of up to 5 days for a total of up to 13 days, whereas British Columbia has bereavement leave of up to 3 days and family responsibility leave of up to 5 days for a total of 8 days.

Ontario is also the only Canadian jurisdiction to have an employer-size (50+) eligibility threshold.

Payment for any of these leaves is not common, but does exist. The federal jurisdiction provides 3 paid days of bereavement leave for immediate family members. Quebec offers 1 paid bereavement day for immediate family members, and Newfoundland and Labrador provide 1 paid bereavement day for a relative.

Only Prince Edward Island provides for paid sick leave. After six months continuous service with an employer, an employee is entitled to unpaid leaves of absence of up to three days for sick leave during a twelve-month period. If the employee takes three consecutive days, the employer may ask for a medical certificate. Employees who have more than five years of continuous service with the same employer are entitled to one day of paid sick leave and up to three days of unpaid sick leave each calendar year.

In the US, it is common to have no statutory leave entitlement for PEL. Only California and Massachusetts have PEL-related leaves. Both states have provisions for paid sick leave, which are described in section 5.3.5.

\textsuperscript{178} Statistics Canada, CANSIM Table 552-0001 – Canadian Business Patterns, Location Counts with Employees, by Employment Size and North American Industry Classification System, Canada and Provinces (Ottawa: Statistics Canada, 2018). These are calculations made by the Ontario Ministry of Labour based on data from Statistics Canada’s Canadian Business Patterns. The data includes all active Canadian locations with employees in 2014.
**Submissions**

During consultations we heard concerns from employee advocates about the 50+ employee threshold. They have made recommendations to remove this threshold and extend PEL to employees working for smaller employers so that all employees could have access to this benefit.

Employers asserted that PELs should be assessed in the context of the other leaves that are provided in the ESA including: pregnancy leave, parental leave, family medical leave, organ donor leave, family caregiver leave, critically ill child care leave, crime related child death of disappearance leave, leave for declared emergencies and reservist leave (see section 5.3.6). The problems many employer stakeholders point to is the complexity in navigating the various ESA leaves, and concerns about the way leaves are implemented.

Some employers with generous paid sick leave and bereavement and other leave policies advised that some of their employees view PEL days as being an entitlement that exists in addition to leaves already provided by the employer. The ESA currently provides that:

> If one or more provisions in an employment contract...that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract...apply and the employment standard does not apply.

Some employers have said that the nature and scope of the current PEL makes it difficult for employers to establish that their leave policies provide a greater right or benefit than PEL. For example, some say that even though they provide for paid sick leave, some employees are asking for additional unpaid sick leave days pursuant to the statutory provision.

During consultations, we heard from a number of employers about absenteeism and employees abusing the PEL provisions. Some employers pointed to high levels of absenteeism on Mondays and Fridays and on days abutting holidays as circumstantial evidence of abuse. They also asserted that although they are entitled to “require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave” that the circumstances triggering entitlement to such leaves are difficult if not impossible to monitor.
Employers point out that the impact of such leaves when expressed as a right or entitlement can be very significant particularly because employers are not given much, if any, notice by employees of their intention to take such leaves. Indeed the very nature of such leaves, being related to emergencies precludes much notice being given in most circumstances. The leaves, although unpaid, often trigger additional costs to schedule overtime for others to fill in for the absent employee or even to staff at higher levels than necessary in order to retain the requisite staffing levels for their manufacturing operations. Sometimes, it requires the additional use of temporary and/or part time employees or of agency workers. Absenteeism and the management of absenteeism is a major concern for employers because it adds to costs and decreases productivity.

A number of employer stakeholders recommend separating/categorizing PEL into three separate leaves.

We did not hear from many smaller employers but we anticipate that they might well have vigorous opposition to any extension of the PEL provisions to employers who regularly employed less than 50 employees. Such employers do not have the resources to employ human resources professionals and lack the expertise needed to deal with absenteeism issues. Secondly, there is a concern that they do not have the flexibility and the capacity to deal with PELs as currently framed in the legislation. It can be expected that small employers have key employees who perform essential functions and who cannot be replaced on a short-term temporary basis. Therefore, they may argue that the extension of PEL provisions to smaller employers will have significant adverse impact on their ability to provide service/product to their customer/consumer base.

**Options:**

1. Maintain the status quo.

2. Remove the 50 employee threshold for PEL.

3. Break down the 10-day entitlement into separate leave categories with separate entitlements for each category but with the aggregate still amounting to 10 days in each calendar year. For example, a specified number of days for each of personal illness/injury, bereavement, dependent illness/injury, or dependent emergency leave but the total days of leave still adding up to 10.

4. A combination of options 2 and 3 but maintaining different entitlements for different sized employers.
5.3.5 Paid Sick Days

Background

As described in the section 5.3.4, currently, under the ESA, an employee whose employer regularly 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.

In addition, employers may request “reasonable evidence” with respect to absences taken under PEL. This could include requiring an employee to provide a doctor’s note in cases where they have been away from work due to illness.

In the “Guide to Consultations” we asked whether revisions were needed to this entitlement, and whether there should be a number of job-protected sick days.

In Expected and Actual Impacts of Employment Standards, a paper prepared for the Changing Workplaces Review, Professor Morley Gunderson noted there is not a lot of research documenting the extent to which personal and other leaves are taken and their effects on health and other outcomes. He states that “workers who come to work when sick are not likely to be productive and can infect others with that associated cost,” but that creating paid sick days would be most costly for employers and would also add a cost to the public medical system for providing examinations and documentation. He further says that “workers clearly respond to the incentives of sick leave in that the more generous the leave provisions and the greater the job protection, the longer the sick leave that is taken, with their use increasing to the extent that employees increasingly regard them as a ‘right’ rather than a privilege.”

While some employers do not provide paid sick days, many others do. Where they exist, sick leave plans vary greatly in benefits provided. Some employers have plans which provide for short term and long term disability. Some employer plans and collective agreements have unpaid waiting periods before sick pay is granted, or they provide different amounts of pay depending on the number of sick days taken in a year.
**Other Jurisdictions**

While most provinces in Canada have some protection for employees to be away from work due to illness, requiring payment for sick days is not common. In Canada, Prince Edward Island is the only province to provide 1 paid sick day per year. This leave is only available to employees with 5 or more years of service.

In the US, California and Massachusetts have paid sick leave legislation.

In California, the leave is available to all employees and accrues at 1 hour of paid leave for every 30 hours worked. Employers are allowed to limit the amount of paid sick leave per year to 24 hours or 3 days per year.

In Massachusetts, paid sick leave is available to employees who work for employers with 11 or more employees and accrues at one hour of earned sick time for every 30 hours worked up to a cap of 40 hours per year. Employers with fewer than 11 employees are expected to offer the same leave, but unpaid.

In September 2015, US President Obama signed an executive order requiring federal contractors to offer their employees up to 7 days of paid sick leave per year. The executive order was estimated to assist approximately 300,000 people at the time of signing. In addition, President Obama has urged Congress to pass legislation that would provide paid sick day protections for workers.\(^{179}\)

Globally, a 2010 report for the World Health Organization\(^{180}\) suggests that as many as 145 countries have some form of leave and wage replacement with respect to employee illness. However, there are variations in how long these leaves may be and how wages are replaced (for example, wages may be replaced only partially).

**Submissions**

During consultations we heard from many employee advocacy groups and labour groups about the need for paid sick leave. We also heard from health care professionals and others that the lack of paid sick days causes unnecessary costs to patients, other workers who become infected by colleagues who are ill, and the health-care system generally.


Employee advocacy groups asserted that the lack of legislated entitlements to paid sick days has left many precarious workers unable to stay home when sick due to fear of lost wages and/or termination. It was commonly recommended that the ESA should be amended to repeal the exemption of 49 or fewer workers from providing PEL that all employees should accrue paid sick time [for example, a minimum of 1 hour of paid sick time for every 35 hours worked (approximately 7 paid sick days per year)], and that employers should be prohibited from requiring evidence for such absences.

Many employers were opposed to the creation of paid sick days. Some felt that a new statutory requirement would be overly costly and hurt their competitiveness. Many employers pointed to the current PEL requirement, which can be used for personal illness, to illustrate how some employees abuse the provision by viewing it as a vested entitlement. In discussing PEL, employers noted the importance of being allowed to request doctors’ notes to substantiate employee absences while acknowledging the burden that this places on the health care system. On the other hand many people have questioned the utility of medical notes which very often can only repeat what the physician is told by the patient, are costly, and which are of very little value to the employer and have little probative value in any legal proceeding.

Although we did not receive a submission from the Ontario Medical Association (OMA), in January 2014, the OMA issued a news release encouraging people who are sick to stay home. It also encouraged employers to not require sick notes as doing so only encourages the spread of germs in the doctor’s office waiting room. The then-president of the OMA said: “I can’t stress it enough going to work while sick is bad for you and potentially worse for your colleagues. Staying home to rest will help you to manage your illness and prevent others from getting infected.”

**Options:**

1. Maintain the status quo.
2. Introduce paid sick leave –
   a) Paid sick leave could:
      i. be a set number of days (for example: every employee would be entitled to a fixed number of paid sick days per year); or
      ii. have to be earned by an employee at a rate of 1 hour for every 35 hours worked with a cap of a set number of days;
b) Permit a qualifying period before an employee is entitled to sick leave, and/or permit a waiting period of a number of days away before an employee can be paid for sick days;

c) Require employers to pay for doctor’s notes if they require them.

5.3.6 Other Leaves of Absence

Background

The ESA provides ten unpaid, job-protected leaves of absence. Before 2001 (when the ESA, 2000 came into force), there were only two job-protected leaves: pregnancy leave and parental leave. The (then) new ESA introduced a third new leave: emergency leave (the name was later changed to PEL). Seven new leaves have been created in the decade between 2004 and 2014.\(^\text{181}\)

While PEL is discussed in a different section of this report (see section 5.3.4), all the remaining leaves are discussed below.

Pregnancy Leave and Parental Leave

Under the ESA, pregnant employees who qualify have the right to take pregnancy leave of up to 17 weeks of unpaid time off work.

New parents have the right to take parental leave – unpaid time off work when a baby or child is born or first comes into their care. Birth mothers who took pregnancy leave are entitled to up to 35 weeks’ leave. Birth mothers who do not take pregnancy leave and all other new parents are entitled to up to 37 weeks’ parental leave.

The federal Employment Insurance Act (EIA) provides eligible employees with maternity and/or parental benefits that may be payable to the employee during the period he or she is off on an ESA pregnancy or parental leave.

Family Caregiver Leave

Family caregiver leave is a leave of up to 8 weeks per calendar year per specified family member. It may be taken to provide care or support to certain family members for whom a qualified health practitioner has issued a certificate stating that he or she has a serious medical condition.

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\(^{181}\) One of these leaves is Declared Emergency Leave, which is available in certain circumstances where the Ontario government declares an emergency under the Emergency Management and Civil Protection Act. There has not been a declared emergency since this leave was introduced in 2006, and this leave is not discussed further in this report.
Family Medical Leave

Family medical leave is a leave of up to 8 weeks in a 26-week period. It may be taken to provide care or support to certain family members and people who consider the employee to be like a family member in respect of whom a qualified health practitioner has issued a certificate indicating that he or she has a serious medical condition with a significant risk of death occurring within a period of 26 weeks.

The federal EI provides 26 weeks of employment insurance benefits (“compassionate care benefits”) to eligible employees taking this leave.

Critically Ill Child Care Leave

Critically ill child care leave is a leave of up to 37 weeks within a 52-week period. It may be taken to provide care or support to a critically ill child of the employee for whom a qualified health practitioner has issued a certificate stating:

- that the child is a critically ill child who requires the care or support of one or more parents; and
- sets out the period during which the child requires the care or support.

Parents who take leave from work to provide care or support to their critically ill child may be eligible to receive EI special benefits for Parents of Critically Ill Children (PCIC) for up to 35 weeks.

Crime-Related Child Death or Disappearance Leave

Crime-related child death or disappearance leave provides up to 104 weeks with respect to the crime-related death of a child and up to 52 weeks with respect to the crime-related disappearance of a child.

An employee who takes time away from work because of the crime-related death or disappearance of their child may be eligible for the Federal Income Support for Parents of Murdered or Missing Children grant.

Organ Donor Leave

Organ donor leave is an unpaid, job-protected leave of up to 13 weeks, for the purpose of undergoing surgery to donate all or part of certain organs to a person.
**Reservist Leave**

Employees who are reservists and who are deployed to an international operation or to an operation within Canada that is or will be providing assistance in dealing with an emergency or its aftermath are entitled under the ESA to unpaid leave for the time necessary to engage in that operation.

Employees on ESA leaves have the right to continue participation in certain benefit plans and continue to earn credit for length of employment, length of service, and seniority. In most cases, employees must be given their old job back at the end of their leave.

**Income Support and Leaves**

The leaves under the ESA are unpaid, but employees taking Pregnancy and Parental Leave, Family Medical Leave, Critically Ill Child Care Leave, and Crime-Related Child Death or Disappearance Leave may be eligible for EI benefits or grants from the federal government.

Owing to this interaction between these federal income supports and the provincial job-protected leaves, Ontario is often limited in how and when it introduces or structures new or existing leaves. Most provinces follow suit or introduce/implement leaves that are closely aligned with federal income support programs.

For example, two recent federal changes may have an impact on Ontario’s Family Medical Leave:

1) an amendment to the EIA increased the number of EI compassionate care benefit weeks from 6 weeks in a 26 week period to 26 weeks in a 52 week period; and

2) an amendment to the CLC that increased maximum compassionate care leave from 8 weeks to 28 weeks for providing care or support to a family member with a serious medical condition with a significant risk of death within 26 weeks. The period in which the leave may be taken has increased from 26 weeks to 52 weeks.

In addition, the new federal government has committed to providing Canadians with more generous and flexible leaves for caregivers and more flexible parental leave. The government’s election platform commitment specified that, in the future, parents may be able to receive benefits in blocks of time over a period of
up to 18 months and may be able to take a longer leave of up to 18 months when combined with maternity benefits at a lower level.

These federal changes put pressure on Ontario to follow suit with leaves that mirror the federal changes so that employees who rely on the ESA can fully take advantage of the expanded EI benefits.¹⁸²

Other Jurisdictions

Jurisdictions vary in their approach to the number of leaves they offer and in how those leaves are structured. In Canada, many of the provinces model their leave provisions on the CLC to ensure that employees are able to access federal benefits or grants when utilizing the job-protected leave. Also, some jurisdictions offer leaves to employees such as Domestic Violence/Abuse Leave (California and recently passed in Manitoba) and Elder/Child Care Leave (in Massachusetts).

Submissions

Through the consultations, we heard about different situations that might warrant the need for a job-protected leave. Specifically, we received submissions that suggested the need for a job-protected leave for employees who are victims of domestic abuse. Unfortunately, victims of domestic abuse often must find shelter for themselves and their children or to seek counselling with respect caring for themselves and their children. They may also be required to attend court proceedings related both to their right to stay in a matrimonial home and to deal with contested family issues relating to the primary residence, access to the children, or spousal and child support. These issues require immediate attention and a leave from work may be necessary. During consultations one union suggested that the ESA be amended to introduce 5 paid days of domestic violence leave and a right to extend the leave on an unpaid basis as needed.

We also received submissions that special leave provisions of 52 weeks should be available for employees who are dealing with the death of a child that is not a result of a crime.

On the other hand, during consultations we heard from a number of employers and employer organizations who cautioned us against introducing any new

¹⁸² Nova Scotia has already amended its Compassionate Care Leave to mirror the recent EI and CLC changes to compassionate care leave and Newfoundland and Labrador is making changes.
paid or unpaid leaves and recommended consolidation of the various existing leave provisions. For example, one association pointed out that there are four separate leaves related to the employee or their family members and that a more consolidated approach would provide administrative relief to employers. Likewise, another organization suggested that their members view the number of leaves in Ontario as confusing and burdensome; it was told by survey respondents that simplification would help both businesses and employees that are requesting the leaves.

Generally, employers believe that the existing leave provisions in the ESA provide reasonable and generous leave provisions for employees and to increase these leave provisions would further compromise productivity and competitiveness.

**Options:**

1. Maintain the status quo.

2. Monitor other jurisdictions and the federal government’s approach to leaves and make changes as appropriate (e.g., to family medical, pregnancy and parental and family caregiver leave).

3. Introduce new leaves:
   a) Paid Domestic or Sexual Violence Leave\(^{183}\) for a number of days followed by a period of unpaid leave;
   b) Unpaid Domestic or Sexual Violence Leave;
   c) Death of a Child Leave, either through:
      i. expansion of the existing Crime-related Child Death or Disappearance Leave or Critically Ill Child Care Leave; or
      ii. creation of a separate leave of up to 52 weeks for the death of a child\(^{184}\)

4. Review the ESA leave provisions in an effort to consolidate some of the leaves.

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\(^{183}\) A private member’s bill was recently introduced that would (if passed) create a new leave of absence if an employee or the employee’s child has experienced domestic or sexual violence (Bill 177, *Domestic and Sexual Violence Workplace Leave, Accommodation and Training Act, 2016*).

\(^{184}\) A private member’s bill was recently introduced that would (if passed) create a new leave of absence of up to 52 weeks if an employee’s child dies (Bill 175, *Jonathan’s Law (Employee Leave of Absence When Child Dies), 2016*).
5.3.7 Part-time and Temporary Work – Wages and Benefits

(Note: Issues concerning employees’ right to request changes to their schedule are dealt with in section 5.3.2 on Scheduling. Further descriptions on part-time and temporary employment can be found in Chapter 3).

Background

This section deals with issues related to compensating part-time, temporary, casual and limited term contract employees in the same manner as full-time employees doing the same work in the same establishment hired directly by an employer. This section does not address temporary employees hired by a THA and assigned to a client. That subject is covered in section 5.3.9.

Over a long period, employment in part-time and temporary work has grown considerably and is a prominent feature of the modern labour market. Attitudes towards workers in such jobs have been changing as well. For example, at various times the OLRB considered that full-time and part-time workers should generally be in separate bargaining units because they did not share a community of interest. The attachment and commitment of part-time and temporary employees to the business was considered to be less than that of full-time and permanent employees. It was thought that their concerns and interests would be so different that they should not even bargain as a single group. This approach reflected the logical expectation that their treatment on issues like wages and benefits would be different.

This policy of separate certification for part-time and full-time units ceased in 1993 when the amendments\(^{185}\) to the Labour Relations Act overruled such an approach and created a presumption in favour of combined full-time/part-time units.\(^{186}\) The fundamental attitude that part-timers doing the same work in the same establishment can be treated differently through lower wages and relative access to benefits, however, has persisted in some areas of the economy and in some establishments. While many employers may treat their employees equitably (e.g., pro rata treatment or meeting a reasonable threshold of income or hours to qualify for benefits) – it is still common to find part-timers being paid less than comparable

\(^{185}\) Under Bill 40, the Labour Relations and Employment Statute Law Amendment Act, 1992 (proclaimed into effect on Jan. 1, 1993), the LRA was amended to direct the OLRB to certify part-time and full-time employees in the same unit where the union had more than 55% membership support overall.

\(^{186}\) In 1995, Bill 7 repealed the Bill 40 amendments. Nevertheless, the Board continued to adopt in practice the Bill 40 practice of preferring combined over separate units in respect of full and part-time employees.
full-time employees, and without equitable access to benefits. This has raised concerns regarding the treatment of such employees in comparison to full-time employees doing the same work in the same establishment.

Concerns have also been raised over the growth of individuals working on ubiquitous fixed and limited term contracts. There are concerns over the lack of security in such arrangements – particularly in instances where it appears that employees are kept in such positions indefinitely to justify lower wages and lack of benefits.

**Current Application of the ESA**

The only type of wage discrimination that is prohibited under the ESA is to ensure that women and men receive equal pay for performing substantially the same job. They are entitled to receive equal pay for “equal work,” meaning work that is substantially the same, requiring the same skill, effort and responsibility and performed under similar working conditions in the same establishment.\(^{187}\) The Act does not extend such protection to part-time or temporary employees in comparison to full-time employees.

Part-time and temporary employees are covered by the ESA and generally have the same rights as other employees as they are equally entitled to minimum wage, regular pay days, overtime, etc.

The ESA does not require provision of benefits plans. Where benefits plans are provided by employers, the ESA prohibits discrimination (with some stipulations\(^ {188}\)) between employees or their dependents, beneficiaries or survivors because of the age, sex or marital status of the employee.

**Part-time Employment**

“Statistics Canada defines part-time workers as employed persons who usually work fewer than 30 hours per week at their main or only job\(^ {189}\).”

\(^{187}\) Exceptions include where differences are due to seniority, merit or other criteria not based on gender (e.g., working night shifts).

\(^{188}\) For example, when referring to benefits and age discrimination – “age” is defined as any age of 18 years or more and less than 65 years.

In 2015, there were 1.3 million part-time workers in Ontario, which comprised approximately 19% of total employment in the province. Job growth in part-time employment outpaced full-time work between 2000 and 2015, growing at 25% and 18%, respectively.¹⁹⁰

Part-time employment in Ontario tends to be:

- predominantly female (as of 2015, women made up about 50% of total employees and 66% of total part-time workers, while men comprised 34% of total part-time workers)¹⁹¹;
- recent immigrants (as of 2008, they made up 10% of total employees and almost 16% of temporary part-time workers)¹⁹²; and
- minimum-wage earners (as of 2013, 21.8% of part-time workers earned minimum wage as compared to only 3.4% of full-time workers).¹⁹³

**Temporary Employment**

StatsCan defines a temporary job as having a predetermined end date, or a temporary job that will end as soon as a specified project is completed. It includes seasonal jobs; temporary, term or contract jobs, including work done through a THA; casual jobs; and other temporary work.¹⁹⁴

Between 2000 and 2015, cumulative growth in temporary employment has outpaced that of permanent job growth (at 45% and 15%, respectively).

As of 2015, there were 747,600 temporary employees in Ontario, comprising approximately 13% of total employees (temporary and permanent).¹⁹⁵

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¹⁹¹ Statistics Canada, CANSIM Table 282-0002.
Part-time or Temporary Work Arrangements

Employees with part-time or temporary work arrangements generally experience:

- **Lower Wages**

  In 2015, median hourly rates for part-timers were $12.50, only slightly more than half of the $24.04 for full-timers in Ontario.\(^{196}\) Median hourly wages for temporary employees were $15.00 in 2015, while permanent employees earned $23.00 per hour across the province.\(^{197}\)

  These gaps may reflect differences in the types of jobs done by part-time/temporary and full-time/permanent workers, but they also reflect pay differences that exist when the jobs are the same or similar.

  In 2012, 30% of minimum wage earners were employed in a temporary status, a figure that well exceeded the share of temporary status workers in the workforce as a whole at that time (12.9%). Thus, minimum wage workers were two-and-a-half times more likely to be employed in a temporary job category such as seasonal, contract, casual, etc.\(^{198}\)

- **Less Access to Benefits**

  These differences in salary are compounded by differences in benefit coverage and especially as many benefits are non-taxable. Employers are at least twice as likely to offer extended health, dental, insurance and pension benefits to full-time permanent employees as to part-time and temporary employees.\(^{199}\) Some employers and some multi-employer collective agreements offer benefits to part-timers but it is difficult to generalize about them because they vary and have different thresholds for service before employees can qualify. Some employers pay part-time employees a fixed percentage of pay in lieu of benefits.

  A 2006 study found that only 23% of temporary and contract workers had some form of benefits, as compared with 86% of full-time, permanent workers.\(^{200}\)

\(^{196}\) Statistics Canada, CANSIM Table 282-0152 – Labour Force Survey Estimates, Wages of Employees by Type of Work, National Occupation Classification, Sex, and Age Group (Ottawa: Statistics Canada, 2016).

\(^{197}\) Statistics Canada, CANSIM Table 282-0074.

\(^{198}\) Computed by the Ontario Ministry of Finance based on data from Statistics Canada’s Labour Force Survey. This was a special tabulation made for the Ontario Minimum Wage Advisory Panel.


\(^{200}\) McMaster University, Work and Health Survey (Hamilton: McMaster, 2006).
Less Likely to be in Unionized Positions

Union coverage is higher for full-time employees than part-time employees. However, coverage has been trending downwards significantly for full-time employees, but relatively flat for part-time employees (i.e., the gap has shrunk). In 2015, the union coverage in Canada was 32.2% for full-time and 23.5% for part-time employees.\(^{201}\)

As of 2015, the union coverage was 27.7% for permanent and 20.8% for temporary workers in Ontario.\(^{202}\)

Other Jurisdictions

Canada

There are two jurisdictions in Canada that mandate parity in wages or benefits according to employment status.

In Quebec, employers are prohibited from paying an employee less than other employees doing the same work in the same establishment, solely on the basis that they work fewer hours each week (i.e., an employee working on a part-time basis). This does not apply to employees who earn more than twice the minimum wage.

In Saskatchewan, an employer with 10 or more full-time equivalent employees must provide benefits to eligible part-time employees (i.e., part-time employees who work between 15 and 30 hours a week receive 50% of the benefits provided to comparable full-time employees, and those working 30 or more hours in a week receive 100% of the benefits provided to comparable full-time employees).

Australia

In Australia, part-time employees are entitled to the same rights, on a “pro-rata” basis, in relation to the number of hours worked. They are also entitled to ongoing employment (or a fixed-term contract) and can expect to work regular hours each week. Australia also has special provisions for casual workers\(^ {203}\) through casual loading, a percentage on top of the base pay received by full-time and part-time employees.

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\(^{201}\) Statistics Canada, CANSIM Table 282-0224 – Labour Force Survey Estimates, Employees by Union Status, Establishment Size, Job Tenure, Type of Work and Job Permanency (Ottawa: Statistics Canada, 2016).

\(^{202}\) Statistics Canada, CANSIM Table 282-0074.

\(^{203}\) Those who have no guaranteed hours of work, usually work irregular hours, do not get paid sick or annual leave, can end employment without notice, unless notice is required by a registered agreement, award or employment contract.
employees. Casual employees get paid extra to make up for not getting entitlements like paid annual leave and sick leave. The exact amount of the “top-up” depends on the industry and the occupation. Most casual workers are entitled to receive 25% above the wages received by regular employees doing the same work.  

**European Union (EU)**

Part-time work has been promoted in the EU over the last two decades as a tool to mobilize labour-market groups with lower participation rates (e.g., women with children, individuals with health problems and older workers). The EU has also strongly promoted part-time work as a way to offer employers who face variations in business demand increased scheduling flexibility.

Encouraging part-time employment appears to have been one important rationale behind the agreement of all the relevant interests in society that there should be equal treatment in compensation between part-time and full-time employees. From this agreement came the Council Directive 97/81/EC in 1997.

Accordingly, in the EU, part-time workers may not be treated in a less favourable manner with respect to employment conditions than comparable full-time workers solely because they work part-time unless justified on objective grounds. A comparable full-time worker is an employee in the same establishment having the same type of employment contract or relationship, who is engaged in the same, or similar work or occupation with due regard being given to other considerations which may include seniority and qualification/skills (the Directive also deals with scheduling requests, which is dealt with in section 5.3.2).

The term “working conditions” is defined differently in the various EU countries but generally encompasses hourly wages, probationary periods, various leaves, and health and safety, training, sick pay, pension schemes, incentive programs, transfer possibilities, notice periods etc. Pro rata treatment of part-time workers with full-time workers based on the differences in hours worked is in keeping with the principle of fair treatment and there is recognition that some benefits and working conditions are difficult to apply or to provide on a pro rata basis or to provide to workers whose hours of work are insufficient to make the benefits reasonable or applicable. There are provisions, for example, that entitlement to a particular employment condition be subject to a period of service, or a number of hours worked or a level of earnings.

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The term “objective reasons,” which permits differences in treatment, has been defined as precise and concrete circumstances characterising a given activity. It must be transparent as to the aim, and relate to objective reasons why the nature of the part-time or fixed-term work justifies differential treatment. In the UK, the courts have interpreted objective reasons to mean that the part-time nature of an employee’s status must be the effective and predominant cause of the less favorable treatment, though not necessarily the sole reason. A performance related pay scheme, or differences in seniority or skill and qualifications could justify different treatment.

Casual employees may be excluded from the laws requiring no discrimination against part-timers, but in practice most countries in the EU do not exclude them.

In 1999, the EU also passed Directive 1999/70/EC on Fixed-Term Work. The Directive sought to eliminate discrimination in the pay and conditions of work between fixed-term and permanent workers. It also prohibits the treatment of fixed-term workers in a less favourable manner than permanent workers solely because they have a fixed-term contract, unless the difference in treatment can be justified on objective grounds. The terms used in the Directive are identical to those used with regards to part-time employees.

To prevent abuse, countries must introduce one or more of the following measures:

- objective reasons justifying the renewal of such contracts or relationships;
- the maximum total duration of successive fixed-term employment contracts and relationships; and
- the maximum number of successive renewals.

Repeated renewals of fixed-term contracts was seen as a problem insofar as they may have been used to circumvent employers’ obligations to permanent employees with respect to termination of employment, for instance. The most popular measure for preventing abuse of fixed-term contracts is a cap on the total duration of such contracts.

**Submissions**

Employee advocacy and labour groups have argued that part-time workers should receive the same pay (and in some cases, benefits) as their full-time counterparts.
Some have expressed concern that employers are using employment status to impose inferior pay on part-time and temporary workers. They are concerned that this is leading to a growing “precatariat,” challenging concepts of decency of work, fairness and imposing challenges on vulnerable individuals to improve their situation.

Concerns were also raised with the issue of ongoing fixed-term contracts which may keep employees in a precarious state over long periods of time (i.e., unable to access permanent employment entitlements even though they have been employed over a long period of time with one employer). Concerns were also raised with respect to employees who have successive short term contracts and project work with successive employers who find it difficult to obtain benefit coverage.

Many groups recommended that there be no differential treatment in pay and working conditions for workers who are doing the same work but are classified differently (i.e., part-time or temporary); and that where an employer provides benefits, these must be provided to all workers, at least pro rata or equitably, regardless of employee status.

University faculty associations have raised the issue of providing the same wages and benefits to part-time, contract faculty as full-time faculty in order to address growing concerns regarding precarious work in the sector.

One employer expressed support, stating that temporary workers should be paid a considerably higher minimum wage, and that part-time workers should have the same pay and benefits as full-time workers. The vast majority of employers have been silent on this issue.

Professor Harry Arthurs recommended that part-timers be paid the same as full-timers in the same establishment performing similar work.

**Options:**

1. Maintain the status quo.

2. Require part-time, temporary and casual employees be paid the same as full-time employees in the same establishment unless differences in qualifications, skills, seniority or experience or other objective factors justify the difference.

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205 For example, contract workers may be offered lower wages and benefits when compared to full-time employees. They also may have less access to pension plans or severance pay.

3. Option 2 could apply only to pay or to pay and benefits, and if to benefits, then with the ability to have thresholds for entitlements for certain benefits if pro rata treatment was not feasible.

4. Options 2 or 3 could be limited to lower-wage employees as in Quebec where such requirements are restricted to those earning less than twice the minimum wage.

5. Limit the number or total duration of limited term contracts.

5.3.8 Termination, Severance and Just Cause

5.3.8.1 Termination of Employment

**Background**

In most cases, when an employer ends the employment of an employee who has been continuously employed for 3 months, the employer must provide the employee with either written notice of termination, termination pay in lieu of notice, or a combination of the two. Notice of termination is intended to ensure that employees are given some minimum amount of advance warning of termination of employment (or pay in lieu of notice or some combination thereof) so that the employee can attempt to make new arrangements for work.

The following table specifies the amount of notice required if an employee has been continuously employed for at least 3 months. Special rules apply to the amount of notice required in cases of mass terminations.

<table>
<thead>
<tr>
<th>Period of Employment</th>
<th>Notice Required</th>
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<tbody>
<tr>
<td>Less than 1 year</td>
<td>1 week</td>
</tr>
<tr>
<td>1 year but less than 3 years</td>
<td>2 weeks</td>
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<tr>
<td>3 years but less than 4 years</td>
<td>3 weeks</td>
</tr>
<tr>
<td>4 years but less than 5 years</td>
<td>4 weeks</td>
</tr>
<tr>
<td>5 years but less than 6 years</td>
<td>5 weeks</td>
</tr>
<tr>
<td>6 years but less than 7 years</td>
<td>6 weeks</td>
</tr>
<tr>
<td>7 years but less than 8 years</td>
<td>7 weeks</td>
</tr>
<tr>
<td>8 years or more</td>
<td>8 weeks</td>
</tr>
</tbody>
</table>
There are certain rules that apply during the statutory notice period. For example, the employer cannot reduce the employee’s wage rate and must continue to make whatever contributions would be required to maintain the employee’s benefit plans.

The ESA also has rules concerning the temporary layoff of employees and how long such a layoff can last before the employer is considered to have terminated the employment. Generally, a temporary layoff can last no more than 13 weeks in any period of 20 consecutive weeks, but can last longer in certain circumstances (e.g., where the employer continues to make payments for the employee’s benefit under an insurance or retirement/pension plan).

Employees who are guilty of wilful misconduct, disobedience, or wilful neglect of duty that is not trivial and has not been condoned by the employer are not entitled to notice of termination or termination pay under the ESA.

Additionally, notice of termination generally does not apply to an employee who was hired for a specific length of time or until the completion of a specific task (with some exceptions). There are other exemptions.

For employees with separate periods of employment, two periods of employment will be added together if they are separated by 13 weeks or less; if two periods of employment are separated by more than 13 weeks, only the most recent period counts for purposes of notice of termination.207

*Relationship with the Common Law of Wrongful Dismissal*

Employees whose employment has been terminated and/or severed may file a complaint for termination pay and/or severance pay with the Ministry or they may sue for damages representing “reasonable notice” in a wrongful dismissal action in court. However, they cannot do both.

Because of the costs and delays surrounding suing for wrongful dismissal and the unpredictability of the result, many employees settle for their ESA entitlements even though what they are entitled to under the ESA may be less – sometimes substantially less – than the damages they would be entitled to receive at common law.

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207 Different rules apply for severance pay, where multiple periods of employment are added together regardless of the amount of time between those periods. See Section 5.3.8.2.
Other Jurisdictions

The federal jurisdiction and all provincial jurisdictions require employers to provide employees with advance notice of their termination, or pay instead of notice.

Threshold for entitlement: Every jurisdiction requires a minimum amount of employment before the obligation to provide notice of termination is triggered. The threshold ranges from a low of 31 days in Manitoba to a high of 6 months in New Brunswick and Prince Edward Island, with all other jurisdictions, including Ontario, setting the threshold at 3 months.

Amount of notice/pay required: All jurisdictions have a stepped system that requires employers to provide more notice/pay the longer the employee has been employed. All jurisdictions have a maximum amount of notice/pay that is required; the most common one, found in seven jurisdictions, including Ontario, is 8 weeks.

Submissions

Compared to some other issues, termination and severance of employment did not receive significant stakeholder attention during the consultations. There were, however, a number of suggested changes and concerns identified.

We heard that the 8-week cap on notice of termination (or pay in lieu of notice) should be eliminated or increased. It could, for instance, be increased to 26 weeks to mirror the cap on severance pay. We also heard that the 3-month employment threshold should be eliminated.

Some employee advocates raised concerns about the eligibility of recurring seasonal, contract, THA, and construction employees to notice/pay in lieu of notice. They also want to ensure that recurring periods of employment with the same employer are “counted” in determining eligibility.

With respect to temporary layoffs, we heard that rules concerning temporary layoffs and when they constitute a termination of employment are complex and open to employer manipulation.

In terms of an employee’s obligations when he/she is ending an employment relationship, it was also suggested that employees be required to provide 2 weeks’ notice.
Options:

1. Maintain the status quo.
2. Change the 8-week cap on notice of termination either down or up.
3. Eliminate the 3-month eligibility requirement.
4. For employees with recurring periods of employment, require employers to provide notice of termination based on the total length of an employee’s employment (i.e., add separate periods of employment as is done for severance pay). For example, if an employer dismisses a seasonal employee during the season, the employee could be entitled to notice based on his/her entire period of employment (not just the period worked that season).
5. Require employees to provide notice of their termination of employment.

5.3.8.2 Severance Pay

Background

“Severance pay” is compensation that is paid to an eligible employee who has his or her employment “severed.” It compensates an employee for loss of employment. Severance pay is not the same as and is required in addition to termination pay, which is given in place of the required notice of termination of employment.

An employee qualifies for severance pay if his or her employment is severed and he/she:

- has worked for the employer for five or more years; and
- his or her employer either:
  - has a payroll in Ontario of at least $2.5 million; or
  - has severed the employment of 50 or more employees in a 6-month period because all or part of the business has permanently closed.

In determining whether the 5-year employment threshold is met, multiple periods of employment with the same employer are added together regardless of the amount of time between the periods of employment or the reason any of the periods of employment came to an end. Seasonal employees and employees on
fixed-term contracts, for instance, would have their previous years’ employment with the same employer counted for the purposes of determining their eligibility for severance pay.

Almost 40% of Ontario employees are covered fully by the ESA severance pay provision.\textsuperscript{208}

**Other Jurisdictions**

In Canada, only Ontario and the federal jurisdiction provide for severance pay entitlements. The threshold for entitlement is longer in Ontario than the federal jurisdiction – 5 years’ employment in Ontario compared to 12 months’ employment in the federal jurisdiction. However, the amount of severance pay to which an eligible employee is entitled is more generous in Ontario – 1 week’s pay per year of service (to a maximum of 26 weeks) in Ontario compared to two days’ pay per year of employment (with a minimum benefit of 5 day’s pay) in the federal jurisdiction.

**Submissions**

Employee advocates have suggested that the employment, payroll and 50-employee thresholds be eliminated or reduced. It was also submitted that greater clarity is needed on the question of whether payroll outside of Ontario “counts” in the calculation of the $2.5 million payroll.\textsuperscript{209}

The large number of vulnerable employees in short-tenure precarious jobs results in their not being entitled to any severance pay.

**Options:**

1. Maintain status quo.
2. Reduce or eliminate the 50 employee threshold.
3. Reduce or eliminate the payroll threshold.
4. Reduce or eliminate the 5-year condition for entitlement to severance pay.
5. Increase or eliminate the 26-week cap.
6. Clarify whether payroll outside Ontario is included in the calculation of the $2.5 million threshold.

\textsuperscript{208} Vosko, Noack, and Thomas, 4.
\textsuperscript{209} Paquette c. Quadraspec Inc., (2014) ONCS 2431. A recent Ontario court decision ruled that, in determining whether the employer’s payroll is $2.5 million, the employer’s payroll outside Ontario should be included in the calculation. This outcome, however, does not align with the ministry’s long-standing operational policy of looking only at the employer’s payroll in Ontario.
5.3.8.3 Just Cause

Background

The ESA does not require employers to have “just cause” for terminating an employee’s employment. Generally, an employer can dismiss an employee for any reason (subject to the anti-reprisal protections). Except for terminations for wilful misconduct, disobedience, or wilful neglect of duty (that is not trivial and has not been condoned by the employer), the ESA requires only that the employer provide notice of termination or pay in lieu of notice to the employee and, if the employee is eligible, severance pay.

Three Canadian jurisdictions, Nova Scotia, Quebec and the federal jurisdiction have unjust dismissal protection that allows employees to contest their termination and provide for possible reinstatement by an independent arbitrator where no cause is found to exist. However, as a result of a recent Federal Court of Appeal decision (now under appeal at the Supreme Court of Canada), there is a question as to whether the federal CLC does protect against termination where no cause exists.

In the three Canadian jurisdictions that have unjust dismissal protection:

- all impose a minimum service requirement before an employee has the protection, ranging from 12 months to 10 years;

- the statutory remedial authority has been interpreted as allowing for “make whole” remedies where an employee has been unjustly dismissed, including reinstatement and compensation addressing lost wages and benefits, mental distress, job search expenses, and other damages incurred because of the dismissal; and

- although the statutory language used to trigger a contravention is slightly different in each jurisdiction, the decision-makers all generally apply the same standards that are applied by arbitrators in the collective agreement context when they determine whether there was “cause.”

The intent of statutory unjust dismissal protection is to prevent arbitrary and unfair terminations, to enhance job security, to avoid the negative impacts on

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210 Although many adjudicators interpret the Canada Labour Code as providing authority for awarding whatever is needed to make the employee “whole”, there is a great deal of inconsistency and some just apply the common law rules of wrongful dismissal when measuring damages.
an employee who has been summarily dismissed and to provide “make whole” remedies that include the possibility of reinstatement, a remedial authority not available through the courts in a wrongful dismissal suit.

Almost all collective agreements contain a “just cause” provision and many cases of industrial discipline and discharge are contested in arbitration proceedings on a daily basis in Ontario. The proposal would extend this system to terminations to the non-unionized sector.

Many temporary foreign workers (TFWs) are employed on a seasonal basis in Ontario in agriculture and come here each year from the Caribbean, Mexico, and Vietnam and elsewhere under a program administered by the federal government. As a practical matter, most workers are permitted to be employed only by a single employer. If a TFW is dismissed by the employer, he/she is often required to return to their country of origin. Migrant workers and their representatives advised us that TFWs are often threatened with dismissal and with being sent home.

Similar concerns were expressed in relation to TFWs injured on the job who may be sent home or threatened to be sent home because of injuries sustained on the job.

**Submissions**

Employee advocates have said that the ESA should be amended to provide protection against unjust dismissal, meaning employees could not be dismissed without just cause and could be reinstated if they were dismissed without cause. Adjudication by a government appointed adjudicator – who has the jurisdiction to order reinstatement in an appropriate case – is seen as a more accessible, efficient and effective than the courts.

Such protection could be limited to employees who had been employed for a certain minimum period.

Some suggested that, at a minimum, an employer should be required to provide reasons for terminating an employee’s employment, which may provide greater protection against employer reprisals.

It was also suggested that an expedited process should be in place for TFWs who are particularly vulnerable to unilateral employer action and – in the absence of an expedited adjudication process – may otherwise be required to leave Canada before a complaint of unjust dismissal is heard.
Options:
1. Maintain the status quo.
2. Implement just cause protection for TFWs together with an expedited adjudication to hear unjust dismissal cases.
3. Provide just cause protection (adjudication) for all employees covered by the ESA.

5.3.9 Temporary Help Agencies

Background
Temporary work, a large part of which occurs through temporary help agencies (THAs), has grown over the past 10 years.

THAs recruit and assign people to perform work on a temporary basis for clients of the agency. The duration of the assignment can vary from a day to years. Such persons are termed here "assignment workers." Clients comprise diverse sectors and professions (e.g., manufacturing, administrative, support services, information and information technology, etc.), and as such require assignment workers with varying degrees of skill and education. However, the temporary staffing sector disproportionately comprises lower-skilled and lower-wage workers.

Businesses use THAs in a variety of ways and for a variety of purposes. Some may not always be able to predict their staffing needs and so may need temporary help to manage peaks and valleys in demand. THAs are widely used to fill this need although some employers use their own pools of temporary workers. Other clients use assignment workers as an integral part of their regular staffing program using it as a device to vet workers in lieu of a probationary period (although most keep a probationary period if the assignment worker is ever hired by the client), or because it is much easier to terminate an assignment worker than it is a regular employee of the client. Clients also wish to have a specialized agency recruit and screen potential workers at their business.

At the end of 2014, there were 1,045 temporary help services in Ontario which comprised 44.1% of all temporary help service establishments in Canada.

We heard that THAs were ubiquitous in many communities and constituted the major or sole entry point to employment into certain industries in some Ontario communities.

Data on industry growth are available for the employment services sector, which includes temporary staffing services as well as executive search and recruitment.\(^{212}\) These data suggest the employment services sector is growing quickly; operating revenue grew by about 7% from almost $12.4 billion in 2012 to almost $13.3 billion in 2014 across Canada – with Ontario generating just over half that. Ontario experienced growth in revenue between 2012 and 2014 of about 9%, increasing from $6.4 billion to almost $7 billion.\(^{213}\)

Almost 53% of the $13.3 billion in operating revenue across Canada in 2014 was generated in temporary staffing services.\(^{214}\)

Since the economic recovery began in the US in 2009, staffing employment grew 3.5 times faster than the economy and seven times faster than overall employment.\(^{215}\) In 2014 the industry grew 2.5 times faster than the economy and was on track to grow 3 times faster in 2015.\(^{216}\) In the 20 years before 2013, the economy grew on average 2.7% annually while temporary and contract staffing grew at an average annual rate of 4.6% and sales increased 8.3% on average.\(^{217}\)

Temporary and contract sales in the US grew to $115.5 billion in 2014, a year over year increase of 5.7%, and were expected to increase by 5% in 2015 and 6% in 2016. The penetration rate of the industry in the US reached a new record in 2015 of 2.05% of non-farm employment. Data from the Association of Canadian Search, Employment and Staffing Services (ACSESS) indicate that in Canada the penetration rate is 0.75%.

212 Under the North American Industry Classification System, employment services comprises establishments primarily engaged in listing employment vacancies and selecting, referring and placing applicants in employment, either on a permanent or temporary basis; and establishments primarily engaged in supplying workers for limited periods of time to supplement the workforce of the client.


214 Statistics Canada, CANSIM Table 361-0066 – Employment Services, Sales by Type of Goods and Services (Ottawa: Statistics Canada, 2016).


216 Ibid., 9.

The industry attributes its growth to the need for flexibility and access to talent by clients. Using THAs to keep fully staffed during busy times, to fill in temporarily, to replace absent employees, to staff for short term projects, and to use agencies to find permanent employees are among the reasons that the US industry gives for why its clients use them increasingly. It is also said that economic uncertainty and volatility constrains new job creation and the use of THAs allows for “leaner staffing.”

**THA Business Model**

While the specifics of the staffing industry business model are somewhat opaque (e.g., percentage of the mark-up charged to clients by agencies, wages of assignment workers relative to regular staff, etc.), the basic structure is that the agency recruits, refers and pays the assignment worker who performs their duties at the client’s place of business, subject to the direction of the client and for the benefit of the client’s business. The assignment worker can be removed from the client’s workplace at the direction of the client with no requirement of any notice. After the assignment is terminated, the assignment worker then is placed back on the referral list of the agency and may or may not be assigned to work for another client of the agency.

Assignment workers may comprise a large or small percentage of the client’s workforce and may work there for short or very long periods of time as circumstances vary from client to client, agency to agency, and worker to worker.

While the agency provides workers’ compensation insurance coverage for assignment workers, generally in client-agency contracts, the client agrees to provide all assignment workers with a safe worksite and information, and training and safety equipment as required. Because the client controls the facilities in which workers work, the client and agency generally agree that the client is primarily responsible for compliance with all applicable occupational, health and safety laws.

Anecdotally, we were advised that THAs charge a significant percentage premium to their clients for every hour that the assignment worker works for the client. We were advised that this premium to the client was perhaps 40% or more above the hourly rate paid by the THA to the assignment worker. Based on her research in

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218 Ibid., 32.
the US, Erin Hatton claims that agencies typically charge their clients about twice the workers’ hourly wage.\(^{219}\)

**Assignment Worker Profile**

There are limited data on assignment workers in Canada although there tends to be more on the industry in the US. In Canada, according to 2004 statistics,\(^{220}\) assignment workers are:

- most likely to work in processing, manufacturing and utilities jobs (43%) and in the management, administrative and other support industry (48%);
- far less likely to be unionized than direct-hire, permanent employees (recent estimates of union coverage rates among agency workers are as low as 3.4%);
- less likely than other workers to have completed high school or have a university degree; and
- are older than other types of temporary workers\(^ {221}\) (e.g., seasonal, contract or casual workers), with 32% being 45 years of age or older.

Although some assignment workers seek agency work because they desire flexible employment conditions, studies have found that many engage in this work for involuntary reasons – that is, they have been unable to find more stable employment.\(^ {222}\)

**Triangular Relationship**

The triangular relationship makes the legal status of assignment workers, clients and THAs complex. While assignment workers generally have the same rights as other workers under the ESA, Occupational Health and Safety Act, 1990 (OHSA), LRA, and Workplace Safety and Insurance Act, 1997 (WSIA), the employment relationship under such laws function differently than those for workers hired by and working directly for a client employer. The laws are applied differently because

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\(^{221}\) In Canada, definitions of temporary employment in standard statistical sources are not entirely consistent but normally include contract or term, agency, seasonal and casual (on-call) employment.

of the complexity of the triangular relationship. While rights technically may be
the same, the economic and structural realities of the triangular relationship often
mean that practically, rights are ephemeral and cannot be accessed.

**Employment Standards Act, 2000 (ESA)**

Under the ESA, where a THA and person agree, verbally or in writing, that the
agency will assign (or try to assign) the person to perform work on a temporary
basis for its clients, the agency is deemed to be the employer of record by the
ESA. This has been the case legislatively since 2009, and was the program policy
before that. The ESA accepts the long-standing industry position that the employer
is the agency, not the client.

Once there is an employment relationship between an agency and an assignment
worker, the relationship continues whether or not the employee is on an assignment
working) with a client of the agency on a temporary basis. The fact that an
assignment ends does not in itself mean that the employment relationship with
the agency ends. Assignment workers generally have the same rights as other
employees (e.g., regarding minimum wage, overtime, vacation, etc.), but the
triangular employment relationship complicates the operation of the Act for
such workers.

For example, rights to notice on termination operate differently for an assignment
worker and a regular employee hired directly by client. If both employees do the
same work at the client’s business for 4 months and both are “let go” without
notice, the client would be required to pay its direct employee termination pay
in lieu of notice of 1 week, but would have no payment obligations\(^ {223}\) to the
assignment worker.

The agency also does not have such an immediate obligation to the assignment
employee because the loss of work (i.e., assignment) is not technically the end
of the employment relationship. If the assignment employee were placed on a
temporary layoff instead of being reassigned to another client, termination pay will
only be payable by the agency to the assignment worker if the temporary layoff
turns into a termination of employment, e.g., the worker is not referred to another
client by the agency within 13 weeks (in any period of 20 consecutive weeks).\(^ {224}\)

\(^{223}\) Termination pay calculation is different for assignment workers than regular employees under
the ESA (see Section 74.11.7).

\(^{224}\) Or more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks of
layoff in any period of 52 consecutive weeks under specific circumstances (for complete list
see Section 56(2) of ESA).
(A week would not count as a week of layoff if the assignment employee were assigned to perform work for a client during that week, even for only a day).

The ESA also contains protections and responsibilities specifically for THAs, assignment workers and clients. For example, the ESA:

- prohibits THAs from imposing certain barriers that would prevent or discourage clients of agencies from hiring the agency’s assignment workers directly (e.g., an agency not allowed to restrict client from entering into a direct employment relationship with assignment worker);
- prohibits agencies from charging assignment workers (or prospective assignment workers) certain fees (e.g., for becoming an employee of the agency, assigning or trying to assign employee to perform work for a client, providing employee with interview preparation, or for accepting direct employment with an agency client);
- limits to 6 months the time period in which agencies can charge clients for hiring an assignment worker permanently;
- prohibits clients of agencies from taking reprisals against assignment workers for asserting their ESA rights;225
- requires that a THA provide its assignment workers with certain information about proposed assignments226; and
- requires that a THA provide its assignment workers with a Ministry of Labour information sheet on their ESA rights.

As of November 20, 2015, clients are jointly and severally liable for unpaid regular wages, overtime pay, public holiday pay and premium pay. Requirements were also introduced which require both the agency and client to record the number of hours worked by assignment workers (and retain such records for up to 3 years to be available for inspection). There is no liability by the client for termination or severance pay, vacation pay, and unpaid job protected leaves.

225 Client is not allowed to: intimidate the employee, refuse to have the employee perform work, refuse to allow the employee to start an assignment, terminate the assignment of the employee, or otherwise penalize the employee.

226 Name of client, contact information for client, hourly or other wage rate or commission and benefits associated with assignment, hours of work, general description of work, estimated term of assignment, and pay period/pay day.
Labour Relations Act, 1995 (LRA)

Although the LRA does not speak specifically to THAs, in practice, the OLRB has not treated assignment workers as being employees of the THA. Instead, the determination of who is the employer occurs each time the issue is raised by a party, based on the particular facts. Typically the issue of identifying who is the employer arises in certification applications where the question is whether the client or the THA is the employer. If the assignment workers are employees of the client, they potentially count for the purposes of any vote and are potentially members of any bargaining unit established by the Board, but that is not the case if the assignment workers are found to be employees of the THA. Thus, if the assignment workers are considered employees of the THA and not the client, they are unable to unionize at the client workplace level. Although labour relations legislation would technically enable THA employees to organize at the level of the THA, there are numerous challenges to organizing at this level (e.g., assignment employees are dispersed at different client locations or the client may simply use another agency). In any event, unionization at the agency level is almost non-existent in Canada.

Often there is prolonged litigation at the OLRB as to who is the employer; most frequently the client has been found to be the employer based on ordinary employment law tests. In two cases both were found to be related employers.

Workplace Safety and Insurance Act (WSIA)

The agency is deemed to be employer of record for purposes of the WSIA, including paying Workplace Safety and Insurance Board (WSIB) premiums, WSIB experience rating, and return to work obligations. The agency pays WSIB premiums for assignment workers as they move through assignments (i.e., clients do not pay anything to WSIB). These premiums can be charged back to the client directly or indirectly through fees (e.g., as part of the markup).

WSIB experience rating programs are meant to encourage employers to reduce injuries by providing refunds to safe employers and surcharges to employers with high injury rates. WSIB premium-based refunds or surcharges are based on an employer’s accident record. In the THA sector, experience rating costs and

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227 There are cases where in exercising its jurisdiction to determine the appropriate bargaining unit, at the request of the union, the Board has excluded the assignment workers from the bargaining unit while finding them to be employees of the client.

benefits are applied to the agency supplying and paying the worker, not the client to whom the worker is supplied. This is the case even though injuries occur at the client workplace, which is controlled by the client who decides what work the assignment workers perform. The experience ratings for the clients, especially those with dangerous work, are generally significantly higher than for a THA. Accordingly, the WSIB premiums paid by agencies are often significantly less than those paid by the clients for their own staff doing the same work. This provides an incentive for the client to use the assignment workers to perform more dangerous work. A client can save money by assigning work that is more likely to give rise to an accident or injury to assignment workers than to its own employees.

The issue that is raised at a general level is whether it is appropriate for there to be economic incentives for clients to use assignment workers, and at a more particular level whether it is appropriate for there to be economic incentives for clients to use assignment workers for more dangerous work.

The Stronger Workplaces for a Stronger Economy Act, 2014, provided the government with a regulation-making authority to require that the WSIB, under its experience rating programs, ascribe injuries and accident costs to the clients of the THAs where injuries to agency workers actually occur rather than to the agencies themselves. For these amendments to have any effect, they would need to be proclaimed into force, and a regulation would then need to be established under the amendments. Neither has occurred.

The premium rating system is currently the subject of possible revision, which would result in generally higher premiums for THAs. It is our understanding that the contemplated changes will still make it potentially cheaper for a client to use assignment workers in general and for risky work in its own establishment in particular. For example, if a THA carries a high premium rate because its workers have been subject to numerous accidents or injuries, then the client can reduce its cost by just switching to a new THA with lower premiums. There are few barriers to entry into the THA industry.

WSIA has a vigorous scheme to encourage and promote reintegration of injured workers into the workplace. In the case of an assignment worker, however, the client has no obligation to accommodate and put back to work or reintegrate an injured worker at the client’s business following an injury. The only responsibility for reintegration of the injured worker lies with the THA. However, the THA complies with its responsibility by putting the injured assignment worker on the THA's
referral list for up to 1 year, and assigning them, if there another assignment that allows for modified work, or is one that the worker can otherwise perform.

**Occupational Health and Safety Act (OHSA)**

Under OHSA, where a worker is employed by an agency to perform assignments in the client’s workplace, the agency and the client are jointly responsible for taking every precaution reasonable in the circumstances to protect the health and safety of the assignment worker. The client normally has the day-to-day control over the work and working conditions of the workplace to which the workers are assigned. However, an agency is not relieved of its legal duties under the OHSA for the worker’s health and safety during an assignment; employer duties in the OHSA apply to both the client and agency. Under typical contracts between agencies and clients, the client agrees to be primarily responsible for compliance with the Act because it controls the facilities in which the assignment worker works, while the agency is supposed to instruct the employee on general safety matters in accordance with information which the client gives the agency.

**Other Jurisdictions**

**Canada**

Across North America, some jurisdictions have looked at how to address THA issues. Ontario is in the minority of jurisdictions that specifically addresses THA employment in its legislation. In addition to requiring a licence to operate, Manitoba’s *Worker Recruitment and Protection Act* has provisions regulating the operation of the THA sector (e.g., agencies are prohibited from charging assignment workers any fees and from preventing a client from hiring an assignment worker) which are largely similar to regulations in Ontario.

**United States (US)**

In the US, the use of THAs has grown disproportionately faster than the American economy. While stronger growth in the use of temporary help is a feature of a growing economy, especially as it emerges from recession, the American Staffing Association has commented for some time that disproportionate growth of the staffing industry may be a secular trend reflecting a new approach by employers to managing growth and their workforces by using THAs. Normally the increased use by employers of temporary staffing agencies is followed by a concomitant increase

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229 Employees cannot be charged fees for: being hired by agency; working for a client; becoming an employee of the client; any other circumstances as described by regulations.
by employers in direct hiring. However, as the use of temporary hiring’s increase in
the US, and as permanent hiring fails to keep pace, the view has been expressed
by the industry that the trend to the use of temporary help is a long-term trend
and that the growth in the use of THAs will in future exceed ordinary
employment growth.230

The ubiquity of temporary help workers has also led to significant criticism of
the industry, much greater regulation by the US federal government, and new
legislation in some states where THAs are very prevalent.

Critics, typified by Erin Hatton and the National Employment Law Project (NELP),231
argue that the greater use of temporary agency work is part of the decline of the
middle class.

*It is almost a cliché to talk about the decline in Americans’ work lives over the
last decades of the twentieth century. Time and again, newspaper headlines
have lamented what the New York Times called the “downsizing of America”
wage freezes and massive layoffs; closed factories and jobs moved abroad;
permanent employees replaced by contingent workers. Wages stagnated
and access to benefits declined. The possibility of lifetime employment
was replaced with the likelihood of chronic job insecurity and episodes of
unemployment. Career ladders collapsed, with more and more workers
finding themselves stuck at the bottom.*

*The temp industry has become a classic symbol of this degradation of work.
Temping is the quintessential “bad” job: On average, temps earn lower
wages and receive fewer benefits; and they have less job security, fewer
chances for upward mobility, and lower morale than those with full-time,
year-round employment. What’s more, by increasing the flexibility of the labor
supply, the temp industry contributes to downward pressure on wages,
decreased employment security, and limited upward mobility for all workers,
not just temps.*

The NELP also argues that competition between staffing agencies causes
significant downward pressure on wages. The US industry is now largely
production and material moving jobs as opposed to office and administrative jobs.

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230 Berchem, 22.
231 Hatton, *The Temp Economy: From Kelly Girls to Permatemps in Postwar America.*
In the US, agencies are used directly or indirectly by the vast majority of Fortune 500 companies and racialized workers are disproportionally represented among employees of the agencies. NELP noted studies that say that health of such employees is impacted adversely disproportionately, and that the average wage difference is 22% between other private sector employees and industry workers.

Hatton has criticized the industry in the US for what she describes as its consistent effort to undermine the value of permanent workers and to expand its reach by encouraging business to look upon their employees as disposable liabilities:

First, the temp industry’s business is literally to sell degraded work: The temp industry provides American employers with convenient, reliable tools to turn “good” jobs into “bad” ones (and bad jobs into worse ones). But the temp industry has also operated on another, equally important level — in the cultural arena, where battles over “common sense” about work and workers take place.

The temp industry’s high-profile marketing campaigns have had a powerful impact on this cultural battlefield, helping establish a new morality of business that did more than sanction the use of temps; it also legitimized a variety of management practices that contributed to the overall decline in Americans’ work lives.

These cultural changes in the second half of the twentieth century were indeed remarkable. By the turn of the twenty-first century, even as some corporate executives continued to extol the value of their employees, it became widely acceptable to talk about workers—all workers, from the highly skilled to the day laborer—as costly sources of rigidity in an economy that required flexibility. As Berkeley economist Brad DeLong observed in 2009, companies “used to think that their most important asset was skilled workers…. Now, by contrast, it looks as though firms think that their workers are much more disposable — that it’s their brands or their machines or their procedures and organizations that are key assets. They still want to keep their workers happy in general, they just don’t care as much about these particular workers.” Or, as management guru Peter Drucker said more bluntly in 2002, “Employers no longer chant the old mantra ‘People are our greatest asset.’ Instead, they claim ‘People are our greatest liability.’”
As noted elsewhere in the context of joint employer liability doctrine under the FLSA\(^{232}\) and in the context of the joint employer doctrine recently applied by the National Labor Relations Board (NLRB) as set out in the case of Browning-Ferris,\(^{233}\) the THA industry has attracted the strong and recent attention of regulators in the US. The thrust of this attention is, in effect, to make clients and THAs joint employers. There has also been severe criticism of the treatment of these workers by clients by the US Occupational Safety and Health Administration.\(^{234}\)

Illinois, Massachusetts and California have all passed laws in the last decade. Illinois requires that third-party clients that contract with day and temporary service agencies for the services of day labourers share all legal responsibility and liability for the payment of wages under state wage payment and minimum wage legislation.\(^{235}\) Based on the Illinois model, new legislation in California makes clients (with some exceptions) share legal responsibility and civil liability with labour contractors for payment of wages.

California, Illinois and Massachusetts require employees to be provided with a notice of details of the assignment by the time of dispatch. Illinois and Massachusetts both require THAs to be licensed. They have also required that a poster summarizing temporary workers’ rights be displayed at agency locations, and deductions from wages be limited.

Finally, to improve working conditions and treatment of temporary workers, NELP has documented the emergence of employee community organizations across the US to challenge THA clients.\(^{236}\)

**European Union (EU)\(^{237}\)**

There was strong antipathy to THAs in the early and mid-1900s in Europe, which led to the outright banning of temporary agencies in some countries, or strict licencing in most. There was a change in attitude in the last part of the last century.

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232 See section 5.2.2.
234 The Director (United States Occupational Safety and Health Administration) as quoted in the New York Times, August 31, 2014: “We’ve seen over and over again temporary workers killed or seriously injured on their first day at work,” Mr. Michaels said. “When we investigate, we see that most employers don’t treat temporary workers the way they treat their permanent employees — they don’t provide them with the training that is necessary.” Available online: http://www.nytimes.com/2014/09/01/upshot/the-changing-face-of-temporary-employment.html.
235 “Day and temporary labor” does not include work of a professional or clerical nature; thus, those occupations are exempt from this legislation.
236 These are described in the NELP Report from pages 22-24.
237 Katherine Gilchrist, *Temporary Help Agencies* (Toronto: Ontario Ministry of Labour, 2016). The material in this section on the EU was taken from a paper prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review.
in the context of a growing movement within the EU since the 1990s towards promoting flexible forms of work (including part-time and temporary work) as a strategy for better meeting the needs of employers and of employees.

This new attitude to temporary work through agencies was made possible by the adoption of the concept of “flexicurity” whereby flexible forms of work are promoted but in a context of the protection of and the provision of security for temporary help workers. Flexicurity is seen by the European Commission as an integrated strategy which promotes flexibility and security in the labour market concurrently. This includes policies which promote lifelong learning and training, adjustments to period of unemployment and transition, and comprehensive social security systems.238

While the part-time and limited-term directives were passed in 1997, the issues surrounding THAs were much more controversial as there was much antipathy to the model in many countries. After almost 10 years of EU-level consultation, debate and discussion, a Directive on Temporary Agency Workers (2008/104/EC) was finalized which legitimized agency work, defined private employment agencies as the employer239 and provided equal treatment for assignment workers as that of clients’ directly hired workers.240 The Directive had three objectives:

1) to better develop flexible forms of work to promote job creation and higher levels of employment through reducing restrictions placed on temporary agencies (the perceived positive role of temporary agency work in bringing people into work and reducing unemployment as well as supporting labour market access of specific target groups was an important rationale

238 European Commission, Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security (Brussels: European Commission, 2007). The components of flexicurity are:

- Flexible and reliable contractual arrangements (from the perspective of the employer and the employee, of “insiders” and “outsiders”) through modern labour laws, collective agreements and work organisation;
- Comprehensive lifelong learning (LLL) strategies to ensure the continual adaptability and employability of workers, particularly the most vulnerable;
- Effective active labour market policies (ALMP) that help people cope with rapid change, reduce unemployment spells and ease transitions to new jobs;
- Modern social security systems that provide adequate income support, encourage employment and facilitate labour market mobility. This includes broad coverage of social protection provisions (unemployment benefits, pensions and healthcare) that help people combine work with private and family responsibilities such as childcare.

239 Apart from the UK, in all EU Member States the assignment worker is generally defined as an employee of the agency working under the managerial authority of the user company (i.e., client). In Czech legislation, both the agency and the client are employers.

240 EU countries have interpreted the TAW Directive differently. Not all EU countries have embraced temporary agencies without certain restrictions on their use. Some countries, including Belgium continue to restrict the sectors in which temp agencies can operate while other have either loosened restrictions in line with the aim of the Directive, or else never had significant restrictions in the first place, such as in the UK.
for adopting regulations on temporary agency work at the European and national levels);

2) an increase in the 1990s in temporary agency work throughout the EU, coupled with very disparate regulations, led to the perceived need for the EU to set common minimum standards for temporary agency work in order to prevent “unfair competition” between different member states and to prevent a “race to the bottom;” and

3) to correct the negative working conditions for temporary workers who suffered a pay gap with those hired directly by the employers, together with the gap in training and in working conditions, as well as greater exposure to physical risks, intensity of work and accidents at work.

In most EU member states, the principle of equal treatment simply means that for the purposes of basic working conditions, the legislation, collective agreements, or other binding agreements (general company pay scales are included, as are company guidelines) applying to the sector of the user company or to the user company itself will apply to temporary agency workers. In a few member states, including in the UK, the working conditions that apply to the temporary agency worker are those that apply to a comparable employee at the same company.241

Exceptions from Equal Treatment:

Exceptions, called “derogations,” from the equal treatment principle, are permitted for temporary agency workers on open-ended employment contracts providing pay between assignments, to uphold collective labour agreements or based on agreements of “social partners”, who are essentially national employer and employee organizations. Any country which opts to derogate from the principle must take measures to prevent misuse:

• five countries, including the UK, permit unequal treatment in pay when temporary agency workers have a permanent contract with a temporary agency, and are paid between assignments. In the UK, temporary agency workers with a permanent contract of employment are not entitled to equal pay for the duration of their assignments, provided that in the period between assignments they are paid at least half the pay to which they were entitled in respect of their most recent assignment, and not less than the national minimum wage;

241 The comparability standard has been seen as potentially problematic or subject to abuse by the company, as it may in fact be a lesser standard where a “dummy comparator” is hired at the company, with considerably lower working conditions than other employees in order to use as the comparator for temporary agency workers.
• ten states, including Germany and the Netherlands, allow collective labour agreements to deviate from equal treatment of agency workers. There has been criticism from academics as well as the European Trade Union Institute that the principle of equal treatment has been rendered moot in such cases; however, in many, if not all, of the ten countries, collective labour agreements have either introduced equal treatment clauses (after qualifying periods in some cases, such as the Netherlands, where it is 26 weeks), or else have negotiated for better wages than had been the cases pre-Directive; and

• a third derogation is permitted by Article 5(4) where member states, in which there is no legal mechanism for declaring collective agreements universally applicable or for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at the national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle of equal treatment. Such arrangements may include a qualifying period for equal treatment. In practice only the UK and Malta use this exception. In the UK, agency workers are entitled to full equal treatment at the user undertaking once they have completed a 12-week qualifying period in the same job with the same hirer.

Restricting Abuse of the Derogations:

The Directive further requires states to take appropriate measures to prevent misuse in the application of the exception and in particular, successive assignments designed to circumvent the provisions of the Directive. The risk of circumvention of the principles of equal treatment and equal pay is particularly high if the principles are not applied from the first day of the agency worker’s assignment, but only after a qualifying period, as it creates an incentive for the user undertaking to enter into successive short contracts with the agency in order to reset the qualifying period and therefore never face the obligation to pay equal wages.

The UK has adopted detailed measures to avoid misuse of its temporary work agency legislation by providing that, in case of a break of less than 6 weeks by an agency worker on assignment at a user undertaking, the qualifying “clock” is not reset to zero. In Ireland, only a gap of at least 3 months between two assignments would break the link.
Australia

In Australia, regulations are at the state level. Employment agents (i.e., THAs) must be licensed in most states and territories. Licensing involves making an application (i.e., filling forms and paying a licence fee). Assignment workers must receive at least the minimum entitlements in the relevant modern award (awards are in effect the governing terms and conditions of employment for a sector) and National Employment Standards or where the agency has its own enterprise agreement relating to wages and working conditions, that agreement.

Submissions

Employee-representative bodies, advocacy, and labour groups have argued that assignment workers in THAs are fundamentally vulnerable and experience:

- lower pay;
- difficulty understanding and exercising employment rights;
- vulnerability in making complaints;
- increased risk of injury on the job-site;
- job instability;
- deterioration of health;
- unpredictable hours and income insecurity; and
- barriers to permanent employment.

In addition, they suggest many become trapped in a precarious state and clients are increasingly using agencies to avoid employment regulation and other costs.

The differential between what is paid by the agency to the assignment worker and what is charged to the client is said to create an incentive for the agency to keep wages as low as possible and to keep the worker in that vulnerable temporary position for as long as possible. The wage differential between what is paid to the assignment worker and to the client’s employees for doing essentially the same work is also criticized as discriminatory and unfair.

Further, it is said that clients are able to avoid paying the real costs of accident and injuries in their workplace because they can pay cheaper WSIB premiums if the work is performed and injuries are sustained by assignment workers instead of
their permanent workers for whom they pay premiums directly. It is also said that injured assignment workers are not properly integrated back into the workforce because the client has no obligation to do so and the agency obligation is fulfilled simply by putting the injured worker on the list for further referral to another client.

Client employers have argued that agencies provide flexibility in an increasingly competitive marketplace (i.e., labour costs savings associated with recruitment, termination and severance, workers’ compensation, benefits, training are all covered by the agency, not the client). THAs have been described as offering organizations “just-in-time,” “labour-on-tap,” or “no strings attached” workers. Some submissions spoke to the important role THAs play in supporting business by matching workers with employers that have short term or finite needs to address peaks or valleys in personnel requirements (e.g., helping employers find coverage for leaves of absence as required by ESA). Such groups expressed concern that restrictions could reduce flexibility and competitiveness. Further, they have argued that the liability for ESA rights should remain with the agency (i.e., recommend not extending joint liability to items not under clients’ control such as vacation pay, PEL, termination pay, benefit plans, etc.).

Agency representatives similarly stressed the continued need for the sector to respond to:

- unexpected business growth;
- unexpected and long-term absences;
- the need to bridge permanent replacements;
- special projects; and
- seasonal rushes, and pre-selection of candidates.

They also stressed the advantages that agencies provide to immigrants:

- temporary work allows employers to evaluate employees whose credentials may be otherwise difficult to validate;
- employees develop experience in Canadian job market; and
- employees are able to form contacts with employers.

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Agencies represented by ACSESS submitted that the existing ESA requirements introduced in recent years offer appropriate protections and any new protections would cause undue harm to the staffing industry.

ACSESS recommended that the government not legislate any wage parity provisions, arguing that there is no guarantee that temporary employees will be equally qualified to those they are replacing or working with, and that it would be an overreaching response to a complex range of factors.

**Options:**

*(Note: See Chapter 4 for options in the labour relations context).*

1. Maintain the status quo.

2. Expand client responsibility:
   a) expand joint and several liability to clients for all violations – e.g., termination and severance, and non-monetary violations (e.g., hours of work or leaves of absence);
   b) make the client the employer of record for some or all employment standards (i.e., client, agency, or make both the client and the THA joint employers).

3. Same wages for same/similar work:
   a) provide the same pay to an assignment worker who performs substantially similar work to workers directly employed by the client unless:
      i. there are objective factors which independently justify the differential; or
      ii. the agency pays the worker in between assignments as in the EU; or
      iii. there is a collective agreement exception, as in the EU; or
      iv. the different treatment is for a limited period of time, as in the UK (for example, 3 months).

4. Regarding mark-up (i.e., the difference between what the client company pays for the assignment worker and the wage the agency pays the assignment worker):
   a) require disclosure of mark-up to assignment worker;
   b) limit the amount of the mark-up.\(^\text{243}\)

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\(^{243}\) A private member’s bill (PMB) 143, *Employment Standards Amendment Act (Temporary Help Agencies), 2015* was recently introduced on November 18, 2015 that would (if passed) require that agencies pay assignment workers 80% of the fee charged to clients.
5. Reduce barriers to clients directly hiring employees by changing fees agencies can charge clients:
   a) reduce period (e.g., from 6 to 3 months);
   b) eliminate agency ability to charge fee to clients for direct hire.

6. Limit how much clients may use assignment workers (e.g., establish a cap of 20% on the proportion of client’s workforce that can be agency workers).

7. Promote transition to direct employment with client:
   a) establish limits or caps on the length of placement at a client (i.e., restrict length of time assignment workers may be assigned to one particular client to 3, 6, or 12 months, for example);
   b) deem assignment workers to be permanent employee of the client after a set amount of time or require clients to consider directly hiring assignment worker after a set amount of time;
   c) require that assignment workers be notified of all permanent jobs in the client’s operation and advised how to apply; mandate consideration of applications from these workers by the client.

8. Expand Termination and Severance pay provisions to (individual) assignments:
   a) require that agencies compensate assignment workers termination and/or severance pay (as owed) based on individual assignment length versus the duration of employment with agency (as is currently done). For example, if an assignment ends prematurely and without adequate notice provided but has been continuous for over 3 months or more, the assignment worker would be owed termination pay;
   b) require that clients compensate assignment workers termination and/or severance pay (as owed) based on the length of assignment with that client. Assignment workers would continue to be eligible for separate termination and severance if their relationship with agency is terminated.

9. License THAs or legislate new standards of conduct (i.e., code of ethics for THAs).

244 PMB 143 includes a similar provision (e.g., maximum 25% of total number of hours worked are by assignment workers).
245 PMB 143 includes a provision whereby agencies are prohibited from operating without a licence.
5.4 Other Standards and Requirements

5.4.1 Greater Right or Benefit

Background

Employees and employers cannot contract out of ESA standards. Section 5(1) prohibits an employer and an employee from contracting out of, or waiving, an employment standard and provides that and any such contracting out or waiver is void.

However, the ESA does contemplate an employer providing employees greater rights or benefits than the standards in the Act. Section 5(2) of the ESA provides:

> if one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

This means that if established employer policies in a non-union workplace or collective agreements provide a greater right or benefit than a specific standard in the ESA, the terms of the policy or the collective agreement apply instead of the ESA provisions. The greater right or benefit provisions do not provide for all benefits provided by an employer to be compared with all benefits required by the ESA. An employer cannot rely on a greater benefit with respect to one standard to offset a lesser benefit with respect to another. This has not been permitted because the result would be that employees would be deprived of the benefit of some standards. Accordingly, when comparing benefits to assess greater right or benefit, the comparator must relate to the same subject matter. For example, the purpose of rest periods is to provide employees time off work and it is not a greater benefit for an employee to receive payment in lieu of the required rest periods.

Submissions

Employers in the context of PEL have commonly raised the issue of greater right or benefit. Some argue that, as a bundle, their leave policies are more generous than PEL even if they do not cover all the specific instances that PEL can be taken (see sections 5.3.4 – PEL and 5.3.5 – Paid Sick Days).
During consultations, some employers suggested that collective agreements or employer policies, taken as a whole, should be assessed to determine whether the contract provides greater rights or benefits than the ESA standards, taken as a whole. Opponents of this approach argue that the main purpose of the ESA is to mandate statutory minimum terms and conditions of employment for employees. Adopting this approach to measuring greater rights or benefits would mean that some legislated minimum standards would not be available to employees on the basis that the benefit package provided by their employer provides greater benefits than the ESA. Furthermore, opponents of this approach argue that measuring whether a package of rights and benefits provided to employees by an employer provides greater rights or benefits would be a difficult – perhaps impossible – task. Employees have different needs and circumstances. What is an essential entitlement for one employee may be of no moment to another.

**Options:**

1. Maintain the status quo.

2. Allow employers and employees to contract out of the ESA based on a comparison of all the minimum standards against the full terms and conditions of employment in order to determine whether the employer has met the overall objectives of the Act.

### 5.4.2 Written Agreements Between Employers and Employees to Have Alternate Standards Apply

**Background**

Some of the employment standards established by the ESA consist of one rule that applies automatically unless the employer and employee agree that another rule applies. The rule that applies automatically is often referred to as the “default standard”; the rule that applies if the employer and employee agree is referred to as the “alternate standard.”

Agreements to an alternate standard between employees and the employer can be made for a number of employment standards, including:

- how and where wages can be paid;
- limits to the hours of work limits;
• minimum rest periods;
• the formula for determining when overtime pay is earned;
• taking overtime as paid time off instead of pay;
• whether an employee works on a public holiday; and
• when vacation pay and vacation time are provided.

The Act currently provides for agreements to be entered into in 20 different contexts. This section discusses the application and appropriateness of individual agreements to alternate standards generally, but not the specific advisability of the agreements in a particular context. For example, the advisability of employee agreement to variations in hours of work is discussed in section 5.3.1 – Hours of Work and Overtime Pay.

The Act requires that an agreement between an employee and employer to have an alternate standard apply must, with one exception, be set out in writing. Only agreements to split the mandatory 30-minute eating period into two shorter periods do not have to be in writing.

Additional requirements apply to some types of agreements (e.g., employers must provide employees with a Ministry-prepared information document before the employee agrees to work excess daily or weekly hours, and sometimes they must also obtain approval from the Director of Employment Standards (see section 5.3.1 for more on Director approvals and Hours of Work and Overtime Pay)).

The policy of the ES Program is that electronic agreements can constitute an agreement in writing.

The requirement to have agreements in writing aids the administration and application of the Act. Precisely written agreements help to avoid misunderstandings between the parties as to what they agreed to and provide evidence of the mutual intention of employers and employees. Such agreements help to ensure that the employer and employee are aware of the consequences of their agreement and further decrease the likelihood that the validity of an agreement will be challenged by an employee claiming lack of informed consent. Finally, such agreements provide a permanent record and allow an ESO to readily determine which standard is to be enforced, the default or the alternate.
Unless the Act provides otherwise, employees are entitled at any time to revoke their written agreement to the alternate standard and revert to the default standard. In some cases, the employer and employee must both agree in order to revoke the agreement (e.g., overtime averaging agreements) or the employee must provide the employer with advance written notice (e.g., agreements to work excess daily or weekly hours).

The ESA’s anti-reprisal provision prohibits employers from threatening or otherwise penalizing employees for refusing to enter into an agreement or for revoking an agreement.

**Submissions**

We heard from employee advocates that, because employees do not have equal bargaining power with their employers, employees’ agreements are not always voluntary – they enter into them because they are afraid that they will lose their jobs or otherwise be sanctioned if they refuse. They suggest that this is particularly problematic in the overtime averaging context and with respect to agreements entered into by assignment employees. A recommendation was made that the Act be amended to remove the ability to enter into agreements.

Employer groups generally recommended that the flexibility needs to be maintained and enhanced. Rules concerning hours of work and overtime were cited in particular as needing additional flexibility.

Several employer groups suggested that the ESA should be amended to permit employees and employers to enter into agreements in electronic form. It may be that the stakeholders who made this submission were unaware of the existing policy that permits this or would like to see it codified in the ESA.

**Options:**

1. Maintain the status quo.
2. Amend the ESA to reflect the Ministry of Labour ES Program policy that electronic agreements can constitute an agreement in writing.
3. Amend the ESA to remove some or all of the ability to have written agreements.
5.4.3 Pay Periods

Background

The ESA requires employers to establish a recurring pay period and a recurring pay day, and to pay all of the wages that were earned during each pay period (other than accruing vacation pay) no later than the pay day for that pay period.\(^{246}\)

With the one exception described below, the ESA does not prescribe any limits as to how long or short a pay period can be, or the days of the week that it can start and finish.

Common pay periods are weekly, bi-weekly, semi-monthly, and monthly.

Several employment standards refer to a “work week.” For example, the entitlement to overtime pay is triggered after working a certain number of hours in a work week, the amount of public holiday pay an employee is entitled to is determined on the basis of wages earned and vacation pay payable over a 4-work week period, and the weekly/biweekly rest rule and maximum number of weekly hours an employee is permitted to work are determined with reference to the work week.\(^{247}\) “Work week” is defined as a recurring period of 7 consecutive days selected by the employer for the purpose of scheduling work; if the employer has not selected such a period, the work week will be a recurring period of seven consecutive days running from Sunday to Saturday.\(^{248}\)

The employer’s work week may or may not correspond to the employer’s chosen pay period.

A special rule with respect to pay periods applies to the commission automobile sales sector.\(^{249}\) This rule, which applies to employees who sell automobiles partially or exclusively on a commission basis:

- provides that pay periods are not to exceed 1 month;
- establishes reconciliation periods of 3 months’ duration;

\(^{246}\) See Section 11 of the ESA.
\(^{247}\) See Sections 22(1), 24(1)(a), 17(1)(b) and 18(4) of the ESA.
\(^{248}\) See Section 1 of the ESA.
\(^{249}\) See Section 28 of O. Reg. 285/01.
where a commission automobile sales employee receives wages in the form of a “draw” or advance against commissions earned, the employer is required to reconcile at the end of each reconciliation period the amount advanced with the amount of commissions that the employee earned (the reconciliation cannot result in the employee being paid less than the minimum wage for each pay period, and the balance at the end of each reconciliation period cannot be carried forward into the next reconciliation period):

– if the employee earns more in commissions than he or she received in draws during a particular reconciliation period, the surplus is to be paid to the employee – it cannot be carried forward past the end of the reconciliation period in order to offset any deficit that may accrue on the employee’s account during later reconciliation periods;

– similarly, if the employee earns less in commission than he/she received in draws during a particular reconciliation period, the “deficit” may not be carried forward past the end of the reconciliation period in order to offset commissions earned in later reconciliation periods. (The employer may be able to recoup the amount of the deficit by making deductions from wages earned in the next reconciliation period if the employee provides written authorization to do so, if it does not result in the employee earning less than the minimum wage for each pay period).

**Submissions**

Pay period issues did not receive attention in stakeholder submissions.

We heard from Ministry staff that:

• where an employer’s pay period does not correspond to the employer’s work week, it takes substantially more time for ESOs to determine whether there has been compliance with standards that are based on the employer’s work week. This is more acute in the proactive inspection context because of the number of payroll records that officers review; and

• determining whether there has been a contravention could be made simpler and more efficient if the ESA required pay periods and work weeks to be harmonized (e.g., by permitting only weekly or bi-weekly pay periods).
Options:

1. Maintain the status quo.

2. Amend the ESA to require employers to harmonize their pay periods with their work weeks by, for example, permitting only weekly or biweekly pay periods, and requiring the start and end days of the pay period to correspond to the employer’s work week.

3. Extend, either as-is or with modifications, the application of the special rule that applies only to the commission automobile sales sector to other sectors in which wages are earned by commission (e.g., appliance, electronics, furniture sales).

5.5 Enforcement and Administration

5.5.1 Introduction and Overview

While we have not reached conclusions about the specific policy responses on enforcement that we will recommend, we conclude that there is a serious problem with enforcement of ESA provisions. While most employers likely comply or try to comply, with the ESA, we conclude that there are too many people in too many workplaces who do not receive their basic rights. Compliance with ESA standards ought to be a fundamental part of the social fabric. Indeed, attaining a culture of compliance with the ESA in all workplaces is one of the fundamental policy goals guiding our recommendations in this Review.

In a society where there is a culture of compliance with ESA standards, both employers and employees would be reasonably aware of their legal rights and responsibilities, while the law would be easy to access, to understand and to administer. It would be culturally unacceptable not to provide workers with the minimum requirements that the law demands, employees would be aware of their rights and would feel safe in asserting them. Widespread blatant abuse of basic rights would not only be legally impermissible but culturally and socially unacceptable. There would be a strong element of deterrence in the system as those who engaged in deliberate flouting of the law would be dealt with by not only having to make restitution and but also being liable for significant administrative monetary penalties.
Enforcement and the need for widespread compliance is one of the critical requirements of a system of employment standards. As Professor Harry Arthurs said:

*Labour standards ultimately succeed or fail on the issue of compliance. Widespread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law.*

Over 90% of the approximately 15,000 complaints made every year are by people who have left their jobs voluntarily or after they have been terminated. When the Ministry investigates those complaints, of the claims that are not settled or withdrawn, they conclude about 70% of the complaints are valid. In addition, when the Ministry proactively carries out inspections of workplaces, they commonly find violations of the Act. In the three years between 2011-12 to 2013-14, the Ministry found violations 75-77% of the time. Where an inspection of the employer was carried out after a complaint was made, violations were found over 80% of the time.

The literature in this area is clear that fear of reprisals reduces the number of complaints that are made. Therefore, absence of complaints from some sectors of the economy or from some workplaces may be as consistent with non-compliance as it is an indication of substantial compliance.

It is apparent there is substantial non-compliance. Misclassification (including illegal unpaid internships) appears to have become widespread and along with some of the most frequent violations of the ESA – failing to pay wages on time or not paying overtime pay – is evidence that there is significant non-compliance with basic legal obligations.

A variety of factors contribute to non-compliance.

Ignorance by both employees and employers of their rights and obligations contributes to non-compliance. Many small employers and employees have no idea what the ESA requires. Educating employers about their responsibilities is as important as educating employees about their rights.

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252 Vosko, Noack, and Tucker, 5.
The complexity of the law may contribute to a lack of understanding of the rights and obligations in the ESA, thereby exacerbating non-compliance.

Some employers have an uncaring attitude towards their obligations and responsibilities and do not regard them as important enough to ensure compliance.

Some employers violate the law as part of a deliberate business strategy or because they think their competitors are not complying.

Some employers are confident that because their employees will not complain, and the likelihood of government inspection is very low, non-compliance is a risk worth taking calculating that if they are caught, they can extract themselves from the legal consequences of non-compliance without much difficulty and with trivial costs.

It is all too common for some non-compliant employers to attempt to avoid liability by abandoning their company with no assets and starting up the same business using another incorporated entity.

Unfortunately, there is a widespread fear among employees of reprisals if they complain about violation of their ESA rights\(^{253}\) and this inhibition contributes to non-compliance.

Accordingly, in considering our recommendations, we need to assess the existing system and try to address in a significant way all the causes of the current state of non-compliance. We will consider the following:

- whether to recommend measures that contribute to education and knowledge by both employers and employees of rights and obligations in the workplace;
- whether to recommend changes that remove or reduce barriers to complainants;
- what can be done to try to deal with the fear of reprisals by providing speedy and effective adjudication of reprisal claims;
- how to provide greater access to justice for employees and employers;

\(^{253}\) Ibid., 21. Numerous scholarly and other works have suggested that fear of reprisals is widespread and the research study done for this Review confirms those facts.
• the desirability of providing for greater deterrence for employers who do not comply with the ESA; and
• the need to find more efficient and effective ways to collect monies owing to employees.

Finally, it is necessary to consider a new strategic approach to enforcement because of many fundamental changes in the workplace. There are many employees in precarious jobs whose basic employment rights are being denied, at the same time as there are limited government resources. Below we explore some dimensions of a strategic shift.

5.5.1.1 Academic Reviews of the Enforcement Regime

As part of the Review, two reports were commissioned on the issues of compliance, enforcement and administration. The first report contains many options to consider regarding compliance and enforcement strategies based on a review of the academic literature. The second report contains options to consider based upon a review and analysis of Ministry data regarding the enforcement and administrative processes.

We will carefully consider both reports and their recommendations. In addition to the options and ideas specifically referred to in this Chapter, we invite interested stakeholders and members of the public to review the reports and comment to us as they see fit.

5.5.1.2 Overview of the Employment Standards Enforcement and Administration

The Employment Standards Program

The ESA is administered and enforced through the Ministry of Labour Employment Standards Program. This program consists of the Employment Practices Branch in Toronto, and five regional operating areas. The Program’s centralized intake centre, the Provincial Claims Centre, is in Sault Ste. Marie.

256 Employees may choose to pursue their ESA rights through the civil courts rather than the ES Program. Employees who are covered by a collective agreement work through their union to enforce their ESA rights.
The Minister of Labour appoints a Director of Employment Standards to administer the Act. The Director of Employment Standards and the Regional Directors report to the Assistant Deputy Minister of the Ministry’s Operations Division.

One of the ES Program approaches to administering and enforcing the Act centres on education and outreach, recognizing that education and compliance go hand-in-hand. These educational and outreach activities seek to create an environment where employees and employers (and others with obligations under the ESA) understand their statutory rights and obligations, and employers have compliance tools and resources.

**Employment Standards Officers’ Powers**

Ministry ESOs reactively investigate claims filed by employees who believe their current or former employer has contravened the ESA, and proactively inspects workplaces to check compliance. ESOs are empowered, among other things, to:

- enter and inspect any place (except for a personal dwelling, which requires a warrant or consent);  
- interview/question any person on matters that may be relevant;  
- demand the production of records and to examine those records and remove them for review and/or copying; and  
- require parties to attend meetings with the ESO for purposes of advancing the investigation of a claim or an inspection.

People are required to answer an ESO’s questions and are prohibited from providing information that they know is false or misleading or from interfering with an ESO’s inspection or investigation.

If an ESO determines that there was a monetary contravention, the employer (or other entity who has been found liable under the ESA) is often given the opportunity to pay the amount owing without an order being issued (this is referred to as voluntary compliance). If the employer does not voluntarily comply, the ESO has the authority to issue an order requiring payment. An administrative fee of 10% of the amount owing (or $100, whichever is greater) is added on to the amount of the order. Orders to Pay Wages are the most frequently issued sanction when employers do not voluntarily comply.\(^{257}\)

\(^{257}\) Vosko, Noack, and Tucker, 6.
Employees can generally recover money owing under the Act through an Order as long as a claim is filed within 2 years of the contravention. In an inspection, ESOs can issue an Order to recover money owing up to 2 years before the date that the inspection was commenced. There is no statutory limit on the amount of money that can be recovered for employees.\(^{258}\)

Directors of corporations that fail to pay its employees can be held liable under the ESA for some of the unpaid wages (up to 6 months’ wages and 12 months’ vacation pay, but not termination or severance pay). The ESA’s director liability provisions generally mirror those in the OBCA but provide for enforcement through the ES Program rather than through court proceedings that are typically more protracted and expensive (see section 5.2.2 for the discussion on director liability).

ESOs may also issue compliance orders ordering that a person cease contravening the Act, directing what action (other than the payment of money) the person shall take or not take to comply with the Act, and specifying a date by which the person must do so. Compliance orders may be enforced by injunction obtained in the Superior Court of Justice. Compliance Orders are the primary tool used in response to violations found in workplace inspections.\(^{259}\)

In some circumstances, for example in cases of reprisal, the ESO can issue an order to compensate and – if the reprisal took the form of a termination – reinstate an employee. The types of damages that can be included in a compensation order include amounts representing the wages that the employee would have earned had there been no reprisal, damages for emotional pain and suffering and other reasonable and foreseeable damages.\(^{260}\)

The Act also allows separate but associated or related legal entities to be treated as one employer if certain statutory criteria are met, and authorizes ESOs to issue Orders to entities other than the direct employer. This provision may create another source (“deep pocket”) for satisfying an employer’s monetary ESA obligations.

\[^{258}\text{The time limits on recovery through an order and the limit on the amount that can be the subject of an order were amended effective February 20, 2015: the $10,000 cap on an Order to pay wages for a single employee was removed, and the provision that limited Orders to covering only those wages that became due in the 6 months prior to the date the claim was filed (or 12 months in the case of vacation pay and repeat contraventions) was changed to two years. The previous limitations apply only with respect to wages that became due prior to February 20, 2015.}

\[^{259}\text{Vosko, Noack, and Tucker, 6.}

\[^{260}\text{For example, damages representing the loss of an employee’s reasonable expectation of continued employment with the former employer, expenses incurred in seeking new employment, and damages representing lost benefit plan entitlements that an employee was wrongfully deprived of.}
}
when the direct employer is insolvent or has minimal assets (see section 5.2.2 for the discussion on the “related employer” provision).

ESOs are empowered to issue a NOC, which involves the imposition of an administrative monetary penalty, where the ESO finds a contravention of the Act. The penalty is payable to the Ministry of Finance (MOF) and becomes part of the province’s general revenues. Details on the NOCs are set out in the remedies and penalties section below.

ESOs may initiate a prosecution under Part I (“tickets”) of the Provincial Offences Act (POA). The ESO may recommend a prosecution under Part III of the POA but the final decision to prosecute under that Part rests with the Ministry of the Attorney General (MAG). Details on the factors considered by ESOs under each Part and the penalties are detailed below in the remedies and penalties section. In general, deterrence tools such as NOCs and POA prosecutions are used less frequently than measures that bring employers into compliance.261

Applications for Review

Employers, corporate directors and employees who wish to challenge an order issued by an ESO or the refusal to issue an order are, in most cases, entitled to apply for a review of the order by the OLRB. The OLRB is an independent, quasi-judicial tribunal that mediates and adjudicates a variety of employment and labour relations matters under a number of Ontario statutes, including the ESA. The details regarding the review process are found in detail below in the section on reviews.

Collections

Many employers, corporate directors and others who are issued Orders or NOCs pay the required amounts without delay. Some, however, do not, and debt collection becomes a necessary part of enforcing the ESA.

The ESA contains several provisions that facilitate the collection of unpaid Orders and NOCs. These provisions:

- allow the Ministry to demand payment from persons who are believed to owe money to, or who hold money for, an employer, corporate director or other person who owes money under the ESA (bank accounts, accounts

receivable, and rental and royalty payments are common sources of funds that are subject to these third party demands);

- allow the Ministry to file a copy of an Order to pay in court (filing the Order makes available creditors’ remedies such as writs of seizure and sale, garnishments, and directions to enforce by sheriffs or bailiffs. In order to ensure coordinated oversight of the debt, only the Ministry – not the employee who is owed the wages – is able to file the Order in court).

Historically, all collection activity was performed by the Ministry of Labour. In 1998, this function was delegated to private collection agencies. In 2014 the MOF became the designated collector. MOF is authorized to collect a reasonable fee and/or costs from the debtor, which are added to the amount of the debt.

From 1991 to 1997, employees were able to access a provincial EWPP. The purpose of the EWPP was to guarantee employee wages up to a specified maximum (initially $5,000, subsequently reduced to $2,000) where an order for those wages went unpaid by an employer. The program was administered through the Ministry of Labour and funded from provincial general revenues. The government subsequently attempted to recover funds from employers whose employees received money from the EWPP. Further details concerning collections are found in the collections section below.

5.5.2 Education and Awareness Programs

**Background**

The Ministry engages in several educational and outreach initiatives that are designed to help employees and employers understand the rights and obligations that are set out in the ESA. These include: the provision of videos and explanatory materials on the Ministry website; a call centre to provide general information about the ESA in multiple languages; the giving of seminars to employee and employer groups; and a Policy and Interpretation Manual that sets out in detail the policies and interpretations of the Director of Employment Standards.262

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262 Employment Standards Officers, who are charged with enforcing the Act, are required to follow the Director’s policies. The Manual, which is written by ES Program staff, is currently published by a legal publishing firm and is available for purchase by external stakeholders such as clinics, law firms, unions, employers and human resource professionals. Effective summer 2016, the Ministry will publish the Manual electronically in-house. As of the date of writing the Ministry had not settled on whether the Manual will be publicly available.
The Act requires employers to post and provide employees with a statutory ESA poster that provides a brief description of the Act and provides the Ministry’s web address and phone number if employees or employers wish to obtain more information.

ESA education is not part of the provincial high school curriculum, whereas occupational health and safety education has been part of the provincial high school curriculum since 1999.

Employee advocacy groups, unions and employers have all called on the government to improve educational activities.

Employee advocacy groups and unions recommended that the government ensure that educational materials are easy to understand and are provided in multiple languages. They suggested launching extensive public awareness campaigns about the ESA, with a particular focus on the anti-reprisal protection and the issue of misclassification of employees as self-employed workers. They also suggested that all newly registered businesses be provided information about their ESA obligations and that ESA training be made mandatory for employers, managers and supervisors. Recommendations were also made to make ESA training mandatory for employees and to fund employee advocacy groups to provide educational programs for employees.

Employers argued that the ESA’s complexity makes it difficult for employers to comply. Some employers suggested:

- ensuring that the Ministry uses simple, clear language in all communications that explain the ESA;
- public ESA information campaigns in multiple languages;
- working more with community agencies to maximize outreach;
- providing easy access to the Ministry’s Policy and Interpretation Manual; and
- providing links in the online ESA to clear and concise interpretations of the provisions.

It is clear that the Act could be simplified and a variety of new and better ways found to communicate and to increase awareness, knowledge and understanding
of workplace rights and obligations and to make such information accessible to all Ontarians. We welcome specific ideas in this regard that anyone may wish to advance.

5.5.3 Creating a Culture of Compliance

Background

Multiple factors contribute to non-compliance with employment standards. Achieving a higher level of compliance will not likely occur merely by amending the legislation or by increasing penalties for non-compliance. There needs to be improved education and outreach to achieve better understanding of workplace rights and obligations. Employees must be able to assert his/her workplace rights without fear of reprisal and the process to access those rights must be fair and effective. In this section we discuss possible new approaches that could assist in achieving greater awareness of rights and obligations directly in the workplace itself by making employers and employees responsible for compliance.

Internal Responsibility System (IRS)

To create a culture of workplace compliance with the ESA, it is necessary to find ways to bring greater responsibility for compliance directly into the workplace itself. Rather than leaving it only to government to carry out inspections to test if there is compliance, and rather than leaving it only to employees to file complaints with the government (which mostly occurs only after they are no longer employed), we will consider a new system in which responsibility is placed directly on employers and employees to increase awareness and compliance.

The impetus for this approach comes largely from the IRS established by the OHSA that has been effective in making Ontario’s workplaces safer and healthier. Under OHSA, both employers and employees have responsibility for health and safety in the workplace and both play a role in endeavoring to achieve compliance with the Act. In this regard, joint health and safety committees or, in smaller workplaces health and safety representatives, have proven generally effective in strengthening the health and safety culture than would otherwise be the case. They have raised employee and employer awareness of health and safety issues and in many workplaces have contributed to the identification and elimination of hazardous conditions and to a safer workplace.
Options:

1. Implement an ESA Committee, as an expansion of the Joint Health and Safety Committee.

An Employment Standards compliance IRS could be accomplished by expanding the jurisdiction of existing joint health and safety committees and representatives (a committee is generally not required in small workplaces with fewer than 20 workers; a workplace representative is generally required only in workplaces with 6 to 19 workers):

• to give them authority to deal with ESA matters; or
• to have other committees/representatives appointed in the workplace with jurisdiction to deal with ESA compliance.

It would not be necessary for every member of a health and safety committee to take on responsibility for both health and safety matters as well as ESA matters as some members could be added to deal only with ESA matters. ESA training would have to be made available to committee members and representatives that deal with ESA matters.

Unlike health and safety committees, there would be no obvious need for an ESA Committee in unionized workplaces as the union already has the responsibility to deal with ESA issues and to monitor compliance. Accordingly it would not appear to be necessary to have an internal ESA responsibility system in unionized workplaces.

The fundamental obligations of the employer would be:

• to conduct a simplified self-audit developed and prescribed by the Ministry, to check that the employer is complying with the ESA; and
• to meet with the committee/representative and review the employer’s compliance audit.

A copy of the compliance and confirmation of the meeting with the committee/representative may be required to be sent to the Ministry.
Conducting the simplified audit and meeting with the committee/representative should mean the employer would not only be aware of the requirements of the Act but also review compliance with the representative or the committee. This would raise not only awareness of rights and obligations but also compliance.

Two possible models for the ESA Committee – a basic model and an enhanced model – are set out for discussion.

a) Basic Model:

Under this model, the basic requirement of the committee/representative would be to meet with the employer to receive and review the employer’s compliance audit.

In addition, if the employee committee members/representative requested that the employer address ESA issues or complaints, the employer would be obligated to do so, but the committee would have no on-going duty to monitor compliance or to investigate any alleged violations discovered by them or brought to their attention.

b) Enhanced Model:

Under an enhanced model, in addition to the requirement to review with the employer its compliance audit, the committee/representatives would have an on-going responsibility to promote awareness of – and compliance with – the ESA.

Committees/representatives would be authorized under the Act to look into any ESA matter identified by them, the employer or by any employee(s) and have the right to be provided by the employer with all information necessary to establish whether there is compliance with the ESA.

The committees/representatives would have an on-going duty to monitor compliance, to meet regularly with the employer, to communicate to employees and to look into any alleged violations discovered by them or brought to their attention.
2. Require employers to conduct an annual self-audit on select standards with an accompanying employee debrief.

Pursuant to this option, employers would be required to audit compliance with select standards identified by the Ministry (e.g., the Ministry may select 1, 2 or 3 standards per year). These standards would be announced to employers and employees in advance with targeted communications and education. To promote accountability and awareness, the results of these audits would be shared with all employees.

5.5.4 Reducing Barriers to Making Claims

5.5.4.1 Initiating the Claim

Background

Employees not covered by a collective agreement can file a claim with the Ministry of Labour if they believe their employer (or former employer) has not complied with the ESA. Unionized employees must generally enforce their ESA rights under the grievance and arbitration provisions of the collective agreement.

In 2010 the Act was amended so that the Director of Employment Standards could require that a complainant employee first contact his or her employer about the employment standards issue before a claim will be assigned to an ESO for investigation. There are template letters and other supporting material on the Ministry’s website that employees can use. This has been referred to as the “self-help” requirement.

As a matter of Ministry policy, there are exceptions to the general rule that employees first contact their employer. These exceptions are identified on the claim form and in Ministry material explaining the claims process and include situations where an employee is afraid to do so because of fear of reprisal. As a practical matter, we are advised that claims are not rejected by the Director because the employee has not contacted his or her employer first, although the claims processor typically asks for the reason the employer was not contacted.

The research study commissioned for this Review suggested that there has been a significant decline in the number of claims filed over a period of years and that some of this decline may be associated with the introduction of the self-help requirement. Indeed the authors of the study concluded that:
The balance of evidence suggests that the decline in complaints corresponds to the introduction of the OBA [the self-help provision] the requirements of which may be dissuading workers from pursuing their rights.263

Employees who file an ES claim must provide their name, which is shared with the employer during the claims process. At one time, the Ministry permitted employees to file a claim confidentially (i.e., where the employee’s name was known to the Ministry, but not the employer). This practice was changed in response to an OLRB ruling that employees would have to identify themselves to enable the employer to know the case it had to meet264. In comparison, the Wage and Hour Division (WHD) of the US DOL indicates that its policy is to protect the confidentiality of the complainant in their investigations, with some exceptions.265

Outside the claims process, individuals can anonymously provide information to the Ministry about possible ESA violations. This information is passed on to Ministry staff for review and could, but does not necessarily, lead to a proactive inspection.

When an employee files an ES claim, he or she can authorize a third party (e.g., legal counsel, family member, or any other person) to act on his or her behalf with respect to the claim.

The majority of ESA claims are filed by former employees after they have quit or their employment has been terminated.266

The ESA currently provides broad protection for employees against reprisal by an employer for exercising his/her rights under the ESA, including filing a claim. Reprisal protection is dealt with further in section 5.5.4.2.

263 Vosko, Noack, and Tucker, 19.
265 “Wage and Hour Division Fact Sheet #44: Visits to Employers,” United States Department of Labor, http://www.dol.gov/whd/regs/compliance/wdfs44.htm. The name of the complainant and the nature of the complaint are disclosed when it is necessary to reveal a complainant’s identity, with his or her permission, to pursue an allegation, and when the Wage and Hour Division is ordered to reveal information by a court. The Wage and Hour Division’s Frequently Asked Questions are available online: http://www.dol.gov/wecanhelp/howtofilecomplaint.htm.
The number of claims filed with the ES Program and the number of investigations that were completed in recent years is as follows:\textsuperscript{267}

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Complaints Filed</th>
<th>Complaints Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006/07</td>
<td>22,620</td>
<td>15,995</td>
</tr>
<tr>
<td>2007/08</td>
<td>20,789</td>
<td>18,533</td>
</tr>
<tr>
<td>2008/09</td>
<td>23,286</td>
<td>21,304</td>
</tr>
<tr>
<td>2009/10</td>
<td>20,381</td>
<td>20,764</td>
</tr>
<tr>
<td>2010/11</td>
<td>17,094</td>
<td>27,637</td>
</tr>
<tr>
<td>2011/12</td>
<td>16,140</td>
<td>19,032</td>
</tr>
<tr>
<td>2012/13</td>
<td>15,016</td>
<td>12,344</td>
</tr>
<tr>
<td>2013/14</td>
<td>15,485</td>
<td>14,656</td>
</tr>
<tr>
<td>2014/15</td>
<td>14,872</td>
<td>17,453</td>
</tr>
</tbody>
</table>

As can be inferred from the data, the Ministry has taken special measures at various times, as in 2010-11, to deal with backlogs of complaints.

In the discussion below regarding inspections, we discuss the possibility of a strategic approach to both complaints and to inspections that could have consequences for the complaints process. That section should be read in conjunction with this one.

**Submissions**

Unions and employee advocates assert that fear of reprisal can significantly deter employees from making timely complaints and that a requirement to inform the employer before filing a complaint exacerbates the problem of accessing ESA entitlements. They point to the large number of claims that are made by employees after they have left the employ of the employer as evidence supporting a conclusion that the obligation to inform their employer is a barrier to accessing justice.\textsuperscript{268} They would like to see the requirement eliminated. In addition to suggesting more robust anti-reprisal protection (dealt with in section 5.5.4.2),

\textsuperscript{267} This data is provided by the Ontario Ministry of Labour.

these advocates recommend that the ESA be amended to permit the Ministry to receive and investigate anonymous complaints and that employee representatives such as legal clinics or unions be permitted to file claims of alleged violation without specifically naming employees who have allegedly been denied their ESA entitlements.

Employers likely will argue that most small and medium employers do not have readily accessible human resources expertise or employment law advice and that most non-compliance is as a result of innocent inadvertence or lack of knowledge of the technicalities of the law. As a result, it is likely that they prefer an opportunity to resolve issues directly with their employees – a practice consistent with good employee relations and which should lead to increased compliance and to increased education of both employers and employees in a non-adversarial environment.

If anonymous or third party complaints are specifically provided for in the ESA, it is clear that employers will have to be advised of the details of alleged non-compliance in order to respond to the case they have to meet and in order to rectify the problem, if any. The facts of alleged violation, including the names of employees allegedly adversely affected, will have to be made known to the employers regardless of how the complaint is initiated. Whether the name of the complainant must be provided to the employer is a separate issue.

**Options:**

1. Maintain the status quo with a general requirement to first raise the issue with employers but at the same time maintain the existing policy exceptions and maintain current approach of accepting anonymous information that is assessed and potentially triggers a proactive inspection.

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

3. Allow anonymous claims, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.

4. Do not allow anonymous complaints, but protect confidentiality of the complainant, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.
5. Allow third parties to file claims on behalf of an employee or group of employees, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.

5.5.4.2 Reprisals

Background

The current ESA provides broad protection to employees against reprisal.

The Act prohibits employers, and anyone acting on their behalf, from intimidating, dismissing or otherwise penalizing an employee or threatening to do so because the employee attempted to exercise, or did exercise, his or her rights under the ESA. More particularly, an employee is protected against any reprisal if he or she engages in any of the following activities:

- asks the employer to comply with this Act and the regulations;
- inquires about his or her rights under this Act;
- files a complaint with the Ministry under this Act;
- exercises or attempts to exercise a right under this Act;
- gives information to an ESO;
- testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act; or
- participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act;
- Employers are also prohibited from penalizing an employee in any way because the employee;
- is or will become eligible to take a leave;
- intends to take a leave or takes a leave under Part XIV of the ESA; or
- because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to the employee.

The burden of proof that an employer did not engage in a reprisal against an employee is on the employer.
Assignment workers of THAs are protected from reprisal by both the THA and the client to whom they are assigned to perform work.

Employees who believe they have been subject to reprisal may file a claim with the Ministry, which will investigate.

If an ESO determines that a reprisal occurred, the officer may order that the employee be compensated for any loss incurred as a result of the contravention or that the employee be reinstated, or may order both compensation and reinstatement.

Reprisal claims are currently not given priority by the Ministry. It takes approximately 90 days before claims are assigned to a Level 2 ESO for investigation, and on average it takes approximately 51 days to conclude an investigation.

In recent years, approximately 12% of claims contained an allegation of reprisal (or leave of absence, which almost invariably entails a reprisal allegation). The majority of these involve a termination. Approximately 20% of cases result in a finding of a contravention; however the percentage of contraventions may be higher given that a substantial number of them are settled or withdrawn.

In the Ministry’s experience, most employees who have been terminated do not seek reinstatement.

**Submissions**

Employee advocates and unions:

- observe that rights and protections afforded by the ESA are meaningless without effective anti-reprisal protection;
- are critical of the current system of enforcement; and
- generally agree that, currently, the cost of reprisal to employers is not a significant deterrent.

Employee advocates assert that many employees do not raise ESA issues with their employer or file a complaint because of fear of reprisal notwithstanding the protections contained in the ESA with the result that many work in substandard conditions.

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270 Ibid., 30.
Employee advocates and unions advocate creating an expedited process for reprisal investigations in order to prevent compounding contraventions and to minimize the chilling effect of the reprisal on other employees. They also assert that an expedited process for reprisal complaints would emphasize to employers the importance of the anti-reprisal provisions of the ESA and may increase the numbers of successful employee reinstatements.

**Options:**

1. Maintain the status quo.
2. Require 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).
3. Require the OLRB to hear applications for review of decisions in reprisal on an expedited basis if the employee seeks reinstatement.

### 5.5.5 Strategic Enforcement

Strategic enforcement is increasingly important when the workplace environment is becoming more complex and governments with limited resources are faced with high public expectations. In this section we will canvass different strategies for enforcing the ESA.

#### 5.5.5.1 Inspections, Resources, and Implications of Changing Workplaces for Traditional Enforcement Approaches

**Background**

*Inspections*

An “inspection” is where an ESO proactively attends an employer’s place of business to ensure compliance with certain parts of the ESA. This typically involves the officer reviewing the employer’s payroll records and conducting inspections.

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271 Inspections typically ensure compliance with these employment standards: poster requirements, wage statements, unauthorized deductions, record keeping, hours of work, eating periods, overtime pay, minimum wage, public holidays, vacation with pay, and the rules regarding temporary help agencies charging assignment employees fees and requiring agencies to provide assignment employees information. Inspections do not typically address termination and severance pay, reprisal, or leaves of absence issues. Misclassification issues where employers treat employees as independent contractors are typically not addressed during an inspection unless the issue is widespread in that workplace.
interviews of employees and the employer. Proactive inspections are intended to discover and remedy contraventions and bring the employer into compliance going forward as well as to heighten awareness and understanding of rights and obligations. In addition, an effective proactive inspection program should deter non-compliance. Contraventions were detected in 75-77% of inspections in the years between 2011-12 and 2013-14, and 65% in 2014-15.272

Until recently, ESOs conducted either inspections or investigations – they did not do both. Most now investigate and inspect.

In determining which employers to inspect, the Ministry relies on a variety of criteria. For example, an employer may be inspected because:

- an ESO who conducted an investigation believes that there may be contraventions with respect to employees other than the claimant;
- it has a history of contravening the ESA;
- a “tip” was received from the public (including employees who may be afraid of reprisal) or from Ministry staff;
- it is part of a sector that has been targeted for inspection.

The ES Program determines sectoral targets (often termed “blitzes”) based on:

- input from employee and employer groups;
- a review of public policy and research papers;
- analysis of the Program data on sectors contravention profiles; and
- government priorities.

The Ministry typically announces blitzes in advance on the theory that an industry that knows it will be under scrutiny will move on its own in advance to comply.

The ES Program also employs what is called a “compliance check”: an online self-assessment tool that asks employers about their compliance with seven non-monetary standards.

There are more than 400,000 workplaces in Ontario. An average of approximately 2,500 inspections have been conducted annually in recent years. This means that only about 0.6% of workplaces are inspected annually.

272 See, for example, the 1991, 2004 and 2006 Annual Reports of the Office of the Provincial Auditor of Ontario.
Best Use of Limited Resources

There is general consensus that proactive enforcement is a more effective mechanism for ensuring ESA compliance than relying on individual employees to file claims. It has long been a goal of the Ministry of Labour to continually increase the number of proactive inspections it conducts. That goal is, however, balanced with the need to limit wait times for claim investigations. More resources are currently allocated to reactive rather than proactive measures.

There is great pressure on the Ministry to use its limited resources efficiently and to strike the right balance between reactive (claim investigations) and proactive (inspections) work. The wait times for investigations and the number of inspections have both previously been the subject of comment by the Provincial Auditor.²⁷³ The Program continuously revisits its processes and policies with a view to having faster and more streamlined services that will result in shorter wait times for claim assignment, quicker resolution of complaints, and increased proactive activity.

The ESA contemplates that the Ministry will investigate all claims that are filed, as long as the claimant has taken the specified steps to facilitate the investigation. Where a claimant has not taken the specified steps within 6 months of filing the claim, the officer is deemed to have refused to issue an order. The claimant has the right to apply to the OLRB for a review of the refusal. In a world where financial constraints are a constant, budgetary considerations do not permit the hiring of enough ESOs to complete the investigation of all complaints in a timely fashion while also maintaining a significant proactive presence. The result is that there is a backlog of uninvestigated and unresolved complaints.

Quarterly, between 2011-12 and the first two quarters of 2015-16:

- the average wait time for assignment to a Level 1 ESO ranged from 2 days to 67 days, with an average of 35.4 days. Over the past four quarters in this period the average was 38 days;

- the average wait time for assignment to a Level 2 ESO for investigation has ranged from 54 days to 189 days, with an average of 119.6 days. Over the past four quarters in this period the average was 89 days.

²⁷³ See, for example, the 1991, 2004 and 2006 Annual Reports of the Office of the Provincial Auditor of Ontario.
This problem is not unique to Ontario. In the US in 2010, David Weil described the situation as follows:

The challenges facing the major agencies in the US Department of Labor (DOL) that regulate conditions in the workplace are daunting. Public policies on health and safety, discrimination, and basic labor conditions cover millions of workers, and have to be implemented in hundreds of thousands of disparate workplaces in differing geographic settings. Conditions within those workplaces vary enormously – even within a single industry – and employers often face incentives to make those conditions as opaque as possible. Workers in many of the industries with the highest levels of non-compliance are often the most reluctant to trigger investigations through complaints due to their immigration status, lack of knowledge of rights, or fears about employment security. Even the laws, which set forth the worker protections DOL agencies are charged with enforcing, have limitations in the 21st-century business community. Compounding all of the above, agencies charged with labor inspections have limited budgets and stretched staffing levels, coupled with a very complicated regulatory environment.

These challenges, however, reach beyond the number of investigators available to the DOL or to the Wage and Hour Division (WHD) in particular. Profound changes in the workplace, including the splitting up of traditional employment relationships, the decline of labor unions, and the emergence of new forms of workplace risk make the task facing DOL agencies far more complicated. In addition, expectations and demands on all regulatory agencies to demonstrate progress toward achieving outcomes and the resulting impacts on how government agencies are overseen by Congress, accountability agencies, and the public have created intensified pressure and scrutiny.274

The Changing Workplace and Implications for Traditional Enforcement Approaches

- Revisit approach of investigating all claims:

  There have been fundamental changes in the workplace. The number of employees represented by trade unions has declined. There has been a major change in how many businesses organize their affairs as the direct

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274 David Weil, Improving Workplace Conditions through Strategic Enforcement, a Report to the Wage and Hour Division (Boston: Boston University, 2010), 1.
employment of employees has been shifted to other business entities including subcontractors, temp help agencies and franchisees. It is argued that there are many more vulnerable employees in precarious jobs whose basic employment rights are being denied. This denial of rights and protections occurs for many reasons including fear of reprisal, employees’ ignorance of their rights and for a multiplicity of other reasons. However, it is exacerbated by the overwhelming number of complaints and by the lack of resources required to make timely investigation of all complaints.

This leads to the question as to whether the traditional approaches to enforcement are sufficient. Ontario may be well advised to consider different enforcement strategies to ensure compliance with the ESA. As Weil concludes: “fissuring means that enforcement policies must act on higher levels of industry structures in order to change behavior at lower levels, where violations are most likely to occur.”

New enforcement sector-based strategies may need to be designed to change employer behavior and improve compliance with priority being given to those sectors where non-compliance is most problematic.

Administrative programs like Ontario’s, which involves government officials investigating and ruling on claims, are in place across Canada. In other jurisdictions, such as the UK, employees are responsible for presenting their own case to an employment tribunal. In the context of new and different enforcement strategies, more worker outreach and education of both employers and employees, the policy of investigating every complaint may have to be modified so that not all complaints are investigated. This does not imply that there should be no avenue for redress for individuals with complaints, nor does it mean that individual complaints would not be important in assisting the Ministry in initiating targeted and proactive inspections. It may mean that some complainants would have to file claims:

- in small claims court, or if there is a more broadly based OLRB presence for ESA matters (described below);
- directly with the OLRB; or
- in some other simplified expedited dispute resolution process where there is either no investigation or a less onerous investigative process.

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275 Ibid., 1.
Focusing on the “top of industry structures” and other strategies:

Any policy shift away from the investigation of all complaints must be accompanied by new enforcement strategies. It has been argued by David Weil and others that changes in the structure of the economy and in the complexity of employment relationships together with the decline in unionization have meant that the traditional complaint driven approach to enforcement is less and less effective. Weil put it this way: 276

*The employment relationship in many sectors with high concentrations of vulnerable workers has become complicated as major companies have shifted the direct employment of workers to other business entities that often operate under extremely competitive conditions. This “fissuring” or splintering of employment increases the incentives for employers at lower levels of industry structures to violate workplace policies, including the FLSA. Fissuring means that enforcement policies must act on higher levels of industry structures in order to change behavior at lower levels, where violations are most likely to occur.*

Weil recommended designing sectoral enforcement strategies, a central purpose of which – as with all enforcement strategies – is to deter violations before they occur. This involves analysing and understanding the structure of industries to provide insights into why there are higher levels of non-compliance in some industries than in others and to help inform sector-based enforcement strategies designed to improve compliance. It is his view that understanding supply-chain relationships, franchising and other industry structures is an essential first step to the development and implementation of effective enforcement strategies.

Such an approach would enable focusing at the top of industry structures – the top of the supply chain for example – where decisions are made that affect compliance by those lower in the chain. Weil suggests that education, persuasion as well as the use of other regulatory tools (like hot goods provisions and other penalties) can found the basis of agreements that will have impact on all the employers in the supply-chain. The strategic use of proactive investigations on a geographic and/or industry basis is also recognized as an essential component of any overall strategy designed to assist in improving compliance. Complaints of individual workers (or their

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276 Weil, 1.
silence) should be used to help set priorities for strategic enforcement initiatives. This may involve developing special complaint procedures for employees in targeted sectors or industries to obtain information about compliance in order to leverage complaint investigations more strategically. Finally, Weil focuses on the sustainability of enforcement and the importance of changing employer behaviour on an on-going basis by combining state enforcement initiatives with private monitoring.

Given the similarities between the structural changes in the US economy and those in the Ontario economy, the strategic approach of Dr. Weil warrants serious consideration.

**Submissions**

Employee and labour advocates expressed very strong support for proactive inspections. Their recommendations focused on expanding the scope of what is included in targeted inspections. Some have argued that the Ministry should not give advance notice of inspections to an industry arguing that this allows other industries to know they are not being inspected and also undermines the effectiveness of the inspections in the targeted industry.

More specifically, it has been recommended that the Ministry:

- inspect all employers that have been found in a claims investigation to have contravened the Act;
- work with federal agencies to map sectors where the practice of employers falsely classifying or misclassifying employees as independent contractors is widespread or growing, focus inspections on those sectors, and have officers look into the issue of misclassification during inspections;
- focus proactive inspection resources on workplaces with migrant and other vulnerable and precariously employed workers;
- hire more officers to increase the capacity to conduct proactive inspections, and/or shift away from the current complaint-driven enforcement process, and allocate more resources to pro-active enforcement initiatives (including spot checks, audits, and inspections).

Some employer groups expressed support for effective enforcement of the ESA. Generally, they spoke of the desirability of providing education and assistance to employers who want to comply and targeting those who are deliberately
contravening the Act. Consistent enforcement of the ESA supports a competitive environment based on a level playing field. More specifically, they recommended the Ministry:

- focus inspections on those with a bad compliance history;
- facilitate a more consistent approach by officers; and
- use the inspection process to educate employers.

**Options:**

1. Maintain the status quo.
2. Focus inspections in workplaces where “misclassification” issues are present, and include that issue as part of the inspection.
3. Increase inspections in workplaces where migrant and other vulnerable and precarious workers are employed.
4. Cease giving advance notice of targeted blitz inspections.
5. Adopt systems that prioritize complaints and investigate accordingly.
6. Adopt other options for expediting investigation and/or resolution of complaints.
7. Develop other strategic enforcement options.

### 5.5.5.2 Use of Settlements

**Background**

The Act permits parties to settle their ESA issues in a number of different circumstances. Settlements can be facilitated by ESOs, or parties can settle the matter themselves and inform the ESO. If the employee and employer comply with the terms of the settlement, the settlement is binding, any complaint filed is deemed to have been withdrawn and any order made by an ESO in respect of the contravention or alleged contravention is void (except a compliance order). Settlements are void if the employee (or in the case of a settlement facilitated by an ESO, the employer) demonstrates that it was entered into as a result of fraud or coercion.

Settlements are void if the employee (or in the case of a settlement facilitated by an ESO, the employer) demonstrates that it was entered into as a result of fraud or coercion. Approximately 15% of claims were settled with the assistance of an ESO or by the parties themselves in the 2014/15 year. Even where a settlement occurs, the Ministry may still choose to continue prosecution proceedings against the employer if a violation was found.
Labour Relations Officers (LROs) at the OLRB attempt to effect a settlement of applications for review of an officer’s decision. Approximately 80% of ESA reviews are settled. In employer-initiated reviews, we are advised that employees often settle for less than the amount that was ordered by the ESO.

The MOF, as the designated collector of unpaid orders and notices, is authorized to enter into a settlement with the debtor, but only with the agreement of the employee. If the settlement would provide the employee less than 75% of the amount he or she is entitled to, the approval of the Director of Employment Standards must be obtained.

Academic research suggests that the vulnerabilities of employees diminishes the value of ESA settlements that they negotiate.279

**Submissions**

A criticism we heard frequently related to the settlement process at the OLRB. The OLRB has a professional cadre of mediators – LROs – who are assigned to assist the parties to help resolve matters in advance of hearings. The success of this settlement process is very important to the smooth functioning of the tribunal as a high rate of settlement is a critically important part of any adjudicative system. Without settlements, too many cases would go on for too long and there would be an excessive burden on already strained adjudicative resources. Without the possibility of settlements, any legal process becomes more time consuming and more expensive for the parties and for society as a whole.

In labour relations matters the Board officers responsible for mediating interact mostly with sophisticated parties and legal counsel in helping to effect settlements. In ESA cases, however, they often deal with unsophisticated and unrepresented complainants and respondents. One common issue cited to us is that complainants are often very dissatisfied with the settlement process. They may feel out of their depth, unduly influenced, and even pressured in many circumstances to settle in a way that they feel is inappropriate. We are not surprised that this feeling exists. Settlement is never an easy process. It requires honest reflection on the merits of the case and weighing of options. It is especially hard when you are unrepresented and have no advice you can rely on. One of the most important skills lawyers and paralegals bring to clients in the legal process is the ability to help clients assess the strength of their case and to negotiate an appropriate

279 Banks, 30.
outcome. If more complainants were represented in the settlement process, there would still be some degree of dissatisfaction – as there usually is – but as a society we could expect that overall it would be regarded by all those who participate as a better process.

We heard concerns that employees often compromise claims even where there appears to be strong evidence supporting their entitlement to a higher amount. Unions and employees advocates argue that the likelihood of settlement creates a perverse incentive to violate minimum standards because non-compliant employers, when faced with a valid complaint, are often able to settle claims for less than the cost of compliance.

Employers have not made submissions on this point. It may be that employers, particularly small employers, will express concern about the diversion of resources to litigation if there is a substantive interference with the ability of the parties to settle a case. They are likely to point out that the time, cost and risk associated with litigation often compel parties to consider settlement that is preferable to trial. The reasons why an employee or an employer might prefer a timely settlement are numerous. There are cases where facts are disputed and/or credibility is an issue or where the application of the law to agreed facts is disputed. It would be costly and inefficient to prohibit settlements in such circumstances. Suffice to say, employers are likely to view settlements as a smart and efficient dispute resolution mechanism that should be available to the parties.

**Options:**

1. Maintain the status quo.

2. In addition to the current requirement that all settlements be in writing, provide that they be subsequently validated by the employee in order to be binding. For example, provide that a settlement is binding only if, within a defined period after entering into the settlement, the employee provides written confirmation of her or his willingness to settle on the terms agreed to and acknowledges having had an opportunity to seek independent advice.

3. Have more legal or paralegal assistance for employees in the settlement process at the OLRB as set out below in section 5.5.6.
5.5.5.3 Remedies and Penalties

Background

Enforcement mechanisms that encourage compliance, deter non-compliance and provide appropriate and expeditious restitution to employees whose ESA rights have been violated are an essential part of an effective compliance strategy.

Thousands of complaints are filed with the Ministry of Labour for ESA violations every year. Approximately 70% of assessed complaints lead to confirmed violations of the ESA.280

The Act provides these enforcement tools when an employer281 is found to have contravened the Act:

<table>
<thead>
<tr>
<th>Tool</th>
<th>Primary Purpose</th>
<th>Details</th>
</tr>
</thead>
</table>
| “Voluntary Compliance”        | Restitution     | Employer pays the employee the amount that was owing without an Order being issued.  
With voluntary compliance (rather than an Order) the employer may receive the money sooner and the employer abandons its right to apply to review the determination.  
Approximately half of the claims where a contravention was found are resolved through voluntary compliance. |
| Order to Pay Wages (or Fees)  | Restitution     | The Ministry orders the employer to pay the employee the amount that was owing, plus pay an administrative fee to the government of 10% of the amount owing (or $100, whichever is greater). |
| Order for Compensation        | Restitution     | Available only for certain contraventions (e.g. reprisal, leaves of absence).  
The Ministry orders the employer to financially compensate the employee (i.e., pay the employee damages for the wages that the employee would have earned, the value of the lost job, emotional pain and suffering, and other reasonable and foreseeable damages) plus pay an administrative fee to the government of 10% of the amount of damages (or $100, whichever is greater). |

281 “Employer” is used here to capture anyone who may be issued an enforcement tool, i.e., those who are not the “employer” but who have ESA liabilities (e.g., corporate directors, clients of temporary help agencies).
### Order for Reinstatement
**Primary Purpose:** Reinstatement
**Details:** Available only for certain contraventions (e.g., reprisal, leaves of absence) where the employee’s employment was terminated.

The Ministry orders the employer to reinstate the employee.

### Director’s Order to Pay Wages
**Primary Purpose:** Reinstatement
**Details:**
The Ministry orders director(s) of a corporation that has not paid the employee to pay some of the unpaid wages (up to 6 months’ wages and 12 months’ vacation pay, but not termination or severance pay).

### Compliance Order
**Primary Purpose:** Bring into Compliance
**Details:**
The Ministry orders the employer to take or refrain from taking actions in order to comply with the Act. (The order cannot require that money be paid).

This may be used for monetary and non-monetary contraventions.

### Notice of Contravention ("NOC")
**Primary Purpose:** Penalty & Deterrence
**Details:**
The Ministry orders the employer to pay an administrative monetary penalty, ranging from a flat $250 upwards to $1,000 per employee affected by contravention.

Penalty is paid to the government.

Employers do not have to pay the amount of the NOC into trust in order to apply to have it reviewed by the OLRB.

On review, the Director of Employment Standards has the onus to establish on a balance of probabilities that a contravention occurred; the OLRB usually considers documentary evidence insufficient proof and requires the attendance of the issuing officer at the hearing.

Primarily because of the costs associated with this, the policy of the ES Program is for officers to issue “tickets” under the POA where possible, rather than an NOC.

In 2014/15, 65 NOCs were issued in the claim investigation context and 34 were issued in the inspection context.

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282 The amount of the NOC for failing to post or provide the Ministry’s ESA poster, or to keep proper payroll records or make them readily available for an ESO are: $250 for a first contravention; $500 for a second contravention in a 3-year period; and $1,000 for a third or subsequent contravention in a 3-year period. For contraventions of other provisions of the ESA, the penalties are: $250 for the first contravention multiplied by the number of employees affected; $500 for a second contravention in a 3-year period multiplied by the number of employees affected; and $1,000 for a third or subsequent contravention in a 3-year period multiplied by the number of employees affected.

283 Vosko, Noack, and Tucker, Table 4.1 and 4.2.
<table>
<thead>
<tr>
<th>Tool</th>
<th>Primary Purpose</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provincial Offences Act prosecution – Part I</td>
<td>Penalty &amp; Deterrence</td>
<td>Prosecution for contravening ESA. ESOs consider the following factors when deciding whether to initiate a prosecution under Part I of the POA: the seriousness of the offence, whether there is a history of non-compliance; mitigating circumstances (for example, whether full and timely restitution has been made for employees affected by the contravention), and whether other steps can be taken to effectively deter future non-compliance. Generally, Part I prosecutions are used for first offenders where the offence is viewed as being less serious. Part I prosecutions are commenced by serving the defendant with either an offence notice (“ticket”) or a summons within 30 days of the alleged offence. Although a summons can result in a $1000 fine, the ES Program practice is to proceed by way of a ticket in most cases, which can result in a $360 fine. In 2014/15, 340 tickets were issued.284</td>
</tr>
</tbody>
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| Provincial Offences Act prosecution – Part III | Penalty & Deterrence | Prosecution for contravening ESA. Used to prosecute corporate directors, for serious offences, and for repeat or multiple offenders or if Part I is not seen as a sufficient deterrent. Commenced by the laying of an information. Requires a court appearance. Conviction carries a fine up to $100,000 for a first offence for a corporation, $250,000 for a second offence and $500,000 for a third or subsequent offences, or up to $50,000 and imprisonment up to 12 months for an individual. |

Whether or not a contravention is found, ESOs can require an employer to post in its workplace any notice the ESO considers appropriate or any report concerning the results of an investigation or inspection. In practice, ESOs order employers to post documents only in the inspection context, not in the claim investigation context.

The Ministry publishes the name of anyone convicted under the POA of contravening the ESA on its website.

284 Vosko, Noack, and Tucker, Table 4.4.
Despite the high rate of confirmed ESA violations, relatively few penalties are issued, as the numbers in the chart above demonstrate.

On some occasions, employers provide the statutorily required payments to an employee after a claim is filed and the employee withdraws the claim and, as a result, the Ministry closes the claim without an investigation. Without a finding that the employer contravened the Act, enforcement tools are not available. Similarly, if the parties enter into a binding settlement, the claim is deemed to be withdrawn and any order made in respect of the contravention or alleged contravention is void. Approximately 14% of claims were settled in the 2014-15 year. Settlements do not terminate prosecutions.

In addition to the above, the ESA provides that the Director of Employment Standards may, with the approval of the Minister of Labour, determine a rate of interest and manner of calculating interest for the purpose of the Act and sets out circumstances in which interest may be payable pursuant to those determinations: when an ESO issues a Director Order to Pay, when the OLRB makes, amends or affirms an Order, and where money is paid from the Ministry’s trust fund. (There is no provision addressing interest awards by ESOs against employers). To date, the Director has not made these determinations. The effect of this is that no interest is payable in any of the circumstances in which the Act mentions interest.

Part III prosecutions are relatively rare. When Part III prosecutions do occur, they are usually for failure to comply with an order to pay.

**Submissions**

We heard little from employers on how the remedies or penalties might be amended. However, it would seem that employers generally recognize the benefits of effective enforcement and increased compliance. Some supported the imposition of higher penalties on those who intentionally contravene the ESA. Some recommended that warnings should be issued to first time offenders who unintentionally contravene the Act.

This topic received a significant amount of attention in other stakeholders’ submissions. The general thrust of many submissions by employee advocacy groups and labour groups is that the current remedies set out in the ESA are

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285 See Section 88(5).
286 See Sections 81(8), 119(12), 88(7), 117(3) and 117(4).
inadequate for protecting Ontario workers in an increasingly turbulent and precarious labour market and that this weakness in legal standards is exacerbated by a consistent failure to effectively enforce the employment standards which are already in place.

It has been submitted, for example, that the current remedies, monetary value of penalties, and ES Program procedures:

…create a perverse incentive for employers to violate the minimum standards of their workers. It is more financially lucrative for employers to withhold or fail to pay a worker their minimum entitlements under the ESA, and if the employee should launch a successful complaint, be put in a position where the employer can potentially settle the debt owed to the aggrieved worker for cents on the dollar, potentially below the minimum standard set by the Legislature.

Unions and employee advocacy groups submitted that penalties for non-compliance should be increased to deter employers from willfully violating the minimum standards under the ESA.

**Options:**

1. Maintain the status quo.
2. Increase the use of Part III prosecutions under the POA particularly for repeat or intentional violators and where there is non-payment of an Order.
3. Increase the frequency of use of NOCs by the ES Program. This could be supported by:
   a) requiring employers to pay an amount equal to the administrative monetary penalty into trust in order to have a NOC reviewed by the OLRB;
   b) removing the “reverse onus” provision that applies to the Director of Employment Standards when a NOC is being reviewed at the OLRB.
4. Require employers to pay a financial penalty as liquidated damages to the employee whose rights it has contravened, designed to compensate for costs incurred because of the failure to pay (i.e., borrowing costs), in a specified amount or an amount that is equal to or double the amount of unpaid wages and a set amount for non-monetary contraventions.
5. Increase the dollar value of NOCs.

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

7. Use the existing authority of officers to require employers to post notices in the workplace where contraventions are found in claim investigations.

**Interest**

8. Have the Director of Employment Standards set interest rates pursuant to the authority to do so in section 88(5) so that interest can be awarded in the circumstances currently allowed for.

9. Amend the Act to allow employers to be required to pay interest on unpaid wages.

**Other Options (as discussed below):**

10. Make access to government procurement contracts conditional on a clean ESA record.

11. Grant the OLRB jurisdiction to impose administrative monetary penalties.

Since compliance is an important public policy objective, it has been suggested that employers who have a record of contravention of the ESA should be denied the ability to bid on government contracts. It is argued that such a policy would ensure that non-compliant employers are not “rewarded” and that bidders do not build non-compliance into costing estimates. There has been little discussion about this option. Should stale-dated records of non-compliance always disqualify an employer? Should inadvertent non-compliance by an employer who has quickly remedied any issue of non-compliance operate as a disqualifier? There may be many questions that require thoughtful consideration before any policy is recommended. We welcome comments from stakeholders.

As a result of some of the submissions received, there have been discussions about the advisability of giving the OLRB jurisdiction to impose, where appropriate, significant administrative penalties on non-compliant employers. This would be in addition to other remedial authority, for example, the authority to make orders to compensate employees where violations are shown to have occurred and to issue prospective compliance orders.
One of the advantages of giving the OLRB such jurisdiction would be that the Board could – over time – develop consistent jurisprudence and clearly articulate circumstances where non-compliance may result in an administrative monetary penalty against a non-compliant party as well as other remedies to rectify the wrongdoing. This would not only allow the thoughtful and reflective development of jurisprudence by the tribunal with the relevant expertise but also the imposition of administrative monetary penalties in appropriate cases would act as a significant deterrent to all employers as well as providing a penalty for non-compliance to a particular employer.

It may not be prudent or appropriate to give the OLRB jurisdiction to impose administrative monetary penalties in litigation between private parties. The imposition of an administrative monetary penalty would then be seen as an outcome that should be the result of state action and in the public interest. Therefore, we have been considering a model in which complaints could be initiated directly by the Ministry of Labour or by the MAG against a named respondent or respondents where an administrative monetary penalty is one of the remedies sought. Some office, perhaps a Director of Enforcement, would be given responsibility to determine when to initiate a case in which an administrative monetary penalty is sought and to take carriage of such cases as the applicant in the proceedings.

With thousands of contraventions found every year, it is impractical for a Director of Enforcement to have carriage of each complaint that appears meritorious. If a Director of Enforcement were given the authority to have carriage of and to take cases directly to the OLRB, the Director could limit the cases taken on to those where, after receiving advice from the Director of Employment Standards, he/she determines that there is a public policy interest in achieving an outcome that would better reflect the seriousness of the violation(s) alleged, for example – where after an investigation:

- it appears that there are reasonable and probable grounds to believe a serious reprisal has occurred; or
- in any other case where the Director of Enforcement determines it is appropriate and advisable to proceed directly to the OLRB (for example, where there are multiple violations disclosed either by an ESO investigation or by an inspection or an audit or where the employer has been found to have violated the ESA on previous occasions).
An employer or other respondent would know in advance the potential risks arising from a Ministry initiated complaint. If the Director of Enforcement were going to seek an administrative monetary penalty over and above a remedy for the claimant(s) or other employees whose rights have been violated, the respondent would be advised not only of the details of the alleged violations but also of the amount of the administrative monetary penalty that is being sought by the Director. At any hearing, the burden of proof would be on the Ministry.

The current complaints driven process is essentially a two-party process with the complainant and a respondent employer/corporate director being the parties. With some exceptions, the parties are therefore in a position to resolve their own litigation. A settlement with respect to one or more employees should not bar the Director from assuming carriage of a case and taking it to the OLRB to seek an administrative monetary penalty and/or compensation for employees with whom there is no settlement and for whom no complaint has been made – for example compensation for others if violations are uncovered during an inspection or during the investigation of an individual claim. In a process where the Director of Enforcement decided to take carriage of a complaint or to initiate a complaint, the employee claimant(s) would not be responsible for preparing the case or for taking the matter to a hearing before the OLRB. Carriage of the case would be the responsibility of the Director.

A complaint initiated by the Director of Enforcement would not – and should not – preclude a settlement agreement between the Director and the employer on the question of remedy for adversely affected individuals and on the question of the administrative penalty – the latter perhaps subject to the approval of the OLRB. The Director will be in the best position to assess the strengths and weaknesses of the case, to assess how best to serve the public interest and to take into account the views and the rights of adversely affected employees all of which would – of necessity – be taken into account by the Director of Enforcement in deciding whether and on what terms to settle. One would assume that – as a matter of policy – counsel acting on behalf of the Director of Enforcement would do his/her best to ensure that the claimants received what they ought to receive based on the proper application and interpretation of the ESA.

Giving the OLRB jurisdiction to impose monetary sanctions for violation of employment standards law would not only underscore the important public policy objectives of compliance, but would also act as a deterrent to respondents and others from engaging in future conduct that violates the ESA.
Other tribunals have statutory authority to impose administrative monetary penalties. The Securities Commission, if in its opinion it is in the public interest to do so, may make an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law (see section 127(1)(9) of the Securities Act). The Securities Commission also has jurisdiction in appropriate cases, after conducting a hearing, to order a respondent to pay the cost of the investigation and the cost of the hearing incurred by the Commission.

Finally, the Securities Act provides that revenue generated from the exercise of a power conferred or a duty imposed on the Commission does not form part of the Consolidated Revenue Fund but can be used for various purposes including: for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets. In Rowan v. Ontario (Securities Commission, 110 O.R. (3d) 492, 350 D.L.R. (4th) 157), at para. 52, the Court of Appeal approved the following statement of the Commission:

*In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than “the cost of doing business”. In the current securities regulation and today’s capital markets context, a $1,000,000 administrative penalty is not prima facie penal.*

This is language that may resonate with others trying to create a workplace environment in which compliance is the norm and non-compliance is the exception. Unfortunately, non-compliance with the ESA currently affects thousands of Ontarians and is a significant societal problem. Giving the OLRB jurisdiction to impose monetary penalties may have the desired effect and be, as the Securities Commission stated, “appropriate legislative recognition of the need to impose sanctions that are more than the cost of doing business.”

If the OLRB were to be given an expanded jurisdiction to impose significant monetary sanctions up to $100,000 per infraction, there is also reason to consider giving the OLRB jurisdiction to order an unsuccessful respondent to pay the cost of the investigation and the costs of the hearing incurred by Director of Enforcement. Similarly, it may be prudent to consider stipulating that revenue
generated from the exercise of a power conferred or a duty imposed on the OLRB does not form part of the Consolidated Revenue Fund but could be used for various purposes including:

- paying any outstanding orders against the respondent;
- paying unpaid wages to any other employee of the respondent who has not received his/her entitlement under the ESA;
- educating employees and employers about their rights and obligations under the ESA;
- funding legal and other support for employees who wish to file complaints including funding representation costs at before the OLRB; and
- using the revenue generated by fines and penalties to help fund increased enforcement activity.

5.5.6 Applications for Review

**Background**

Employers, corporate directors and employees who wish to challenge an order issued by an ESO or the refusal to issue an order are, in most cases, entitled to apply for a review of the order by the OLRB.

The application for review must be made in writing to the OLRB within 30 days after the day on which the order, or notice of the refusal to issue an order, was served on the party wishing to apply for review. The OLRB has jurisdiction to extend the time for applying for review if it considers it appropriate to do so.

In the case of an order directed against an employer, the employer must first pay the amount owing as determined by the ESO, plus the administrative fee, to the Director of Employment Standards in trust. This requirement ensures that the ordered amount will be available to be paid to the employee if the appeal fails.

The OLRB applies a “self-delivery” model to ESA appeals. Under this model, applicants are required to deliver a copy of the application and supporting documents to the responding parties, including the Director of Employment Standards before filing them with the OLRB. If the case is scheduled for a hearing

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287 Exception: the amount that has to be paid into trust to appeal a compensation order is limited to $10,000.
the parties are required – no later than 10 days before the hearing – to deliver to
the other parties and file with the OLRB copies of all documents they will be relying
on in the hearing.

The OLRB assigns a LRO to work with the parties to attempt to settle the case. Approximately 80% of ESA reviews are settled. If the parties do not settle, it will be referred to a hearing. Recently, hearing dates have been set approximately 4 months after the settlement meeting.

In recent years, approximately 735 review applications have been filed annually (representing an appeal rate of approximately 6.5% of claims in which an officer made a decision). A majority of the review applications are made by employers and directors of companies but a substantial share is made by employees. Approximately 80% of ESA appeals are settled. Of those cases that do not settle and a determination on the merits is made, almost twice as many applications were dismissed than were granted.

The OLRB is required to give the parties full opportunity to present their evidence and make submissions. In essence, the review hearing before the OLRB is like a trial with evidence-in-chief, cross-examination and documentary evidence. This means that if a party wants the OLRB to consider any documentary or other information (including information that he or she gave to the ESO), the party will have to adduce evidence before the OLRB. The OLRB makes its determination based on the evidence and argument that the parties present to the OLRB. The OLRB on a review of an order, may amend, rescind or affirm the order or issue a new order; on a review of a refusal to issue an order, the Board may issue an order or affirm the refusal.

The Board may dismiss an application for review if the applicant does not make out a case for the orders or remedy requested, even if all of the facts stated in the application are assumed to be true. This is a summary dismissal based on the application material filed.

The OLRB generally processes ESA reviews in the order that they are received and ESA cases are not given priority. The Ministry’s Director of Employment Standards is a party to the appeal and the Director’s representative participates in some but not all hearings. The Director’s representative does not directly support either workplace party but advocates for an application of the ESA that is consistent with the Director’s interpretation of the relevant section(s).
Parties to the review may retain a legal advisor. In practice, we are advised that most parties are self-represented.

The OLRB does hear some cases in regional centres in Ontario but there are few, if any, vice-chairs resident in these communities. The cost of travel including the time consumed in travel by vice-chairs from Toronto makes these hearings outside Toronto expensive and impractical for the volume of cases where the vice-chairs always have to travel. For employees and employers living outside Toronto and far from locations where the OLRB holds ESA review hearings, attending such hearings is a very expensive and time-consuming process.

The current regime is essentially a two-party process with a complainant employee and a respondent employer being the parties to the dispute with responsibility for the litigation at the review stage of the OLRB. With some exceptions, the parties are therefore in a position to resolve their own litigation.

Currently the ESA review process is a de novo process meaning that the parties can call evidence and what occurred at the ESO stage does not strictly matter. This distinguishes an ESA review from a pure appeal where, save in very unusual circumstances, an appellate tribunal does not hear evidence but decides an appeal on the basis of the written record which often includes a record of the evidence heard by the court or tribunal whose order is being appealed.

The ESOs, in fulfilling their roles to investigate alleged ESA violations, do not hear evidence in the traditional sense of hearing testimony under oath and receiving into evidence document filed by the parties in accordance with rules of evidence. The ESOs will have done their best to investigate a complaint by speaking with the complainant, perhaps with other employees and with the employer and anyone else who may have relevant information, and will also review the relevant records. If, based on his/her investigation, the ESO concludes there has been a violation, the employer is typically given an opportunity to pay the amount owing without an order being issued. If payment is not made, the necessary order issues. The fact that an enforceable order has been made (or not made) may give rise to an application for review by the party against whom the order has been made or by the person denied relief that he/she believes is warranted. At that review, either party may put evidence before the OLRB either by oral testimony or relevant documentary evidence.
The record currently before the OLRB consists of the ESO’s order, the reasons for the order that may refer to relevant employer records.

**Options:**

1. Require ESOs to include all of the documents that they relied upon when reaching their decision (e.g., payroll records, disciplinary notices, medical certificates) when they issue the reasons for their decision. This will ensure that the OLRB has a record before it of the documents relied on by the ESO in making an order or in denying a complaint. Such a mandatory process should lead to a more consistent quality of decision-making by ESOs and would help explain the decision to the affected parties and to the OLRB as well as providing a more complete record to the OLRB sitting in review. For an employee who seeks a review of a decision, this procedure would also alleviate – at least to some extent – any obligation to produce some, or all, of the documentary evidence relevant to a review.

2. Amend the ESA to provide that on a review, the burden of proof is 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.

3. Increase regional access to the review process. To facilitate this, the Ministry of Labour might appoint part-time vice chairs in various cities around the province (perhaps in the main urban centres in each of the 8 judicial districts in Ontario or in the 16 centres where the Office of the Worker Adviser (OWA) has offices) who would have training and expertise in the ESA only (not in labour relations) and who could conduct reviews on a local basis. This would make attending and participating in the review process more accessible and less expensive for both employees and employers.

   Special procedures, like pre-review meetings with the parties could be scheduled in advance to ensure narrowing of the issues, agreement on facts and perhaps settle cases, much like pre-trials in civil cases. The appointment of local ESA Vice-Chairs of the OLRB is similar to a proposal Professor Arthurs made to the federal government to deal with the special needs of distant communities (see: *Fairness at Work*, p. 207).

4. Request OLRB to create explanatory materials for unrepresented parties. There will always likely be a significant number of unrepresented parties at the OLRB. One straightforward way to assist is by ensuring that memoranda in plain language are prepared to assist self-represented
individuals, both employees and employers, with respect to both the procedure and the applicable principles of law, including the burden of proof and basic rules of evidence. These sorts of memoranda have proven to be of great assistance to self-represented individuals in other legal proceedings including in criminal prosecutions where an understanding of the burden of proof and the rights of the accused in a criminal prosecution are of fundamental importance to the accused.

5. Increase support for unrepresented complainants. The criticism of the settlement process at the OLRB set out above in section 5.5.5.2 would be addressed at least in part if currently unrepresented complainants were represented in the review process at the OLRB. We set out below two possibilities that have been raised with us.

*Increase resources and expanded mandate for the Office of the Worker Adviser*

The OWA is an independent agency of the Ministry of Labour. Its mandates are set out in the WSIA and the OHSA. Its costs are paid by the WSIB.

The OWA currently provides free and confidential services to non-unionized workers (advice, education, and representation) in workplace safety insurance matters (formerly called workers’ compensation) and on occupational health and safety reprisal issues. The OWA delivers all of its services in English and French. In addition to representing workers at the WSIB, and the Workplace Safety and Insurance Appeals Tribunal (WSIAT), it also represents workers in proceedings before the OLRB in health and safety reprisal cases. It provides self-help information for workers to handle their own claims where appropriate. The OWA develops community partnerships with other groups that assist injured workers or who promote health and safety in the workplace. The OWA also provides educational services in local communities on topics related to its mandates. The OWA has offices in Toronto, Scarborough, Ottawa, Downsview, Hamilton, Mississauga, St. Catharines, London, Sarnia, Waterloo, Windsor, Sault Ste. Marie, Sudbury, Thunder Bay, Timmins and Elliot Lake.

The OWA could be given an enhanced jurisdiction and a new funding model developed to help employees with claims under the ESA and to represent such employees on reviews. An expanded mandate would be consistent with their current mandate to assist workers with workplace issues. If the mandate of the OWA were expanded, the result would be legal or paralegal support for employees and some employees would be
able to have representation at the review proceedings before the OLRB where self-represented individuals find themselves in unfamiliar territory.

**Pro Bono Assistance**

To supplement the Office of Worker Adviser, lists of lawyers willing to provide pro bono legal assistance on review cases could be established. There are many lawyers in Ontario who deal with, and many specialize in, employment matters, who may well be prepared to act in cases where the OWA cannot or should not. Many younger lawyers, and paralegals, especially in large firms, do not always get sufficient opportunities to advocate in legal proceedings and it may be that there are a significant numbers of professionals who would make themselves available for one or more days per year and who could take on the handling of several cases to be heard or dealt with on the same day.

### 5.5.7 Collections

**Background**

Over the past 6 fiscal years, the Ministry has assessed an annual average of $21.5 million of unpaid wages and other monies owing under the Act. Through voluntary payment and collection activity, an annual average of $13.6 million was recovered, representing an average recovery rate of 63%.

On average, 300 to 400 unpaid Orders (worth about $1 million in total) are assigned by the Ministry of Labour to its designated collector, the MOF, which recovers about 10%.

**Submissions**

Employee advocates and unions observe that, without an effective collections system, employees who have gone through the entire Ministry process may end up with a hollow victory if the employer refuses to comply with the order to pay. They recommended faster and more effective collection.

Some possible suggested improvements are:

- the Ministry should be authorized to impose a wage lien on an employer’s property when an employment standards claim is filed for unpaid wages;

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288 Not including assessments where the employer is bankrupt, under receivership or subject to other formal insolvency proceedings.
the Ministry should be authorized to request the posting of performance bonds in cases where there is a reasonable likelihood that wages will go unpaid in the future based on an employer’s history of previous wage claim violations or for employers in sectors demonstrated to be at high risk of violation;

the Ministry should re-establish a wage protection plan, funded by employers;

claimants should be permitted to file and enforce orders as an order of the court;

the Ministry should have the authority to revoke the operating licences, liquor licences, permits and driver’s licences of those who do comply with orders to pay.

We have also been made aware of some hurdles that impair the ability of the MOF to collect ESA debts. We received advice to consider making recommendations to mirror some collections-related provisions in the Retail Sales Tax Act such as:

- remove the requirement to file a certified copy of an order in court in order for creditors’ remedies to be made available, and instead make an order valid and binding upon its issuance;
- allow for the issuance of a warrant;
- allow liens to be placed on real and personal property;
- allow the Ministry to consider someone who receives assets from a debtor to be held liable for the debtor’s ESA debt. This provision would allow the recovery of assets that have been transferred to a family member/spouse in an attempt to avoid paying an order.

**Options:**

1. Maintain the status quo.

2. 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. This could include incorporating some of the collections-related provisions in the Retail Sales Tax Act – which is another statute under which the MOF collects debts – into the ESA, such as:

   a) removing the administrative requirement to file a copy of the Order in court in order for creditors’ remedies to be made available;
b) creating authority for warrants to be issued and/or liens to be placed on real and personal property;

c) providing the authority to consider someone liable for a debtor’s debt if he/she is the recipient of the debtor’s assets, in order to prevent debtors from avoiding their ESA debt by transferring assets to a family member.

3. 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.

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

5. Establish a provincial wage protection plan.

6. Provide the Ministry with authority to revoke the operating licences, liquor licences, permits and driver’s licences of those who do not comply with orders to pay.
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How You Can Provide Input on the Interim Report

If you are interested in responding to the Interim Report with your comments, ideas and suggestions, please contact the Ontario Ministry of Labour by:

E-mail: CWR.SpecialAdvisors@ontario.ca
Mail: Changing Workplaces Review, ELCPB
      400 University Ave., 12th Floor
      Toronto, Ontario M7A 1T7
Fax: 416-326-7650

Comments are encouraged throughout the consultation period as posted on the Ontario Ministry of Labour website.

Thank you for taking the time to participate.
Notice to Consultation Participants

Submissions and comments provided are part of a public consultation process to solicit views on reforms to Ontario’s employment and labour law regime that may be recommended to protect workers and support business in the context of changing workplaces. This process may involve the Ministry of Labour publishing or posting to the internet your submissions, comments, or summaries of them. In addition, the Ministry may also disclose your submissions, comments, or summaries of them, to other parties during and after the consultation period.

Therefore, you should not include the names of other parties (such as the names of employers or other employees) or any other information by which other parties could be identified in your submission.

Further, if you, as an individual, do not want your identity to be made public, you should not include your name or any other information by which you could be identified in the main body of the submission. If you do provide any information which could disclose your identity in the body of the submission this information may be released with published material or made available to the public. However, your name and contact information provided outside of the body of the submission, such as found in a cover letter, will not be disclosed by the Ministry unless required by law. An individual who provides a submission or comments and indicates a professional affiliation with an organization will be considered a representative of that organization and his or her identity in their professional capacity as the organization’s representative may be disclosed.

Personal information collected during this consultation is under the authority of the Employment Standards Act, 2000 and the Labour Relations Act, 1995, and is in compliance with subsection 38(2) of the Freedom of Information and Protection of Privacy Act.

If you have any questions regarding the collection of personal information as a result of this consultation you may contact the Ministry’s Freedom of Information Office, 400 University Avenue, 10th Floor, Toronto, Ontario, M7A 1T7, or by calling 416-326-7786.