

Submission by the United Steelworkers

Ontario's Changing Workplaces Review Consultation Process

SEPTEMBER 18, 2015





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Introduction

The United Steelworkers (the “Steelworkers” or the “USW” or the “Union”) is pleased to present this submission to the Special Advisors. Your appointment by the government of Ontario to this vital project is welcomed by our membership.

We are optimistic that your experience and judgment, the evident need for reform, the many excellent briefs and presentations that you have received and the government’s public commitment to find ways to “...best protect workers while supporting businesses in our changing economy...” can combine to result in sound, durable, progressive and effective reforms that will modernize labour legislation in Ontario.

Leading up to this submission, the USW made nine presentations to the public hearings that you held across the province. Our presenters represented the diversity of our membership and of the employees who wish to join our Union. They are listed below and the body of this submission features quotations from them at relevant sections.

- | | |
|------------------------------|--|
| June 16, 2015 – Toronto | Marty Warren USW District 6 Director
<i>Focus: Overview of USW positions</i> |
| June 18, 2015 – Ottawa | Kelly Orser, President USW Local 2010, representing administrative staff at Queen’s University
<i>Focus: Organizing rights for employees</i> |
| June 18, 2015 – Ottawa | Omar Ahmed Omar and David Meinzinger, USW Local 9796, representing security officers across Ontario
David Lipton, USW Staff Rep
<i>Focus: Successor rights in the contract services sector</i> |
| June 24, 2015 – Mississauga | Denis Nobes, employee of Munro Industries, Utopia, ON
<i>Focus: Organizing rights for employees</i> |
| June 25, 2015 – Guelph | Henri Bazinet, USW Local 9796
Representing security officers across Ontario
<i>Focus: Successor rights in the contract services sector</i> |
| July 8, 2015 – London | Bob Lapchuk, USW Local 9176, representing employees at Crown Holdings, Toronto
<i>Focus: Rights of workers in protracted labour disputes</i> |
| July 23, 2015 – Sudbury | Rick Bertrand, President Local 6500, representing Vale employees, Sudbury
<i>Focus: Rights of workers in protracted labour disputes</i> |
| July 23, 2015 – Sudbury | Pascal Boucher, USW Local 6500, representing Vale employees, Sudbury
<i>Focus: Organizing rights for employees</i> |
| September 18, 2015 – Toronto | Mark Rowlinson, USW National Office
<i>Focus: Summary of USW proposals</i> |

This thorough submission builds on these nine presentations. It reflects the hopes and needs of our members across Ontario. As you work toward your draft preliminary report to the Minister this fall, our Union will seek to meet with you to discuss in finer detail our proposals and any questions you may have.

The Union eagerly anticipates the August, 2016 target for your final report to Minister of Labour and for positive legislative action by the government soon after that.

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Who We Are

The United Steelworkers is an international trade union with over 220,000 members in Canada. Approximately 70,000 of these members work in Ontario.

Steelworkers are men and women of every social, cultural and ethnic background in every industry and job. From our roots in core industrial sectors such as mining and steel, the Steelworkers has grown into the most diverse union in Ontario, representing employees in all areas of manufacturing including electronics, auto parts, rubber, aluminum and glass, plastics, appliances and paints. In addition, the Steelworkers represent service employees in call-centers, retail stores, hotels, banks and nursing homes. Our Union is proud to represent thousands of security guards, truck drivers and university employees. And we remain Ontario's predominant union in the mining sector.

The Steelworkers is committed to ensuring that employees in Canada, whether members of our organization or not, are treated with dignity, respect and equality in Canadian workplaces and communities. We negotiate strong collective agreements with good wages to ensure that the economic lives of our members and their families are improved, and that they are treated with dignity and respect in their workplaces. We negotiate secure benefits and pensions to ensure that our members and their families are able to enjoy their retirement years.

We are committed to helping unrepresented employees join our union. Employees cannot effectively raise their standards of living without the right to join trade unions and bargain collectively. The effective enforcement of other key labour rights such as protecting workplace health and safety, workers' compensation, minimum standards, pay equity and the right to a workplace free from discrimination is often not possible without a trade union.

The USW is particularly responsive to the representation needs of vulnerable workers, including women, recent immigrants, employees with disabilities, and those who experience intolerable and unsafe working conditions and the arbitrary and unfair exercise of employer authority. Employees from coast to coast to coast have sought membership in our Union in large numbers over the last twenty years. As a result, we are acutely aware of the importance of every employee's right to join a trade union of their choice without fear of intimidation or coercion.

Changing Workplaces, Changing Times

On February 17, 2015, the Ontario government announced its review of Ontario's labour and employment legislation.

This review comes at an important moment for Ontario employees. As the government's Speech from the Throne almost a year ago noted: "Ontarians seek good jobs not as an end to themselves, but as a means by which we can achieve our goals and do more for ourselves and our families".

Today, too many Ontarians are working hard at jobs that are not helping them meet their goals. As this government has made clear, the world of work is changing. Steady, full-time jobs that provide good wages, benefits and a solid pension at retirement are increasingly rare. Instead, precarious employment is on the rise. This work is generally low-paid and offers minimal or no benefits or retirement income. More importantly, the work itself is tenuous: part-time and casual hours, or short-term contracts that may or may not be renewed year after year, abound.



"... the world of work is becoming disfigured by what everyone is now calling "precarious employment". This new world is not the result of some natural or unstoppable evolution. It is in large measure the result of deliberate policy choices by successive governments on labour and employment issues. Those policy choices have tilted the playing field in favour of employers by increasing their power in the workplace. The results have been bad for our province's economy and the quality of life of its people."

Marty Warren, United Steelworkers
 District 6 Director, June 16, 2015

This new world is not the result of some natural or unstoppable evolution. It is in large measure the result of intentional policy decisions by successive governments which have prioritized profits over people. For more than twenty-five years, the business community has been telling governments that lower corporate taxes, less government regulation, and weakened labour rights will result in job creation and economic prosperity; and governments have heeded that call, slashing corporate tax rates and deregulating the workplace in an effort to stimulate the economy and encourage job growth.

Under these policies, labour and employment legislation was amended. Minimum employment standards were lowered under the guise of increased workplace "flexibility" and the ability of employees to exercise their right to choose union membership was eroded. Structural changes in Ontario's economy coupled with global economic uncertainty compounded the effect of these policy choices. Fewer workers benefited from minimum employment standards protections, and well-paying jobs in industries like manufacturing and construction with higher unionization rates have been lost. Consequently, union density

in Ontario has fallen, from a rate of 33.7 percent in 1981 to a rate of 27 percent in 2014, the second lowest of any province in Canada.¹ Indeed, the private sector unionization rate in Ontario currently sits at 14.4 percent, a 37% drop in the density rate since the year 2000.²

1 See Diane Galarneau and Thao Sohn, *Long-term trends in unionization*; Statistics Canada, November 2013, Chart 2, p. 3; Sheila Block, *A Higher Standard: The case for holding low-wage employers in Ontario to a higher standard* Canadian Centre for Policy Alternatives, Table 1, p. 7
 2 Sheila Block, *supra*, note 1 at p. 17

The effect of these actions and events is now clear: income inequality in Ontario and the rest of Canada has soared. Unlike the period between 1945 and the early-1980's, which saw a narrowing of the gap between rich and poor in Canada, the period between 1991 and 2011 has been marked by a significant increase in income disparity. During that period, the richest 5% of Canadians accrued 35% of all income growth, while the bottom 50% of income earners received a meager 7%.³

While corporate leaders and shareholders are increasingly well rewarded with outsized compensation packages, stock dividends and buybacks, working women and men take home less. Besides less money in their pockets, Ontarians have less control over their working lives than ever before, as steady full-time jobs give way to precarious employment that leaves workers struggling and fearful.

Better policy choices can abate these sad trends.

Improving employment standards protection for employees will assist in ameliorating growing income inequality and the worst effects of the rise of precarious work in Ontario. But stronger regulatory protection, in and of itself, will not be enough. Facilitating the right of employees to join a trade union is critical to helping Ontarians do more for themselves and their families. Representation by democratic trade unions, independent of the influence and control of employers, with the resources to engage in meaningful collective bargaining, are directly associated with important public policy goals, including a reduced gender pay gap, greater access to retirement security, lower poverty rates, increased voter participation, and safer, more democratic workplaces.

Studies show that union members in Ontario have a significant wage advantage over their non-union counterparts: in 2014, union members in Ontario earned \$6.57 per hour more than workers without union representation.⁴ The union wage advantage for women is even greater, at close to \$8.00 per hour.⁵

Union members are also more likely than their non-union counterparts to have access to health and welfare benefits, including drug and dental plans, short-term and long-term disability benefits, and pension income upon retirement.

The benefits of a strong and vibrant trade union movement are not just felt by union members. Gains won by union members through innovative, responsive collective bargaining have a positive effect on the terms and conditions of employment of non-union employees in the same industry, as employers match union wages and working conditions in order to fill job vacancies.

Further, union-led campaigns for law reform have had a significant effect on the lives of employees across Canada. It was the trade union movement that led the struggle for an eight-hour work day, that championed our current health and safety regulatory system, and that pushed for paid parental leave. More recently, the USW has been instrumental in the passage of the Westray amendments to the *Criminal Code*, which impose significant penalties on employers whose criminal negligence results in the death or injury of their employees. The USW also successfully lobbied for the introduction of the federal *Wage Earner Protection Program Act*, which provides a fund from which employees left without paid

3 Hugh Mackenzie and Richard Shillington, *The Union Card: A Ticket Into Middle Class Stability*, Canadian Centre for Policy Alternatives, p. 5-6

4 Canadian Labour Congress, *The Union Advantage – Provincial and Territorial Breakdown*, <http://canadianlabour.ca/why-unions/provincial-and-territorial-breakdown/ontario>

5 *Ibid* at <http://canadianlabour.ca/why-unions/provincial-and-territorial-breakdown/ontario>

wages, vacation, termination or severance pay can draw if their employer becomes insolvent. These positive gains for employees would not have been possible without the collective action of workers through the trade union movement.

Finally, quite apart from improvements in specific terms and conditions of employment, access to meaningful collective bargaining enriches our democracy by enhancing worker self-determination. As the Supreme Court of Canada noted in its decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* [2007] S.C.J. No. 27:

The right to bargain collectively with an employer 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....As explained by P.C. Weiler in *Reconcilable Differences* (1980):

Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect the dignity of the work in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them... [p.33]

In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, we underlined the importance of protecting workers' autonomy:

Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life.

If the Ontario government is committed to addressing the issues facing today's employees in light of our changing workplaces, the path forward is clear: the government must enhance worker protections under employment standards legislation and facilitate the ability of employees to join trade unions. By redressing the imbalance of power inherent in the employment relationship through regulatory protection and meaningful access to effective collective bargaining, this government can help working women and men ensure a brighter future for themselves and their families.

To that end, the USW welcomes the opportunity to provide our recommendations on changes to the *Labour Relations Act, 1995* and the *Employment Standards Act, 2000*.

Labour Relations Act, 1995

RECOMMENDATION 1: Restore Card-Based Certification

In order to facilitate the right of employees to join unions if they so choose, and give employees an effective voice in their workplace, it is essential that the Ontario *Labour Relations Act, 1995* (the “OLRA” or the “Act”) be amended to restore card-based certification to the industrial sector.

Card-based certification was introduced into the Ontario *Labour Relations Act* in 1950. For forty-five years, including through the Conservative governments of Leslie Frost, John Robarts and Bill Davis, card-based certification was the means by which employees exercised their right to join a trade union and bargain collectively with their employer. In 1995, without consultation with the labour relations community, the Conservative government removed card-based certification from the Act, and replaced it with a system of U.S.-style mandatory votes.

The implementation of a mandatory representation vote process in Ontario has had serious consequences for labour relations in the province. Since its implementation in 1995, the number of employees in Ontario who have been able to exercise their right to join a trade union has plummeted.

In 1994-1995, prior to the implementation of a mandatory representation vote, the Ontario Labour Relations Board (the “OLRB” or the “Board”) received 1,077 new certification applications and granted 762 certificates covering 32,116 employees in Ontario.⁶

By the year 2001-2002, the number of new applications had dropped to 624. Of those 624 applications, 307 certificates were granted, for a total of 16,255 new members, a drop of 49% when compared to 1994-1995.⁷ A review of the Board’s Annual Reports for the past 14 years confirms a reduction of approximately 200 to 400 applications per year when compared to the pre-1995 card-based certification process, from a low of 592 applications in 2011-12 to a high of 799 applications in 2006-07.

The Union’s public polling data indicates that the drop in union organizing cannot be explained by a decrease in employee interest in joining unions. Recent polls conducted by the USW show that in 2015, nearly three in ten (28%) non-union employees who are eligible to join a union want one. When asked if they would join a union if they were guaranteed there would be no reprisal against them by their employer, that number jumped to 40%.⁸

Further, studies conducted by labour relations experts support the view that mandatory representation vote regimes are deeply undemocratic in their treatment of employees and provide greater opportunity for employer interference in employee free choice. In 1995, the federal government asked a commission chaired by Andrew Sims Q.C. to review possible amendments to the *Canada Labour Code*. The Sims Commission considered whether to move away from a card-based certification system and require mandatory representation votes. The Commission rejected such a change, and in doing so concluded:

6 Ron Lebi & Elizabeth Mitchell, *The Decline in Trade Union Certification in Ontario: The Case for Restoring Remedial Certification*, 10 *Canadian Labour and Employment Law Journal* 473 at p. 475

7 *Ibid*, at p. 476

8 Vector Poll, *The Vector Poll on Public Opinion in Canada*, United Steelworkers, July 2015, p. 39

We are not convinced that the statute should make representative votes mandatory. The card-based system has proven to be an effective way of gauging employee wishes and we are not persuaded that it is unsound or inherently unconvincing to employers. It requires a majority of all workers, not just those who vote. It reduced the opportunities for inappropriate employer interference with employees' choice.⁹

More recent empirical evidence supports the conclusion reached by the Sims Commission that employer interference with employee choice is more effective when governments remove the right of employees to join trade unions by means of card check and introduce mandatory representation votes instead. In a 2004 study reviewing twenty years of certification procedures in British Columbia, UBC researcher Chris Riddell found that not only did certification success rates decline by almost 20% following a move from card-based certification regimes to mandatory representation votes, but management opposition, as measured by unfair labour practices, was at least twice as effective in the voting regime as in the card-check regime.¹⁰

A similar conclusion was reached in an earlier study by former British Columbia Labour Relations Board Chair Stan Lanyon and his colleague Robert Edwards, who collected data that confirmed a link between abandonment of card-based certification and a rapid rise in the successful use of illegal tactics by employers against organizing employees. As a result, the authors concluded:

The use of representation votes as a condition of certification does not further democratic rights, but instead serves the interests of the employer who would wish to influence his employees' decision on the question of union representation.¹¹

Findings in research studies conducted in Ontario mirror the conclusions reached in other jurisdictions. In her study on Ontario's labour laws following the introduction of a mandatory vote system, York University Professor Sara Slinn found evidence that the legislative change to a mandatory vote system had a disproportionate impact on weaker and more vulnerable employees:

It is clear that the overall proportion of certification applications resulting in a certificate being issued is substantially lower in the Bill 7 period than in the Bill 40 period. It is also apparent that the characteristics of applicants seeking certification, and of those units granted union certification are significantly different....The apparent shift under the Bill 7 period towards larger bargaining units, and away from part-time units and the service sector, is a matter of concern to both policy-makers and unions. The majority of job growth in the private sector is in smaller workplaces and in the service sector. This shift therefore suggests that Bill 7 has had a disparately negative effect on relatively weaker employees, such that employees who may most

9 Andrew Sims, Rodrigue Blouin and Paula Knopf, *Seeking a Balance, Review of Part 1 of the Canada Labour Code*, 1995 Report for the Federal Minister of Labour, p. 62

10 Chris Riddell (2004) "Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998", *Industrial & Labor Relations Review*, Vol. 57, No. 4, article 1, p. 509

11 S. Lanyon & R. Edwards, "The Right to Organize: Labor Law and its Impact in British Columbia" in S. Hecker & M. Hallock, eds., *Labour in a Global Economy: Perspectives from the U.S. and Canada* (Eugene, OR: Labor Education and Research Center, University of Oregon, 1991)

benefit from unionization are less able to access union representation.¹²

[emphasis added]

Professor Slinn's findings continue to be borne out by the statistics. As Economist Shelia Block notes in her recent paper, *A Higher Standard*, precarious work is more prevalent in smaller workplaces. Further, statistics show sharply lower union density rates in smaller workplaces: union density in establishments with fewer than 20 employees stands at 6.7 percent in the private sector. The rate rises to 15 percent for private sector employers with 20-100 employees and to between 23.4 and 23.7 percent for establishments with 100 to 500 employees.¹³

The Union is well aware of the opposition in the employer community to the return of card-based certification. Employers and other supporters of the mandatory vote system advance the pretense that representation votes are democratic and equivalent to any other kind of election process, including political elections or referenda. Despite a superficial and simplistic similarity, there is no equivalency between a political election and a union representation vote. Union representation votes are unlike any other kind of "election" because of the inherent coercive power that employers hold over employees – the power to control employees' pay, hours and working conditions or even to deprive employees of their livelihood.

In an election when voters choose their Member of Provincial Parliament ("MPP"), they determine who will represent citizens within the context of a democratic system, and, indeed, which party will form the government. In a union representation vote, the issue is not which "party" will direct the enterprise, but instead whether employees will have democratic bargaining and representation rights *at all*. A successful union organizing campaign does not allow workers to choose a new workplace "government". A successful union campaign leaves the employer in the position of governance, with employees now simply securing legal guarantees of basic rights of "voice and vote".

The comparison between a political election and a union representation vote breaks down further still if one considers the actual circumstances in which a union representation campaign occurs.

In theory, employees are supposed to be allowed to engage in union-related communication in the workplace during non-work time, but, given the reality of most workplaces, this right is elusive at best and non-existent in most instances. The right of employees to communicate with each other about union membership is severely restricted by the inherent characteristics of most workplaces and by management directive and actions.

The actual environment and context in which employees consider union membership is far different from that which the Act seeks to establish. The Act provides a range of freedoms and rights that may be clear and self-evident to legal practitioners but which are all too often chimerical when workers attempt to put them into practice in the real world.

For example, as the Board's jurisprudence makes clear, absent extraordinary circumstances, employees cannot be prevented from taking part in discussions and other activities regarding unionization

¹² Sara Slinn, The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis 10 *Canadian Labour and Employment Law Journal* 399 at p. 428-429

¹³ Sheila Block, *supra*, note 1 at p. 21

that happen in the workplace before and after working hours, or during lunch periods or coffee/rest break times, even if they are paid for such lunch or break times.

But in most workplaces, employees know full well that 'in reality' they have no such right and that their union-related communication or activity in the workplace is not adequately protected. Employees know viscerally that most employers actively discourage such activity and will not in any way countenance union discussion in the workplace at any time.

On the other hand, employers and managers have easy and unrestricted access to employees while they are at work. Employers and managers maintain full control of the workplace. They know the number of employees in the workplace, and can easily speak with them in person or by means of electronic or other forms of communication which they control. As well, employers and managers have the home addresses and telephone numbers of employees, allowing easy contact with employees when they are not at work.

Employees and their chosen unions have no such lists and no equal capacity to communicate, either in or out of the workplace.

Union-related communication between employees in the workplace is most often hidden in furtive conversations where employees hope they are out of sight of managers or away from the increasing presence of electronic surveillance. Often, such communication is relegated to conversations in the local Tim Horton's as employees look over their shoulders to keep an eye out for supervisors, or the handing out of flyers on the edge of company parking lots.

And even if employees are able to start talking about unionizing and trying to build a support level that would get them a vote, in many instances they are faced with the important question *"40% of what? How do we know how many people actually work here?"*

Only employers know the actual number of employees that they employ. Employees and their chosen unions, especially in larger or dispersed workplaces, begin and often end campaigns with no firm knowledge about how many employees there actually are. This challenge is aggravated in workplaces with complex shift arrangements and by the increasing use of contractors and temporary or casual labour arrangements.

And if a vote eventually happens, it is most often held in the workplace, an environment fully controlled by the employer and to which the union is given only brief access solely in the voting area. Meanwhile, the employer remains free to campaign throughout the rest of the workplace at all times prior to and during the vote.

Contrast all of that with elections for political office.

Far from having to sign up 40% of the electors (as in union organizing campaigns), candidate eligibility in a political election is achieved with a nominal number of signatures from people in the riding.

Candidates operate from identical voters' lists with equal contact information and campaigns operate under common spending limits. Voters are under no fear that voting for a certain candidate or party might actually place them in danger of losing their employment. Balloting takes place on neutral ground and campaign activities are banned from the entire area.

And the winner actually takes office, whereas a successful union vote merely provides employees with the right to bargain.

In summary, there is just no basis for stating that Ontario's current vote-based system for achieving union representation is democratic. Indeed, the evidence suggests that mandatory representation votes are precisely the opposite: such a regime gives employers better and more effective opportunities to thwart employee wishes and affect the outcome of a certification application. The only procedure for the selection of a trade union that takes into account the fundamental realities of the employment relationship is a card-check certification regime in which the Board considers all membership evidents submitted on the application date, such as the one currently in place under the construction industry provisions of the OLRA.

Furthermore, as a tool of progressive public policy, card-check certification procedures promote healthy relationships between employers and employees by helping to avoid a pitched battle between management and workers during a certification campaign. In a representation vote, voting in favour of the union is often characterized by the employer as tantamount to a vote "against" the employer. Therefore, card-check certification procedures promote healthier labour relations in the workplace by avoiding the workplace polarization that often results from anti-worker campaigns encouraged by a vote-based system.

RECOMMENDATION 1.1: Amendments to Increase Fairness in the Certification Process

The best way to return fairness and balance to the OLRA and to facilitate the right of employees to make free decisions about union representation is to restore card-based certification to the industrial sector provisions of the Act. In addition, the USW recommends other amendments to the Act to improve the certification process and reduce the structural imbalances inherent in the current system. The USW recommends the following in addition to and independent of the restoration of card-check certification to the Act:

- (a) Amend the OLRA to require employers to provide unions with a list providing the name, home address, telephone numbers, and job title for each of an employer's employees.**



"It took us months and months to build a list of possible employees. How can that be fair? The current process ensures that the employer has all of the information while employees and the unions with which they are working have almost none... the rights of employees to organize need to be simplified and made more democratic. Too many barriers exist that make it difficult for us to exercise our rights under the law."

Kelly Orser, President, USW Local 2010
 (Queen's University administrative support staff and academic assistants),
 June 18, 2015

Under the current Act, a trade union and its supporters in the workforce do not receive a list of employees in the bargaining unit until after it has filed an application for certification with the Board. As a result, under the present system, union supporters and their union must expend considerable energy locating employees during an organizing campaign. Union supporters and the union they have chosen to campaign with, unlike employers, cannot effectively communicate with employees in the workplace. Unions and their supporters do not know all employees' home addresses, nor do they have access to an employee's home or cellular telephone number, or email address. Given the above, the ability of unions and their supporters to communicate with employees and campaign for their support is severely limited.

An employer, however, has no such restriction on its access to employees: management representatives have easy and almost unlimited access to employees while they are at work. As well, employers have personal contact information for employees, giving them the ability to contact employees even when they are not at work.

No other "democratic" vote process operates without basic voter information, and with such restrictions on one of the participants. In a political election, all parties have equal access to a voter's list, complete with names and addresses, well before a vote takes place.

An employer's privileged access to its employees creates unfairness in the certification process, and taints what is supposed to be a "democratic" exercise of employee wishes.

In addition to the imbalance in communication and access inherent in the vote process, unions and their supporters in the workplace do not have firm information as to the number of employees that might be in the possible bargaining unit.

To remedy these imbalances in the current system, the Union proposes that the Act be amended to permit a union to apply to the Board in the early stages of an organizing campaign to obtain a list of employees in the workplace and their contact information. We propose that such an application be disposed of quickly and without a hearing, similar to the way in which a representation vote is ordered in the present system.

Under our proposed amendment, a union would file its application for information with the Board and serve it on the employer. The employer would then have two days to respond to the application. If the union can adduce evidence, in the form of signed applications for membership demonstrating the support of at least 20% of the employees in a unit that could be appropriate for collective bargaining, the Board would require the employer to produce a list of employees that would include each employee's full name, job classification, position title, home address and telephone number (home and cellular) and, if in the employer's possession, their email address. The USW notes that there is precedent for the disclosure of employee contact information in union certification proceedings: the National Labour Relations Board (the "NLRB") in the United States has recently redesigned its procedures in certification cases. As part of that redesign, in addition to the longstanding provision of employee addresses, the NLRB now requires employers to provide available personal email addresses and phone numbers for all employees in a union's proposed bargaining unit in order to permit unions to communicate with prospective voters about the representation vote.

In addition, we propose that the employer be required to maintain the accuracy of the list. Many of today's workplaces are characterized by extremely high employee turnover. Furthermore, we have experience with employers who have hired significant numbers of employees during union campaigns for the purpose of "flooding" the voter's list and defeating the union's organizing campaign.

As a result, under our proposed amendment, the employer would have an ongoing obligation to update the list if there are any changes to it on a bi-weekly basis for a period of two months or until an application for certification is filed, whichever is sooner.

(b) Amend the OLRA to provide the Board with greater discretion to make interim orders

Prior to 1995, the Board had the discretion under the OLRA to make a wide variety of substantive and procedural interim orders, including the power to reinstate a key inside organizer discharged during the period of an union organizing campaign pending the hearing of a union's unfair labour practice complaint. With the election of the Conservative government in 1995, the right of the Board to make substantive interim orders was removed entirely. This continued until 2005 when the Act was amended and the Board was once again given some discretion to make substantive interim



“But when it comes to exercising what is the legal right in Ontario to choose union membership, even rough, tough mining workers are often reluctant to step into the spotlight. Mining workers know that the mining companies do not want their employees to have union membership. And they know that they are taking a real risk if they decide to try to lead a union campaign.”

Pascal Boucher, USW Local 6500
 (Vale, Sudbury) July 23, 2015

orders in the case of discharged union organizers under section 98 of the OLRA, although in a highly circumscribed manner.

The USW submits that the Act should be amended to return the right of the Board to make substantive interim orders in accordance with the broad language set out in the pre-1995 Act.

The USW notes that pursuant to section 16.1 of the *Statutory Powers Procedures Act* R.S.O. 1990, c. 22 (the "SPPA") the vast majority of administrative tribunals established by statute in the province have an unfettered right to make interim decisions and orders in order to ensure they are able to appropriately fulfill their statutory mandate. The notable exception to the application of the SPPA is the OLRB, which, as set out above, has only a restricted right to issue substantive interim orders.

The USW submits that, as a matter of principle, the OLRB's right to make interim decisions and orders must be restored. Interim powers are an important part of the Board's remedial "tool kit". The termination or other punishment of a key inside union organizer has a devastating effect on the organizing efforts of employees. It significantly and negatively affects the ability of union supporters in the workplace to maintain support for winning bargaining rights. The remaining union supporters have often lost a visible and vocal link to the union. As a result, they will be reluctant to connect further with the union and participate meaningfully in its lawful activities. Furthermore, the termination of a key inside organizer means a union has lost a vital link with the workforce through their inside contacts and supporters. The union's ability to secure the trust of other employees is therefore fundamentally harmed.

Where inside contacts and supporters are punished or terminated, employees who wish to support the union and participate in its lawful activities will not do so because they feel vulnerable to punishment or termination themselves, in view of the employer's demonstration that it is prepared to use its economic power to penalize employees who seek to exercise their rights under the Act.

As a result, unless the Board can take swift remedial action when an employer commits what is arguably an unfair labour practice, employees will remain intimidated and fearful of their employer, and thus, will be unwilling to continue to participate in their union's organizing campaign.

It is therefore essential that the Board have a broad discretion to provide interim relief, including the reinstatement of a key inside organizer terminated during a union organizing campaign. As a result, the Act should be amended to provide the Board with a broad and unfettered substantive interim relief power.

(c) Repeal section 8.1 of the OLRA

In 1998, the Conservative government amended the Act to include section 8.1. The section essentially provides a mechanism by which employers can challenge a union's entitlement to a vote, regardless of the results in the ballot box or the actual wishes of employees.

Section 8.1 allows an employer to indicate in its response to a union's application for certification that it disagrees with the union's estimate of the number of employees in its proposed bargaining unit. When the employer gives such notice, the Board must order the ballot box sealed unless the employer

and the union agree otherwise. Once the Board has received the notice, the Board is required to determine whether the union's proposed bargaining unit could be appropriate, the number of individuals in that bargaining unit, and whether more than 40 percent of the individuals in that appropriate unit were members of the union on the date of the filing of the application for certification.

If it is not clear that the union has the requisite 40 percent support on the face of the application and response, the Board will hear the evidence and submissions of the parties on the section 8.1 issue following the holding of a representation vote. The ballot box will be sealed at the vote if the employer requests it. If the union is found not to have filed its application with the support of 40 percent of the employees in the bargaining unit, the union's application will be dismissed, regardless of the outcome of the representation vote.

In our view, section 8.1. is anti-democratic: the section can result in the dismissal of an application for certification even where a majority of employees have expressed a wish to be represented by a trade union.

This is not merely an abstract problem: in *Renaissance Fallsview Hotel* [1999] O.L.R.B. Rep. December 1086, employees voted 92-59 to have the applicant union represent them in their relations with their employer. However, the Board was required to dismiss the application on the basis that the union had not applied for certification with the support of 40 percent of the employees in the proposed bargaining unit, despite the results of the vote. In other words, even though a union has no access to information on the number of employees in its proposed bargaining unit during its organizing campaign, the legislation requires that a union be correct in its estimate of the number of employees in the bargaining unit, or face the dismissal of its application for certification. In the Union's submission, this is strong evidence of the way in which the current Act operates to frustrate organizing attempts by unions, and provides further means by which employers can defeat the wishes of their employees to unionize.

(d) Introduce e-votes and off-site voting in certification applications, and the use of electronic union membership cards

The USW proposes that this government amend the Act to require the Board to hold representation votes off-site, or by means of telephone or electronic voting, at the request of a trade union.

Electronic voting, in particular, has a number of merits. First, because electronic votes require only access to a telephone or the internet, they allow the Board to conduct votes amongst employees who work complex shift schedules, in remote areas or multiple work locations, or from home or locations outside of an employer's office quickly, and in a manner that gives all employees an opportunity to vote.

Second, removing a representation vote from the workplace reduces employer scrutiny and surveillance of employees at the vote. This increases employee comfort with the secrecy of a Board-ordered representation vote, and makes it more likely the vote will better reflect the true wishes of employees in the bargaining unit.¹⁴

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 14 On this point, see the testimony of Professor Sara Slinn before the Standing Senate Committee on Legal and Constitutional Affairs, December 10-12, 2014 at 24:89.

Thirdly, when votes are held in the workplace, the union is granted access only to the room containing the poll area during the voting period, while the employer remains free to campaign throughout the rest of the workplace at all times prior to and during the vote. In contrast, elections for political office in Canada (cited by proponents of mandatory representation votes in support of their position) take place either on neutral ground or, increasingly, via electronic means, and campaign activities are banned from neutral voting areas.

Further, in light of the common use of modern methods of communication, like email, it should be relatively easy to ensure employees receive their PIN number in electronic votes within a very short period of time in keeping with the importance of holding a representation vote within five business days.

In short, e-votes provide a relatively quick means of testing the wishes of employees while enhancing ballot confidentiality. The USW notes that the Canada Industrial Relations Board has been conducting electronic votes in many of its applications where a vote is required to determine employee wishes in the last few years. The USW's experience with such votes is that they are an efficient and effective means of testing employee wishes in a certification application.

The USW would also support an amendment to the Act that would permit acceptance of electronic union membership evidence in support of certification applications. Given modern technology, employees are subjected to increasing levels of surveillance by employers in the workplace. The use of electronic cards would allow employees to sign union membership cards away from the workplace if that is their preference. This would give comfort to employees concerned about disclosing their union support, and reduce opportunities for an employer to learn the identity of union organizers and supporters and engage in illegal intimidation or coercion. Ontarians can already carry out many important and personal matters on-line, from renewing drivers' licenses and license plate stickers to registering their consent to donate organs and tissue. Allowing for electronic union membership evidence in support of applications for certification is logical and can enhance the ability of employees to access the freedoms guaranteed in the OLRA.

(e) Remove the Board's obligation to consider a union's support in the bargaining unit when determining whether to grant remedial certification

Prior to 1998, the Board had the authority to certify a union even where the union lacked the requisite level of support for certification, or where the union had lost a representation vote, in circumstances where the employer had engaged in misconduct such that the true wishes of employees could not be ascertained. In addition, with the exception of the period 1993-2005, in order to obtain remedial certification a union was required to demonstrate that it had sufficient membership support adequate to maintain collective bargaining with an employer.

The 1998 amendments removed the Board's right to certify a union as a remedy to employer misconduct. Instead, the Board was restricted to ordering a new representation vote where an employer engaged in misconduct during an organizing campaign, and to "do anything" to ensure that the new vote reflected the true wishes of employees.

In 2005, the Liberal government restored the Board's remedial certification power. However, in doing so, the government substantially changed the pre-1995 provisions to provide that the Board must consider the results of a previous representation vote and whether a trade union appeared to have membership support adequate for the purposes of collective bargaining when determining an application for remedial certification (see section 11(4)). The present section 11 of the Act also mandates that the Board should only issue remedial certification "if no other remedy would be sufficient to counter the effects of the contravention (see section 11(2)(c)).

The USW submits that section 11(2)(c) should be amended to the pre-1995 language which gave to the Board the authority to issue remedial certification once the true wishes of employees could no longer be ascertained as a result of employer misconduct. This is a simpler and more logical test than the test found in the current Act. Further, the USW submits that section 11(4) should be removed from the Act. The results of a previous representation vote and the union's level of membership support should not be relevant considerations in the exercise of the Board's discretion under section 11. Those kinds of considerations function as an incentive for employers to take steps early in a union's organizing campaign to rid itself of union supporters.

(f) Re-introduce a day-to-day hearing model in certification applications

Prior to 1995, the Board scheduled applications for certification to be heard quickly, and more importantly, the hearings were scheduled to continue on a day to day basis, for four days per week, until they were concluded.

However, since 1995, the scheduling of certification applications has changed. While the Board commences the hearing of these applications quickly, the Board now only schedules an initial two days of hearing in the fourth week following the filing of an application for certification. If the matter cannot be heard within those two scheduled dates, further hearing dates must be found. These further dates are usually scheduled many months later. As a result, applications for certification can take upwards of six months to a year to litigate.

It is simply not possible for a union to maintain employee support if the litigation in an application takes many months. During that period of time, employees are continually exposed to the employer's opposition to the union in the workplace. Union support erodes, no matter how strong the desire of the employees for union representation might have been.

Once representation is determined through a vote or otherwise, employees want to know the outcome. If, in fact, a majority of employees support the union, those employees want to bargain a first collective agreement, and see the tangible benefits of union representation. However, until the certification hearing is determined, the union cannot serve legal notice to bargain and cannot negotiate a collective agreement. Indeed, the union can do very little to demonstrate the benefits of union membership given that the union has not been certified as the bargaining agent. This alone may cause union support to diminish, even in the absence of a continued employer campaign.

It is imperative, therefore, that certification hearings be heard as quickly as possible on a day to day basis.

(g) Amend the OLRA to remove the mandatory bar on successive certification applications by any union after an unsuccessful certification drive

Prior to the 1998 amendments to the OLRA introduced by the Conservative government, when employee wishes were tested in an application for certification and the application was dismissed because the union did not have majority support, the union was barred from filing another certification application for one year.

In 1998, section 10(3) of the OLRA was amended to bar all unions from filing an application for certification for a like unit following an unsuccessful certification application. The effect of the bar is, in essence, to disenfranchise employees for a period of a year.

We submit that such an outcome unnecessarily penalizes employees who voted not to have a particular union represent them in their relations with their employer. Employees should have the democratic right to reject one union and choose another. As a result, we propose that the bar in section 10(3) of the Act be amended to its pre-1998 status. That is, only the applicant union should be barred from re-applying within one year of an unsuccessful certification application.

(h) Amend the OLRA to introduce “just cause” protection for bargaining unit employees where a union has been certified as the bargaining agent until a first contract is reached or the parties are in a lawful strike/lockout position

From 1993-1995 under the Act, following certification by the Board, employees in a bargaining unit had the right to just cause protection until a first collective agreement was negotiated. During that period, if an employee was terminated without just cause, the union could file an application to the OLRB requesting the employee’s reinstatement.

Virtually every collective agreement contains a just cause provision. Access to that right should occur immediately upon certification. Employees should have the right to just cause protection without regard to how long it takes the parties to negotiate a collective agreement. The employer should have no incentive to delay reaching a collective agreement and rid itself of union activists.

A form of such protection exists under the *Canada Labour Code* for all employees.

We submit that it is essential that employees be given just cause protection as soon as they have chosen to be represented by a union. Such a provision contributes to labour relations stability during this crucial period, an important public policy goal. It also gives the union the opportunity to demonstrate the benefits of unionization to new members.

(i) Amend the OLRA to provide for first contract arbitration without pre-conditions

In order to overcome roadblocks to the establishment of a first collective agreement and stable labour relations, the Board should be given power to settle the terms of a first contract upon the application of either party. Such a provision existed in the Act from 1993-1995.

It has long been the strategy of anti-union employers in Ontario to attempt to defeat the wishes of their employees by resisting any reasonable first collective agreement. Employers know that the

longer they can delay first contract negotiations, the more they can weaken the resolve of employees who have chosen to join the union.

During the period that the Act provided parties with automatic access to first contract arbitration in Ontario, the vast majority of first contracts were nevertheless settled through negotiation. However, for those employers that tried to use first contract negotiations as a means to defeat the union, automatic access to arbitration was an invaluable tool to ensure that employees who had chosen to unionize were able to obtain the benefits of a first collective agreement.

If the government is not prepared to include automatic access to first contract arbitration in the Act, there should at least be access to arbitration where a union is certified by the Board pursuant to the Act's remedial certification provision. In that situation, the union must negotiate a collective agreement in an environment in which the Board has already found that it is impossible to determine employees' wishes. Employees have been intimidated and the employer has demonstrated it is prepared to break the law in order to prevent employees from exercising their statutory rights. In such circumstances, first contract arbitration is essential.

(j) Amend the Act to provide for increased monetary penalties for unfair labour practice violations during an organizing campaign

The USW proposes that specific penalties be imposed on employers where the OLRB concludes that an employee has been terminated during an organizing campaign in violation of the Act. At present, the Board typically requires that employers found to have breached the Act by terminating an employee for engaging in union activities reinstate the employee to employment and compensate the employee for her or his lost wages and benefits. However, the employer is not punished for violating the Act, despite the fact the employee is likely to have suffered for a protracted period without income, and the attendant consequences, including damage to the employee's credit rating and other financial interests, such as mortgages, leases, car payments, etc.

As a result, the USW proposes that, in cases where an employer is found to have unlawfully terminated an employee during an organizing campaign, the Board should have the power to order a specific penalty amounting to triple the wages and benefits lost by the employee. Such a penalty would serve as a clear disincentive to employers who are contemplating action against union supporters in their workplace. Further, it would provide assurances to employees who seek to exercise their rights that the Board will protect them from unlawful employer interference.

RECOMMENDATION 2: Amend the Act to Introduce a Ban on Replacement Workers

Replacement workers are strangers to the bargaining relationship. They are not part of the union's bargaining unit. They do not participate in collective bargaining. They do not vote in a strike vote. As such, the mere introduction of replacement workers in a unionized workplace in and of itself upsets the balance of power that the parties establish and measure at the outset of a strike. In addition, the introduction of replacement workers creates a variety of quantifiable negative outcomes. These outcomes include greater picket line violence and longer strikes.¹⁵



"Today, with our plant controlled by a huge corporation based in the US, with over 140 plants worldwide, there is a huge imbalance of power at the bargaining table when the company wants to pillage the collective agreement. This is not the Ontario that we started in as working people. The conclusion is staring us all in the face: Ontario's laws fail to take into account the power imbalance between massive, mobile, international capital and Ontario's working people."

Bob Lapchuk, member of USW Local 9176
 (Crown Holdings, Toronto), July 8, 2015

The outcomes described above accurately reflect our Union's experience with replacement workers. When replacement workers are introduced into a strike, they come into direct contact with picketers and other union members who continue to support the strike. In our experience, this contact is provocative and disruptive. It is often relied upon by employers to demoralize the union's membership. In these circumstances, it is hardly surprising that the presence of replacement workers can escalate the number of picket line incidents and result in violence on the line. The escalation of picket line incidents and violence undermines the rule of law.

It is also our view that strikes in which replacement workers are used last longer than they would if replacement workers were not used. The Union's recent experience with its Crown Packaging bargaining unit in Weston, Ontario is a ready example of the effect that replacement workers can have on the duration of a strike. The most significant issue dividing the parties in the last 11 months of that two-year dispute was the return to work of striking employees. Crown's intransigence on returning striking employees to employment was only possible because Crown had exercised its right to use replacement workers during the course of the strike. The use of replacement workers both upset the balance of economic power

between the Union and Crown, and, more importantly, complicated the issue of striking employees' return to work, thus prolonging the strike.

A long strike can have a widespread effect. It can not only be economically devastating to the strikers themselves, but also to the community and its businesses, as the strikers' ability to purchase goods and services is significantly diminished. It is in the public interest to support fair legislation that permits the quickest and most effective resolution to bargaining disputes.

The use of replacement workers unfairly distorts the economic power balance in a strike situation, and it weighs heavily against any union that chooses to exercise its right to strike. There is no legitimate

¹⁵ Replacement of Striking Workers during Work Stoppages in 1991, April 1992, Industrial Relations Division – Office of Collective Bargaining Information, Toronto; P. Crampton, M. Gunderson and J. Tracy, The Effect of Collective Bargaining Legislation on Strikes and Wages, University of Maryland, June 9, 1994.

basis for permitting the employer to use replacement workers in the context of a system of labour relations which recognizes that the relationship must be determined by the parties to the agreement and not threatened, undermined, or even destroyed, by individuals who are strangers to the bargaining relationship.

The Act represents the legislature's attempts to carefully balance the rights of unions and employers throughout their relationship. The use of replacement workers upsets the balance which is otherwise sought to be achieved by the extensive and detailed code of conduct that is regulated through our labour laws. Accordingly, the Act should unambiguously and without qualification ban the use of replacement workers during strikes.

RECOMMENDATION 3: Amend the Act to Ensure Striking Employees Can Return to Work at the Conclusion of a Strike



“And for long disputes like ours, it is high time

for Ontario to get rid of the Labour Relations Act’s 6 month limit on the right to reinstatement of striking workers. This is an outdated, old-fashioned and regressive choking-off of our legal rights. (It)...serves no purpose but to provide a cover for employers that simply want to punish striking employees, to try to make an example of us, to frighten working people with a raw exercise of power. The members of our Local Union and others that in the future choose to exercise the legal right to strike do not deserve to be treated by companies as inconveniences to be tossed aside just because the law allows it.”

Bob Lapchuk, member of USW Local 9176 (Crown Holdings, Toronto), July 8, 2015

Section 80 of the Act provides protection for employees who engage in lawful strike activity during the first six months of a strike. Section 80 provides as follows:

Reinstatement of employee

80. (1) Where an employee engaging in a lawful strike makes an unconditional application in writing to the employee’s employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection (2), 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 shall not discriminate against the employee for exercising or have exercised any rights under this Act.

Exceptions

(2) An employer is not required to reinstate an employee who has made an application to return to work in accordance with subsection (1),

(a) where the employer no longer has persons engaged in performing work of the same or similar nature to work which the employee performed prior to the employee’s cessation of work; or

(b) where there has been a suspension or discontinuance for cause of an employer’s operations, or any part thereof, but, if the employer resumes such operations, the employer shall first reinstate those employees who have made an application under subsection (1). 1995, c. 1, Sched. A, s. 80.

Section 80 as it currently reads has been included in the Act since at least 1974, with the exception of the years 1993-1995, when the Act guaranteed employees the right to reinstatement at the conclusion of a strike or lockout. The purpose of section 80 is to provide protection for employees by safeguarding their right to return to work during the first six months of a strike. That is, the section was intended to protect employees. However, in the Crown strike, mentioned above, section 80 was used by the employer as an excuse not to return employees back to work because the strike had lasted in excess of six months.

The Union takes the position that section 80 does not permit employers to refuse to allow striking employees to return to work. However, employers are now using section 80 to achieve a purpose for which it was never intended: to further tip the balance of power in collective bargaining in their favour. Combined with the use of replacement workers, employers have been able to successfully utilize section 80

to unfairly enhance their bargaining power once the six month mark of a dispute is reached. Employers have effectively argued that employees have no right to return to work at the conclusion of a strike which lasts for more than six months, absent an agreement with an employer to do so, or a finding by the Board that an employer has acted unlawfully in refusing to return employees to work. As a result, in the absence of a successful unfair labour practice complaint, unions are forced to expend their bargaining power in an attempt to negotiate their members back to work. This coerces unions and their members to concede on issues that they might not otherwise have given up had employees been guaranteed the right to return to work at the conclusion of the strike.

The Union submits that the failure to protect the right of striking employees to return to work at the conclusion of a strike, whenever that may occur, is inconsistent with sound labour relations policy and values arising out of the Canadian *Charter of Rights and Freedoms* (the “Charter”). Section 5 of the Act guarantees the right of every person to join a trade union of the person’s own choice, and to participate in its lawful activities. Section 1(2) of the Act provides that for the purposes of the Act, no person shall cease to be deemed to be an employee because the person ceases working for an employer because of a strike or lock-out. These provisions are designed to safeguard the right of employees to engage in lawful strike activity and to ensure the protection of their employment relationship with an employer even during the course of a strike or lockout.

Further, the importance of that protection is supported by the recent decision of the Supreme Court of Canada in *Saskatchewan Federation of Labour v. Saskatchewan* [2015] S.C.J. No 4, in which the Court found that the freedom of association guarantee under section 2(d) of the Charter includes protection for the right to strike.

The Union submits that without an unfettered right to return to work at the conclusion of a strike, and in the absence of a ban on replacement workers, language in the Act designed to protect lawful strike activity is rendered illusory. The Act should be amended to protect the right of employees to return to work without restriction following a lawful strike.

It is important to note that Ontario’s protection for striking employees lags behind that of many other provinces in Canada. At the present time, five provinces (Alberta, Saskatchewan, Manitoba, Quebec, Prince Edward Island), and the federal jurisdiction protect the right of employees to return to work at the conclusion of a strike. Given that both British Columbia and Quebec ban the use of replacement workers, Ontario has fallen behind in ensuring meaningful protections for those engaging in lawful strike activity.

RECOMMENDATION 4: Amend the Act to Provide Access to Interest Arbitration as of Right Where a Strike or Lockout has Lasted Longer than 90 Days



“As working people who are on the sharp end of what everyone knows is one of Ontario’s longest disputes, we know in our bones that an arbitrated settlement would have meant that we would have been back in our plant, making cans and doing it very well. There would have been a contract that likely would not have been to our liking or to the company’s but it would have been accepted by both sides and our province would have been a better and fairer place.”

Bob Lapchuk, member of USW Local 9176
 (Crown Holdings, Toronto), July 8, 2015

Another method of ensuring that strikes and lockouts are not unnecessarily prolonged is to provide the parties with the opportunity to access interest arbitration where a strike or lockout has lasted beyond a certain time period.

Under the current Act, the Board has no power to require parties to resolve their differences in bargaining by way of interest arbitration, except in first contract situations (section 43) where certain conditions are satisfied, or, in theory, as a remedy to an unfair labour practice complaint under section 96 of the Act. Otherwise, parties must mutually agree (section 40) if they wish to settle a collective agreement by means of interest arbitration.

This is not the case, however, across the country. In particular, section 87.1 of the Manitoba *Labour Relations Act* specifically allows either party engaged in a strike or lockout to apply to the Manitoba Labour Relations Board to settle the provisions of a collective agreement where at least sixty (60) days have elapsed since the strike or lockout commenced, and where the parties have worked with a conciliation officer for at least thirty (30) days during that period without success.

We propose a similar provision be included in the OLRA.

Lengthy strikes and lockouts that last many months or years have a negative effect, not just on the immediate parties to that strike or lockout, but also on the surrounding community. And the effect of a long strike or lockout on employees can be devastating. In order to weather a strike that runs many months or years, employees may be required to expend savings or cash-in their retirement savings plans. They may be required to remortgage their houses, or may indeed lose their homes because they are unable to continue mortgage payments. Depending on an employee’s age at the commencement of the strike, she or he may never financially recover from the economic impact of the strike, causing severe hardship not just for the employee him or herself, but for his or her family members as well.

Our Union knows first-hand the ruinous effect of lengthy strikes on employees and their families. Our members’ strikes against Vale in Sudbury and Crown Packaging in Weston are two recent examples of strikes that carried for more than a year – in the case of Crown for close to two years. While the financial impact of those strikes on our members was devastating, the large, multi-national corporations against which our members sought a fair collective agreement were able to weather the strike with far less impact: in part because they engaged replacement workers to do the work of our members on strike, and, in part, because multi-national corporations like Vale and Crown Packaging are so large that the loss of business at one location has little effect on their operations as a whole.

The negative effects of a long strike or lockout can be felt well past the end of the strike or lockout itself. Lengthy strikes or lockouts do serious harm to labour relations between the parties, creating a toxic work environment that take years to repair. One year following the end of the Vale strike, relations between management and the local union executive continued (and continue to this day) to be difficult. At that one-year mark, the parties had well over 400 outstanding grievances.

The introduction of a provision that would permit either party to apply to have a collective agreement resolved by interest arbitration in situations where a strike or lockout has lasted a considerable period of time would avoid the destabilizing effect such action has on labour relations between the parties.

Further, we know from statistics arising out of the Manitoba experience that such a provision is used infrequently, and only when absolutely necessary: from the period 2001-2012, only five applications were filed under section 87.1 of the Manitoba Act. Of those five applications, two were withdrawn before a hearing was held, and three were granted. Indeed, the inclusion of a provision which permits either party after a certain time to apply for interest arbitration may result in the parties reaching a collective agreement sooner than they might otherwise in order to ensure control over the terms of the agreement.

As a result, the Union submits that the Act should be amended to provide access to interest arbitration by either party to settle the terms of a collective agreement where a strike or lockout has lasted at least 90 days, using the legislation currently in place in Manitoba as a guide.



“From our perspective here in Sudbury, as hard-working people who were in one of our province’s longest labour disputes, we think that an arbitrated settlement could well have meant a better end to that strike for our community, for our members and even for Vale...Giving workers, through their union (and employers) this access to arbitration can make our province a better, fairer and more economically inclusive and successful place.”

Rick Bertrand, President, USW Local 6500
 (Vale, Sudbury) July 23, 2015

RECOMMENDATION 5: Amend the Act to Provide for Successor Rights in the Contract Service Sector



“The security industry... is plagued by low wage competition. Providing successorship rights to these vulnerable workers would help these businesses to compete more on the quality of their service, rather than by paying poverty wages and stripping away employment benefits and job security provisions such as seniority.”

Omar Ahmed Omar, member of USW
 Local 9597 (Security officers),
 June 18, 2015

The USW represents a large number of employees in the contract services sector. At present, our union represents approximately 6,000 agency-based security guards across the province. These guards provide security services on the properties and in the workplaces of third parties.

The rise of contract employment is one of the reasons the government has initiated this review of labour legislation in the province. In the last fourteen years, employment in the business services sector (which include temporary agencies, cleaning, security and food services) in Ontario has grown by 39%, from 240,000 in 2000, to 334,700 in 2014.¹⁶ These workplaces are marked by a high level of part-time and casual employment, and low wages.¹⁷

Under a previous version of the Act, unionized contract employees in the food services, cleaning and security contract sectors had their collective agreement rights protected in the event that a contract changed hands. In 1995, the contract successorship provisions were removed from the Act. The remaining succes-

sorship provisions, which provide for the continuation of a collective agreement only in circumstances where a union can prove a “sale of business” has taken place, leaves unionized contract employees without recourse. As a result, under the current version of the OLRA, contract employees who have union representation often lose both their collective agreement and their bargaining rights if their employer loses the service contract covering their worksite.

Hence, over time, it is simply not possible for employees in the contract service sector to maintain their chosen union and their collective agreements. Client employers take advantage of the omission from the Act, and will often choose non-union contractors when contracts come up for renewal. This means employees who have chosen to be represented by a union are quickly stripped of their rights when the contract is re-tendered, and must attempt to re-organize and negotiate a new agreement with the new contract provider.

In order to address this problem, the USW submits that section 64.2 of the pre-1995 OLRA, which extended the successorship provisions of the Act to situations where a contract was transferred by virtue of a change of contract service provider, should be reinstated. Further, we propose that the language in section 64.2 be broadened to provide that the section may be applied not just to specific building services like cleaning, security and food services, but to any contractual arrangement where employees perform services at premises that are their principal place of work; the employer ceases, in

¹⁶ Sheila Block, *supra*, note 1 at p.7-8

¹⁷ *Ibid*, p. 7-8

whole or in part, to provide the services at those premises; and substantially similar services are subsequently provided at the premises under the direction of another employer.

If we are to respect the choice of employees to be represented by a union, then we cannot allow employees to lose their union merely because a third party has decided to change contractors. Otherwise, employees in the already large, and growing, contract service sector (a sector where, as noted above, non-union employees are typically paid at or near minimum wage) will continue to have difficulty retaining union representation and improving their working lives.



“It is high time for working people in my sector – the security industry – to have the same rights as other employees in Ontario. Already low-paid workers in Ontario are losing their rights overnight through the flipping of contracts between wealthy corporations. It is just not right and we look to you to recommend to the Ontario government that it is time to put a stop to this race to the bottom. We deserve to keep our union and our collective agreement once we have chosen them.”

Henri Bazinet, member, USW Local 9597
(Security officers)

RECOMMENDATION 6: Amend the Act to Broaden the Definition of a Related Employer

Under the current Act, two or more corporate entities can be found to be “related” employers, and may be treated as such for the purposes of the OLRA, where they are carrying out related or associated activities under common control or direction.

Traditionally, the Board has required evidence of direct control by employers over employees’ working conditions under this section of the Act before it has been prepared to find the common control and direction requirement of the section has been met. As a result, relationships between a parent company and its subsidiary, franchisor and franchisee, and owner and subcontractor have fallen outside of the purview of section 1(4) unless the parent, franchisor or owner retains fundamental control over the employment relationship.¹⁸ Put another way, the current related employer provisions are not sufficient to ensure that unions can negotiate with employers who assert a degree of control over both the ostensible employer and over employees of that ostensible employer, or who exercise significant influence over terms and conditions of employment. Moreover, these employers have been able to avoid liability under the Act, or a collective agreement, by structuring their relationship so they are formally “at arm’s length” from the other entity but where the economic realities are that both jointly are responsible for the conditions under which employees work. The result is that collective bargaining is often rendered illusory because control over costs, like labour costs, rests with one corporate entity, and day-to-day supervision and control of employees with another.

As a result, the Union submits that section 1(4) of the Act should be amended to explicitly provide that two or more employers may be found to be related even where one company exercises only indirect control over the working conditions of a group of employees. This would allow unions to obtain a related employer declaration in situations where an employer has devolved day-to-day control and supervision over employees to another employer, but where the first employer maintains indirect control over employee working conditions such that a union cannot bargain effectively without that employer’s participation at the table.¹⁹

18 See, for example, *Metro Waste Paper Recovery Inc.* [2009] O.L.R.B. Rep. Nov/Dec 911.

19 The Union notes that a recent decision of the National Labour Relations Board provides guidance in this respect. See *Browning-Ferris Industries of California Inc. and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters* (2015) 362 N.L.R.B. No. 186

**RECOMMENDATION 7:
 Amend the Act to Broaden Sectoral or Regional-Based Bargaining and Permit the
 Combining of Bargaining Units**

The rise of precarious work requires this government to think creatively about how to facilitate trade unionism for employees dealing with modern methods of work not contemplated by governments at the time of the introduction of the Wagner Act, the New Deal, and P.C. 1003, the foundation of our current model of labour relations.

That model rests, in large part, on the presumption that bargaining will take place between a union and employer within an individual workplace. In the industrial sector, the central determination in any application for certification before the OLRB is that of the “appropriate bargaining unit”, which, subject to certain exceptions, usually constitutes a single workplace within a single municipality. As such, the model presupposes a stable, full-time, steady, fairly large workforce and a local or national employer.

While such workplaces continue to exist, as this review recognizes, they are no longer the norm. As noted previously, over the last 15 years, there has been a sharp increase in employment in Ontario in trade (retail and wholesale), business services (which include temporary agencies, cleaning and security services) and accommodation and food service. Indeed, in the last 15 years, these sectors of our economy outpaced overall Ontario employment growth.²⁰

However, employees in these sectors have notoriously difficult barriers in their path to organize. Structural impediments to their organizing are numerous: workplaces tend to be small, low skilled and low paid. In addition, they have a higher proportion of part-time employment, and the nature of the employment is itself less stable due to the high proportion of contract work subject to tender. Given the precariousness of the work, employees in these areas are, not surprisingly, less likely to risk the wrath of their employer by engaging in a union organizing campaign, and are more susceptible to employer interference when a campaign starts.

The OLRB has attempted to address these issues by applying a more flexible definition of an “appropriate bargaining unit” where unions seek certification in these sectors. However, despite all efforts, union density amongst these employees remains the lowest in the province.²¹

The USW submits that in order to stimulate organizing in these sectors, and to ameliorate the worst effects of this kind of precarious work, the OLRA should be amended to provide for greater sectoral or regional-bargaining.

Regional or sectoral-based bargaining is not unknown in this province: sectoral-based bargaining is the basis for collective bargaining in the construction industry in Ontario. Under those provisions, the construction industry in Ontario has been divided into seven sectors: the industrial, commercial and institutional sector (ICI sector) which is governed by mandatory, single trade, multi-employer, province-wide bargaining, and the six non-ICI sectors (residential, roads, sewers and watermains, heating engineering, pipelines, and electrical power systems) which are governed by regional bargaining between one or more trades and one or more employers.

20 Sheila Block, *supra*, note 1 at p. 7-8

21 Sheila Block, *supra*, note 1 at p. 7

Other provinces that have also introduced greater sectoral-based bargaining structures provide a model for such amendments in Ontario. In 1992, the B.C. government appointed a special panel of advisors to review its labour legislation.²² The report issued by the advisors included a recommendation for a sectoral certification procedure which would apply in sectors “historically underrepresented” by trade unions as determined by the B.C. Labour Relations Board, where the average number of employees at work locations within the sector was less than 50.

Under its recommendation, the B.C. Labour Relations Board was responsible for conducting a hearing on whether or not the sections of the *Code* should be applied to the sector. The sector would have two characteristics: a geographic scope, and employees performing similar tasks. The union would then file an application for certification where it had support amongst employees at more than one work location. If successful, the union would be granted a certificate for a unit within the sector at the locations where it had support, and a collective agreement would be bargained with the relevant employer or employers. If the union could then gain support amongst employees at other locations within the scope of the certificate, it could apply to the Board for a variance to encompass the new employees, and, if the union could demonstrate sufficient support at that location, the collective agreement would apply to those employees.

In our view, such modest reform may provide a workable model for the introduction of sectoral-based bargaining rights in the industrial sector under the OLRA. In our submission, any amendment to the Act to provide for sectoral bargaining in the industrial sector should give the Board the discretion to decide the industries to which the sections would apply, along the lines of the B.C. model which was predicated on a finding that a sector was “historically underrepresented” by trade unions. However, unlike the B.C. model, we would propose no limit on the number of employees in a workplace to which the section would apply, so as to maximize its effect.

The Union submits that such a proposal would give unions an incentive to organize smaller workplaces by making the organization of such workplaces more cost-effective. Further, organization of small workplaces along sectoral lines also provide the opportunity for more effective collective bargaining, as a larger number of employees increase the union’s bargaining power, with the result that there will also be more pressure on non-union employers in the industry to match the terms and conditions of employment provided under existing sectoral collective agreements. Finally, the B.C. model preserves employee choice, by requiring employees to support the union for the purposes of its initial sectoral certification and subsequently if it wishes to expand the scope of its existing collective agreement.

However, we also note that the B.C. model is by no means the only example of broader-based sectoral models. In Quebec, for example, the decree system provides a useful example of broader-based sectoral extension of collective agreements. Federal *Status of the Artist* legislation, passed in 1992, provides another example of a model that accommodates freelance self-employed and often precarious cultural workers. Finally, the Ontario *Employment Standards Act* provides the government with the regulatory power to create sectoral standards in a wide range of industries.

²² John Baigent, Vince Ready, Tom Roper, *A Report to the Honourable Moe Sihota Minister of Labour: Recommendations for Labour Law Reform*, Queen’s Printer for British Columbia, 1992.

The Union also proposes that the Act be amended to restore the Board's power to combine two or more existing bargaining units with one employer into a single bargaining unit. The Board had such a power under the Act during the Bill 40 period under the NDP government (section 7). However, that power was repealed when the Conservative government took power in 1995.

The Board has long held a preference for larger bargaining units on the basis that such units have greater viability than smaller, more fragmented units. As a result, the return of the Board's power to combine bargaining units will help avoid bargaining unit fragmentation in the workplace, while enhancing bargaining unit stability.

All of the models are worthy of exploration. If this review is truly going to address the changing nature of work and workplaces in Ontario, it is our submission that it is essential that this issue of broader-based, sector bargaining models be addressed and explored.

A WORD OF CAUTION



“We want a real union, not some kind of employee committee with no power and no teeth to actually get things done. But getting there is tough. Compared to the company, we have no way to contact all of our co-workers and have the discussion. We have no list. We have no real way to talk to people freely on our own time at work. We do not know how to contact people on their off time. And too many people support the union but are scared to show it in any way.”

Dennis Nobes, employee of Munro Industries in Utopia, Ontario, June 24, 2015

We are aware that there has been discussion about the introduction of joint employer-employee “work committees” which would operate in non-union workplaces in Ontario for the purpose of giving employees a greater “voice” in their workplace. The Law Commission of Ontario (the LCO²³) considered just such a proposal at some length in its December 2012 report entitled *Vulnerable Workers and Precarious Work*, as a complement to employment standards compliance and enforcement.²³

The USW agrees that increased employee participation in the workplace is an important and laudable goal. Employees should be protected under Ontario legislation in the event they choose to engage in collective activity in order to improve their working lives, consistent with their constitutional right to collective bargaining under the freedom of association guarantee in the *Charter*. To that end, the Union supports the amendment of the Act to make it explicit that employees have the right to engage in, or to refrain from engaging in, “concerted activity for the purposes of collective bargaining or other mutual aid or protection” (emphasis added), as is the case in section 7 of the American *National Labour Relations Act*.

Having said that, the Union has serious concerns about the efficacy and viability of legislated work committees (similar to existing occupational health and safety committees) for two reasons. First, the inherent imbalance of power between employees and employers problematizes the effective operation of any work committee. Giving employees “voice” in their workplace requires more than just mandating that employers meet with employees and listen to their concerns: effective “voice” requires that employees have the power to require employers to take action to give some effect to employee demands, even in the face of employer resistance to such demands.

The Supreme Court recently commented on the importance of union independence and autonomy for the purposes of ensuring meaningful relations with employers in its decision in *Mounted Police Association v. Canada (Attorney General)* [2015] S.C.J. No. 1. In doing so, the Court stressed the importance of employee choice and union independence and autonomy. The Court noted:

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.²⁴

To the extent that proposed work committees would be used to ensure compliance with employment standards legislation, they would require very rigorous regulatory support and oversight to do so effectively

²³ Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, Toronto: December 2012 at p. 66-67

²⁴ *Mounted Police Association of Ontario v. Canada (Attorney General)* [2015] S.C.J. No. 1 at para 85.

given the inherent power imbalance in the employment relationship. We have concerns about this or any government's commitment to providing the financial support necessary to ensure their effective operation.

Second, the USW has concerns that work committees of the sort considered in the LCO Report may be used by employers to facilitate "in-house" employee associations dominated by employers. These in-house associations could then be used by employers to prevent or resist organizing efforts by trade unions that employees have turned to for representation.

If the government wants to ensure meaningful workplace participation for employees in Ontario workplaces, a mechanism is already in place for achieving that goal: the Ontario *Labour Relations Act, 1995*. Indeed, section 2 of the Act specifically provides that one of its purposes is to "promote flexibility, productivity and employee involvement in the workplace"; an acknowledgement, in the Union's submission, that collective bargaining can not only help facilitate employee participation in the workplace, but that greater employee involvement in the workplace by means of collective bargaining can actually help employers enhance the flexibility and productivity of their operations. As Justice Wilson of the Supreme Court of Canada explained in that Court's decision in *Lavigne v. Ontario Public Service Employees Union et al* (1991) 81 D.L.R. (4th) 545 at 607:

...collective bargaining is a mechanism by which individual employees come together and form a union to represent their interests. The whole purpose of unionization is to strengthen the position of these employees in order to offset the countervailing power of employers. Rather than simply enacting legislation aimed solely at protecting individual workers by curtailing and controlling employer abuses (e.g. minimum wages, occupational health and safety, and workers' compensation legislation), the government established our current regime of collective bargaining. The purpose of this system is also to curb the excesses of the common law of the employment relationship and thereby assuage industrial tensions. This is achieved, not through legislative protectionism, but rather through the promotion of the self-advancement of working people.

In our submission, once revised and updated with the amendments set out in this submission, the Act will provide an adaptable, flexible model fully capable of ensuring meaningful employee involvement in Ontario workplaces. However, in order for such a model to function adequately, the government must commit to facilitating the right of employees to join unions if they so choose. As the panel of special advisors to then B.C. Minister Moe Sihota wrote in recommending labour law reform in that province:

There is little point in developing models where collective bargaining can be more responsive if we do not first protect the right of employees to freely engage in collective bargaining. Labour legislation must ensure that workers' rights to join trade unions may be exercised without interference and, if trade union representation is selected, our legislation must then ensure that the workplace encourages cooperation and flexibility.²⁵

25 John Baigent, Vince Ready, and Tom Roper, *supra*, note 22 at p. 10



“What motivates pro-union mining workers up north in Ontario are concerns about health and safety, concerns about fair treatment and respect on the job, plus the need for the employment security that comes from having a real grievance procedure where the company is not the final decision-maker.”

Pascal Boucher, USW Local 6500
 (Vale, Sudbury) July 23, 2015

EMPLOYMENT STANDARDS ACT, 2000

Our Union has significant experience with the existing *Employment Standards Act, 2000* (the “ESA” or the “Act”) and its predecessors. While many of our collective agreements contain terms and conditions of employment greater than the statutory minimum provided under the ESA, our local unions often find themselves negotiating provisions relating to hours of work, vacation pay, and holiday pay with regard to those statutory minimums. Further, the vast majority of our collective agreements do not address issues around notice of termination or severance pay in the event of a layoff or plant closure. As a result, when it comes to entitlement to notice of termination/termination pay and severance pay, our members often look solely to the ESA to provide such entitlements.

In general, our members, our staff and our local unions find the language of the ESA difficult to navigate, understand, and interpret. Indeed, even legal professionals complain about the byzantine language of certain sections of the Act – the provisions around temporary layoffs/terminations are notoriously unclear. The application of the Act in general, and certain employment standards in particular, are subject to numerous exemptions and exceptions that employers can exploit, and that, in turn, problematize enforcement of the Act by our staff and local unions at arbitration.

The changing workplace has had a profound effect, in our view, on the effectiveness of the Act. Employers have been able to take advantage of the Act’s assumption of a traditional “employee-employer” relationship to craft new kinds of legal relationships with employees that fall outside the purview of the legislation. Exceptions to the Act are antiquated and outdated; the enforcement provisions of the Act are reactive and rely too heavily on employees to resolve issues with the employer. Tight limitation periods and caps on recovery prevent employees from obtaining full redress where an employer is in breach of the Act. Finally, the rise of increasingly complex corporate relationships, and the weak language around joint and several liability of related entities, allows employers to structure corporate transactions so as to avoid ESA obligations to the detriment of Ontario employees.

All of these issues must be addressed if the Act is to achieve its purpose of providing a solid “floor” upon which employees can rely in negotiating terms and conditions of employment with their employer, and help ensure fairness in Ontario workplaces well into the 21st century. To that end, the Union recommends the following amendments to the Act:

RECOMMENDATION 1: Expand the Definition of “Employee” in the Act

As the nature of employment changes, and we move away from the “traditional” employment relationships seen in the past, how we define the employment relationship must change as well. The Toronto Workers’ Action Centre (the “WAC”) has expertly outlined the problem and solution in its report entitled *Still Working on the Edge*:

Employers are able to deprive workers of employment rights, benefits, and protections because work arrangements do not conform to the standard employment model underlying employment standards, policies, and practices. We need to seek a universal approach to coverage under the ESA, which effectively provides basic minimum standards for all workers. The starting point should be that all workers, regardless of form of work, are entitled to minimum employment standards.²⁶

The Union supports WAC’s submission that the definition of “employee” should be broadened along the lines of Ontario’s *Occupational Health & Safety Act* to define a worker as “a person who is paid to perform work or supply services for monetary compensation”.

26 Mary Gellatly, *Still Working on the Edge : Building Decent Jobs From the Ground Up*, Worker’s Action Centre, March 2015 at p. 9

RECOMMENDATION 2: Review, Eliminate and Update the Exemptions Under the Act

The ESA has been amended a number of times since its original enactment in 1968, almost fifty years ago. The result is a patchwork of exemptions, regulations and rules, which no longer reflects the new economy. The USW supports a complete review of Regulation 285/01 which excludes a number of job occupations from the hours of work, minimum wage, overtime pay, and public holiday pay provisions of the Act, and provides special rules for those in certain industries, like residential care workers, domestic workers, and harvesters. Such exclusions should be reduced or eliminated.

In addition, the Union proposes that the provisions of the Act which exclude certain employees from minimum standard entitlements relating to notice of termination and severance pay be removed entirely. Under the Act, entitlement to notice of termination requires three months of employment, while entitlement to severance pay requires five years of service with a particular employer, and is only available where the employer is laying off at least 50 employees or meets the payroll threshold of 2.5 million dollars as set out in the Act. With the increase of short-term and other forms of precarious employment, along with the increasing number of smaller workplaces, these antiquated exemptions are no longer responsive to the situation of employees in non-standard employment. Further, these exemptions can be manipulated by employers to reduce their liability under the Act.

If this government is committed to minimum standards legislation that protects employees' working conditions, exemptions which do not reflect modern work relationships must be eliminated.

RECOMMENDATION 3: Amend the Language of the Act Around Employer Joint and Several Liability

The rise of sub-contracting has had a profound effect on employees in Ontario over the last twenty-five years. More than ever before, large and medium-sized employers alike are reaching agreements with subcontractors to operate portions of their business. In addition, large corporate employers can often find ingenious ways of restructuring their operations to avoid their legal obligations, including minimum standards requirements.

The only mechanism under the current Act for dealing with those kind of subcontracting or restructuring arrangements is through section 4, which permits two or more employers to be treated as one entity under the Act. In order for a “related employer” finding to be made, the Act requires two things:

- that the employers carry on associated or related activities, and
- that the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of the Act.

The activities or businesses do not need to be carried on at the same time in order for a “related employer” finding to be made. Where employers are found to be related under section 4, they are jointly and severally liable for any violation of the Act, and for any wages (as defined in the Act) owing to employees.

In our view, the language of section 4 is problematic, and has been interpreted too narrowly by decision-makers, most notably by the Ontario Labour Relations Board’s in its decision in *Novaquest Finishing Inc.* [2006] O.E.S.A.D. No. 440.²⁷

The facts in that case are straightforward. On December 19, 2003 approximately 150 employees of the Catelectric-Dip Corporation were terminated from their employment. Approximately one month later, the Company went bankrupt. Employees (who were not unionized) filed employment standards claims with the Ministry of Labour for the severance and termination pay owing to them. The employment standards officer investigating the complaint found that two other operating companies, Novaquest Finishing Inc. and 4064186 Canada Inc. were related to Catelectric-Dip within the meaning of the Act, and therefore were responsible for severance and termination pay owing to Catelectric-Dip employees. The total liability was approximately \$983,000.

Novaquest and 4064186 appealed the ESO’s decision to the Ontario Labour Relations Board. The Board found that Novaquest, 4064186 and Catelectric-Dip were all carrying on associated or related activities, meeting the first requirement for a related employer finding under the Act. However, the Board, in a separate decision, concluded that the “effect” of the companies carrying on related or associated activities did not directly or indirectly defeat the intent or purposes of the Act.

In doing so, the Board rejected the employees’ argument that the related employer provision of the Act was, in essence, a “deep pockets” provision. Instead, the Board found that in order to meet the “effect” requirement of section 4 of the ESA, there had to be a connection between the “relatedness” and the

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 27 Upheld on appeal: *Abdoulrab v. Ontario (Labour Relations Board)* [2009] O.J. No. 3668 (Ont. C.A.)

insolvency. In the Board's view, only in circumstances where the bankruptcy was caused or affected by the relationship between the related entities would the requirements of the section be met. In essence, the Board's interpretation of section 4(1)(b) has effectively precluded a related employer finding in bankruptcy and insolvency situations unless employees can prove that the bankruptcy is not *bona fide* i.e. unless there is some evidence that the associated or related entities which continue to operate actually drove the insolvent employer into bankruptcy.

It is important to note that the employees' position in this case was supported by the Director of Employment Standards, both at the Board and before the Court. In Court, the Director stressed that the ESA is remedial public welfare legislation designed to ensure minimum employment standards for a vulnerable class of employees in Ontario. Further, the Director noted that the "related employer" provisions of section 4 were designed to expand who is liable as the "employer" for employees' entitlements to wages under the ESA without regard to corporate form. As a result, a large and liberal interpretation of "effect" was necessary to fulfill the purposes of Act.

Nevertheless, the positive and logical interpretation advanced by the employees and supported by the Director was rejected by the Board and, subsequently, the Court. The result is to read the term "effect" out of the statute entirely.

The outcome of this case has had a profound effect on working people in Ontario. Over the course of the past fifteen years, we have dealt with a number of bankruptcies and insolvencies where our members might have recovered millions of dollars were it not for the Board's interpretation of section 4. For example:

- In December 2005, 35 employees at a company called Lindsay Electronics arrived for work only to be told by the trustee that their employer had gone bankrupt and their employment with the company was terminated. All of the employees had more than 20 years of service, and none of them received severance or termination pay. The total amount owing to employees was over \$600,000. The following day, the management team of Lindsay Electronics opened a new company in Peterborough (outside the scope of the Union's collective agreement) called Lindsay Broadband. The new company carried on the same business, served the same customers, had the same management team, and employed some of the same individuals as Lindsay Electronics. The Union settled this case for a fraction of what was owed to employees, knowing that it would not be successful at the Board, given the decision in *Novaquest*.
- In April 2007, 180 USW members lost their jobs when Genfast Manufacturing in Brantford went bankrupt. Genfast was owned by the same group of individuals who owned and ran a competitor company in the U.S called MNP. MNP and Genfast were clearly related employers. Further, a substantial proportion of Genfast's business went to MNP following the bankruptcy. Our Union litigated a common employer case at the Labour Board for two years, but eventually the facts that emerged simply did not meet the very high test set by the *Novaquest* decision. In other words, we could not prove that Genfast's bankruptcy was a sham, even though it was clear that MNP benefited from the bankruptcy and MNP senior managers were running Genfast. As a result our Union had to settle the severance pay claim for pennies on the dollar.

- In March of 2009 185 employees at Marathon Pulp Inc. lost their employment when their employer was assigned into bankruptcy. Marathon Pulp was a joint venture of two larger companies, Kruger Inc. and Tembec Inc., both of which continue to operate. There was evidence that Tembec, at least, was heavily involved in the day-to-day operations of Marathon. Tembec management employees worked at the Marathon mill and were involved in collective bargaining. Representatives of Kruger and Tembec made up all of the sitting members of the Board of Directors of Marathon. Employees were owed wages, vacation, severance and termination pay totaling approximately 8 million dollars. The Union filed grievances against the directors and two related entities, but settled the case given the Board's decision in *Novaquest* and the low likelihood of success at the Board.

These are just three cases which our Union has worked on. Unfortunately, there are many more. In all three cases, the Union settled employee claims for far less than what they were owed because it was our view we would not be successful before the Board given the *Novaquest* case. It is not an exaggeration to say that the Board's interpretation of section 4(1)b) has cost our members millions of dollars in lost wages, including severance and termination pay.

In our view, section 4(1) (b) should be removed from the Act. The related employer section of the ESA should operate as a deep pockets provision (as originally intended), and apply in any case where employers are carrying on associated or related activities and wages or other minimum standards entitlements remain unpaid. This way, employers cannot structure themselves or contract out work so as to shield themselves from liability under the Act.

RECOMMENDATION 4: Improve Minimum Standards Under the Act

In addition to amending the Act to ensure its application to employees across the province, the USW submits that amendments should be made to improve certain minimum standards under the Act. In this respect, the USW supports the amendments to minimum standards provisions proposed by the WAC in its report, *Still Working On The Edge*, as follows:

- Provide for an eight-hour work day and a 40-hour work week. Employees should have the right to refuse work beyond 40 hours. Overtime at time and a half should be paid (or taken as paid time off in lieu) after 40 hours.
- Excess hours of work permits should be issued only in exceptional circumstances, and should be conditional on demonstrated efforts to recall employees on layoff, offer hours to temporary, part-time and contract employees, and/or hire new employees.
- Provide for an unpaid half-hour lunch break and two paid breaks for every five hours of work.
- Increase paid vacation entitlement to three weeks per year. After five years of service, increase vacation to four weeks of paid vacation per year.
- Require two weeks' advance posting of work schedules for employees (including when work begins, ends, shifts and meal breaks). Further, require that employees receive the equivalent of one hour's pay if the schedule is changed with less than a week's notice, and four hours' pay for schedule changes made with less than 24 hours' notice. There should also be no reprisals where employees request schedule changes.
- Repeal the exemption for employers of 49 or less employees from providing personal emergency leave.
- Provide for up to seven paid sick days per year for employees in Ontario.
- Repeal section 50(7) and amend the ESA to prohibit employers from requiring evidence to entitle employees to personal emergency leave or paid sick days.

RECOMMENDATION 5: Restore the Employee Wage Protection Program

In 1991, the NDP Government amended existing employment standards legislation to introduce the employee wage protection program. The purpose of the program was to guarantee employee wages, including vacation and holiday pay, as well as severance and termination pay, up to a maximum of \$5000 where an order for such monies went unpaid by an employer. The program was administered through the Employment Standards Branch of the Ministry of Labour, and funded out of provincial general revenues. Where a claim was paid, the government would attempt to recover funds from employers and businesses. The program was discontinued by the Conservative Government in 1995.²⁸

Despite its repeal in 1995, the need for the program remains. The final report evaluating the first three years of the federal Wage Earner Protection Program (which allows employees to claim for unpaid wages, vacation pay, severance pay and termination pay where their employer has gone bankrupt or is in receivership) provides that approximately 36,426 employees of 1,843 insolvent employers applied for reimbursement from that program. The total amount owing to those employees was \$255,105,472. The program paid out \$74,091,146 to applicants. That means over a three year period, employees in Canada suffered a loss of more than 181 million dollars in lost wages, vacation, termination and severance pay as a result of employer insolvencies.²⁹

If employment standards constitute the minimum entitlements employees should receive for work performed for an employer, employees should not fail to receive those amounts merely because their employer has become insolvent, or is resisting payment. Ontarians engaged in precarious work are those individuals who can least afford to shoulder the burden of lost wages and other minimum standards entitlements. As a result, we propose that the employee wage protection program be restored. Such a program at the provincial level could be co-ordinated with its federal counterpart to ensure that employees in Ontario receive 100% of their entitlements under the Act. We would also propose that the cost of such a fund be borne by Ontario employers, in the same manner as the current Ontario Pension Benefits Guarantee Fund.

28 See Law Commission of Ontario, *Employment Standards: Working with Ontarians to Reform the Law*, p. 1

29 Employment and Social Development Canada, *Evaluation of the Wage Earner Protection Program: Final Report*, March 2014 at p. 24

RECOMMENDATION 6: Improve Enforcement of the Act

Worker protections under the ESA are worthless without an effective, efficient system of enforcement. While ESA violations for unionized employees are dealt with via the grievance and arbitration procedure of their collective agreement (a system in respect of which we propose no change), non-unionized employees are required to approach their employer and attempt to resolve ESA issues before filing a complaint against the employer with the relevant Ministry office.

This system presupposes employees understand their rights under the Act, that they will risk reprisals or even the loss of their job by raising potential ESA issues with their employer, either individually or collectively, and that they will proceed with a complaint in the event their employer is unable and unwilling to remedy their violation of the Act.

Our experience in helping employees join our union has shown us that the current system of enforcement is not working. Often, the employees we speak with in the course of our organizing campaigns do not know their ESA rights, or have been given incorrect information about their entitlements. Those employees who do know their rights are often afraid of speaking to their employer or filing a complaint for fear of employer retaliation or punishment.

Given our experience in this area, the Union supports the recommendation of both the LCO and WAC that a public education and outreach campaign is necessary to ensure that employees understand their rights under the Act. We support an extensive public campaign aimed at both employees and employers to raise the profile of the Act. Further, the Union recommends that the Ministry produce a plain-language summary of the Act which employers would be required to provide to new employees, and which they would be required to post in the workplace. The summary should be available in multiple languages in order to ensure that employees can read and understand it.

The Union also supports the recommendation that workers' rights services in legal aid clinics be expanded so as to ensure that low-income employees have legal support available to provide them with information and enforcement assistance.

While public education and information campaigns are vital to any effort to increase employer compliance with the Act, so too is an effective complaints system. In the Union's view, there is too great a focus on remedying violations of the Act through an individual complaints process, and too little on proactive measures like unannounced Ministry inspections. Our experience is that employers are not selective about compliance with the Act: that is, where an employer has failed to comply with the Act in respect of one employee, there are likely other employees of that employer in the same situation. This appears to be borne out by statistics: as the LCO notes in *Vulnerable Workers and Precarious Work, 2011-2012* data from the Ministry of Labour indicates that 83 percent of proactive inspections revealed violations of the Act.³⁰ This shows that employers are acting in flagrant disregard of their statutory obligations.

As a result, the Union supports the hiring of a greater number of employment standards officers and inspectors who would be responsible for conducting unannounced bi-annual audits of Ontario work-

³⁰ Law Commission of Ontario, *supra*, note 23 at p. 56

places to ensure compliance with the Act. Further, in our submission, a successful ESA complaint (i.e. a finding that an employer has breached the Act) should automatically trigger an audit of that employer by a Ministry inspector.

The Union also supports removing the requirement from the Act that employees must first speak with their employer to try and remedy a minimum standards issue before filing a complaint with the Ministry. The Union submits that given the power imbalance inherent in the employee-employer relationship, such a requirement will be, at the very least, ineffective and at worst, an impediment to ESA compliance.

Employer compliance with the Act will not increase while penalties for violating the Act are low and seen by employers as part of the “cost of doing business”. In addition to increased inspections for those employers that violate the Act, the Union supports a serious and substantial increase in fines for employers that choose to ignore their ESA obligations. Large penalties for violators will send a clear message that this government is committed to ensuring that workers in the province are treated fairly.

SUMMARY OF RECOMMENDATIONS

Ontario *Labour Relations Act, 1995*

RECOMMENDATION 1: Restore card-based certification

RECOMMENDATION 1.1: Increase fairness in the certification process:

- (a) Require employers to provide unions with a list setting out the name, home address, telephone numbers, email address and job title for each employee in a proposed bargaining unit
- (b) Provide the Board with greater discretion to make interim orders
- (c) Repeal section 8.1 of the Act
- (d) Introduce e-votes and off-site voting in certification applications, and the use of electronic union membership cards
- (e) Remove the Board's right to consider a union's support in the bargaining unit when determining whether to grant remedial certification
- (f) Re-introduce a day-to-day hearing model in certification applications
- (g) Remove the mandatory bar on successive certification applications by any union after an unsuccessful certification drive
- (h) Introduce "just cause" protection for bargaining unit employees where a union has been certified as the bargaining agent until a first contract is reached or the parties are in a lawful strike/lockout position
- (i) Provide for first contract arbitration with pre-conditions
- (j) Provide for increased monetary penalties for unfair labour practice violations during an organizing campaign

RECOMMENDATION 2: Ban replacement workers

RECOMMENDATION 3: Ensure striking employees can return to work at the conclusion of a strike.

RECOMMENDATION 4: Provide access to interest arbitration as of right where a strike or lockout has lasted longer than 90 days.

RECOMMENDATION 5: Provide for successor rights in the contract services sector

RECOMMENDATION 6: Broaden the definition of a "related employer"

RECOMMENDATION 7: Broaden sectoral or regional-based bargaining and permit the combining of bargaining units

Employment Standards Act, 2000

RECOMMENDATION 1: Expand the definition of employee under the Act

RECOMMENDATION 2: Review, eliminate and update the exemptions under the Act

RECOMMENDATION 3: Amend the language of the Act around employer joint and several liability

RECOMMENDATION 4: Improve minimum standards under the Act

RECOMMENDATION 5: Restore the employee wage protection program

RECOMMENDATION 6: Improve enforcement of the Act

THE WAY FORWARD



“There is no substitute for the role of freely chosen, democratic, representative unions that are independent of influence/control of employers and that also possess the legal foundation and the resources to engage in real bargaining.”

Marty Warren, United Steelworkers
District 6 Director, June 16, 2015

Current labour and employment legislation in Ontario is not meeting the needs of employees. The nature of work and the conditions under which work is performed in the province has changed and continues to change, leaving too many Ontarians without minimum standards protection and unable to freely exercise their right to join a trade union if they so choose, at a time when such protection is more necessary than ever.

The changes proposed in our submission would go some distance towards providing protection and fairness to many thousands of vulnerable workers in Ontario. They would address problems arising from the rise of precarious work. And they would be good for Ontario, bringing a measure of stability to industries that are often chaotic due to high turnover, low wages and other factors.

In the Union's view, the implementation of the recommendations in these submissions constitute an important first step in fulfilling the government's commitment to help Ontarians do more for themselves and their families.

We thank the Special Advisors for your time, your insight and your commitment to building a better province for all working people in Ontario. We look forward to continuing this dialogue with you in the coming months.



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