



Building Balance, Fairness, and Opportunity in Ontario's Labour Market

Submission by Unifor to the Ontario
Changing Workplaces Consultation

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Executive Summary

The Ontario Changing Workplaces Review occurs at an important juncture in the evolution of Ontario's labour market. The world of work in this province has been buffeted by a series of macroeconomic shocks (including the after-effects of the global financial crisis, and the erosion of Ontario's crucial manufacturing sector), but also by longer-run structural changes in the way work is organized, contracted, performed, and compensated. What was once known as "non-standard employment" – positions without permanent status or security, regular hours, or normal supplementary benefits – has unfortunately become the new norm in many segments of the labour market. And the institutional and structural factors which once helped working people attain a more stable and prosperous economic position, underpinning the development of healthy, inclusive communities, have been weakened. This institutional disempowerment is visible in indicators such as stagnant union membership, falling collective bargaining coverage, inadequacy of employment standards (including inadequate enforcement), and a generalized willingness (by employers, government, and even workers) to tolerate practices and conditions that are clearly unfair and ultimately unsustainable. These trends have produced a polarization of economic opportunity, and corresponding divisions that are increasingly evident across Ontario society. The dream of a stable and prosperous life seems out of reach for too many working Ontarians, despite their skills, productivity, and work ethic. Instead, they face a daunting reality of underemployment, precarity, inadequate income, and constant economic stress.

This submission represents a comprehensive effort by Unifor to analyze the causes and consequences of these negative trends in Ontario's labour market, and to propose a set of policy responses to the economic, cultural, and technological pressures that are reshaping the world of work. Our submission begins by documenting the broad evolution in Ontario's labour market, including the expansion of precarious work, growing inequality of income, the erosion of institutional bulwarks, and the consequent insecurity faced by most working people. It finds that a combination of cyclical and structural factors has contributed to a fundamental shift in economic bargaining power away from workers – and this shift has allowed employers to determine terms of employment that are increasingly precarious and exploitive.

The core of Unifor's submission then makes a total of 43 specific policy recommendations that together would make a significant positive difference in the functioning of Ontario's labour market. These recommendations are organized into four main sections. Part III of the submission proposes a set of incremental reforms to employment standards and their enforcement; Part IV proposes a corresponding set of reforms to labour relations laws and practices (recognizing the dual mandate of the Changing Workplaces Review to consider both employment standards and labour

relations policies). Then, in Parts V and VI of the submission, Unifor proposes two fundamental and far-reaching changes in approach, that in our view would help to restore fairer treatment in Ontario workplaces, and a more sustainable balance of economic power between workers and employers. The first of these fundamental changes, described in Part V, involves legal and regulatory protections for workers in non-unionized workplaces to meaningfully express their “voice,” and undertake collective actions in support of their workplace interests. Our second far-reaching proposal, described in Part VI, is for a system of sectoral standards that would apply to both unionized and non-unionized workplaces; these sector-wide standards would establish norms of fairness and performance across specific regionally and industrially-defined sectors, hence establishing a sustainable “level playing field” for all enterprises.

The submission concludes by confronting concerns that improving fair treatment, protection, and compensation in Ontario workplaces would deeply damage Ontario’s economy – perhaps by motivating an outflow of business investment, or making Ontario-produced goods and services “too expensive.” We provide ample documentary and economic evidence regarding the positive spillover effects of stronger employment practices and collective representation for productivity, retention, skills acquisition, and other determinants of business success, concluding that Ontario’s economy will be strengthened by our proposals for building higher-quality workplaces.

A summary listing of our 43 specific recommendations is provided in the conclusion.

Unifor thanks the Government of Ontario, and the Special Advisors, for this important opportunity to review the broad state of Ontario’s evolving labour market, and to envision strategies – both incremental and far-reaching – for building a better one.

Part I: Introduction

1.1 About Unifor

Unifor is the largest trade union in Canada in the private sector of the economy. We represent 310,000 members, living in all regions of Canada, and working in over 20 defined sectors of the economy, at all stages of the value-added chain: including resources, manufacturing, transportation, and private and public services. Over half of our members live in Ontario.

Unifor was founded on Labour Day 2013, through the merger of the former Canadian Auto Workers and Communications Energy and Paperworkers unions. Unifor is committed to a vision of democratic, innovative, social unionism. Our founding documents recognize that the union's responsibility as an organized voice for working people must extend beyond the workplace and the collective bargaining table, into society as a whole, and moreover that we work to defend and promote the interests of all working people in Canada, their families, and their communities – not just those that are our members.¹

This vision to act on behalf of the broader community of working people centrally shapes our recommendations in this submission, much of which addresses broader policy and regulatory actions which may not directly affect Unifor members, but which nevertheless would improve the lives of working Ontarians (including those who will never have the opportunity to join a trade union).

We thank the Special Advisors to the Changing Workplaces Review, and the staff of the review, for the opportunity to participate in this important process, and for your attention to our views. We note that representatives from several Unifor local unions in Ontario participated in the community hearings held earlier as part of this process. This submission represents the views of the national union, but will make reference in numerous sections to the presentations and experiences reported by several of our participating locals.

1.2 Building Balance, Fairness, and Opportunity in Ontario's Labour Market

The Changing Workplaces Review is a timely and important response by the Ontario government to emerging evidence that the terms of conditions of employment have deteriorated on a sustained and multidimensional basis for a large proportion of

¹ For more details on the mission statement of Unifor, please see the document passed at the union's founding convention: "A New Union for a Challenging World," Unifor (Toronto: 2013), <http://www.newunionconvention.ca/wp-content/uploads/2013/08/682-New-Union-Vision-web-ENG.pdf>.

working people in this province. As will be documented in this submission, millions of Ontarians experience one or more forms of precarity in their work lives: unpredictable or irregular schedules, temporary or uncertain terms of employment, various forms of nominal or marginal self-employment, inadequate part-time hours when they want and need more hours of work, and others. Even those in permanent and full-time positions experience greater insecurity and exploitation as a result of a broad shift in the balance of power in the labour market. Labour incomes have declined relative to growing productivity, and labour income itself has been distributed more unequally. These dual trends of stagnating income and growing inequality impose major and ongoing costs on society: not just on those who work in poor-quality, uncertain jobs (and their families), but on communities, the economy, and government. There is growing evidence from a rich, multidisciplinary scientific literature that inequality and economic and social exclusion generate a multitude of costs (experienced via criminality, poor health and education outcomes, lower productivity, reduced “social capital,” higher fiscal expenses, and more) that we all ultimately must pay for.

These broad and worrisome trends, in our judgment, reflect a common set of causal factors, including economic, structural, and social forces. For several reasons, the economic and structural position of working people in the labour market has been weakened, in a sustained and comprehensive manner, in recent decades. The factors behind that disempowerment include:

- Chronically weak demand for and underutilization of labour, reflecting persistently weak macroeconomic conditions and the erosion of some key industries in the provincial economy (such as manufacturing). Facing widespread unemployment and underemployment, workers feel compelled to accept sub-standard or exploitive conditions, on pain of not working at all.
- The enhanced mobility of business in key tradeable sectors of the economy (including both goods and services sectors), which allows them greater sway in imposing compensation and work practices (backed by threats of relocation) if workers do not comply.
- The erosion of union representation and collective bargaining in the face of active employer opposition, less amenable labour laws, and fear among workers, such that unions now represent just one of six workers in Ontario’s private sector.
- The capacity of new technology to facilitate precarious employment practices (such as “on-call” scheduling, irregular shift patterns, and the ubiquitous use of employment agencies) by businesses.
- The growing concentration of unemployment and poverty in certain regions and communities of Ontario society, with consequently reduced mobility between those hard-hit segments and the rest of the labour market. This enhances the pressure on members of those groups to tolerate exploitive or even abusive practices and conditions.

- A more widespread acceptance across society (including within government) of the basic idea that employment conditions are to be established on the basis of so-called “free contracts” between workers and employers, free from interference or regulation on the part of government. This contributes to a reluctance by workers to demand collective or governmental redress to unfair situations, and to a pervasive passivity on the part of government (including a reluctance to meaningfully enforce those rules, standards, and protections which do exist).

Together these long-run trends have contributed to a situation in which working people, individually and collectively, are falling behind. Workers’ share of total GDP produced in Ontario has declined. Wages for many workers are inadequate to meet the basic requirements of modern

life, for them and their families. Working conditions are often intolerable and unacceptable. Many workers are exploited and mistreated at their jobs, yet feel unable to speak out or seek redress. Yet the institutional bulwarks which are essential for working people to attain better outcomes from the labour

market (such as ambitious and actively-enforced employment standards, strong and widespread collective bargaining structures, and even a positive common-sense understanding of fair practice in the world of work) have become less capable of moderating these trends, instead of being strengthened to meet these challenges. The result is a labour market marked by pervasive inequality, underemployment, and all too often hopelessness.

WORKPLACE PERSPECTIVE

“We do not accept that working in a precarious, low-paying job is the best that we can possibly hope for, for the next generation of Ontario workers. Our starting point must be that as a society, we clearly have the collective power to set certain standards, expectations, and rules governing the nature of work, working conditions, and fair compensation. Nothing is pre-ordained in the way we treat each other in the workplace.”

Katha Fortier, Ontario Regional Director, Unifor,
Toronto

To address these problems (and their human and social consequences), Ontario needs nothing less than to revitalize a broad spirit of active, modern, ambitious, and egalitarian labour market intervention. The role of government must be much more than standing by and watching social conflict, limiting itself to policing a narrow vision of the “rulebook” – especially when one side in that conflict is so clearly and pervasively “winning.” Government has a responsibility to intervene, in a conscious effort to build a more balanced, inclusive, and sustainable distribution of opportunity and income, recognizing that a stronger, healthier, and more sustainable society will result.

After all, that was the broadly accepted idea that underpinned postwar labour and social policies: when the middle class was first “invented,” and when governments of all partisan stripes actively contributed to institutional changes such as the expansion of collective bargaining, minimum wages, and employment and pay equity. This common-sense understanding was rooted in the recognition that active institutional forces were essential to achieving widespread prosperity. And this understanding is consistent with historical and international evidence: without strong trade unions, widespread collective bargaining, and ambitious and actively enforced employment standards, no society has ever attained truly mass prosperity.

We reject the pessimistic conclusion that the above-listed forces are inevitable and irresistible, and that society must simply resolve itself to a reality of grim precarity and inequality. We believe that a better labour market balance – one that protects individual workers, and achieves a more desirable and sustainable distribution of income between workers and businesses – can be reattained on the basis of innovative, modern labour market policies, yet in a manner consistent with successful business investment, competition, and exports. Our submission will describe the range of interventions which could, in our view, move Ontario toward that outcome.

1.3 Overview of this Submission

This submission is organized as follows. Section II assembles documentary evidence regarding the deterioration of employment conditions in Ontario, the rise of various forms of precarious work, and the economic, social, and human consequences of wage stagnation and inequality. This section provides more detail on the long-run economic and social problems which, in our view, could be ameliorated with appropriate provincial policy reforms.

Unifor’s specific recommendations to the Special Advisors are then organized and discussed in the next four sections. Reflecting the dual nature of this review’s mandate (considering both employment standards and labour relations matters), Section III presents a series of specific recommendations for incremental reforms to employment standards (including enforcement issues), while Section IV includes a similar series of recommendations in the realm of labour relations. The next two sections then describe broader and more innovative ideas for redressing current problems in labour relations and employment standards. Section V introduces the principle of protecting collective action on the part of non-unionized workers; this principle is well-enshrined in U.S. labour law, but not in Ontario. Providing non-union workers with explicit legal protection for their collective efforts to improve employment conditions, would make a significant contribution to enhancing their “voice” in employment matters, and reinforcing broad social norms of fair treatment. Section VI, meanwhile, describes a set of proposals which would allow for the application of both employment standards and

collective bargaining structures on a sector-wide basis. In proceeding on a sector-wide basis to lift standards, policy makers can hope to focus their efforts on certain sectors where precarity and unfair treatment are endemic, in a manner which treats all employers in the sector equally. The innovative measures proposed in these two sections, along with the incremental improvements described in Sections III and IV, together would constitute a substantial and comprehensive strategy for restoring a better balance in Ontario's workplaces, in light of the negative economic and structural forces summarized above.

Section VII of the report then considers a range of economic evidence regarding the impact of employment standards and collective bargaining on key economic outcomes: including employment, business investment, and growth. It concludes that concerns expressed by business lobbyists and others, that strengthening Ontario's regime of labour market policies will somehow "scare away" investment and undermine overall economic performance, are not supported by Canadian or international evidence.

Finally, the conclusion to the submission provides a summary catalogue of our various specific recommendations, and some closing thoughts regarding the challenge of building a broad social consensus around a more egalitarian vision of employment and work.

Part II: Stating the Problem: Precarious Work, Inequality, and its Consequences

The declining quantity and quality of employment opportunities in Ontario is not a recent phenomenon. Depending on how ‘good jobs’ are defined and measured, the structural shift in Ontario’s labour market began in the 1970s or 1980s and has persisted in recent times. The combination of fewer job opportunities amidst the rise of precarious forms of employment has transformed Ontario’s labour market in a way that heightens economic insecurity and exacerbates income inequality. Ultimately, heightened insecurity weakens families, dissolves social bonds and, because insecurity is unevenly distributed across Ontario’s population, it undermines the sense of equity and fairness that underpins democratic citizenship.

The present chapter documents the structural transformation in Ontario’s labour market by chronicling the parallel processes of declining employment opportunities and the shift in employment characteristics to non-standard forms of work. If Ontario’s labour market regulatory apparatus is premised upon standard employment relationships (a term that will be defined below), and if precarious forms of employment are increasing, then labour market regulations and policies will need to be updated to reflect contemporary realities.

The present chapter has six sections. The first section defines some of the key terms used throughout the chapter, including and importantly ‘precarious employment’. The second section outlines some of the socially detrimental effects precarious employment has on individuals and families. Before examining the rise of precarious employment in Ontario, the third section lays out the macroeconomic context in Canada by chronicling the evolution of GDP growth, trade unions and income inequality. The fourth section explores some key measures of labour market performance in Ontario (the quantitative dimension) as a prelude to the fifth section, which probes the changing characteristics of Ontario’s employment (the qualitative dimension). The sixth section closes by painting a portrait of the ‘precariat’—the locations and individuals in Ontario’s labour market that are most likely to be classified as precarious.

2.1 What is Precarious Employment?

Before proceeding, some definitional clarification is needed. ‘Precarious employment’ is a broad term that loosely translates as ‘insecure’, ‘undesirable’ and/or poorly compensated forms of work. On one end of the employment quality spectrum is what is referred to as ‘standard employment relationships’ (SER for short). SER’s have a number of defining features including full-time hours, job permanence, predictable scheduling, decent wages, access to extended health benefits such as dental and vision care, retirement security through a pension and other statutory entitlements. SER’s can also

include things like access to training, some degree of control over the labour process and regulatory protection. In the early postwar decades, this form of employment was a ticket to middle class comfort and security and it enabled workers to fully participate in the political and cultural life of the nation.

WORKPLACE PERSPECTIVE

“I have watched my own two boys, as well as many of their friends, on the treadmill of the employment agency cycle. This problem has exploded with what seems like an agency on every street corner in Peel as well as many other cities across Canada. They’ve been sent to a workplace for several weeks, called not to return and told that the work assignment is complete. Then returned to that workplace at a later date to find out the agency has had workers floating in and out the whole time. Waiting for days, sometimes weeks, for the next work assignment with the promise of maybe tomorrow, leading the worker on just enough that they don’t move on and register with another agency.”
Barb Morrison, President, Unifor Local 584, Brampton

The SER has been in decline for decades and has been increasingly replaced by precarious employment, which is a non-standard employment form on the opposite end of the spectrum. The authors of *The Precarity Penalty* argue that the narrowest definition of employment precarity, one based on the form of the

employment relationship, is temporary employment and self-employment without employees (‘own account’ or ‘solo’ self-employment).² Noack and Vosko develop a measure of employment precarity based on four indicators: no union coverage, no company pension plan, small firm size (fewer than 20 employees) and low wage jobs (measured as 1.5 times the minimum wage).³

Precarious jobs can also be given an encompassing definition that includes one or more elements of labour market insecurity. Precarious jobs include any form of temporary employment (contract, on-call, seasonal), part-time employment or poorly paid employment that lacks benefits and a company pension plan. In the final analysis, Noack and Vosko characterize a precarious job as having high levels of uncertainty, low levels of income, a lack of control over the labour process and limited regulatory coverage.⁴ In terms of categorizing labour market precarity, self-employment is understood to be more precarious than paid employment and solo self-employment more precarious than

² Poverty and Employment Precarity in Southern Ontario, *The Precarity Penalty: Summary* (Toronto: May 2015), p. 23.

³ Noack, A.M. and Vosko, L.F., 2011. ‘Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers’ Social Location and Context’. Toronto: Law Commission of Ontario, p. 13.

⁴ *Ibid.*, pp. 3-5.

employer self-employment. The self-employed are more vulnerable to economic pressures, especially macroeconomic downturns, and even a brief spell of economic inactivity can lead to poverty. The Law Commission of Ontario's report, *Vulnerable Workers and Precarious Work*, notes that the self-employed work longer hours than regular employees and have less access to training and benefits. In comparison to the self-employed with employees, the solo self-employed have lower average income, the Law Commission of Ontario notes.⁵ What's more, the self-employed are often just regular workers (independent and dependent contracts), but are deemed 'self-employed' in order to limit access to employee workplace protections and benefits.⁶

Permanent forms of employment are deemed more secure than temporary employment forms for obvious reasons. The latter include contract, seasonal, casual and on-call employment. Temporary employment forms have uncertainty built into them and are often the result of employers pursuing a 'flexible' workforce, partially on account of the lower labour costs. Temporary employment forms often come without the full range of workplace benefits including health and dental plans, pension plans or severance pay, and temporary workers can have their employment terminated more easily than permanent workers (without sufficient cause). Generally speaking, temporary workers are also less able to influence their workplace environment.

Part-time employment is taken to be more precarious than full-time because of the reduced job security, workplace benefits and statutory entitlements (because of minimum hour thresholds and the like), and because part-time workers often face less predictability in the number and scheduling of working hours. And finally, workers in lower income brackets are deemed more precarious than those in the middle and upper income brackets on account of the financial stress faced by those with meager resources.

If precarious jobs are characterized by low levels of compensation, predictability and security, what effect do these jobs have on the workers who perform them and on the families and communities that depend on them?

2.2 Why Does Employment Precarity Matter?

Numerous studies, including those conducted by the World Health Organization (WHO), find a negative link between precarious jobs and physical and mental health outcomes. According to the WHO, good jobs are associated with financial security, self-esteem,

⁵ Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: December 2012), p. 18.

⁶ Noack and Vosko, *op. cit.*, p. 4.

social status, personal development, strong social relations and protection from physical and psychological hazards, all of which positively contribute to health outcomes.⁷

Precarious jobs have the opposite effects. According to the Law Commission of Ontario, those in precarious jobs are more likely to face physically demanding forms of work and the associated increase in health and safety risks.⁸ Those who hold multiple jobs, work irregular or long hours or who live in low income face elevated uncertainty and stress. Chronic uncertainty leads to elevated levels of the stress hormone, cortisol, and the latter is closely associated with depression, heart disease and diabetes, among other maladies.

In a Wellesley Institute report, Sheila Block notes that there is a direct relationship in between income and Canadian life expectancy. At age 25, the difference in life expectancy in the bottom and top income deciles is 7.4 years for men and 4.5 years for women. An equally important fact, Block notes, is that life expectancy increases across each of the ten income deciles. So in addition to leading a more stressful and less healthy life, those in precarious jobs live shorter lives.⁹

The Law Commission of Ontario also finds that workers in precarious jobs have greater difficulty accessing health services and products. The absence of employment benefits can make the cost of prescription medicine and drugs financially burdensome or even unobtainable. The LCO notes that less than 10 percent of temporary workers receive extended health care benefits and only 2 percent receive dental benefits. The consequence of reduced access to health care and paid sick leave encourages vulnerable employees to ignore injuries and illness, which often compounds the health problem.¹⁰

In addition to the low social status, poor compensation and chronic insecurity, precarious jobs are associated with negative feelings of self-worth and shame. Precarious jobs also impair personal, family and community relationships insofar as those who work multiple jobs or long hours have limited time to maintain and build familial and social bonds, the LOC continues. The PEPSO research group found that men in precarious jobs report delaying marriage and postponing the starting of a new family on account of their insecurity.¹¹

⁷ Commission on the Social Determinants of Health, 2008. *Closing the Gap in a Generation*. Geneva: World Health Organization.

⁸ Law Commission of Ontario, *op. cit.*, p. 28.

⁹ Block, S., 2010. *Work and Health: Explore the impact of employment on health disparities*. Toronto: Wellesley Institute.

¹⁰ Law Commission of Ontario, *op. cit.*, p. 29.

¹¹ PEPSO, *op. cit.*, p. 19.

And given that full participation in the cultural life of the community requires time and financial resources, those in lower income jobs are less likely to engage in cultural activities, volunteer their time or donate to charity. Low income households are also less likely to eat nutritious diets, exercise, partake in extra-curricular activities or tend to the academic needs of their children. Even though Canada has higher inter-generational mobility than the United States (only 20-25 percent of Canadian children growing up in poverty will remain poor into adulthood, compared to 40-60 percent in the United States), the social and economic costs of intergenerational poverty are distressingly high, the LCO notes.¹²

Research pertaining to the United States suggests that the polarization of income and wealth amplifies the political voice of the privileged while muting the political voice of the underprivileged.¹³ Governing institutions are more responsive to the affluent Americans, the report notes, which implies that rising inequality will exacerbate the political disempowerment of the poor. In his research, Martin Gilens finds that governments tend to respond to the interests of the public in general, but when the public is parsed according to socio-economic status, policy decisions strongly reflect the preferences of the top income group and bear no relationship to the preferences of lower income groups. This might be one reason why all but the most affluent choose not to participate with the same intensity. So the growth of precarious jobs not only regressively redistributes income, it further skews the distribution of political power, thereby threatening the ideal of democratic citizenship.¹⁴

The PEPSO research groups' 2015 study, *The Precarity Penalty*, reinforces these findings: workers in a precarious job are more likely to be socially isolated than those in secure employment are and less likely to exercise their democratic rights by participating in the electoral process.¹⁵ The fragmentation of political units according to socio-economic status has been extensively documented in Ontario. David Hulchanski's *The Three Cities within Toronto* noted that back in 1970, when SER's were the norm, 66 percent of Toronto's 500 or so census tracts were classified as middle income and only 19 percent were designated as low income. By 2005, largely as a result of transformations in the labour market, only 29 percent of Toronto's neighbourhoods were middle income, leaving more than half (53 percent) in low income. Low income neighbourhoods are less likely to have access to public transit and social services and generally face poorer

¹² Law Commission of Ontario, *op. cit.*, p. 31.

¹³ APSA Task Force on Inequality and American Democracy. 2004. *American Democracy in an Age of Rising Inequality*. Washington: American Political Science Association.

¹⁴ Gilens, M., 2005. 'Inequality and Democratic Responsiveness', *The Public Opinion Quarterly*, 69 (5), 778-796.

¹⁵ PEPSO, *op. cit.*, p. 12.

material conditions and socio-economic prospects, in addition to political marginalization.¹⁶

Noack and Vosko neatly summarize the problem: workers who continue in precarious jobs for a sustained period of time can become marginalized or be perceived as marginalized in the broader society. This is part of the relationship between precarious jobs and ‘vulnerable workers’.¹⁷ So the growth of labour market insecurity threatens the bonds that stabilize society by undermining the physical and mental health of individuals and by putting strain on family and community ties.

Before exploring the evolving structure of Ontario’s labour market, we need to consult the macroeconomic context in Canada to see the relationship between labour market insecurity and broader structural trends.

WORKPLACE PERSPECTIVE

“Temporary workers are often young, but include many older workers who have been impacted by the 2008 recession and the loss of manufacturing jobs in the province. These workers are often part time workers balancing two or three part time jobs to make ends meet. These workers are often working for minimum wage or even less as self-employed contractors. More and more often, these workers are not employed by the actual business they work for but are employed by “temporary agencies”. These workers aren’t abstract, they are my children, my former colleagues they are your neighbours are our fellow Ontarians and they are growing exponentially in number.”

John Toth, First Vice President, Unifor Local 195, Windsor

2.3 The Macroeconomic Context in Canada

The postwar evolution of the Canadian (and global) political economy is often broken into two periods: the mid-1940s through the 1970s is often referred to as the ‘Keynesian welfare state’ or ‘embedded liberalism’; the period since the late 1970s is often referred to as ‘financial globalization’ or ‘neoliberalism’. Some of the characteristic features of embedded liberalism include governmental commitment to full employment (officially, if not factually), a strong social safety net, labour and product market regulations, managed trade and strategic investment agreements (like the Auto Pact), growing unionization (facilitated by the Rand Formula) and expansionary monetary policy, for example. Neoliberalism is a business-oriented approach to governance and its characteristic features include welfare state retrenchment, trade and investment

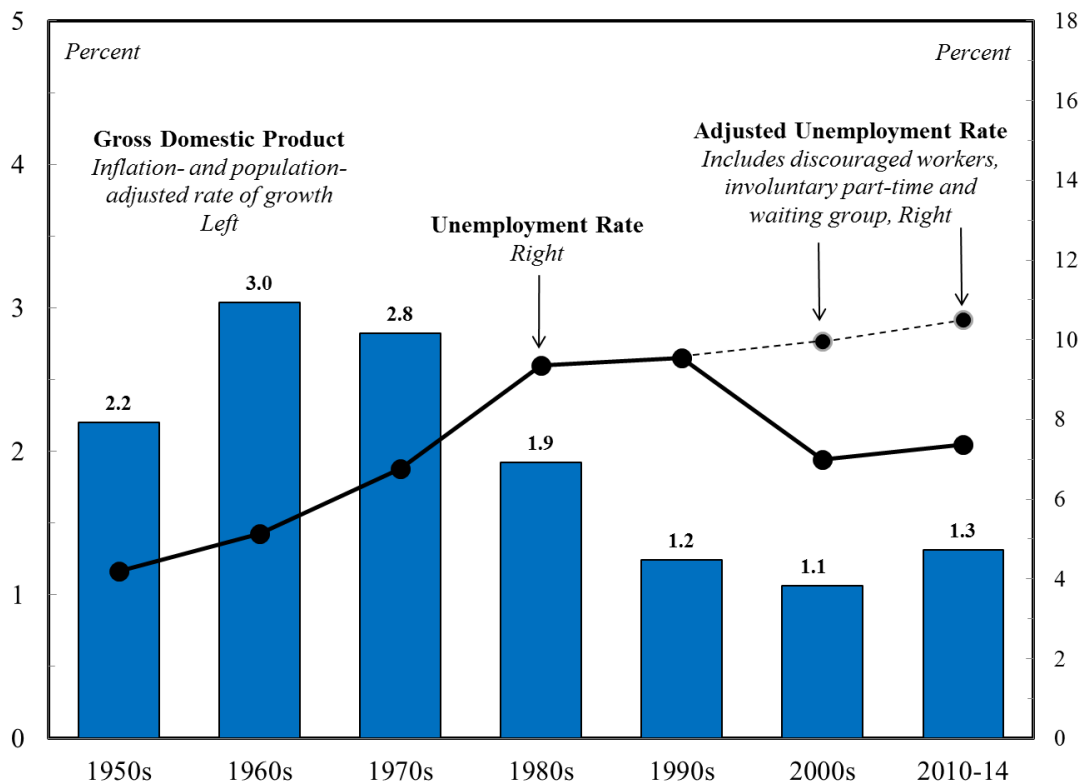
¹⁶ Hulchanski, D.L., 2010. The Three Cities within Toronto: Income Polarization Among Toronto’s Neighbourhoods, 1970-2005. Toronto: University of Toronto.

¹⁷ Noack and Vosko, *op. cit.*, p. 3.

liberalization (e.g., NAFTA), labour and product market deregulation, anti-union labour laws and anti-inflationary monetary policy, for example. Because the embedded and neoliberal eras had differing institutional arrangements and policy priorities, they may be thought of as encompassing ‘regimes’.

The employment crisis that Ontario currently faces grows out of the neoliberal regime. Before documenting the shifting patterns of employment in Ontario it will be useful to review some of the broader macroeconomic trends that characterize the postwar period in Canada, including the changing levels of GDP growth, unionization and income inequality.

Figure 2.1
Canadian GDP Growth and Unemployment: Decade Averages, 1950-2014



Source: inflation-adjusted GDP from Historical Statistics of Canada, Series F35 (1950-1960) and Cansim vectors v3860085 (1961-1980) and v62471340 (1981-2014); Canadian population from Cansim vector v52154496 (1950-2014); unemployment rate (employment as a percent of labour force) from Historical Statistics of Canada, Series D138+D139 (1950-1975) and Cansim vector v2461224 (1976-2014); adjusted ('R8') unemployment rate ('R8') from Cansim Table 282-0085 (2000-2014).

Figure 2.1 plots the decade average rate of GDP growth (adjusted for inflation and population), the unemployment rate and an adjusted unemployment rate that includes

involuntary part-time workers, discouraged workers and the waiting group, all for Canada from 1950-2014. Three things warrant our attention. First, in terms of broad trends, average GDP growth accelerated between the 1950s and 1960s and decelerated in each successive decade. The average unemployment rate trended upward between the 1950s and 1990s and appears to have declined in the 2000s.

Moving from trends to levels, the second thing to note is that GDP growth in Canada has been much lower in the neoliberal era than in the embedded liberal era. Similarly, the rate of growth of job creation has failed to keep pace with the growth of job seekers. Comparing the three plus decades before and after 1980, the rate of GDP growth was halved (having fallen from 2.6 to 1.4 percent, on average) and the unemployment rate rose by one half (from 5.6 to 8.1 percent, on average).

The third thing to note is that, when the unemployment rate is adjusted to reflect discouraged workers, involuntary part-time and the waiting group, it is much higher than the official unemployment rate suggests. The decade average official unemployment rate was seven percent in the 2000s, while the adjusted unemployment rate was 10 percent, or much higher. Figure 1 clearly shows that the average Canadian job seeker faces a more difficult job market and the Canadian economy as a whole is growing at its slowest rate since the Second World War.

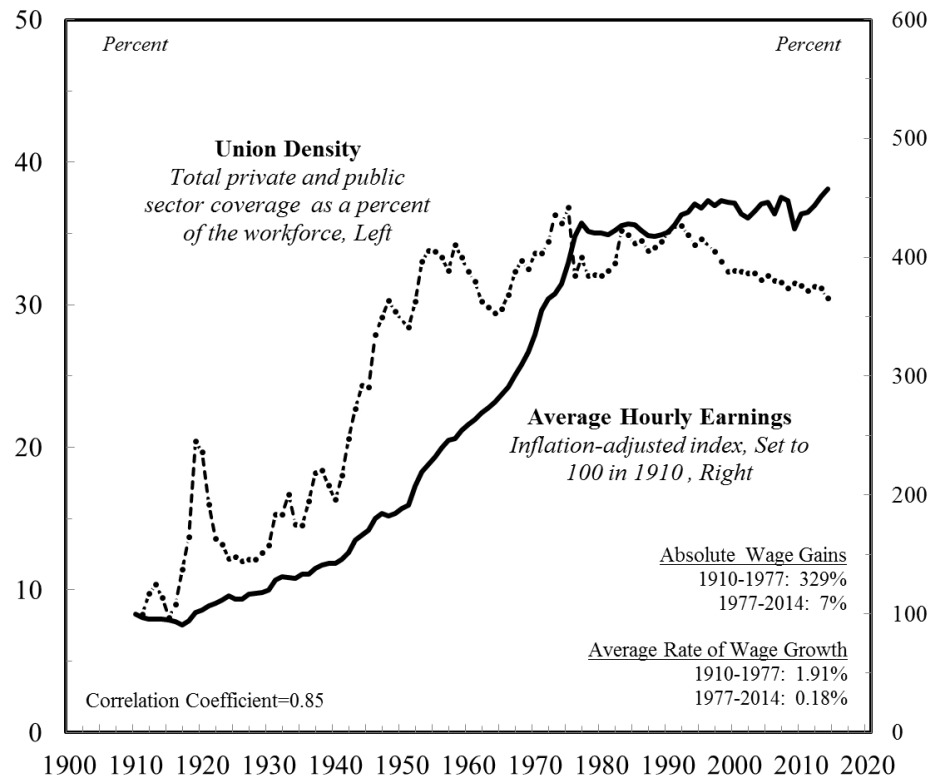
If the period since 1980 has witnessed slower growth and heightened unemployment, what has that meant for the typical worker, unionized or non-unionized? Figure 2 contrasts union density with inflation-adjusted average hourly earnings in Canada from 1910 through 2014, the latter indexed to 100 in 1910. The first metric is a proxy for the institutional power of trade unions and the second is a proxy for working and middle class living standards. The two series are tightly and positively correlated over the past century (a correlation coefficient of 0.85—highly statistically significant).

Between 1910 and 1977, inflation-adjusted hourly earnings rose from 100 to 429—more than quadrupling in just two-thirds of a century. It is the period between 1940 and the late 1970s, specifically, that roughly corresponds with the growth of the Canadian middle class. However, the growth of hourly earnings stagnated after the late 1970s, having risen a meager 7 percent in inflation-adjusted terms between 1977 and 2014. This creates a puzzle: why did earnings grow rapidly from the early part of the century till the late 1970s and stagnate thereafter?

A large part of the answer appears to be the enhanced (then diminished) bargaining position of wage earners resulting from the growth and maturity of unions. Unionization increased modestly in the interwar years, rising from 12 percent in 1924 to 16 percent in 1940. Things began to change more rapidly after 1940 when federal legislation ratified and supported collective bargaining and the right of workers to form unions. By 1944,

with the Cooperative Commonwealth Federation's popularity surging, the Mackenzie King Liberals drafted legislation ('PC 1003'), sometimes referred to as the 'Magna Carta for Labour', that mirrored the Wagner Act of 1936 in the United States. After the War, Supreme Court Justice Ivan Rand made a landmark decision, commonly referred to as the 'Rand formula', which entrenched 'agency shop' and 'dues check-off' as core aspects of labour relations in Canada. In sum, between 1940 and 1946 a framework was created within which the right to union security was established.

Figure 2.2
Trade Union Strength and Canadian Labour Compensation, 1910-2014



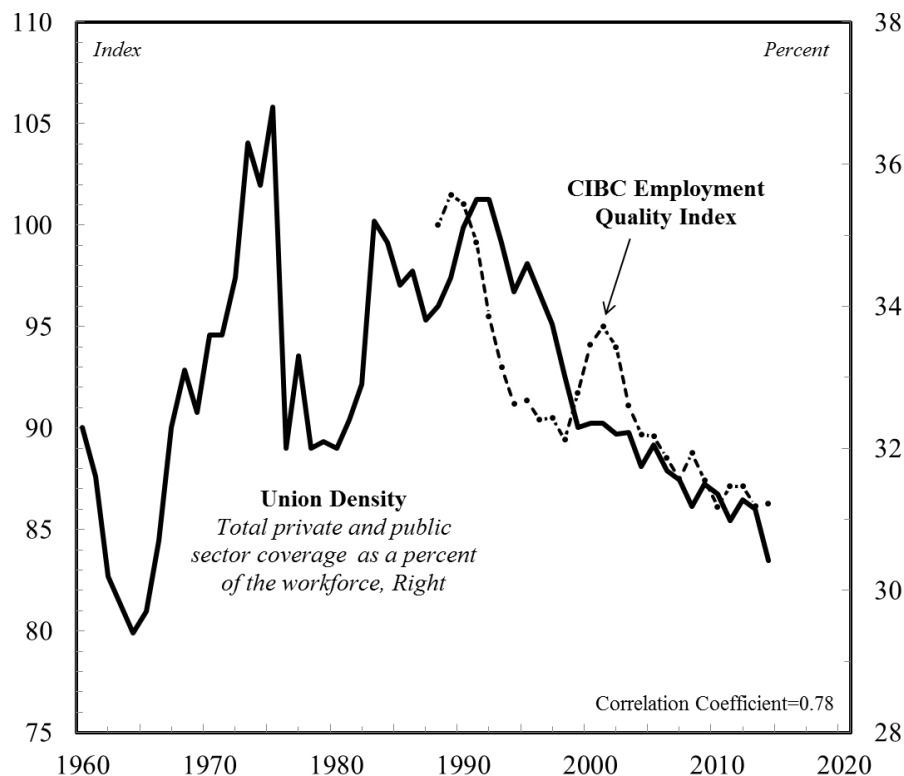
Note: union density was estimated between 1911 and 1920 by taking total union membership as a percent of the Canadian population, with proper rebasing. Average hourly earnings index is adjusted for inflation using the consumer price index. **Source:** average hourly earnings from Historical Statistics of Canada, Series E198 (1910-1948), the IMF through Global Insight (1949-2000) and Cansim 281-0030 (2001-2014); Global Financial Data for consumer price index (code: CPCANM); Canadian population from Historical Statistics of Canada, Series A1 (1911-1920); union density from Historical Statistics of Canada, Series E176 (1911-1975) and Cansim Tables 279-0026 (1976-1995) and 282-0078 (1997-2014).

The fight for union security came largely through negotiations, but was backstopped by the largest strike wave Canadians had ever experienced. The result was a surge in unionization, rising from 16 percent in 1940 to a historic high of 37 percent in 1975. The gradual decline in union density since 1975, having reached a half-century low of 30 percent in 2014, corresponds with the stagnation of hourly earnings.

In terms of macroeconomic performance, then, the embedded liberal regime outperformed the neoliberal regime in terms of economic growth and unemployment. The embedded liberal regime was also a period of increasing trade union power, rising living standards for the bottom and middle income brackets and, importantly, middle class-formation. The decades since 1980 have brought slower growth, heightened unemployment, weakened trade unions and stagnating wages.

It is in this context that the Canadian jobs crisis has emerged. Figure 2.3 contrasts the evolution of Canadian unionization with the CIBC's employment quality index (set to 100 in 1988). The CIBC job quality index is comprised of three parts: the proportion of full-time versus part-time jobs; the split between self-employment and paid-employment; and the sectoral composition of full-time paid employment, with an emphasis on compensation levels (low, medium or high).

Figure 2.3
Organized Canadian Labour Strength and Job Quality, 1960-2014

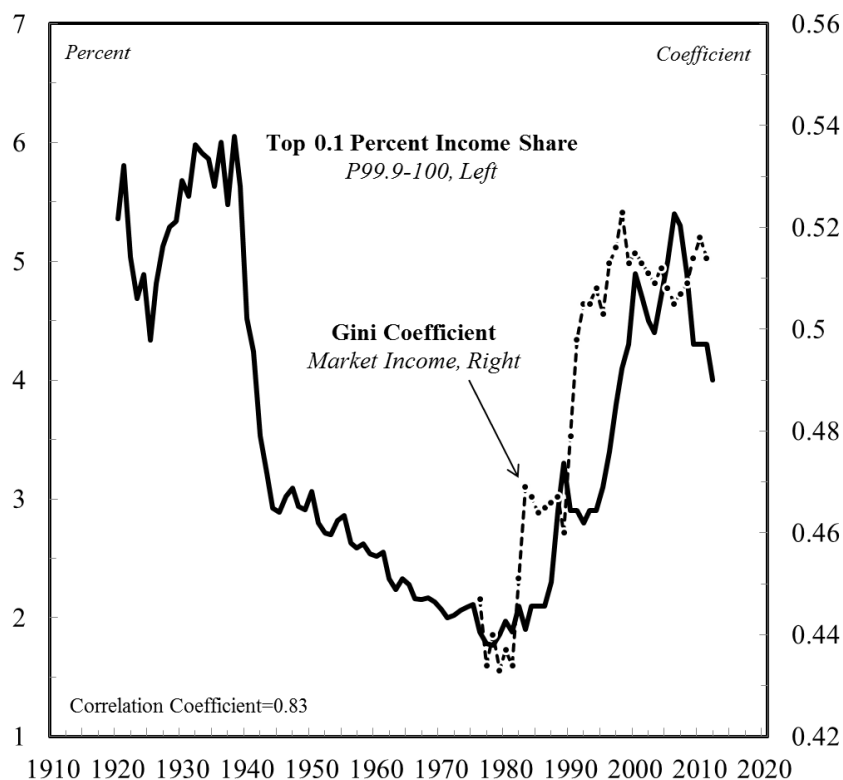


Source: CIBC employment quality index from CIBC economist, Benjamin Tal; union density from Historical Statistics of Canada, Series E176 (1960-1975) and Cansim Tables 279-0026 (1976-1995) and 282-0078 (1997-2014).

Given the importance of collective bargaining to job quality, it is not surprising that the story of declining Canadian union density is closely synchronized with the decline of employment quality. Both indicators reached a quarter-century low in 2014. The CIBC index is a composite of all three measures of job quality, but when we disaggregate the index, we find that all three sub-components have worsened: full-time employment has grown slower than part-time employment, self-employment has grown faster than paid employment, and low-wage jobs are being created more rapidly than high-wage jobs. The combined effect is a decline in job quality.¹⁸

Figure 2.4 registers some of the effects of the decline in job quality by plotting Canadian income inequality, measured two different ways: the income share of the richest 0.1 percent of Canadians and the Gini coefficient. The latter is a broad measure of inequality that ranges in value from a low of zero to a high of one (the higher the coefficient, the more unequal the distribution). Because the two series are different ways of capturing the same phenomenon they are tightly and positively correlated.

Figure 2.4
Canadian Income Inequality, 1920-2012



¹⁸ Tal, B., 2015. 'Employment Quality—Trending Down', *CIBC Economics*, March 5. Available online at: http://research.cibcwm.com/economic_public/download/eqi_20150305.pdf.

Note: top 0.1 percent income share excludes capital gains. It splices together (in 1982) two series that have different methodological and source breaks. **Source:** Gini coefficient from Cansim Table 202-0705; top income share from Saez and Veall (2007), Veall (2010) and Veall (2012), retrieved online from the World Top Incomes Database, <http://topincomes.g-mond.parisschoolofeconomics.eu/>.¹⁹

Canadian income inequality was halved during the Second World War, declined gradually during the first few decades of the postwar era and then trended sharply upward in the decades after 1980. Importantly, in the decades when Canadian unions were strong and growing and when unemployment was comparatively low (1940-1980), income inequality declined. In the decades when labour unions were comparatively weaker, unemployment was higher and when the labour market generally worsened (in quantitative and qualitative terms), inequality increased.

Income inequality is often framed as a progressive value, but recent social science research has challenged that view. In 2009 two British epidemiologists, Richard Wilkinson and Kate Pickett, published *The Spirit Level*.²⁰ The thrust of their argument is that rich societies with less income inequality—less relative poverty—do better on a wide range of social indicators even if they have lower absolute levels of wealth. Wilkinson and Pickett begin with the conventional wisdom, namely that social problems in rich societies tend to be concentrated in the lower part of the social hierarchy: people die sooner, are less happy and generally fare worse if they are in the bottom income brackets. However, when they compare across rich societies they find that these social problems bear little or no relation to levels of *average* income.

Across a wide range of social indicators such as levels of trust, mental illness (including drug and alcohol addiction), life expectancy, infant mortality, obesity, children's educational performance, teenage births, homicide, imprisonment rates and social mobility, they find that all the problems associated with being at the bottom of the social hierarchy are more common in more unequal societies. This is another way of saying there is a positive relationship between income inequality and social pathology.

This claim undermines the view that social problems are caused by poor material conditions. If the latter were true then richer societies would do better than poorer ones. What matters, they contend, is not absolute poverty, but *relative* poverty. Their

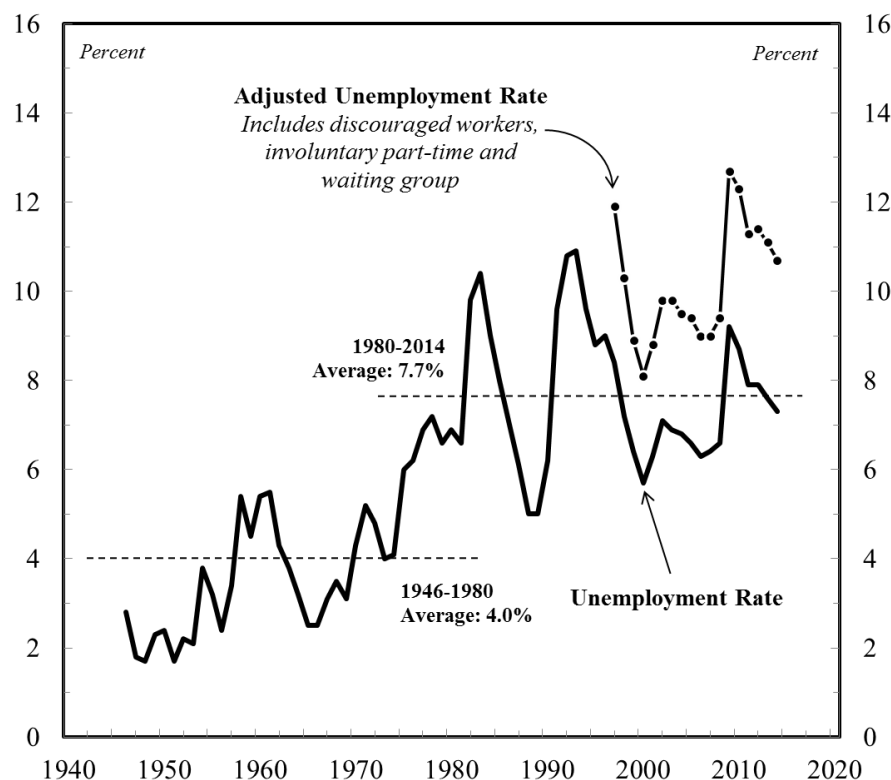
¹⁹ Saez, E, and Veall, M., 2007. 'The Evolution of High Incomes in Canada 1920-2000', in Atkinson, A. B. and Piketty, T., eds., *Top Incomes over the Twentieth Century. A Contrast Between Continental European and English-Speaking Countries*. Oxford University Press, Chapter 6. Veall, M., 2010. 'Top Income Shares in Canada: Updates and Extensions', McMaster University, Department of Economics. Veall, M., 2012. 'Top income shares in Canada: recent trends and policy implications', *Canadian Journal of Economics*, 45(4): 1247-1272. Series updated by M. Veall.

²⁰ Wilkinson, R. and Pickett K., 2010. *The Spirit Level: Why Equality is Better for Everyone*. Toronto: Penguin.

conclusion is that ours is the first generation in the history of humanity for whom improvements in the quality of life are not tied to increases in material comfort. Rather, reducing inequality is the best way to improve the quality of our social environment and social life, and this even applies to people at the very top of the social hierarchy. If this conclusion is correct then inequality can no longer be thought of as a ‘progressive’ value; it should be understood as a broad barometer of social well-being.

It is under the neoliberal regime, then, that Canada has simultaneously witnessed slower economic growth, higher unemployment, weaker trade unions and soaring income inequality. These macroeconomic developments interact in a way that heightens individual stress and insecurity, threatens family stability and erodes community life.

Figure 2.5
Ontario’s Unemployment Rate, 1946-2014



Source: unemployment rate and adjusted unemployment rate from Historical Statistics of Canada, Series D494 (1946-1975) and Cansim Tables 282-0085 (1976-2014) and 282-0086 (2000-2014).

2.4 Ontario’s Worsening Labour Market

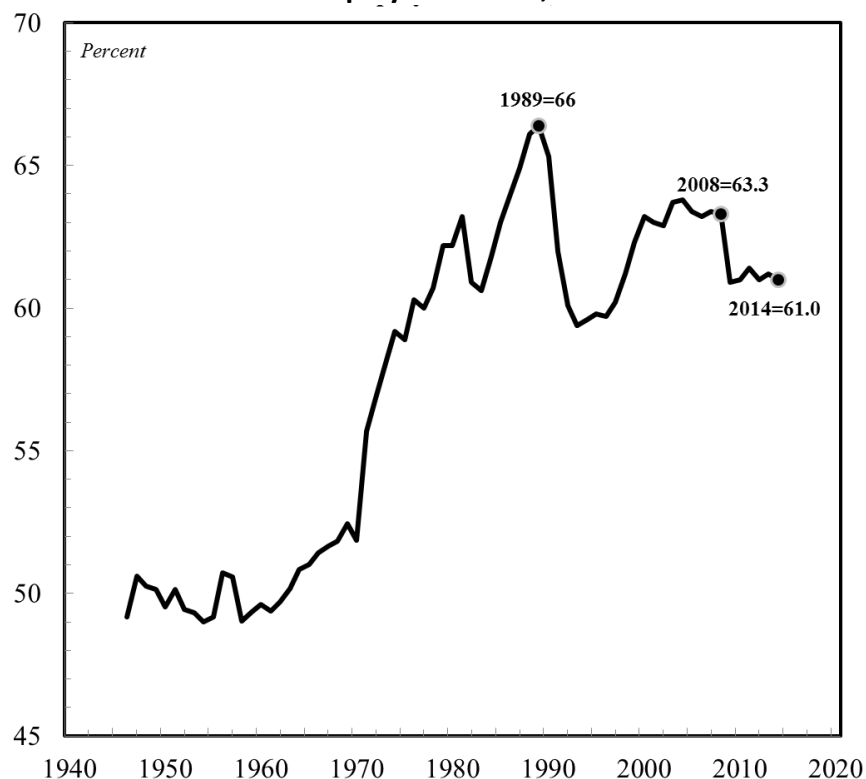
As roughly 40 percent of Canada’s population and GDP, there is a close connection between Ontario’s economic performance and that of Canada. The first place to begin in assessing labour market performance is the unemployment rate, which captures the

percentage of the labour force actively seeking paid employment but cannot find it. Figure 2.5 documents this variable in postwar Ontario, including the adjusted employment rate (reflecting discouraged and involuntary-part time workers and the waiting group).

The first thing to note is the steep increase in the unemployment rate in the neoliberal period (1980-present) when compared with the embedded liberal period (1946-1980). In the periods before and after 1980, the average unemployment rate nearly doubled from 4 to 7.7 percent. This structural shift in Ontario's labour market has been accompanied by much greater fluctuations in the unemployment rate. The combination of a higher average unemployment rate and greater fluctuation has exacerbated labour market insecurity in Ontario.

As of 2014, Ontario's unemployment rate stood at 7.3 percent, which is slightly below the period average (since 1980). However, adjusted unemployment rate in 2014 soars to 10.7 percent, down from a high of 12.7 percent in 2009. This adjustment to the measurement of unemployment increases the rate by nearly one-half. Using either rate, there has been a structural increase in Ontario's unemployment in the decades since 1980.

Figure 2.6
Ontario's Employment Rate, 1946-2014



Note: because of differences in the definition of the working age population, the employment rate after 1975 is not directly comparable to the rate up to 1975. For the sake of consistency, the employment rate from 1946-1975 was rebased using the 1976 value. **Source:** working age population and employment from Historical Statistics of Canada, Series Z298 and D423 (1946-1975); employment rate from Cansim Table 282-0087 (1976-2014).

One shortcoming with the conventional unemployment rate is the definition of the unemployed: those who cease to actively seek work for more than four weeks are no longer classified as unemployed. Their removal from the labour force can artificially lower the unemployment rate (and thereby make the labour market appear stronger than it is), which is why the employment rate is a useful indicator of overall employment possibilities.

Figure 2.6 plots Ontario's employment rate over the postwar era. Until the cultural revolution in the 1960s and the associated mass movement of women into the paid labour force, Ontario's employment rate was roughly 50 percent. The employment rate soared to an all-time high of 66 percent in 1989 (the same year that the Canada-US Free Trade Agreement came into effect). Importantly, whereas the unemployment rate in Figure 2.5 suggests that Ontario's labour market has nearly reached pre-recession levels, the facts in Figure 2.6 tell a different story.

In 2008, on the eve of the Great Recession, Ontario's employment rate stood at 63.3 percent. It fell to 61 percent in 2009, which is where it stood in 2014. This implies that Ontario has not yet recovered (at all) from the financial crisis of 2008-09. The loss of 2.3 percentage points in employment translates into roughly 260,000 jobs. Median full-time incomes in Ontario are roughly \$50,000 per year, so the permanent loss of 260,000 jobs has translated into lost annual Ontario GDP of roughly \$13 billion.

Figures 2.5 and 2.6 together suggest that Ontario's labour market has undergone a structural transformation with the average unemployment rate doubling in the three plus decades after 1980. The facts also suggest that Ontario's labour market has yet to recover from the Great Recession of 2008-09 and this failure to recover has cost Ontarians billions in lost output (to say nothing of the damage to families and communities). If employment opportunities are proportionally shrinking, what is happening to the quality of the jobs that are being created in Ontario?

2.5 Some Dimensions of Employment Precarity in Ontario

In section 2.2 we explored two proxies for employment precarity, namely unionization and poverty. According to Wilkinson and Pickett, poverty in rich societies is best cast in relative terms, not absolute terms, which means that income inequality can validly be thought of as a measure of poverty, and thus, of labour market precarity. In the late 1970s, Canadian unionization began to decline and income inequality began to rise

(unsurprisingly, given the relationship between collective bargaining and the distribution of income). So labour market precarity has been on the rise since the 1970s at least. What do other indicators of job quality tell us about the structural transformation of Ontario's labour market?

WORKPLACE PERSPECTIVE

"If I sell a mattress that earns me a \$300 total commission and the bed has a ten year non prorated warranty, which most of them do, a mattress can be returned for up to 10 years. That customer can call back to the store for a warranty claim and a return to the store. The employer passes the return back onto the salesperson's new earnings as a de-commission of the initial earnings they received in prior months and years; this applies to all goods sold. Drivers' damages comes off too, to settle a customer also, sofa bedroom suites etc. In most cases the employer doesn't notify you of this de-commission. This money is docked off your pay summary and it is the salesperson's obligation to go through their pay to catch the negative return. I have had several discussions over the years with numerous salespeople who work for national competitors that have experienced this practice from their employers. In most cases there is no reprieve for the sales salesperson. The Employment Standards Act is silent in this regard."

Jeff Ferriss, Member, Unifor Local 414, London

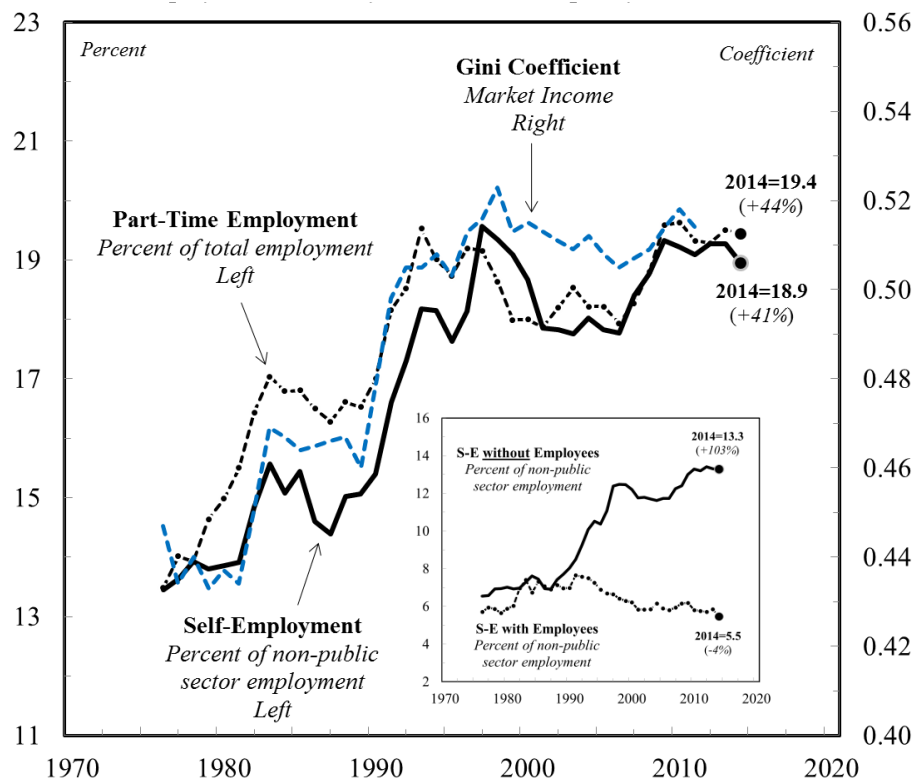
Figure 2.7 documents the closely synchronized rise of two key forms of precarious employment in Ontario by plotting part-time employment (as a percent of total employment) and self-employment (as a percent of non-public sector employment, to reflect that fact that part-time employment is almost

exclusively found in the private sector). It also plots the Gini coefficient for Canada. The facts clearly depict the rise of part-time and self-employment from the late 1970s through the mid-1990s. From the late 1990s till 2007, part-time and self-employment modestly declined. Then, with the onset of the Great Recession and the non-recovery in its aftermath, both forms of precarious employment increased again and stood, as of 2014, at near record highs. Part-time employment now makes up roughly one-in-five jobs, up by nearly one-half since the late 1970s. And as a share of non-public sector employment, self-employment also accounts for roughly one-in-five jobs, also up nearly one-half since the late 1970s.

The Gini coefficient is also plotted in Figure 2.7 to informally test the hypothesis that income inequality (*relative poverty*) can be validly thought of as one form of

employment precarity. The correlation coefficient between part-time employment and the Gini coefficient and self-employment and the Gini coefficient is 0.93 and 0.97, respectively. This is a stunningly high correlation—highly statistically significant—and it suggests that the rise of labour market precarity may be one of the key determinants of heightened Canadian income inequality. Like the two measures of job precarity, the Gini coefficient surged from the late 1970s through the late 1990s and moved laterally thereafter. Given the close association between precarious jobs and low compensation levels, it is not surprising that Canadian income inequality increased in tandem with the structural shift towards precarious employment.

Figure 2.7
Employment Precarity and Income Inequality, 1976-2014

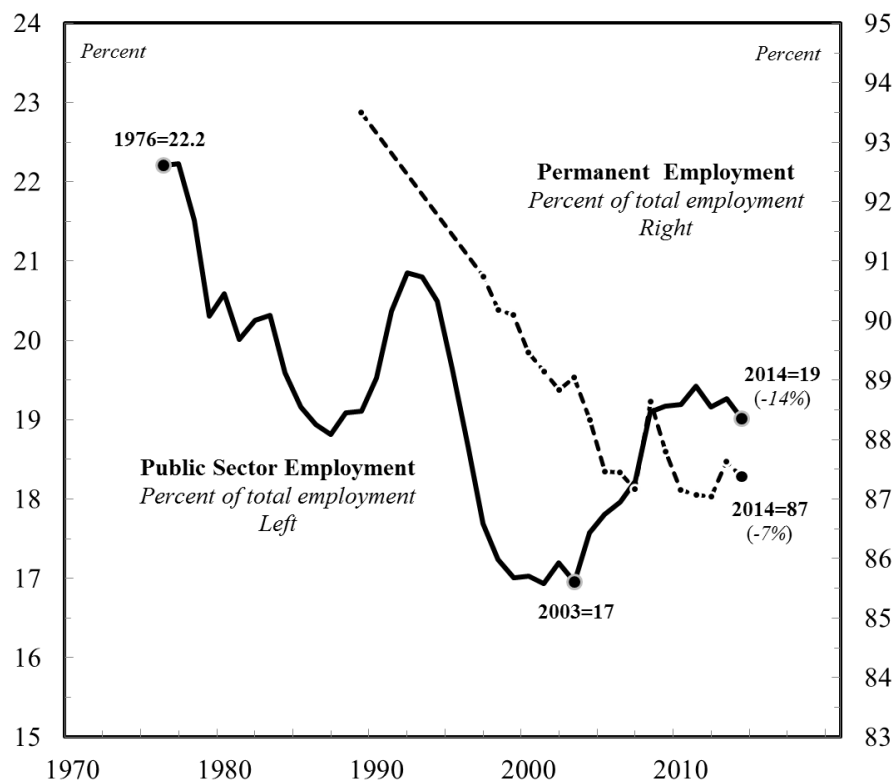


Source: total employment, part-time employment and self-employment from Cansim Tables 282-0087 and 282-0089; Gini coefficient from Cansim Table 202-0705.

Some might wonder why the level of self-employment hasn't increased since the mid-1990s given Ontario's poor labour market performance. Shouldn't *more* people be registering as self-employed, given the paltry growth in paid employment in recent times? The inset graph in Figure 2.7 disaggregates self-employment into its constituent parts: those with paid employees (the thin broken line) and those without paid employees (the thick solid line). Recall: the latter employment form is taken to be more precarious for the reasons discussed in section 2.1.

Interestingly, when we break apart self-employment we find a proportional decline in those with paid employees, from 8 percent in 1991 to 5.5 percent in 2014, and a steep rise in solo self-employment, which has risen from 6.5 percent in 1976 to 12.5 percent in 1999 to 13.3 percent in 2014—a doubling of one of the most precarious forms of employment over the past generation. So self-employment has not held steady in recent years: its more precarious manifestation has doubled while its more secure manifestation has declined.

Figure 2.8
Permanent and Public Sector Employment in Ontario, 1976-2014



Note: permanent employment value interpolated between 1989 and 1997 and continuous thereafter. The 1989 value comes from *The Precarity Penalty*, Table 1, p. 24. **Source:** total employment, public sector employment and permanent employment from Cansim Tables 282-0087 and 282-0080.

Ontario's public sector has historically been a source of stable decent-paying jobs, in part because of heavy unionization and collective bargaining (though this sector has not been immune from the rise of contract work and temp agencies). Figure 2.8 plots the proportional share of employees in the public sector alongside permanent employment (Statistics Canada only began tracking the latter in 1997). In the quarter-century after 1976, public sector employment shrank from 22 percent to just 17 percent of total employment. The past decade has seen a rebound in public sector job creation, but as of 2014 it only stood at 19 percent (a proportional decline of one-seventh since 1976).

Significantly, the public sector's employment share actually shrank after the depths of the Great Recession were reached in 2009. It is also worth noting that there appears to be a relationship between the party in power and the size of the public sector: progressive conservatives tend to oversee a proportional decline in public sector employment while Liberals and New Democrats tend to oversee a proportional increase in public sector employment. Permanent employment has dropped precipitously in recent decades, falling from roughly 94 percent of total employment in 1989 to 87 percent in 2014.

Figure 2.9 summarizes the trends in Ontario's employment growth in the nearly four decades since 1976. Total employment has been growing at an average rate of 1.5 percent—not enough to keep pace with the growth in the labour force—hence the higher unemployment and lower employment levels. Secure forms of employment such as full-time and permanent employment have been growing slower than the average. Precarious forms of employment have been growing much faster than the average. And the more precarious the employment form, the faster the growth rate. Part-time and self-employment have grown nearly twice as fast as full-time and permanent employment, temporary employment has grown nearly three times as fast as permanent employment and solo self-employment, perhaps the most precarious employment form, has grown the fastest. Given the detrimental effects of precarious employment on individuals, families and communities, and on macroeconomic performance generally, these are ominous trends.

The foregoing has explored the changing composition of Ontario's employment growth, but it has not discussed what category of worker tends to occupy a precarious job. Precarious jobs tend to be concentrated in some industries and some segments of the labour force tend to be over-represented in precarious work.

2.6 Precarious Jobs and Vulnerable Workers: A Portrait

What proportion of Ontario's labour market is currently in precarious work? Where are precarious jobs located in the industrial geography? And are there demographic segments of the labour force that are more likely to be employed in precarious forms of work?

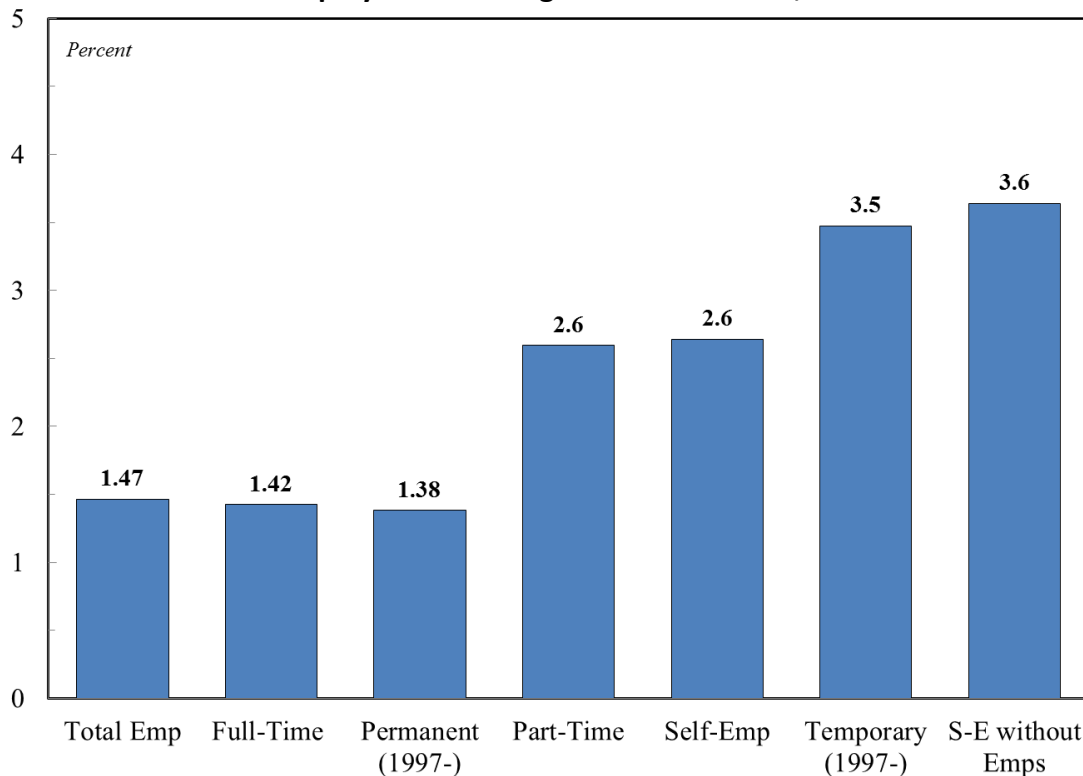
Estimates of the proportion of precarious jobs in Ontario vary. Noack and Vosko estimate that, as of 2008, one-in-three Ontario workers are in a precarious job.²¹ In *It's More than Poverty*, the PEPSO research group found that roughly one-in-five workers is in a precarious job, with another one-in-five in an employment relationship that has

²¹ Noack and Vosko, *op. cit.*, Table 4.1, p. 17.

some precarious elements. Only one-half of workers in the GTHA were in a permanent, full-time position (a SER).²²

According to the scholarly literature, precarious work is unevenly distributed across industries and demographic groups. In their research, Noack and Vosko find that precarious jobs are more common in the private than in the public sector, in small as opposed to medium-sized or large firms and in non-unionized workplaces.²³ Accommodation and food services and agriculture are two of the most precarious industries, Noack and Vosko state, with roughly three-quarters of the jobs therein classified as precarious. This is in contrast to public administration and utilities, where less than 1 in 20 workers are classified as precarious.²⁴

Figure 2.9
Ontario's Employment: Average Rates of Growth, 1976-2014



Source: Cansim Tables 282-0089 (total employment and self-employment), 282-0087 (full-time and part-time), 282-0080 (permanent and temporary).

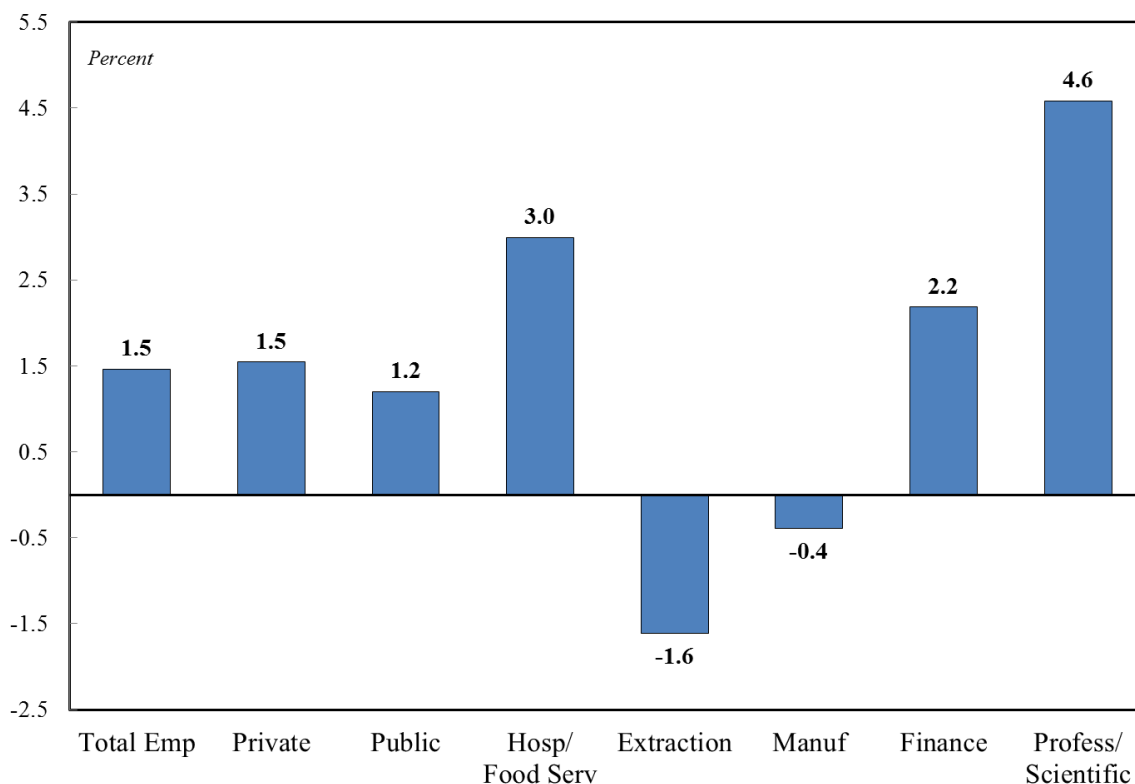
²² PEPSO, *op. cit.*, p. 4.

²³ Noack and Vosko, *op. cit.*, pp. 17-28.

²⁴ Noack and Vosko, *op. cit.*, Appendix B, Table 5.1, p. 46.

The facts in Figure 2.10 capture the polarization of employment opportunity in Ontario by plotting the average growth rate of employment in different sectors and industries. Ontario's labour market growth has taken an 'hourglass' shape, with rapid growth in the low and high income industries and modest or negative employment growth in middle income industries. The facts in Figure 2.10 suggest that total employment and private sector employment have grown at 1.5 percent on average. Public sector employment, which is one of the remaining bastions of the SER, has only been growing at 1.2 percent on average, which means it has been a drag on employment growth. And given that the public sector is one source of good jobs, the slower than average growth in that sector has been a contributing factor to the proportional growth of precarious employment in Ontario.

Figure 2.10
Ontario's "Hourglass" Employment: Average Rates of Growth, 1976-2014



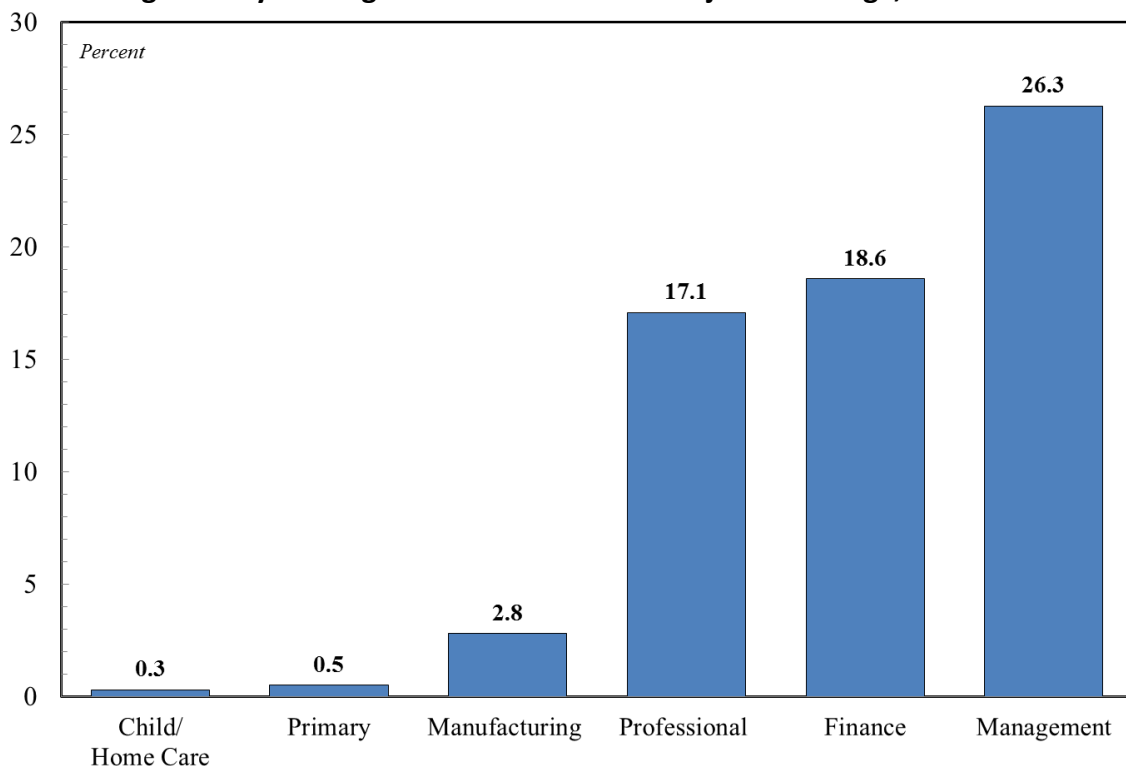
Source: Cansim Tables 282-0089 (total, private and public sector employment) and 282-0008 (hospitality & food services, 'extraction' (forestry, fishing, mining, quarrying, oil and gas), manufacturing, 'finance' (Finance, insurance, real estate and leasing) and 'professional & scientific' (professional, scientific and technical services).

Industries that are growing faster than the average tend to be on the extreme low or extreme high of the wage scale (and so the precarity spectrum) whereas job creation in the middle of the income distribution has been either modest or negative. For example,

hospitality & food services is one of the lowest-paying and most insecure industries and its average employment growth rate over the past four decades is roughly double that of Ontario as a whole. The extractive industry (which includes forestry, mining, and oil & gas) and manufacturing, both of which are historically associated with good jobs, have been contracting, on average. At the top of the wage scale we find the financial industry and those working in scientific or technical professions. The rate of growth of job creation in those industries far exceeds the average.

Employment that once supported middle class living standards is in retreat, being replaced by jobs on opposite ends of the compensation and security spectrum. So what has this meant in terms of wage gains? Figure 2.11 details the (inflation-adjusted) gains from growth in a sample of key industries. Home care and child care work is one of the most precarious employment forms and it has seen virtually no inflation-adjusted increase in average hourly pay in the past two decades. Similarly, those in industries that once provided stable, good-paying jobs such as extraction and manufacturing, have not seen appreciable increases in average compensation (despite significant productivity gains). All the gains from economic growth are converging on the already high-paying professions such as finance and management. The gains these groups are making dwarf other industries, thus exacerbating Canadian income inequality.

Figure 2.11
Average Hourly Earnings in Ontario: Inflation-Adjusted Change, 1997-2014



Source: Cansim Tables 282-0070 (childcare and home support workers; primary occupations; management) and 282-0072 (manufacturing; professional, scientific and technical services; finance, insurance, real estate and leasing).

Apart from the industrial location of precarious work, who is the ‘typical’ worker in insecure employment forms? The scholarly literature suggests that while anyone could find themselves in a precarious job, some groups are heavily over-represented. Women are more likely than men to face employment precarity, often on account of unpaid work in the home or care work. For example, women make up roughly half of Ontario’s workers but 72 percent of permanent part-time workers.²⁵

Racialized workers, aboriginal workers and recent immigrants are more likely to be unemployed and, for those who find employment, a disproportionate number will work a precarious job. This is one reason why these demographic segments are more likely to live in poverty. Racialized families, for example, are three times more likely to live in poverty than non-racialized families, the Law Commission of Ontario reports. Ontario’s 300,000 or so Aboriginal people experience unemployment at a rate nearly double that of Ontario as a whole. And while recent immigrants make up roughly 10 percent of Ontario workers, they make up almost 16 percent of temporary part-time workers.²⁶

Temporary migrant workers, persons with disabilities, young workers and non-status workers are a few other categories that are more likely to end up in a precarious employment relationship. And in terms of professional credentials, there is a negative relationship between educational attainment and employment precarity, such that the more schooling one completes the less likely one will work in part-time or temporary forms of work.²⁷

The purpose of this section has been to document the structural transformation in Ontario’s labour market, with declining employment opportunities and lower quality jobs. Precarious employment is sufficiently destructive, individually and socially, that steps must be taken to reverse these labour market trends.

²⁵ Noack and Vosko, *op. cit.*, Table 4.2, p. 20.

²⁶ Law Commission of Ontario, *op. cit.*, pp. 20-26.

²⁷ Noack and Vosko, *op. cit.*, Table 4.2, p. 20.

Part III: Employment Standards: Incremental Improvements

3.1 A Two-Track Approach: Strengthening Employment Standards and Collective Bargaining

Today's labour market looks very different than in past decades. It is much harder for working people in Ontario to gain access to stable, decently-paid, "middle class" opportunities. Jobs are less secure, more precarious, and inequality is growing. There is no longer any reliable connection between labour productivity and wages – because the bargaining power of employers has become so much stronger in recent years. So we can build a productive, profitable economy, but there is no guarantee that prosperity will "trickle down."

It will require a multidimensional strategy to rebuild the economic position of working people in this province. Otherwise, inequality, exclusion and precarious work will continue to grow. Stronger unions are part of the solution. The international research is very clear: where unions and collective bargaining are well-established, society is more equal and inclusive. Part IV of this submission will describe several suggestions for strengthening opportunities for workers to form unions, and to effectively use their unions to bargain better compensation, working conditions, and security from their employers.

However, unions cannot single-handedly restore balance to Ontario's labour market. After all, more than two-thirds of Ontario workers currently do not have the benefit of union representation (and a substantially higher proportion of those who work in the private sector). More Ontario workers need to benefit from the protection of a union. But we need other measures and supports to lift the quality of jobs, to empower workers to demand and win fair treatment, and to ensure prosperity is widespread.

That is why this submission will also make numerous suggestions for reforms and improvements in employment standards to strengthen the well-being of all workers (whether they are members of a union or not). We recommend, in other words, a two-track approach for rebuilding more inclusive opportunity for workers: requiring improvements in labour relations and collective bargaining, and progressive reforms in employment standards. Both are needed, and they should be seen as complementary parts of an overall integrated strategy to ensure that workers are protected, and have fair opportunity to prosper in today's evolving and precarious labour market.

There was a time when some trade unionists might have downplayed the importance of improvements in universal labour standards, on grounds that they might reduce the private cost-benefit calculation that leads an individual worker to expend the time, risk, and financial cost of joining a union. If all workers can be treated more fairly, union or

no union, this might be seen to undermine the rationale for union activity and membership. In today's lopsided labour market, however, when even many unionized workers seem on the defensive (challenged to hang onto past gains, let alone win a fair share of future prosperity), trade unionists understand well that any measures which

WORKPLACE PERSPECTIVE

"Our store is made up mostly of part-time workers. The store couldn't operate as it does, with extended evening hours and Sundays, without those part-time workers. They are an essential part of the business. But they're often treated like secondary citizens. Our company hires part-time workers, pays them the minimum wage, and refuses to provide access to benefits. They have to wait three years before they qualify. Some move on before they are eligible. Our company budgets work hours for the store – which fluctuate week-to-week – yet don't guarantee part-time employees a minimum number of work hours or shifts. Part-time hours fluctuate between 4 and 32 each week. And shifts can be cancelled with 48 hours of notice"

Kelly Lynn, Member, Unifor Local 414, Ottawa

enhance the institutional and legal standing of workers and labour rights will benefit all workers – including union members. In many unionized workplaces, where union power is modest, the union's modest goals often include merely ensuring that minimum labour standards are enforced.²⁸ Stronger

employment standards translate directly into improvements in workers' conditions, and allow unions to expend their limited bargaining power on other goals. More importantly, improvements in the basic standards of work for non-union workers also benefit unionized members, by limiting the degree of desperation experienced in the non-union segment of the labour market, and encouraging non-union workers to set their sights higher.

For all these reasons, Unifor sees improvements in minimum employment standards to be a core component of reforming Ontario's labour market – a priority that will benefit all workers, both union and non-union.

To that end, Unifor respectfully submits our recommendations for a number of reforms and improvements to the *Employment Standards Act, 2000* ("ESA") and other minimum labour standards. Our suggestions are organized into the following sections.

²⁸ In Ontario, responsibility for enforcement of minimum employment standards in unionized workplaces is assigned to the dispute settlement process specified in the respective collective agreement.

- 3.2 Proposals regarding scheduling issues facing part-time and irregular workers.
- 3.3 Providing proportional benefits to part-time workers.
- 3.4 Improving working conditions and remedies for workers working through a temporary help or employment agency.
- 3.5 Prohibiting employers from creating two-tier wage structures and compensating workers differently based on their hiring date for substantially the same work.
- 3.6 Providing emergency leave for individuals facing domestic abuse.
- 3.7 Enhancing employment standards protections for migrant workers.
- 3.8 Improving enforcement of the *Employment Standards Act, 2000*.

3.2 Part-Time and Irregular Workers: Scheduling Issues

Many Ontario workers do not work regular schedules. Hours of work are changed, often every week, at the employer's behest, based on the flow of business and other motivations. In our experience, this constant flux in work schedules poses tremendous stress on workers and their families. Incomes are unpredictable. Arranging time for family care obligations is made difficult. Changing work schedules are a barrier to schooling and second jobs.

Employers abuse their relative power in the labour market to attain this constant flexibility in schedules from their workers. With a constant condition of excess supply, employers are able to attract workers even without offering regular or adequate hours. By constantly shifting schedules, employers make it impossible for workers (even those not receiving enough hours of work to attain required income levels) to take on a second job – thus ensuring that those workers are beholden to that employer, and constantly available in the event of additional labour requirements. For similar reasons, employers in most part-time situations maintain far more workers on the employment roll than would be required to fill the expected number of hours. By maintaining available surplus labour, employers again ensure that all of those workers are perpetually “hungry” for more hours, thus making it easier to mobilize labour for unexpected demand situations, to substitute for other workers, and other occasional needs.

We do not accept that the overuse of part-time and irregular work schedules is a normal or inevitable feature of the modern labour market. But even where part-time and irregular work is common, some relatively modest changes in scheduling practices would help to make those jobs more manageable for the workers filling them.

Proposal 3(i): Require a minimum call-in period of four hours of work (or pay in lieu).

Proposal 3(ii): Require at least 14 days' notice of compulsory changes in work schedule.

Proposal 3(iii): Require employers to combine hours of work to create more full-time positions.

3.3 Part-Time Workers: Proportional Benefits

One motivation for the over-use of part-time workers by employers is the fact that many are denied access to the supplementary benefit programs which are normally offered to full-time workers. This creates an artificial cost advantage for employers to replace full-time jobs with part-time positions. Supplementary health, pension, and insurance benefits can add one-third or more to direct wage and salary costs. This creates a significant incentive for employers to rely disproportionately on part-time work, since some or most of those supplementary costs can be avoided.²⁹

WORKPLACE PERSPECTIVE

"Sarah is a nurse working two casual positions in Thunder Bay. She has worked for one of her employers since 1991. Sarah has diabetes, and struggles to control her condition.

The extreme stress of multiple and irregular work schedules does not help. She was recently assaulted by a male manager in her workplace, sustaining a shoulder injury, and cannot work, yet EI denies her benefits. She has no health benefits. Sarah's story is just one shocking example of how part-time workers need access to the same protections and benefits as everyone else, including paid sick time and health benefits."

Kari Jefford, President, Unifor Local 229, Thunder Bay

In some cases, this perverse incentive is even reinforced by the design of social policies. Canada Pension Plan premiums, for example, are not collected on the first \$3500 of annual wage income. For minimum wage workers, that represents over 300 hours of work – potentially a half-year's labour for people working 10-15 hours per week (not uncommon in many retail and hospitality settings). The CPP exemption therefore opens the possibility for employers to avoid up to half of their total CPP expenses (just under 5% of earnings, at present), by utilizing an employment strategy based on employing far more people than required – but then reducing the number of hours worked by each. An even stronger incentive for the over-use of part-time work is created by the fact that many supplementary programs are not offered to part-time workers at all.

²⁹ Robert F. Campling, *Employee Benefits and The Part-time Worker: Legal and Economic Issues* (Kingston: Queen's University Industrial Relations Centre, 1987), 63 pp.

Part-time workers should be offered proportional access to supplementary benefits which are available to full-time workers in the enterprise. Just as vacation pay and statutory holiday pay are made proportionate for part-time workers, proportional benefits should be made available for part-time workers.³⁰

Proposal 3(iv): Where employers provide benefits to full-time employees, the *ESA* should require employers to provide proportional supplementary benefits to part-time workers, with the proportion linked to the proportion of hours worked on average over the preceding three months.

3.4 Employment Agencies and Temporary Work

Temporary employment agencies have grown exponentially in Ontario in recent decades, to capitalize on employers' growing interest in temporary and contract labour force strategies. However, these agencies are not merely neutral "middlemen" in the process of matching employer needs with willing workers. They have played a pro-active and damaging role in promoting temporary work arrangements, displacing permanent positions, and subjecting temporary workers to particularly intense exploitation.

Recent amendments to the *ESA* have incrementally strengthened restrictions on these agencies, and protections for the workers they place in temporary jobs. However, more reforms are required to put limits on the abuses experienced through these practices.

Proposal 3(v): Make employers jointly and severally liable with temporary employment agencies for *any* employment standards violations of workers employed in their worksites (not just lost wages) with no ceiling on potential claims and a five-year limit on filing claims.

Proposal 3(vi): Require that temporary agency employees are paid the same wages and benefits as permanent workers in the enterprise they are working in performing comparable work.

3.5 Two-Tier Wages

Increasing income inequality is a pressing concern in Ontario and Canada. The degree of stratification of incomes between different social classes continues to deepen.

³⁰ See International Labour Organization, Sectoral Activities Program, *Terms and Conditions of Employment of Part-Time and Temporary Workers in the Public Service* (Geneva: International Labour Office, 1993), pp. 56-60, for a survey of practices in several OECD countries and Canadian provinces.

Moreover, not only do executives and shareholders obtain incomes which are many multiples of those earned by employees, they are also insisting that the profound material inequality in society be brought directly into the workplace by separating workers who perform the same job into two or more *permanent* tiers of wage recipients.

The two tier wage system is simply another reflection of the unreasonable exercise of employer authority to address competitive cost pressures by implementing workplace rules that contradict basic tenets of fairness and distort rational wage/labour market structures.

A two tier wage system raises issues of inter-generational equity. It denies newly hired, generally younger workers the same wage for performing substantially the same work. The pressure from employers seeking to cut compensation costs by implementing a two tier wage system forces active employees to sacrifice the interests of workers not yet hired. Even so, active employees are participating unwillingly in the creation of arbitrary distinctions amongst co-workers.

In a unionized workplace, a two tier wage system may lead those employees in the second tier to blame their union for the inequity, despite the general resistance by unions to such wage structures. This dynamic does nothing to assist stability in collective bargaining relationships.

Limited data are available with respect to the extent to which two tier wages and benefit schemes have been adopted in Canada.³¹ Nevertheless, in the past five years, pressure from major employers such as Air Canada (2011), Canada Post Corporation (2010-2011), Vale Inco, Stelco, and General Motors of Canada Limited (2012) to oblige their collective bargaining counterparts to accept two tier wage or benefit programs has contributed to high profile, difficult, and disruptive collective bargaining, as well as bitter labour disputes.

WORKPLACE PERSPECTIVE

“Workers from temp agencies have limited training and less opportunities for advancement because companies who use these services do not have a vested interest in these workers. If “work is one of the most fundamental aspects in a person’s life,” temp services circumvent this by not allowing a sense of identity, self-worth and emotional well-being.”

Paul McKee, Vice President, Unifor Local 4268,
Hamilton

³¹ Michael MacNeil, “Two Tier Workplace Compensation Issues and Remedies” (2013) 17 C.L.E.L.J. 181

Fairness in any employment relationship requires that in the context of compensation, there must be equal pay for work of equal value. An equivalent principle of equity may be stated as equal pay for performance of substantially similar work activity. Unifor submits that the two tier wage structures violate these basic principles of pay equity and fairness.

In 1999, the National Assembly of Quebec addressed this concern. The Quebec Legislature amended its *Quebec Labour Standards Act* to provide as follows:

“No agreement or decree may, with respect to a matter covered by a labour standard that is prescribed by Divisions I to V.1, VI and VII of this Chapter as is applicable to an employee, **operate to apply to the employee, solely on the basis of the employee’s hiring date, a condition of employment less advantageous than that which is applicable to other employees performing the same tasks in the same establishment.**”³²

To be clear, the *Quebec Labour Standards Act* does not prohibit differential employment conditions based on seniority or years of service. However, it does make clear that a worker’s hiring date should not determine that worker’s eligibility for entitlements negotiated with the employer, or prescribed by a decree.

The Quebec statute also allows complainants to bring their claim regarding a violation of section 87.1 above, directly to the Quebec Labour Standards Commission, without the condition precedent of grieving under a collective agreement. However, the requirement that a complainant demonstrate that the two tier compensation system is “solely” based on the date of hiring negates the spirit and objective of the provision.³³ For example, in a case called *Commission des Normes du Travail v. Centre Jeunesse des Laurentides*³⁴ the Quebec Court of Appeal held that grandfathering a superior wage entitlement for workers hired prior to a first collective agreement, compared to workers engaged after the conclusion of the first collective agreement was not contrary to section 87.1, because the date of hire was not apparently the sole criteria for the differentiation.

A statutory rule that requires workers/complainants to demonstrate that the two tier compensation differentiation is *solely* based on a hiring date is a veiled invitation to

³² Section 87.1, an *Act Respecting Labour Standards*, S.Q. 1999, C.85, Section 2, 2002, C.80, Section 55.

³³ Michael MacNeil, “Two Tier Workplace Compensation Issues and Remedies” (2013) 17 C.L.E.L.J. 181

³⁴ 2011, Q.C.C.Q. 12600, affirmed 2012, Q.C.A. 620

employers to attempt to skirt the rule by attempting to attach insignificant factors to the two tier system to justify its existence.

Unifor submits that any amendment of the ESA on this model ought to avoid the unfortunate Quebec experience by emphasizing that a two-tier wage will be prohibited if it is principally or primarily because of the employee's hire date. Such an amendment will, in part, relieve against the pressures of cost competition based on arbitrary factors such as an employee's hiring date.

Proposal 3(vii): The *ESA* should be amended to prohibit systemic pay and benefits discrimination based solely on the hire date or age of an employee.

3.6 Leave in Event of Domestic Violence

There is growing awareness of the problems faced by women experiencing domestic abuse and violence, and also awareness that situations of violence or abuse in personal life may affect workers' attendance or performance at work. A recent pan-Canadian survey titled "Can Work Be Safe When Home Isn't" found that domestic violence had a significant impact on the workplace not only for the people experiencing the violence but also for co-workers.³⁵ Research indicates that economic insecurity is one of the major barriers preventing women from reporting abuse and removing themselves from violent situations; fear that they would lose their jobs as a result of moving to a shelter or another safe location, can prevent them from leaving violent situations (often with the added responsibility of protecting their children). Encouraging precedents from other jurisdictions (including Australia) have shown that ensuring the employment security of women fleeing domestic violence can literally save lives, and ratify the courageous acts of women determined to protect themselves and their children. In Australia, over 450 other agreements include domestic violence clauses across such diverse industries as banking, airlines, retail chains, public transport, local government, docks, social clubs, universities and the health sector. The clauses have also been extended to government employees in all but two states. In Canada, Unifor and other progressive unions have worked to pioneer new language protecting women in these situations in collective agreements, but parallel measures need to be taken in employment standards to ensure that non-union workers are entitled to a similar level of protection.

³⁵ Wathen, C. N., MacGregor, J. C. D., MacQuarrie, B. J. with the Canadian Labour Congress. (2014). *Can Work be Safe, When Home Isn't? Initial Findings of a Pan-Canadian Survey on Domestic Violence and the Workplace*. London, ON: Centre for Research & Education on Violence Against Women and Children.

It is incumbent on the government to ensure that such emergency leave protections for victims of domestic abuse are available to all individuals who require them.

Proposal 3(viii): The *ESA* be amended to include the following protection: Workers facing situations of domestic abuse and violence shall be entitled to five days paid leave, with the right to extended unpaid leave as needed (with right to return to their jobs without reprisal once their personal situation has been secured). These leaves shall be contingent on adequate verification from a recognized professional (i.e. doctor, lawyer, professional counselor, social worker, intake worker from a women’s shelter).

To operationalize this principle, the *ESA* should require employers to have in place plans for supporting employees in situations of domestic violence that include the following features:

1. Confidentiality of employee details must be assured and respected to the extent possible. Information will be shared on a “need to know” basis;
2. Workplace safety planning strategies to ensure protection of employees should be developed and clearly understood by the parties concerned;
3. The plan should provide for referral of employees to appropriate domestic violence support services;
4. Provision of appropriate training and paid time off work for designated support roles (including union delegates of health and safety representatives if necessary);
5. Employees entitled to domestic violence leave should also be able to access flexible work arrangements where appropriate; and
6. Employees must be protected against adverse action or discrimination on the basis of their disclosure of, experience of, or perceived experience of, domestic violence.

3.7 Migrant Workers

Temporary foreign workers in Ontario, particularly those in the “low-waged” program stream face some of the most exploitive working conditions of any group in the province and are most vulnerable to employer abuse. Because their presence in Canada depends on their employers’ willingness to maintain an employment relationship, they are even more reluctant than other workers to express concerns or make complaints about

working conditions, safety risks, and violations of employment standards. While the federal government determines overall policy parameters governing this category of immigration, provincial policies can also play a role in addressing the specific risks and dangers faced by migrant workers.

A horrific example of the risks faced by migrant workers in Ontario involves the experience of two women working under the Temporary Foreign Worker Program at a fish processing plant near Windsor.³⁶ As a result of their vulnerability and precarious working conditions, these workers were subjected to unwanted sexual solicitations by their boss, as well as multiple episodes of sexual assaults and touching, a sexually poisoned work environment, discrimination and threats of being repatriated if they did not comply with their employer's sexual advances. With the support of Unifor, the women were able to launch a successful legal challenge against the employer through the Human Rights Tribunal of Ontario.³⁷ But migrant workers cannot count on the ability of well-meaning unions and other third parties to protect them against exploitation of this degree. Pro-active policy measures are needed to ensure that - migrant workers employed in Ontario benefit from the same protections as other workers in our labour market.

Proposal 3(ix): Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices model adopted in Manitoba's *Worker Recruitment and Protection Act* and the enhancements developed in Saskatchewan and Nova Scotia.

Proposal 3(x): Where migrant workers express complaints of employment standards violations, those complaints must be expedited so that they are heard before a worker is repatriated. Where there is a finding of reprisal, provision must be made for transfer to another employer or, where appropriate, reinstatement. The *ESA* should explicitly prohibit an employer from forcing "repatriation" on an employee who has filed an *ESA* complaint. Migrant workers must be able to make claims under the *ESA* whenever the legislation is violated.

³⁶ *OPT v Presteve Foods*, 2015 HRTO 675.

³⁷ Unifor, "Landmark human rights ruling highlights systemic abuse of temporary foreign workers," May 2015, <http://www.unifor.org/en/whats-new/press-room/landmark-human-rights-ruling-highlights-systemic-abuse-temporary-foreign>.

Proposal 3(xi): Change the Canada-Ontario Immigration Agreement (COIA) to create an open work permit program for migrant workers who have filed complaints against recruiters, under the Employment Protection for Foreign National Act, and *ESA*.

3.8 Employment Standards Enforcement

Legislative protections codified in the *Employment Standards Act* and other laws are inadequate for protecting Ontario workers in an increasingly turbulent and precarious labour market, and that is why Unifor is proposing the reforms described in this submission. But this weakness in legal standards is exacerbated by a consistent failure to effectively enforce the employment standards which are already in place. Ontario has emphasized a complaint-driven self-regulatory model of enforcement, dependent on employers acting in a responsible manner.³⁸

The whole system of enforcement depends on unfairly-treated workers being sufficiently aware, confident, and secure to pursue complaints. These preconditions are not a sufficiently reliable basis for a credible employment standards regime.

A survey performed by the Workers' Action Centre 2010-2011 of low-wage workers in Ontario found that of the 520 respondents to the survey:

- 22 percent of the respondents reported earning less than minimum wage.
- 60 percent of the respondents reported working in excess of 44 hours a week during the past 5 years. Of those 60 percent, only a quarter actually working overtime consistently received overtime premium pay and the remainder received overtime pay infrequently or not at all. Furthermore, 18 percent of workers reported working overtime and receiving no payment at all for those hours worked, let alone overtime premiums.
- 26 percent of workers reported that they worked hours for which they were not paid.
- 36 percent of workers surveyed reported that they were not provided with termination pay or notice when fired or laid off.
- 34 percent faced difficulty accessing their vacation pay.
- Of the 62 percent required to work on public holidays, just over half managed to secure their holiday premium pay.³⁹

³⁸ Mary Gellatly et al., “‘Modernizing’ Employment Standards? Administrative Efficiency, Market Regulation, and the Production of the Illegitimate Claimant in Ontario, Canada,” Canadian Political Science Association, 2011.

³⁹ Workers' Action Centre, “Unpaid Wages, Unprotected Workers: A Survey of Employment Standards Violations”, last accessed online on September 10, 2015, please see:

While the study involved a relatively small sample size, it points to problems of a regime based on voluntary employer compliance with the standards set out in the *ESA*. Without adequate enforcement mechanisms, Ontario workers will continue to be deprived of their basic *minimal* work entitlements.

In the face of rampant violations, the Ministry of Labour inspected 17,453 complaints in 2014-2015.⁴⁰ The survey performed by the Workers' Action Centre suggests that these complaints barely scratch the surface of the number of actual violations in Ontario. Of those workers surveyed, only four percent of respondents actually filed an *ESA* complaint with the Ministry of Labour.⁴¹ Respondents to the survey indicated that they are afraid to speak up about their working conditions due to fear of losing their jobs. No matter how bad their working conditions, workers express that they are willing to accept the losses in order to provide for their families.⁴²

Another practical limitation to making an *ESA* complaint is that workers are generally required by the *ESA* to directly request that their employer remedy the *ESA* violation before making an *ESA* complaint will be accepted.⁴³ Requiring workers to first attempt a "self-help" remedy in the face of potential reprisals by the employer creates a significant deterrent for vulnerable workers in accessing their basic entitlements. This requirement is totally divorced from the workplace reality faced by vulnerable workers in Ontario.

The *ESA* enforcement procedures create a perverse incentive for employers to violate the minimum standards of their workers. It is more financially lucrative for employers to withhold or fail to pay a worker their minimum entitlements under the *ESA*, and if the employee should launch a successful complaint, be put in a position where the employer can potentially settle the debt owed to the aggrieved worker for cents on the dollar, potentially below the *minimum* standard set by the Legislature.

<http://www.workersactioncentre.org/wp-content/uploads/2011/12/pb_unpaidwagesunprotectedworkers_eng.pdf> at pp. 5-7.

⁴⁰ Ministry of Labour, Investigation and Inspection Statistics, last accessed online on September 10, 2015, please see: <<http://www.labour.gov.on.ca/english/es/pubs/enforcement/investigations.php>>.

⁴¹ Workers' Action Centre, "Unpaid Wages, Unprotected Workers: A Survey of Employment Standards Violations", last accessed online on September 10, 2015, please see:

<http://www.workersactioncentre.org/wp-content/uploads/2011/12/pb_unpaidwagesunprotectedworkers_eng.pdf> at p. 12.

⁴² *Ibid.*

⁴³ *Employment Standards Act, 2000*, SO 2000, c 41, ss. 96.1(1), 96.1(3)(a); Ministry of Labour, Filing an Employment Standards Claim: <<http://www.labour.gov.on.ca/english/es/pubs/guide/esclaim.php>>.

Of the few workers who make complaints of *ESA* violations, those who are successful in their attempt to get an Employment Standards Officer's order for compensation are entitled only to wages, vacation pay and premiums that remain unpaid, as well as administrative cost of 10% of wages owing or \$100, whichever is greater.⁴⁴ The *ESA* does not provide for interest on unpaid wages. As a basic principle of compensation, the aggrieved party should be put in the same position they would be the violation of their rights not taken place. Without a mechanism for ordering interest on unpaid wages, aggrieved workers cannot be put in the same position as the value of their unpaid wages depreciates due to inflation.

Moreover, a reasonably foreseeable consequence of workers not being paid wages that are due is that

workers cannot make basic payments to cover their costs of living. Though a workers' pay cheque may be late or never come, amounts owing for rent, mortgage and bank statements will continue to become due. In situations where an employer's failure to pay due wages causes additional financial damage to the worker by forcing the worker to take on debt to finance their payments, the *ESA* should allow the power to order damages against employers violating the *ESA* to compensate for the costs of borrowing that they have forced workers to incur.

In order to avoid incentivizing non-compliance with the *ESA* by making it more cost-effective for employers to violate *ESA* minimum standards, greater penalties for non-compliance should be implemented to deter employers from wilfully violating the

WORKPLACE PERSPECTIVE

"After raising his concerns with his supervisor and getting no response, Andy contacted the Ministry of Labour. An M.O.L. inspector was dispatched to the workplace and wrote several orders for the employer to comply with the Occupational Health and Safety Act. It was obvious to the employer that Andy blew the whistle on them. The following week, Andy found his name was no longer on the work schedule. When he asked his supervisor what was going on he was told they were slow and didn't need him. The next week he found out someone else had been hired to do his job. In the time Andy had worked for this company he received positive performance reviews and two small raises. During the time Andy worked for this company he had no break or lunch periods. When he worked statutory holidays he was denied premium pay. When he requested his vacation pay he was told he was a contractor not an employee."

Jim Reid, President, Unifor Local 27, London

⁴⁴ *Employment Standards Act, 2000*, SO 2000, c 41, s. 103

minimum standards under the *ESA*. Though no statistics are published on the rate of confirmation of *ESA* violation complaints, of thousands of complaints are filled with the Ministry of Labour for *ESA* violations every year, the Workers' Action Centre reports based on their personal communications with the Employment Practices Branch of the Ministry of Labour that approximately 75% of complaints lead to confirmed violations of the *ESA*.⁴⁵ Despite the high rate of confirmation of *ESA* violations, only a small number of fines for those violations are ordered every year.⁴⁶ These fines typically are set by the *Provincial Offences Act* at \$360 for violations of workers' rights under the *ESA*, although higher amounts have been ordered against employers who fail to comply with orders to pay made under the *ESA*. Apart from the rare instances of orders for failure to comply with orders to pay under the *ESA*, a ticket of \$360 dollars for violations of the *ESA* does not pose an effective deterrent against violating the *ESA*. Stronger sanctions must be implemented in order to effectively deter the pervasive trend of *ESA* violations.

Moreover, where an employer is found to have engaged in *ESA* violation against an individual employee, the employer should be subjected to a firm-wide investigation to determine if the individual's complaint is indicative of a widespread practice of *ESA* violations as a proactive method of enforcing workers' rights under the *ESA*.

In the rare occasions in which individual workers are able to successfully enforce their rights under the *ESA*, existing mechanisms for enforcing the resulting orders (and collecting fines and other compensation which may have been ordered) are inadequate. Many instances have been reported of orders being made against employers for *ESA* violations, typically following years of persistent efforts by a courageous worker – only to see that apparent victory evaporate in the failure of the employer to pay what is owed.⁴⁷ At present, a worker does not have the capacity to file and enforce an order of an employment standards officer made for wages owing as an order of the court. Only the Director of Employment Standards has the power to file an order to pay as an order of the court.⁴⁸ The preferred vehicle of enforcement for the Ministry of Labour has been through their power to attempt to obtain unpaid wages through the collections

⁴⁵ Workers' Action Centre, "Still Working on the Edge: Building Decent Jobs From the Ground Up", last accessed online on September 10, 2015, please see: < http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf> at p. 36.

⁴⁶ Ministry of Labour, Prosecution and Conviction Statistics, last accessed September 10, 2015, available online at <<http://www.labour.gov.on.ca/english/es/pubs/enforcement/convictions.php>>.

⁴⁷ See for example: Workers' Action Centre, "Still Working on the Edge: Building Decent Jobs From the Ground Up", last accessed online on September 10, 2015, please see: < http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf> at pp. 38-39.

⁴⁸ *Employment Standards Act, 2000*, SO 2000, c 41, s. 126.

enforcement arm of the Ministry of Finance, or privately contracted collection agencies.⁴⁹

The Ministry of Finance, or privately contracted collection agencies then typically begins discussions with the worker (in the tradition of a collection agency) about being willing to “settle” the matter for partial payment of some cents on the dollar. Collection agencies prove to be ineffective at obtaining unpaid wages. Based on statistics from 2006-2010, collections agencies were only able to obtain 12 to 16 percent of the wages owing to workers that they were assigned to collect.⁵⁰

A potential solution to the current unenforceability of orders issued by Employment Standards Officers would be to permit Officers, with the permission of the claimant, or successful *ESA* claimants themselves, to file those orders in court and avail themselves of the full array of judgment enforcement mechanisms available in Ontario.

Meaningful improvements to the *ESA* enforcement system must form a key part of the outcome of the Changing Workplaces process, if it is to hold any credible prospect of ameliorating the circumstances of exploited and abused workers in Ontario. Some of this task will require reinforcing the effectiveness of existing enforcement mechanisms (with additional resources and more aggressive inspection practices). But merely hiring more *ESA* inspectors is unlikely to solve the problem, given the proclivity of fiscally challenged governments to claw back budgets (not to mention bow to the demands of aggressive business lobbyists, complaining about “red tape”). For that reason, we also propose some important institutional changes to the enforcement regime, so that it is less dependent on the actions of an inadequate cadre of government inspectors, but instead establishes an institutional structure which more meaningfully (and consistently) empowers Ontario workers to stand up for their rights.

In light of these observations, Unifor proposes that the *Employment Standards Act, 2000* be amended in the following ways:

Proposal 3(xii): Remove the ability of the Director to require that a worker must first contact their employer and request that the employer voluntarily remedy the *ESA* violation before being permitted to make a complaint to the Ministry of Labour.

⁴⁹ ⁴⁹ *Employment Standards Act, 2000*, SO 2000, c 41, ss. 127-129.

⁵⁰ Leah Vosko, Eric Tucker, Mark Thomas & Mary Gellatly, (2011), “New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada. Paper commissioned for the Law Commission of Ontario. Online: <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf>. Accessed September 10, 2015. p 20.

Proposal 3(xiii): Shift away from the current complaint-driven enforcement process, and allocate more resources to pro-active enforcement initiatives (including spot checks, audits, and inspections).

Proposal 3(xiv): Give employees the right to file complaints directly with the Ontario Labour Relations Board for investigation and adjudication. Filed complaints would be screened by OLRB staff (in conjunction with employment standards officers at the Ministry of Labour) to ensure they are not frivolous, and are supported by meaningful evidence.⁵¹

Proposal 3(xv): Establish a network of independent third party investigators and advocates should be established (on a community “clinic” model), funded in part with the funds attained from ESA-related fines and penalties. Those third party advocates will have rights (with the explicit approval of their clients) to receive relevant information from the employer in question, and to represent the complainant before the OLRB process. Trade unions and other labour advocacy organizations could partner with these clinics to support their work.

Proposal 3(xvi): Fines and penalties levied against employers will be assigned to dedicated funds, used to financially support the operation of third party clinics. Employers found in violation of ESA provisions will also be subject to an administrative fee,⁵² proceeds of which will also be assigned to that fund. Furthermore, OLRB adjudicators would have discretion to award costs incurred by third party advocates in the course of successfully investigating and prosecuting ESA violations. The network of third party advocates would also be funded, in part, through annual operating grants from the Ministry of Labour. We estimate that a network of 10 regional ESA clinics could be funded through a combination of fine revenue, administrative levies and cost recovery, and \$5 million in annual provincial operating grants.

⁵¹ Parallels for this principle of direct access to adjudication can be found in the operation of Ontario’s Human Rights Tribunal model (and other “social justice” tribunals), and in the ability of unionized workers to directly advance their grievances to arbitration.

⁵² Precedents for this approach exist in the 20% administrative levy on any charges applied under the Quebec sectoral decree system, and the criminal victim surcharges that are added to fines imposed on convicted persons under s. 737 of the *Criminal Code*, RSC 1985, C-34.

Part IV: Labour Relations: Incremental Improvements

4.1 Introduction

*Labour and employment rights and the laws that buttress them are not the accumulation of privileges by a vigorous lobby of special interests, but the expression of core constitutional and human rights that benefit, directly and indirectly, the majority of citizens living in a modern democratic society.*⁵³

Labour law serves two purposes. The first is a remedial purpose. It identifies unfairness, imbalance, or injustice and tailors a solution to that problem to achieve a just balance. Labour law also serves an aspirational function. Statutes are the manifestation of our values. In labour law, those values are tied to the freedom of association under s. 2(d) of the *Charter of Rights and Freedoms*.

The Supreme Court of Canada recently reaffirmed that for workers to fully exercise their freedom of association, a fundamental right under s. 2(d) of the *Charter of Rights and Freedoms*, there must be a meaningful process of collective bargaining:

*This Court reaffirmed in Fraser that a meaningful process under s. 2(d) must include, at a minimum, employees' right to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.*⁵⁴

Unifor submits that the current review ought to bear in mind at all time these questions about the two roles of legislation: does our current labour regime strike a just balance; and does it reflect *Charter* values?

Below is a summary of Unifor's proposed amendments to the *Labour Relations Act, 1995*:

1. The purpose clause of the *Labour Relations Act, 1995* should be amended to reaffirm the Provincial government's role as a facilitator and promoter of collective bargaining, and to express stronger commitments to building and strengthening collective bargaining in Ontario, and minor amendments. Other

⁵³ Michael Lynk, 2009, "Labour Law and the New Inequality", Vol. 15 Just Labour: A Canadian Journal of Work and Society 125 at 135.

⁵⁴ Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4 at para 29.

incremental or minor amendments can remove arbitrary barriers to the resolution of workplace disputes.

2. Certification procedures should be modernized to:
 - a. Reintroduce card-based certification of new bargaining units;
 - b. Allow for electronic and neutral votes to be held;
 - c. Allow the use of electronic membership evidence in certification applications; and
 - d. Introduce mechanisms to allow unions to obtain from employers accurate employee lists and employee contact information where 20 per cent or more of the proposed bargaining unit supports the union.
3. Expand the interim relief powers of the Ontario Labour Relations Board and arbitrators.
4. Allow automatic access to first contract arbitration after 30 days of being in a legal strike/lockout position, and provide access to interest arbitration where a strike/lockout has been ongoing for 180 days.
5. Provide for successor bargaining rights where a new employer replaces another as the provider of a contracted service.
6. Provide for successor rights where a federally-regulated enterprise sells its business to a provincially-regulated enterprise.
7. Remove the six-month limit on a striking employee's right to reinstatement.
8. Provide the Ontario Labour Relations Board with the power to combine and/or consolidate bargaining units.
9. Clarify and expand a duty of good faith bargaining on the employer in the context of a plant closure.

4.2 Purpose Clause and Minor Amendments

Purpose Clause

Proposal 4(i): Amend the purpose clause of Ontario's *Labour Relations Act, 1995* to recognize Ontario's long-standing tradition of collective bargaining and encouragement of constructive settlement of disputes, to reaffirm Ontario's commitment to facilitating and promoting the maintenance and acquisition of collective bargaining rights, to empower worker participation, to enhance working conditions and to developing sound labour-management relationships in Ontario.

In 1995, the provincial Conservative government passed Bill 7, repealing the former *Labour Relations Act* and enacting the *Labour Relations Act, 1995*. Bill 7 stripped away many of the fundamental aspects of Ontario's Labour regime that had been in place for

decades following the Second World War.⁵⁵ Importantly, much of what was stripped away was the product of incremental development in the 1960s, 1970s and 1980s by mostly Conservative governments, pushed many times by the labour movement and opposition parties.

WORKPLACE PERSPECTIVE

“I will be the first to admit that being a S.W.E. [Supplemental Workforce Employee] wasn’t my dream job. As a SWE, we had only the basic protection currently provided by the Acts on the job because we were fundamentally contract workers. We didn’t know how long we would be there for, if we would be dismissed without any real justification or if we would be able to provide for our family. We were precarious workers. Unifor Local 88 stepped up and stood together as a united front to help protect us. I believe that if those hard won protections were afforded to all, through improvements in the language of both these Acts, employers would have a stronger, more dedicated workforce that would improve the situation for all parties. It wasn’t until September 17/2013 after completing contract negotiations that the SWEs got the advantages we needed.”

Barry Smith, Member, Unifor Local 88, Ingersoll

Prior to analyzing the effect and proposed solutions to the discrete aspects of the labour relations regime that we have identified, it is important first to examine the purpose clause of the *Labour Relations Act, 1995*, and the pre-1995 *Labour Relations Act* to identify the shift in values that the Bill 7 amendments represented.

For example, prior to the 1995 changes, the purpose clause included, “[ensuring] that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the union”. That purpose was replaced with “[facilitating] collective bargaining between employers and trade unions that are freely-designated representatives of the employees”.⁵⁶

⁵⁵ Harish C Jain & S Muthu, 1997, “Ontario Labour Law Reforms: A Comparative Study of Bill 40 and Bill 7”, 4 Canadian Labour and Employment Law Journal 312: Bill 7 brought sweeping changes to labour law in Ontario and was passed in a record-breaking three months with virtually no stakeholder consultation; see also “Why Harris Labour Policy Is Bad for Ontario’s Economy” *The [Toronto] Globe and Mail* (13 November 1995) A-15.

⁵⁶ For further discussion, please see Harish C Jain & S Muthu, 1997, “Ontario Labour Law Reforms: A Comparative Study of Bill 40 and Bill 7”, 4 Canadian Labour and Employment Law Journal 312.

The expression of the rights of workers to organize, and to enhance their ability to negotiate terms and conditions of work, to increase their participation in the workplace, and to work towards harmonious labour relations and ongoing stability, was replaced with a purpose clause that gave primacy to business interests. The American influence underlying that change was described in one study in the following way:

The Bill 7 approach towards industrial relations is akin to the *Taft-Hartley Act* of 1947 model. Under this approach, employers' freedom of speech and communication is given equal status with the employees' right to organize and bargain collectively. The government is perceived to be a neutral guarantor of employee free choice between individual and collective bargaining, and to be indifferent to the choice made. In the industrial relations context, taking labour market realities into consideration, this so-called neutral stance has all the appearance of Solomonic wisdom and impartiality, while in practice amounting to a bias in favour of employers.⁵⁷

Perhaps the most telling amendment to the purpose clause was the shift from providing, "fair, effective and expeditious methods of dispute resolution", to simply, "expeditious resolution of workplace disputes".

These changes to the purpose clause, together with the substantive changes to the *Act* itself,⁵⁸ set the stage for the increasing precarity and vulnerability of workers that this panel has been tasked with reviewing. As a result the values espoused in the *Labour Relations Act, 1995* do not reflect the values which we as a society hold regarding the rights of workers. The purpose clause ought to be amended to more thoroughly reflect the *Charter* values that recognize the rights of workers to organize and bargain collectively.

In its landmark decision of the *Mounted Police Association of Ontario*, the Supreme Court of Canada gave recognition to the expanding protections encompassed by section 2(d) of the *Charter*, as well as the value of collective bargaining to Canadian society. In the words of the court,

This then is a fundamental purpose of s. 2(d) — to protect the individual from "state-enforced isolation in the pursuit of his or her ends".... The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals

⁵⁷ *Ibid*, at 315.

⁵⁸ *Ibid*, for a summary of the changes Bill 7 made to the Bill 40 version of the *Labour Relations Act*.

and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.⁵⁹

In the eyes of the Supreme Court of Canada, collective action serves as a vehicle to enhance the ability of employees to advocate for their own interests in the workplace. These valuable contributions, along with Canada's long-standing history of collective bargaining, and the provincial government's commitment to promoting and maintaining the acquisition and maintenance of bargaining rights, ought to be recognized in the purpose clause of the *Labour Relations Act, 1995*.

Minor Amendments

Proposal 4(ii): Section 48(16) of the *Labour Relations Act, 1995* should be amended to provide greater authority to the arbitrator to grant relief against missed time limits in the arbitration procedure as well as in the grievance procedure.

The removal of an arbitrator's power to relieve against non-compliance with time limits in the arbitration procedure is an example of a change under Bill 7 that interferes with the expeditious resolution of workplace disputes. Even bearing in mind the current wording of the purpose clause, the restriction of an arbitrator's authority to extend time limits works against the expeditious resolution of workplace disputes.⁶⁰ Permitting arbitrators to relieve against only some late steps creates an arbitrary impediment that is contrary to the stated purpose of resolving workplace disputes.

Except where a collective agreement states that s. 48(16) does not apply, the provision confers on an arbitrator the power to extend time limits in the *grievance* procedure of a collective agreement where there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced by the extension. Prior to the amendment in 1995, the arbitrator's authority to extend time limitation periods also applied to the arbitration procedure. The post-1995 s. 48(16) was interpreted by the Divisional Court of Ontario in *S.E.I.U., Local 204 v Leisureworld Nursing Homes Ltd.*⁶¹ ("*Leisureworld*"). The Court determined that the legislative intent behind the deletion of "arbitration procedure" in s. 48(16) was to deprive the arbitrator of the authority to

⁵⁹ *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 58.

⁶⁰ s. 2.

⁶¹ [1997] OJ No. 1469 (Div. Ct.); aff'd [1997] OJ No. 4815 (C.A.).

extend time limits in the arbitration procedure. A grievance in that case was therefore dismissed for untimeliness.

Denying the arbitrator the procedural power to relieve against time limitations in the arbitration process leads to the dismissal of potentially meritorious grievances on technical grounds. This issue was implicitly addressed by the Divisional Court in *James Bay General Hospital v. PSAC ("James Bay")*⁶². The case involved a judicial review of a preliminary order in which the arbitrator granted an extension of time to the union to proceed to arbitration for a discharge grievance. The Divisional Court distinguished *Leisureworld* and determined that since the referral to arbitration was included in the third step of the grievance procedure, the arbitrator had the ability to extend the time limit pursuant to s. 48(16).

The subtle distinction between *Leisureworld* and *James Bay* highlights the arbitrary nature of s. 48(16). An arbitrator would be able to extend a time limit and hear a meritorious grievance if the referral to arbitration is contained in the grievance process clause of the collective agreement but not in other cases. In effect, s. 48(16) promotes inconsistency and arbitrariness, which should be remedied to ensure that omissions or mistakes do not bar a determination of the real dispute.

Broadening the arbitrator's procedural power to relieve in appropriate cases against all missed time limits would also modernize Ontario's labour relations law so that it provides the same level of procedural fairness as found in other jurisdictions. For example, "arbitration procedure" is included in the equivalent provisions found under the *Canada Labour Code*⁶³, *Saskatchewan Employment Act*⁶⁴, and Nova Scotia's *Trade Union Act*⁶⁵. All time limits can be extended on "just and reasonable terms" in British Columbia⁶⁶ and Manitoba⁶⁷. Providing arbitrators with the authority to relieve against general breaches of time limits "on just and reasonable terms" allows arbitrators to assess each situation where a preliminary objection of timeliness is raised, and engage in a balancing exercise to ensure fairness is achieved and meritorious grievances are not dismissed.

Labour law should not create arbitrary barriers to the fair resolution of workplace grievances. Amending s. 48(16) to restore the arbitrator's ability to relieve against all time limits in a collective agreement will encourage parties to work cooperatively to

⁶² [2004] O.J. No. 4666 (Div. Ct.).

⁶³ RSC 1985, c L-2, s. 60(1.1).

⁶⁴ SS 2013, c S-15.1, s. 6-49(3)(f).

⁶⁵ RSNS 1989, c 475, s. 43D.

⁶⁶ *Labour Relations Code*, RSBC 1996, c 244, s. 89(e).

⁶⁷ *Labour Relations Act*, CCSM c L10, s. 121(2)(2).

resolve workplace issues, reflecting the values in the renewed purpose clause of the *Labour Relations Act, 1995*.

4.3 Modernizing Certification Procedures

Card-based Certification

Proposal 4(iii): Amend the *Labour Relations Act, 1995* to allow the OLRB to certify a new bargaining unit on the basis of majority union membership in the proposed bargaining unit alone.

The contours of the right to freedom of association have recently been defined by the Supreme Court of Canada in two landmark rulings in early 2015. Building on existing judicial pronouncements, the Supreme Court emphasized the integral value that collective bargaining serves:

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.⁶⁸

While the recent decisions by the Supreme Court of Canada have extolled the virtues of collective bargaining in Canada, and better defined the categories of activities of trade unions and employee associations that receive constitutional protection, a critical aspect of collective bargaining rights has received comparatively little attention. That is the right to join and form an association in the first place. The right to join or form an association is a right that has been enshrined in Ontario's labour relations regime since its inception. The *Labour Relations Act, 1995* provides that: "Every person is free to join a trade union of the person's own choice and to participate in its lawful activities".⁶⁹ Labour law should establish a mechanism whereby employees can elect to join or decline membership in a union, in a reasoned and informed way without unwarranted interferences or obstructions. As articulated by the Supreme Court:

Hallmarks of employee choice in this context include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations.⁷⁰

⁶⁸ *Health Services and Support – Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27 at para 82, [2007] 2 SCR 391.

⁶⁹ *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, s 5.

⁷⁰ *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 86, [2015] 1 SCR 3.

In order to be able to bargain collectively in Ontario, workers must obtain collective bargaining rights through union representation⁷¹. The process by which unions become certified remains skewed in favour of employers as a result of the 1995 changes, despite the lofty aspirational statements of the Supreme Court of Canada. The 1995 changes hindered the ability of unions to communicate to workers regarding organizing, ensured employers can interfere in employee decisions at a critical moment in the organizing process, and stripped the powers of the Ontario Labour Relations Board to effectively remedy employer union-avoidance tactics which cross the line into illegality. As stated by the Supreme Court of Canada, “[t]he guarantee entrenched in s. 2(d) of the *Charter* cannot be indifferent to power imbalances in the labour relations context.”⁷²

This section of Unifor’s submissions is organized as follows:

1. A brief overview of Ontario’s legislative history regarding certification.
2. Empirical evidence from Ontario and other jurisdictions that shows that mandatory voting regimes make union organizing more difficult and less accessible.
3. Empirical evidence regarding the incidence and effectiveness of management opposition to union certification.
4. Proposals to rectify the imbalance in the current system of certification in Ontario.

An overview of methods for certification of bargaining units in Ontario

Ontario labour relations legislation has at different times provided two distinct methods of certifying new bargaining units: card-based certification and mandatory voting.

Prior to 1995, bargaining units were most often certified on the basis of membership evidence alone. Under this model, a trade union applied for certification by submitting membership evidence (in the form of union cards) to the Labour Relations Board. If the union succeeded in providing membership evidence of 55% of the bargaining unit (subject to disputes regarding the size of the unit), the bargaining unit would be certified.

In the event that the union was unable to provide membership evidence of 55%, but had between 40% and 55% membership evidence, the Labour Relations Board would order a vote to determine if the workers wished to be represented by a trade union. If a

⁷¹ In Chapter 5 we propose a limited form of concerted action protection that would not extend to full collective bargaining.

⁷² *Ibid*, at para 80.

majority of workers of the proposed bargaining unit voted in favour of certification, the bargaining unit would be certified.

The 1995 changes re-wrote the procedure by which unions could be certified. Bill 7 eliminated certification of bargaining units through card-based certification. Certification of new bargaining units in all industries was required to be done by way of representation vote. Under the current mandatory vote model, an applicant union must submit membership evidence demonstrating the support of 40% of the bargaining unit. Following the application, a vote will typically be held on the employer's premises five business days later. If a majority of the ballots cast are in favour of the union, the union will be certified as the bargaining agent of the bargaining unit.

Mandatory votes remain the method by which unions become certified to represent bargaining units under the *Labour Relations Act, 1995* (apart from instances where an employer voluntarily recognizes the trade union, a bargaining agent is appointed by statute, or in the construction industry where card-based certification was restored in 2005 through the amendments made by Bill 144).

Mandatory votes introduce a second layer of employee decision-making. An implicit assumption is that employees cannot be trusted to make a reliable decision when they sign a union card. A more critical feature is that mandatory votes make the process an adversarial one in which employers become active participants in opposition to union organizing.

The statistical evidence in Tables A and B below demonstrates that the introduction of mandatory voting in Ontario led to a marked reduction in the success rate of certification applications. As well, the number of applications decreased, perhaps reflecting that diminished likelihood of success in certification applications.

Two trends can be readily observed from the two tables published below. First, as documented by Slinn, the success rate of certification applications began to drop sharply in response to the 1995 changes. That lower success rate continues.⁷³

Second, the number of applications for certifications being filed from fiscal year 1996-1997 declined relative to the number of applications for certification filed prior to the enactment of the *Labour Relations Act, 1995*.⁷⁴

⁷³ Sara Slinn, 2003, "The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis", 10 Canadian Labour & Employment Law Journal 367 at 375.

⁷⁴ *Ibid*; the drop in the number of certification applications filed has been noted in British Columbia as well, when that province adopted a mandatory vote regime, see: Riddell, 2004, *infra* at 507.

Table A – Ontario Certification Applications from 1992-2002

Fiscal Year	Filed	Disposed of	Granted	Granted as proportion of cases disposed
1992-1993	824	743	509	68.5
1993-1994	1166	1135	829	73.0
1994-1995	1077	987	762	77.2
1995-1996	797	759	510	67.2
1996-1997	683	656	387	59.0
1997-1998	733	664	424	63.9
1998-1999	692	665	415	62.4
1999-2000	700	567	313	55.2
2000-2001	850	927	521	56.2
2001-2002	624	686	307	44.8

Table B – Ontario Certification Applications from 2002-2014

Fiscal Year	Filed	Disposed of	Granted	Granted as proportion of cases disposed
2002-2003	658	627	318	50.7
2003-2004	729	584	301	51.5
2004-2005	759	811	428	52.8
2005-2006	631	661	352	53.3
2006-2007	799	713	420	58.9
2007-2008	789	826	422	51.1
2008-2009	742	748	396	52.9
2009-2010	623	559	320	57.2
2010-2011	652	727	429	59.0
2011-2012	592	614	351	57.1
2012-2013	719	669	387	57.8
2013-2014	698	742	416	56.0

Table A is reproduced from a study performed by Sara Slinn, a professor of law at Osgoode Hall University, in which she investigated the effect of the introduction of mandatory votes on certification applications in Ontario. See Sara Slinn, 2003, “The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis”, 10 Canadian Labour & Employment Law Journal 367 at 376.

Table B consists of data compiled by Unifor from the Ontario Labour Relation Board’s *Annual Reports* to determine whether the trends observed by Sara Slinn in her article published in 2004 continue to the present.⁹¹ These figures demonstrate that since the enactment of Bill 7 in late 1995, the lowered rate of certification success demonstrated by Sara Slinn in the article mentioned directly above and reproduced in Table A has been relatively constant under the ongoing mandatory vote regime.

Empirical Evidence Regarding Union Certification Procedures

The significant drop in the likelihood of successful certification applications after 1995 is well-documented. One study using data from January 1987 to May 1998, found an 8 percentage point drop in the success rate of certification applications following the introduction of the *Labour Relations Act, 1995*.⁷⁵

Another study analyzed data from each of the private sector certification applications that occurred under the entire life of the Bill 40 amendments and the first two and a half years of Bill 7, and concluded that certification applications under the mandatory vote regime of Bill 7 were approximately 21.28% less likely to succeed (a total of an approximately 12% percentage point drop from 70.36% likely to succeed under Bill 40 to 58.52% under Bill 7).⁷⁶

Notably in Ontario, the average level of initial support that a union could show in applications under both Bill 40 and Bill 7 remained approximately the same. This suggests that despite similar levels of initial support in organizing drives under both models, the mandatory vote procedure under the *Labour Relations Act, 1995*, led to a consistently lower success rate of certification applications.⁷⁷

The drop in success rates upon the introduction of a mandatory voting scheme is not unique to Ontario. An analysis of nine Canadian jurisdictions from 1978-1996 found that across each of the jurisdictions that changed from card-based certification to mandatory vote procedures, the success rate of certification applications dropped by approximately nine percentage points below what they would have been under a card-based certification model.⁷⁸

British Columbia provides unique insight into the importance of certification procedures on the likelihood of successful applications. The British Columbia *Labour Relations Code* provided for card-based certification of new units until 1984. A representation vote was

⁷⁵ Felice Martinello, 2000, "Mr. Harris, Mr. Rae and Union Activity in Ontario", Vol. 26(1) Canadian Public Policy 1 at 26, 29.

⁷⁶ Sara Slinn, 2003, "The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis", 10 Canadian Labour & Employment Law Journal 367 at 387; it should be noted that the certification success rates under Bill 40 include a combined figure of both card-based certifications and votes conducted where the union could not meet the 55% threshold to be certified without a vote. A specific comparison of the differences between the card-based and vote procedures versus the mandatory vote under the *Labour Relations Act, 1995* can be found at 389 of the same study.

⁷⁷ *Ibid*, at 392-393.

⁷⁸ Susan Johnson, 2002, "Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success", 112 The Economic Journal 344 at 355-356, 358; the study is based on data from British Columbia, Alberta, Manitoba, Saskatchewan, Ontario, Quebec, .

made necessary in 1984. Unique amongst Canadian jurisdictions, British Columbia returned to a card-based certification procedure in 1993.⁷⁹ Using data covering 1978-1998, one study found that in the period from 1984-1993 (the years that the *Labour Relations Code* required mandatory votes), the success rate of certification applications fell by approximately 19 percentage points.⁸⁰ Following the amendments in 1993 that reintroduced card-based certification, the likelihood of success of a certification application was restored to roughly pre-1984 levels.⁸¹ In 2002, the *Code* was again amended to require mandatory representation votes. The reintroduction of the mandatory vote procedure in British Columbia in 2002 was accompanied by a reduction in successful certification by approximately 20 percentage points, paralleling the effect of the introduction of mandatory votes in the 1984-1993. That is compelling evidence that mandatory vote procedures cause the success rate of union certification applications to drop.⁸²

The Role of Managerial Resistance to Unionization under Mandatory Voting Procedures

The academic literature tends to provide two explanations for the negative effect of the mandatory vote model. The first is that employer resistance to unionization under the mandatory vote model is much more effective in interfering with employee choice. The second putative explanation is that union support under a card-based certification model is inflated.

There is no evidence suggesting that union support under a card-based certification is inflated. That suggestion is entirely anecdotal and has not been demonstrated empirically. In contrast, the academic literature has demonstrated that management opposition – whether measured by unfair labour practices or by less egregious tactics – is more effective at deterring successful outcomes of certification applications under a mandatory vote procedure than under card check procedures.⁸³

⁷⁹ Chris Riddell, 2004, “Union Certification Success Under Voting Versus Card-Check Procedures: Evidence From British Columbia, 1978-1998”, Vol 57(4) *Industrial and Labor Relations Review* 493 at 494.

⁸⁰ *Ibid*, at 496.

⁸¹ *Ibid*, at 496, 509; In addition to the introduction of the mandatory vote procedure in 1984, the legislature of British Columbia also introduced other amendments to the *Labour Relations Code* in 1987 such as: mandating that representation votes must occur 10 days from the filing of the certification application, lowering the threshold for decertification, and rules affecting secondary picketing. Upon the reintroduction of card-check in 1993, the vast majority of the legislation was not altered, only card-based certification was reintroduced. On that basis the author of the study had the opportunity to isolate out the effect of the recognition procedure changes and concluded that the entire fall in the 1984-1993 period could be attributed to the implementation of mandatory voting as the union recognition procedure at 503.

⁸² Chris Riddell, 2005, “Using Social Science Research Methods to Evaluate the Efficacy of Union Certification Procedures”, 12 *Canadian Labour and Employment Law Journal* 313 at 321-323.

⁸³ *Ibid*, at 505, 509

A study of the impact of unfair labour practices on certification applications in British Columbia lends itself to a number of important findings:

- The presence of an unfair labour practice allegation correlates with a reduced likelihood of a successful certification by 21 per cent.⁸⁴
- The severity of the unfair labour practice has a role to play in the efficacy of the tactic in reducing successful certification applications:
 - Dismissal tactics are effective, and the more employees that are terminated the more effective the tactic is in reducing a success rate of a certification application.⁸⁵
 - Group coercion including distribution of anti-union memos or newsletters, or anti-union meetings is also a tactic that demonstrably deters successful certifications.⁸⁶
- Specific private sector industries (namely manufacturing, construction, primary resource industries and the hotel/restaurant industry) demonstrate more statistical vulnerability to unfair labour practices.⁸⁷
- The smaller the unit, the greater the likelihood that unfair labour practices will deter successful union organizing.⁸⁸
- The earlier the unfair labour practice is committed, the greater its effect in reducing the chance of a successful certification.⁸⁹

These results are alarming, and indicate that despite the outcome of an unfair labour practice application, employer resistance to organization in the form of unfair labour practices has long-lasting damaging effects which may be beyond the power of a Labour Relations Board to remedy.

Beyond unfair labour practices, overt opposition by employers to union certification is pervasive in Canada. In a survey of employers across eight Canadian jurisdictions⁹⁰:

- 88 per cent of the respondents engaged in actions designed to limit employees' ability to communicate amongst themselves or with union organizers;

⁸⁴ Chris Riddell, 2001, "Union suppression and certification success", Vol 34(2) Canadian Journal of Economics 396 at 405.

⁸⁵ *Ibid*, at 405, 406.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*, at 407.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*, at 408.

⁹⁰ Karen Benthall, 2002, "Employer Resistance to Union Certification", Vol. 57(1) Relations Industrielles/Industrial Relations 159 at 172, 174.

- 68 per cent communicated directly with employees regarding certification applications (most often through captive audience speeches); and
- Approximately one-third engaged in forms of employee surveillance and tightening working rules.

More distressingly, of the employer representatives surveyed, 12% admitted to engaging in unfair labour practices during the organizing drive (Not surprisingly, the author raised concerns that the respondents in the sample likely understated their degree of resistance towards certification).⁹¹

Apart from the effect of this period of employer campaigning on the successful rate of applications, further research has demonstrated that employer opposition to certification applications can have deleterious effects on bargaining relationships where union applications eventually succeed. As stated by one author,

If, during the organizing drive, the employer engaged in actions commonly recognized as unfair labour practices, the probability of concluding a collective agreement decreased in the industry model by 14 percentage points, the likelihood of encountering serious bargaining difficulties increased in both models by 30 to 35 percentage points and early decertification increased by an amazing 46 to 57 percentage points, increasing the probability of early decertification from the mean of height percent to as high as 65 percent.⁹²

Correcting the balance

The empirical evidence discussed above demonstrates that first and foremost there is a demonstrable drop in successful certification outcomes with mandatory voting. Secondly, employer opposition to unionization in Canada is pervasive (and contrary to popular belief, it would appear that Canadian employers are more hostile to unions than our American counterparts⁹³).

The empirical evidence demonstrates that the current procedure of mandatory voting in Ontario allows employers to exert undue influence on workers, and thereby successfully deter organizing activity. In order to correct this imbalance of power, Ontario ought to implement a union certification model that facilitates the acquisition and maintenance of bargaining rights, rather than retaining for most workers a system designed by openly anti-union predecessor government to persist in creating artificial barriers for workers to access and exercise their collective rights.

⁹¹ Ibid.

⁹² *Ibid*, at 179

⁹³ Michele Campolieti, Rafael Gomez, and Morley Gunderson, 2013, “Managerial Hostility and Attitudes Towards Unions: A Canada-US Comparison”, 34 Journal of Labor Research 99.

When a worker signs a union card, they are expressing their desire to join a union and work together to improve their working conditions and meet their employers on more equal terms. Despite the fallacy of trying to equate a workplace election to a political election⁹⁴, the “mandatory vote” regime of certification is the only “democratic” system where the electorate is required to vote twice to demonstrate their desires. The first “vote” is the considered choice to sign a union card during an organizing campaign. The second “vote” is the mandatory representation ballot. It is the only system where between the two elections the party opposing it has *de facto* power to break the rules and utilize illegitimate tactics that cannot be effectively remedied before the election is held. Finally, it is the only system where the party that “loses” the election still retains a significant degree of control over the lives of the electorate that voted “against” them.⁹⁵ As stated by the Supreme Court of Canada:

*The function of collective bargaining is not served by a process which undermines employees’ rights to choose what is in their interest and how they should pursue those interests.*⁹⁶

In order to rectify the imbalance of power and limit the effects that an employer’s illegitimate anti-union tactics can have on a successful organizing attempt, the period of employer campaigning following an application for certification must be eliminated. The most feasible method by which this threat of undue influence could be eliminated is the reintroduction of card-based certification, a procedure which is neither novel in Ontario, and is in fact the method by which Ontario certified new units for the majority of its post-war history.

Alternate Voting Procedures

Proposal 4(iv): Where representation votes continue to be required, amend the *Labour Relations Act, 1995*, to permit forms of electronic voting.

Proposal 4(v): Where representation votes continue be required, amend the *Labour Relations Act, 1995* to require the Board to consider whether any circumstances create reasonable doubt that an employer’s own premises are capable of being a sufficiently neutral vote location and

⁹⁴ Harish C Jain & S Muthu, 1997, “Ontario Labour Law Reforms: A Comparative Study of Bill 40 and Bill 7”, 4 Canadian Labour and Employment Law Journal 312 at 323.

⁹⁵ For further discussion on this aspect, please refer to the Section entitled “Broader Interim Powers” of this brief.

⁹⁶ *Supra*, note 3 at para 85.

where not, require the Board to direct that a vote take place at a neutral site.

Alternate voting methods such as internet or telephone balloting using controlled personal identification numbers facilitates voting that is less affected by coercive forms of employer interference. That interference can take many forms. One tactic used by employers is to enter the voting space selected for the representation vote and by their words or presence attempt to influence the outcome of the vote. One such example involved an organizing drive at Casino Niagara.

Case Study: Casino Niagara

CAW-Canada's organizing drive for Casino Niagara resulted in a representation vote that was scheduled over two days at two separate employer sites. Management personnel attended the vote for the ostensible purpose of casting a ballot, despite their obvious managerial status. The Board officer permitted them to cast segregated ballots. After doing so, they lingered in the voting area and began communicating with employees who were waiting to cast their ballots. When asked to leave by the Union's scrutineer and the Board's field officer, the managers refused and remained for the entire duration that the vote was in progress and continued to communicate with the employees. This strategy was only part of an actively anti-union campaign by the employer.

Tactics like this ought to be impermissible under our scheme of labour relations. Nevertheless, the current system fails to provide a sufficient disincentive from using such illegitimate tactics to influence the outcome of a campaign. An employer such as Casino Niagara can risk punishment long after an organizing drive has been successfully been deterred, when the immediate benefit is to deter their workers from joining together and exercising their collective rights in a meaningful way. Such acts can be fatal to the momentum of an organizing drive, and affect the employees' wishes during subsequent organizing drives.

Electronic voting may reduce opportunities for this kind of interference. The Canada Industrial Relations Board has successfully been employing electronic voting methods for over five years, mainly for reasons of administrative convenience.

E-Voting

In 2009, the CIRB added electronic voting to its repertoire of tools to conduct representation votes. In two circumstances where large employee groups were dispersed over a wide geographic area, CIRB industrial relations officers conducted e-votes supported by an outside electronic voting system company. Eligible employees were issued personal identification numbers (PINs) and were able to cast a secure electronic ballot via Internet or telephone. The Board's officers

administered the vote and oversaw the auditing process. At the conclusion of the voting period, the ballots were tabulated instantaneously, which allowed the parties to know the results without delay. E-voting proved to be a secure, cost-effective and expedient means to ascertain employee wishes.⁹⁷

We ask the panel to consider including electronic voting procedures as an alternative to physical representation votes being held on employer property.

As well, Unifor proposes that the Act provide a mechanism for neutral voting sites to be selected, as an alternative to holding votes on employer property where circumstances create a reasonable doubt that the employer's workplace will allow for employees to express their true wishes. Our proposal is that the Board ought to be required actively to consider any circumstances that might make the employer's own premises unsuitable for a vote and conduct the vote elsewhere if there is reasonable doubt about the objective neutrality of the employer's own premises. The Board might require applicant trade unions to indicate at the time of application whether any such circumstances are known to it.

Electronic Union Cards

Proposal 4(vi): Amend the *Labour Relation Act, 1995*, to permit workers to sign electronic union cards.

The growing legitimacy of verifiable internet-based transactions supports the acceptance of electronic signatures on union cards. In the context of an organizing drive, employees may be subject to intense scrutiny by employers to determine the identity of actual or suspected supporters of the union and whether or not to take action, either permissible or impermissible, during the organizing drive. One particularly concerning tactic is to attempt to surreptitiously observe who is signing cards in order to identify union supporters.

Unifor proposes that electronic union cards could become a method by which members are signed up during organizing drives. Allowing for electronic union cards could permit employees to be signed up from their own home, free from coercion and surveillance.

⁹⁷ Canada Industrial Relations Board, CIRB Newslink – 2010 <<http://www.cirb-ccri.gc.ca/eic/site/047.nsf/eng/00315.html>>; Canada, Standing Senate Committee on Legal and Constitutional Affairs, Issue 24, Evidence – December 10, 2014, <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/24ev-51833-e.htm?Language=E&Parl=41&Ses=2&comm_id=11>.

Concerns about the verifiability of electronic union cards can be satisfied by looking at the way in which the Ontario Labour Relations Board has previously dealt with other innovations in the collection of union membership evidence. The Board has developed policies to assure the integrity of various forms of union membership evidence. A particularly applicable example is the Board's history of accepting mailed membership evidence. The Board traditionally required that a union representative verify each union membership card by contacting the worker to confirm the card.⁹⁸ Accepting electronic union cards is a logical extension.

The existing provisions of the *Labour Relations Act, 1995* provide a safeguard against fraud. The Board can revoke a certificate obtained by fraud.⁹⁹ Allegations of such fraud are rare because unions have no incentive to engage in fraudulent activity in the face of requirements that collective agreements later be ratified by a majority of employees in the bargaining unit.

Early Disclosure of Employee Lists and Employee Contact Information

Proposal 4(vii): Amend the *Labour Relations Act, 1995* to allow trade unions to apply to the Ontario Labour Relations Board to direct the employer to provide accurate lists of employees and contact information for each employee where the applicant union can demonstrate the support of 20 per cent of the employees in the proposed bargaining unit.

Under the *Labour Relations Act, 1995*, unions currently do not have access to lists of employees in workplaces where organizing drives are under way. Unions rely on the knowledge of employee organizers to count the number of employees in a given workplace, and to identify and describe the appropriate bargaining unit. This organizing model raises unique organizing challenges for larger workplaces or workplaces with multiple locations.

Unifor's ongoing effort to organize workers at Toyota's manufacturing plants in Woodstock and Cambridge are demonstrative of the organizing challenges posed by the current scheme.

Case Study: Unifor's Organizing Campaign at Toyota

Unifor's organizing campaign at Toyota lasted almost a full year before an application was filed in 2014. Organizers stood on the roadsides surrounding Toyota's plants in

⁹⁸ Jeffrey Sack, C Michael Mitchell & Sandy Price, "Ontario Labour Relations Board Law and Practice", loose-leaf (consulted on 11 September 2015), (Markham, Ontario: LexisNexis Canada), ch 3 at 3.83.

⁹⁹ *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, s. 64.

Woodstock and Cambridge (despite Toyota's constant surveillance and calls to the police to attempt to deter them from leafletting) through the blistering summer and bitter winter of 2013 to provide information to workers regarding organizing and to sign up new members.

Toyota's operations at Cambridge and Woodstock are typical of very large manufacturing enterprises. Employees work on multiple shifts. They are assigned to small teams and work groups. Their contact with other employees is limited by shift and work area. Toyota like other employers does not generally circulate employee lists or contact information. All of that means that union organizers must collect information in bits and pieces using any available sources.

When it decided to file a certification application, Unifor drew comfort from a publicly available source of information. Unifor relied on an estimate derived from a statutory declaration made by Toyota pursuant the *Toxics Reduction Act, 2009*, a publicly available document.¹⁰⁰ Toyota's declaration disclosed the total number of employees at Cambridge and Woodstock. Relying on a declaration filed on May 29, 2013, Unifor believed that there were 4916 employees at the Cambridge plant, and 2836 employees at the Woodstock plant.¹⁰¹ That was the best publicly available information. Unifor then crafted a bargaining unit description that excluded managerial employees and others, and estimated the number of employees in its proposed bargaining unit to be 6,590. Unifor's tally of cards came to over 3,000. Based on that best information that was publicly available, Unifor's organizers believed that they could satisfy the 40% threshold for a certification application.

The employer's response was the first indication that Unifor lacked sufficient membership evidence to meet that 40% threshold. Toyota identified 7,548 workers in the proposed bargaining unit, as well as an additional 399 workers that Toyota believed should be included in a bargaining unit. On the basis of that new and surprising information, Unifor withdrew its application and a year of organizing efforts bore no fruit.

The organizing drive at Toyota highlights the impractical methods by which unions are forced to organize large workplaces, and the absurd results of relying on the scarce information that is publicly available or obtainable about employee numbers.

To avoid situations where unions are forced to organize without adequate information regarding the proposed bargaining unit, Unifor proposes that the *Labour Relations Act*,

¹⁰⁰ *Toxics Reduction Act, 2009*, SO 2009, c 19.

¹⁰¹ As of now, this document is no longer available on Toyota's website, and has been replaced with a declaration from May 29, 2015 - <http://www.tmmc.ca/en/environmental_responsibility.html>

1995 be amended to allow unions to apply to the Labour Relations Board to seek a direction that an employer must disclose a list of employees in a proposed bargaining unit, subject to a demonstration by the union that it has appearance of support of 20 per cent of the workers in the proposed bargaining unit.

No proprietary or privacy objections outweigh the important public policy reasons for supporting this legislative change.¹⁰² The right to choose to belong to, and participate in a union is a right possessed by workers, not employers. As noted by the Supreme Court of Canada in the landmark decision of the *Mounted Police Association of Ontario*:

[Section] 2(d), viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.¹⁰³

Furthermore, as noted by the Ontario Court of Appeal in 1989:

It is fundamental to the policy underlying the *Labor Relations Act* that employees have a right of self-organization and participation in lawful union activity. Section 3 [now section 5] guarantees that:

3. Every person is free to join a trade union of his own choice and participate in its lawful activities.

¹⁰² Such objections are commonly raised in the context of certification applications, see for e.g. *London and District Service Workers' Union (SEIU, AFL, CIO, CLC, Local 220) v. Kitchener-Waterloo Hospital*, 1988 CanLII 3761 (ONLRB).

¹⁰³ *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 66, [2015] 1 SCR 3.

For those rights to be meaningful, it is manifest that employees must have access to union communications and opportunities for organizational activity. Having given employees the right to decide for themselves whether or not to join a union, the legislatures can be assumed to have intended that they be permitted to make a free and reasoned choice. Such a choice necessarily implied that employees have access to union

WORKPLACE PERSPECTIVE

“Workers are not stupid. When they sign an application for membership card with a union they are joining a union. Why do we second-guess their expression of choice? Why do employers have a week after the application to combat the union certification vote and “ask that the workers vote no”? Does anyone reasonably believe that the opinion of the person that signs my paycheque has no influence? Do I get a week to reconsider my decision for MPP, MP, Mayor or city councillor?”
Joel Smith, Local Union Organizer, Unifor Local 222, Oshawa

information free from restrictions that unduly interfere with the flow of information or their freedom of choice.¹⁰⁴

Despite the legal recognition of the constitutive element of the *Charter* right to freedom of association, and the statutory expectation that employees will make informed and reasoned decisions about those rights, the existing system unnecessarily restricts the ability of unions to

communicate with workers for organizing purposes. Employers have unfettered access to workers at workplaces while union representatives are barred from most workplaces. The exclusion of union representatives has, historically, been justified on the basis of employer’s property rights. However, such rationalizations entirely ignore workers’ *Charter* rights to freedom of association. This “marked imbalance” in communicative access undermines the ability of workers to effectively exercise their rights because absent information, there can be no informed choice.¹⁰⁵

Moreover, privacy arguments should not be permitted to stand in the way of allowing employees meaningful access to exercise their *Charter* right of freedom of association. The information that would be provided in the form of a home contact number or personal contact information does not go to the “biographical core of personal information” of the employees.¹⁰⁶ The contact information would provide the union with direct and quick means of access to workers in order to provide them with the

¹⁰⁴ *Cadillac Fairview Corp, v. RWDSU* (1989), 71 OR (2d) 206 at 208 (CA).

¹⁰⁵ David Doorey, 2009, “Union Access to Workers During Organizing Campaigns: A New Look Through the Lens of B.C. Health Services” Vol 15 Canadian Labour and Employment Law Journal 1 at 8.

¹⁰⁶ *Bernard v Canada* (Attorney General), 2014 SCC 13 at para 112.

appropriate information to make an informed decision about whether to support the union.

This particular, rather modest, amendment would ensure that unions could provide workers with information, where a threshold level of interest in unionization has been demonstrated. This would not give unions an unfair advantage. Rather, it would give unions the opportunity to provide workers with access to information to permit them to make informed decisions about their democratic rights, regardless of whether those decisions are made in support of or in opposition to unionization.

Further, the provision of lists would allow an applicant union to more easily identify an appropriate bargaining unit in order to communicate only with a relevant and appropriate group of workers. Needless and time consuming surprises and disputes about the makeup of the affected bargaining unit may be avoided. For example, a misunderstanding or a dispute with respect to the managerial status of a particular person or group of people can consume days of litigation at the Ontario Labour Relations Board. Transparency would reduce the possibility of such disputes and generally make organizing campaigns less disruptive for unions, employees and employers.

This proposal is consistent with a public policy that for decades facilitated the exercise of collective bargaining and should again do so.

4.4 Broader Scope for Interim Orders

As regulators of labour relations between two parties with often divergent interests, the Ontario Labour Relations Board and arbitrators appointed under the *Labour Relations Act, 1995* have had the delicate task of striking a just balance between the rights of trade unions and employers, and maintaining a fair playing field to the best of their ability. Disputes between employers and trade unions are often won and lost on the basis of momentum and timing. A party can place pressure on the other using their full array of tools and tactics. At times, the tactics employed in labour relations may fall outside of the permissible bounds of the *Labour Relations Act, 1995*, and it is the role of the Board and arbitrators to remedy the situation after a full and fair hearing. However, as described by the Ontario Labour Relations Board:

Labour relations matters often involve a cluster of intangible and fluid social relations which may be extraordinarily time-sensitive. Once these relations are ruptured, they are not easily restored through the sometimes clumsy operation of subsequent remedies. Indeed, it goes

without saying that remedies are, by their very nature, a substitute for what should have happened.¹⁰⁷

It is the role of the Board and arbitrators to use their remedial powers to craft balanced solutions and enhance the board's policy of preserving industrial stability, viable collective bargaining and timely resolutions. Given the often time-sensitive nature of labour relations disputes, the just outcome of a lengthy hearing months or years after the events in question can lead to a hollow victory for one of the parties. The reinstatement of a terminated organizer is cold comfort to a bargaining unit that has long since decided to vote against certification after seeing a colleague being made into an example.¹⁰⁸

Stronger protections for union organizers

Proposal 4(viii): Where s. 98(2) of the *Labour Relations Act, 1995* applies (i.e. applications for the interim reinstatement of an employee or restoration of terms and conditions of employment) amend the act to delete the requirement of preventing irreparable harm, and consolidate paragraphs 3 and 4 of s. 98(2) to require only a “balance of harm” approach in deciding whether or not the Board ought to exercise its remedial powers.

While Unifor recognizes that Bill 144 reintroduced the power of the Ontario Labour Relations Board to reinstate workers who were terminated in the context of an organizing drive, provided that the criteria in s. 98(2) are met, Unifor submits that the *Act* unnecessarily restricts the circumstances where the Board can protect union organizers by granting interim reinstatement orders.

Under s. 98(2), the following conditions must currently be met:

1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
2. There is a serious issue to be decided in the pending proceeding.
3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
4. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.

The Board has consistently declined to order interim reinstatement where employees

¹⁰⁷ UFCW, Local 175 & 633 v 810048 Ontario Ltd c.o.b. as Loeb Highland, [1993] OLRB Rep 197 at 203-204.

¹⁰⁸ UFCW, Local 206 v Swiss Chalet Restaurant #1250, 2012 CanLII 74380 at para 26, 41 (OLRB).

have been dismissed in the context of an organizing drive, but their dismissal has not caused a loss of support for certification of the union. Under the Board's current jurisprudence, in this situation the requirement of the dismissal causing irreparable harm under s. 98(2) paragraph 3 is not met.¹⁰⁹ Without a broader power of interim reinstatement, the current legislation deprives employees who have been dismissed for union activities of a quick remedy if the narrow scope of s. 98(2) is not met.

Prior to 1995 the Board was able to use a "balancing of harm" approach in exercising its interim powers. Remedial relief was not restricted to cases where "irreparable harm" could be identified.

...In other words, the Board must balance the harm to each party in considering whether to grant an interim order. As a result, rather than separating out the concept of irreparable harm which appears to be a poor fit with the Board's experience in remedial matters, and then proceeding to an examination of the balance of convenience, we find **it more consonant with labour relations realities to adopt an approach where we consider both what harm may occur if an interim order is not granted, and what harm may occur if it is.** This does not mean that the notion of irreparable harm is entirely irrelevant. It merely reduces it to one of a number of aspects of harm which the Board might consider in this area.¹¹⁰

The current array of remedial powers possessed by the Board is out of touch with labour relations reality. In the absence of these powers, the Ontario Labour Relations Board remedial toolkit is limited in a way that prevents it from providing effective, timely remedies to stabilize labour relations. It is Unifor's proposal that the *Labour Relations Act, 1995* be amended to provide stronger protections for organizers who otherwise can become collateral damage in the context of a larger labour relations dispute.

Expanding the Ontario Labour Relations Board's Powers Regarding Interim Orders

Proposal 4(ix): Amend the *Labour Relations Act, 1995* to grant expanded powers to the Ontario Labour Relations Board to provide expanded interim order powers to maintain industrial relations stability.

The 1995 changes to the Act also severely curtailed the powers of the Ontario Labour Relations Board to make other kinds of interim relief orders.

¹⁰⁹ 1319557 Ontario c.o.b. Upper Canada Price Chopper, [2009] OLRB Rep 513; Novotel Canada Inc, [2010] OLRB Rep 287.

¹¹⁰ UFCW, Local 175 & 633 v 810048 Ontario Ltd c.o.b. as Loeb Highland, [1993] OLRB Rep 197 at 203.

Other than cases that relate to the reinstatement of union organizers, the Board is limited to interim orders about “procedural” matters. Prior to 1995, the Ontario Labour Relations Board had the power to provide interim relief on “such terms as the Board considers appropriate”. This interim relief power as it existed before proved to be a creative and useful element of the Board’s remedial toolkit. The Board described its power as follows:

Section 92.1 is not a licence for Board management of the workplace. It is a mechanism available for use, where necessary, to stabilize the labour relations situation pending an adjudication of a labour relations dispute.

Under the pre-1995 *Act*, the Board utilized its remedial power in a way that stabilized labour relations in situations where unfair labour practices would have prevented meaningful resolution of the larger dispute. Take for example the case of *Crown Fab Division*.¹¹¹

Case Study: Crown Fab Division

In *Crown Fab Division*, the employer issued a notice to its employees that part of its Mississauga operations would be closing. Shortly before discussions were to begin regarding the terms of the impending closure, the employer terminated the employment of the long-time bargaining unit chairperson, who was also an integral member of the bargaining committee at that location. The employer refused to meet with any bargaining committee of which the chairperson was a member. The Board exercised its interim relief powers in order to stabilize labour relations by directing that the employer recognize and meet with the bargaining committee of which the chairperson was a member. The Board exercised its remedial power to craft a creative solution to the employer’s attempt to disrupt the union’s bargaining committee and reinforce labour relations stability at the bargaining table, without intruding upon the employer’s right to manage its workplace.

Labour relations are dynamic. The possibility always exists that a party will take a risk that may be punished later for an immediate benefit in a time-sensitive situation. The powers of the Labour Relations Board should not be divorced from this reality. The Board should have powers that are well-suited to the task of avoiding mischief and maintaining labour relations stability, and must be equally matched to the ability of a party to disrupt labour relations stability in order to gain an immediate tactical advantage.

¹¹¹ CAW, Local 1256 v Crown Fab Division, [1993] OLRB Rep 960.

Expanding Arbitrator's Powers Regarding Interim Orders

Proposal 4(x): Amend the *Labour Relations Act, 1995*, to give arbitrators broad interim order powers to balance the rights of grievors and employers pending the final adjudication of a grievance and protect the integrity of the grievance procedure, that extend beyond procedural orders.

Similar to the Ontario Labour Relations Board's former interim relief power, the pre-1995 *Act* provided arbitrators with the powers to "grant such interim orders, including interim relief, as the arbitrator or arbitration board considers appropriate".¹¹² Under the current *Act* arbitrators are limited to making interim orders only with respect to "procedural matters".¹¹³

When the power to grant broader interim relief was available, the most common interim relief requests related to providing interim reinstatement. Arbitrators demonstrated their ability to consider the circumstances surrounding a grievance and grant or withhold relief on the basis of the balance of harm that would result to either the grievor or the employer.¹¹⁴ It is inappropriate to fetter the exercise of arbitral discretion in situations where significant harm might result if appropriate interim orders are not available.

Moreover, beyond requests for interim reinstatements, the different fact patterns that arise in grievance arbitration sometime require flexibility in decision-making power to protect the parties on an interim basis. For example, there are situations where arbitral use of an interim order is necessary to protect the integrity of a lengthy proceeding. For example in *OPSEU v Ministry of Correctional Services*¹¹⁵, the Grievance Settlement Board on consent issued an interim order that transferred the grievor to another work location while an arbitration hearing proceeded and later ordered the employer to grant the same grievor a leave of absence in the face of further allegations of employer misconduct.¹¹⁶

¹¹² *Labour Relations Act*, RSO 1990, c L.2, s. 45(8) paragraph 5.

¹¹³ *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, s. 48(12)(i).

¹¹⁴ See for example: *Veratec v USWA, Local 8505* (1993), 34 LAC (4th) 67 (Haefling); *Midas Canada Inc v USWA, Local 6727* (1993), 36 LAC (4th) 349 (Briggs); *Miracle Food Mart of Canada v UFCW, Locals 175 & 633* (1994), 41 LAC (4th) 248 (Gray).

¹¹⁵ *OPSEU (O'Brien) v Ministry of Correctional Services*, (June 13, 1994) (unreported) Ontario Grievance Settlement Board File Nos: 1948/93, 179/94, 236/94.

¹¹⁶ *OPSEU (O'Brien) v Ministry of Correctional Services*, (February 16, 1995) (unreported) Ontario Grievance Settlement Board File Nos: 1948/93, 179/94, 236/94; for further discussion, see Mary Cornish, Harriet Simand and Sheilagh Turkington, 1997, "Ontario's Interim Order Power – How A Procedural Reform Brought Substantive Change", 4 Canadian Labour and Employment Law Journal 37 at 79, 80.

4.5 Settlement of Collective Bargaining Disputes through Interest Arbitration

First Contract Arbitration

Proposal 4(xi): Amend the *Labour Relations Act, 1995* to remove barriers to first contract arbitration.

Collective bargaining is a fundamental right that is protected under s. 2(d) freedom of association of the *Charter of Rights and Freedoms*. To give meaning to that right, labour law must facilitate a process that allows workers to exercise their constitutional right, and prevent employers from infringing on their right to choose to unionize and engage in collective bargaining. Nascent collective bargaining relationships can be too easily frustrated by obstructive collective bargaining conduct. Employers may refuse to engage in a meaningful process of collective bargaining to block employees from exercising their constitutional right to freely associate. One method of encouraging employers to engage in a meaningful process of collective bargaining is to remove barriers to first contract arbitration.

The rationale for first contract arbitration legislation is that it helps parties end bargaining disputes in an expeditious manner, establishes a first agreement quickly, deters bad-faith bargaining and fosters constructive bargaining relationships. It has been shown that first contract arbitration laws reduce incidences of work stoppages¹¹⁷, create an incentive for parties to reach agreement without resorting to work stoppages¹¹⁸, and support and encourage collective bargaining.¹¹⁹

Ontario's First Contract Arbitration Model

Although s. 43 of the *OLRA* provides for first contract arbitration, the requirements to access this process are too onerous. Sound labour relations are not served by erecting barriers to the mechanisms designed to settle impasses. Under the current provision, a party applying for first contract arbitration must establish that the process of collective bargaining has been unsuccessful because of,

¹¹⁷ Susan J.T. Johnson, "First Contract Arbitration: Effects on Bargaining and Work Stoppages", (July 2010) *Industrial and Labour Relations*, vol. 63, no. 4 at p. 592-593.

¹¹⁷ *Ibid.*, at p. 28.

¹¹⁸ *Ibid.*, p. 602

¹¹⁹ *Ibid.*, p. 603.

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.¹²⁰

The threshold is high, which may explain why applications for first agreement arbitration are infrequent. In the 2013-2014 fiscal year, the OLRB reported that it received a total of only 11 applications for first agreement arbitration. Only two were granted. In the same year, there were 416 certifications of bargaining agents.

The number of applications for first agreement arbitration stayed relatively low in the past five fiscal years:

	Total Certification Applications Granted	Total First Agreement Arbitration Applications Received	Total First Agreement Arbitration Applications Granted	Total First Agreement Arbitration Applications Dismissed	Total First Agreement Arbitration Applications Terminated	Total First Agreement Arbitration Applications Settled/Withdrawn
2013-2014	416	11	2	1	0	8
2012-2013	387	20	4	1	0	15
2011-2012	351	11	5	1	0	5
2010-2011	429	18	9	1	0	8
2009-2010	320	12	3	0	0	9

Table reproduced from Ontario's Labour Relations Board's Annual Reports.¹²¹

In Unifor's experience, meeting the test to obtain access to first agreement arbitration is too difficult. Our most recent experience occurred in 2011 and involved a newly certified unit of limousine drivers employed by Aaroport Limousine Services Ltd.¹²²

Case Study: Aaroport Limousine and First Contract Arbitration

¹²⁰ *LRA*, 1995 at s. 43(2).

¹²¹ Ontario Labour Relations Board. *Annual Reports*, 2009-2010; 2010-2011; 2011-2012; 2012-2013; 2013-2014. Online: <http://www.olrb.gov.on.ca/english/public.htm>.

¹²² *Aaroport Limousine Services Ltd.*, [2011] OLRD No. 765; [2011] OLRD No. 1647.

In February 2010, CAW-Canada was certified as the bargaining agent for 140 limousine drivers employed by Aaroport Limousine Services Ltd. The Union gave notice to bargain a first collective agreement. Between February and December 2010, the Union and the employer met 13 times to negotiate a collective agreement, but the parties reached an impasse over a number of contentious issues involving fees and expenses.

Collective bargaining stalled and the employer refused to compromise on several key issues regarding the fees and expenses it charged drivers. A labour dispute started on December 1, 2010. The union filed an application under s. 43 of the *OLRA* for access to first agreement arbitration. The application ultimately failed despite the employer's own acknowledgement that it had been uncompromising in its position.¹²³ The Board determined that the employer was justified in its uncompromising position because some of the union's financial demands were also unreasonable. The Board invited the union to bring a further application if it modified its position.

The Union next attempted to negotiate with the Employer further by revising some of its positions, but the Employer again refused to bargain in good faith. This led to a second application for first contract arbitration direction, which was filed two months after the first application. The Board now determined that the application did meet the test of s. 43 because the employer's position amounted to an uncompromising position without reasonable justification. The Board directed that the first collective agreement be settled by way of arbitration.

Unifor's experience in the *Aaroport Limousine* case demonstrates the difficulty of obtaining a first collective agreement arbitration direction under the current legislation. The preconditions under s. 43 establish a high standard which does not force a meaningful process of collective bargaining. Although the principle of collective bargaining should involve the parties negotiating freely and without the interference of a third party, there will be instances, such as in *Aaroport Limousine*, where obstructive collective bargaining effectively frustrates the right of employees to associate and bargain collectively. In such circumstances, easy access to first contract arbitration is essential if labour relations are not to be defeated.

Remove Barriers to First Contract Arbitration

Unifor submits that s. 43 of the *Labour Relations Act, 1995*, must be amended to facilitate access to interest arbitration to settle first collective agreements. An automatic access model should be implemented as it provides the greatest ease of access to first contract arbitrations. The automatic access model is not a radical or novel idea as it was

¹²³ *Aaroport Limousine Services Ltd.*, [2011] OLRD No. 765 at para 6.

implemented under Bill 40 and is currently used in Manitoba.¹²⁴ Under Bill 40, a party could apply to the Minister of Labour for first contract arbitration if thirty days had elapsed since the day it became lawful for the employees to strike and the employer to lock out employees, and if no collective agreement had been entered into.¹²⁵ In Manitoba, a party may request first agreement arbitration when (a) a conciliation officer has notified the board that the parties have made reasonable efforts but were unable to conclude a collective agreement or 120 days have expired since the appointment of the conciliation officer, (b) a period of 90 days after the certification of the bargaining agent and any period of extension that may be ordered have expired, and (c) the Union and Employer have not concluded a first collective agreement.

Another model to consider is the mediation-intensive system of first contract arbitration that is used in British Columbia.¹²⁶ The preconditions that must be met to apply for first agreement arbitration are that the parties must have bargained collectively to conclude their first collective agreement but failed to do so, and the union has obtained a strike mandate. A mediator is appointed within five days of receipt of an application, and has 20 days to aid the parties in resolving the dispute. If the parties are unable to resolve the dispute in the mediation process, the mediator may recommend the terms of the collective agreement, a strike/lockout, arbitration or mediation-arbitration to resolve the dispute. If the mediator's recommended terms for the first agreement are not accepted by the parties, the dispute normally proceeds to arbitration or mediation-arbitration, and the mediator's recommendations may be relied upon by either party in the subsequent hearings.¹²⁷ The rationale behind allowing the parties to rely on the mediator's recommendations at the first contract arbitration is that it encourages the parties to take the mediation process seriously and to cooperate in settling a first agreement.¹²⁸

Studies have shown that the automatic access and mediation-intensive models are the most successful at fostering bargaining relationships. A recent study examined the effects of Ontario's first contract arbitration models from 1991 to 1998, comparing the likelihood of success of reaching a first contract under the no-fault system (the system that existed from prior to 1993 and after 1995) versus the automatic access model which was in force from 1993 to 1995. The author found that the odds of reaching a first agreement under 1993-1995 regime was 1.7 times greater than under the 1995-1998

¹²⁴ ***Labour Relations Act, CCSM c L10, s. 87.***

¹²⁵ *Labour Relations Act*, RSO 1990, c L.2, s. 41.

¹²⁶ *Labour Relations Code*, RSBC 1996, c 244, s. 55.

¹²⁷ *Ibid.*, at s. 74(5).

¹²⁸ Melanie Vipond, "First Contract Arbitration: Evidence from British Columbia of the Significance of Mediators' Non-Binding Recommendations", (Fall 2011) *Labour Law Journal*, vol. 62.3, at p. 150.

regime.¹²⁹ Moreover, the automatic access model was associated with an increase of 8 to 14 percentage points in achieving a first agreement than the non-automatic model.¹³⁰

In a study of the B.C. mediation-intensive model, the author examined first contract agreement applications in the overall context of representation certifications from 1993 to 2009. The author found that of the 4244 representation certifications granted, 407 were granted access to the first contract arbitration. Of the 407 applications for first contract arbitration, 64 per cent resolved first contract disputes through mediation.¹³¹ In addition, of the cases in which both parties accepted the mediator's recommendations, 82 per cent maintained a bargaining relationship that still existed in 2009.¹³² The author concluded that the B.C. mediation-intensive model was effective in obtaining first collective agreements while avoiding binding arbitration, and in fostering enduring bargaining relationships.¹³³

The benefits of automatic access or mediation-intensive first contract arbitration as supported by the empirical evidence should not be readily dismissed, and should be considered carefully.

Interest Arbitration in Long Disputes

Proposal 4(xii): Amend the *Labour Relations Act, 1995*, to allow access to interest arbitration to settle long labour disputes that last over 180 days.

Under the current *Labour Relations Act, 1995*, the Ontario Labour Relations Board cannot compel parties to resolve their disputes by way of interest arbitration except in the narrow case of a first collective agreement direction.

Even mature bargaining relationships can produce intractable impasses. In order to avoid the financial and human costs of lengthy disputes, Unifor proposes that the *Labour Relations Act, 1995*, be amended to permit access to interest arbitration to resolve lengthy disputes, regardless of the point at which the dispute occurs in a bargaining relationship.

The introduction of a mechanism to settle long labour disputes is not without precedent in Canada. Section 87.1 of Manitoba's *Labour Relations Act* currently provides a mechanism to have the Manitoba Labour Relations Board settle the provisions of a

¹²⁹ Chris Riddell, "Labor Law and Reaching a First collective Agreement: Evidence from a Quasi-Experimental Set of Reforms in Ontario", (July 2013) *Industrial Relations*, vol. 52, no. 3 at p. 732.

¹³⁰ Riddell, at p. 704.

¹³¹ Vipond, at p. 157.

¹³² *Ibid.*, at p. 160.

¹³³ *Ibid.*, at p. 146.

collective agreement where a dispute has been ongoing for at least 60 days and the parties have worked with a conciliation officer or mediator to settle the terms of a collective agreement for at least thirty days.¹³⁴

The *Annual Reports* of the Manitoba Labour Relations Board indicate that applications under s. 87.1 are filed infrequently.¹³⁵ Clearly, the availability of access to interest arbitration after a long dispute does not encourage long disputes in order to access interest arbitration at the end. As well, the Manitoba experience does not suggest that parties are motivated to not negotiate their own collective agreements. It is desirable however, that a remedy be available in the rare cases in which labour disputes continue for a very long time.

Unifor therefore proposes that the *Labour Relations Act, 1995*, be amended to include a mechanism to allow a party to apply to settle a collective agreement through interest arbitration where a strike/lockout has been ongoing for at least 180 days.

4.6 Providing Greater Job Protection to Striking Employees

Proposal 4(xiii): Amend the *Labour Relations Act, 1995* to remove the six month time limit on the right to see unconditional reinstatement following a lawful strike.

Right to Strike and Freedom of Association

Workers exercising their constitutional right to strike to bargain for improvements in their terms and conditions should be able to do so without fear that they will lose their jobs once a lawful strike concludes. In the recent landmark decision *Saskatchewan Federation of Labour v Saskatchewan*¹³⁶, the Supreme Court of Canada stated:

The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations...

The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.

¹³⁴ *Labour Relations Act*, CCSM c L10, s. 87.1.

¹³⁵ Manitoba Labour Relations Board. *Annual Reports*, 2001-2012. Online: <https://www.gov.mb.ca/labour/labbrd/publicat.html>; only five applications under s. 87.1 have been filed in Manitoba from 2001-2012.

¹³⁶ *SFL v Saskatchewan*, 2012 SCC 4 at para 3.

The right to strike is constitutionally protected under s. 2(d) of the *Charter of Rights and Freedoms*, which guarantees individuals the right to freely associate and empower vulnerable groups to pursue legitimate goals and desires to rectify the imbalance in society.¹³⁷ The Supreme Court of Canada proclaimed that the right to strike is integral to collective bargaining for the following reason:

The right to strike is essential in realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse... This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.¹³⁸

The fundamental importance of the right to strike signifies the necessity of amending s. 80 of the *Labour Relations Act, 1995* to ensure that striking employees are not at risk of losing their employment at the end of it.

Insufficient Job Protection for Striking Workers

Although s. 80 provides some job protection for employees engaged in a lawful strike such that an employer must reinstate an employee who makes an unconditional application in writing to the employer, there is a time limitation to exercise this right. Section 80 restricts the right to reinstatement to six months. This creates a major power imbalance in favour of the employer. Every labour dispute is different. For example, Unifor's strikes in 2014 lasted from anywhere between one day and ten months. Other unions have experienced much longer strikes. The most recent notable example in Ontario was the Crown Metal Packaging strike.

Case Study: Crown Metal Packaging Strike

For 17 months, 120 workers at the Crown Metal Packaging's can factory in North York were on strike.¹³⁹ The plant was named the Company's safest and most productive plant in North America in 2012¹⁴⁰, and the Company reported a billion-dollar profit in 2013.¹⁴¹ Yet, Crown Metal proposed to eliminate the cost-of-living wage increases, hire new workers at salaries up to 42 per cent lower than existing ones, and restrict workers'

¹³⁷ *Ibid* at para 53.

¹³⁸ *Ibid* at para 54.

¹³⁹ Marco Chown Oved, "Crown factory workers' strike ignored for 17 months long months", *Toronto Star* (2 February 2015) online: <http://www.thestar.com/news/gta/2015/02/02/crown-factory-workers-strike-ignored-for-17-long-months.html>.

¹⁴⁰ Peter Kuitenbrouwer, "22-month-long strike at Ontario beer can maker a cautionary tale for factory workers", *National Post* (17 July 2015) online: <http://business.financialpost.com/news/22-month-long-strike-at-ontario-beer-can-maker-a-cautionary-tale-for-factory-workers>.

¹⁴¹ Oved, *supra*.

ability to file grievances.¹⁴² The workers rejected the offer and exercised their right to strike on September 3, 2014, not knowing that the strike would last almost two years.¹⁴³ Production continued with replacement workers, which tipped the balance of collective bargaining in favour of the Company as it continued to profit while workers on the picket line suffered financially.

As the strike passed the six months' mark, the Company took a harder line. At one point, it threatened to take back only 40 to 45 of the workers.¹⁴⁴ At another time, it threatened to block 34 workers who were considered to be the most active union members from being reinstated.¹⁴⁵ The Ministry of Labour finally intervened in March 2015, approximately 18 months after the strike began.¹⁴⁶ The Company maintained its position that it would not reinstate some of the striking workers. Collective bargaining stalled for another three months until the Company finally withdrew its proposal and agreed to allow all striking workers the right to return to work. A new collective agreement was ratified on July 19, 2015, ending a 22-month long strike.¹⁴⁷

The threats made by the Company to block striking workers from being reinstated in their jobs were unconscionable given the recent Supreme Court decision. The right to strike is embodied in s. 2(d) of the *Charter*, which protects workers' right to collective bargaining. Workers should not be threatened with job loss for simply exercising their constitutional right. Yet, section 80 of the *Labour Relations Act, 1995* in its current form restricts workers' ability to fully exercise their constitutional right by capping their right of reinstatement at six months.

Proposal: Remove the Six Months' Limitation on the Right of Reinstatement

Unifor proposes that s. 80 of the *Labour Relations Act, 1995* be amended to remove the six months' time limitation on a worker's right to reinstatement after the conclusion of a lawful strike. The six month time limit is an arbitrary cap that favours the employer's interests. Eliminating the cap would also modernize the *OLRA*, and it would bring it in line with other jurisdictions' labour relations legislation that guarantees the right of

¹⁴² *Ibid*, and Kuitenbrouwer, *supra*.

¹⁴³ *Ibid*.

¹⁴⁴ Kuitenbrouwer, *supra*.

¹⁴⁵ Sara Mojtehedzadeh, "Bitterness remains as Crown Metal workers and 2-year strike", *Toronto Star* (20 July 2015) online: <http://www.thestar.com/news/gta/2015/07/20/bitterness-remains-crown-metal-workers-end-2-year-strike.html>.

¹⁴⁶ Marco Chown Oved, "Ontario labour ministry intervenes in 18-month Crown strike", *Toronto Star* (13 March 2015) online: <http://www.thestar.com/news/gta/2015/03/13/ontario-labour-ministry-intervenes-in-18-month-crown-strike.html>.

¹⁴⁷ United Steelworkers, News Release, "New Contract Ratified at Crown Metal Packaging, Strike Ends" (19 July 2015) online: <http://www.usw.ca/news/media-centre/articles/2015/crown-strike-ends>.

reinstatement without a time limitation, and this includes the *Canada Labour Code*¹⁴⁸, Alberta's *Labour Relations Code*¹⁴⁹, Manitoba's *Labour Relations Act*¹⁵⁰ and Saskatchewan's *Employment Act*.¹⁵¹

4.7 Successor Rights for Contract Workers

Proposal 4(xiv): Amend the *Labour Relations Act, 1995*, to provide for successor bargaining rights where a new employer replaces another as the provider of a contracted service.

Increase of Precarious Work in Ontario

Precarious work is characterized by low income, high levels of insecurity, lack of regulatory protections and limited access to social benefits. In Ontario, the share of workers earning minimum wage grew from 2.4 per cent of all employees in 1997 to 11.9 per cent in 2014.¹⁵² The types of industries that have the most precarious employment include accommodation and food services, agriculture, building and support services (such as repair and maintenance services, personal care and laundry), and retail services.¹⁵³ In 2008, a Law Commission of Ontario study revealed that 33.1 per cent of Ontario's labour force was employed in precarious work.¹⁵⁴ A study published in 2015 found that 44 per cent of workers aged 25-64 in the Greater Toronto-Hamilton area were working in jobs with some level of precarity.¹⁵⁵

Precarious work is not evenly distributed across gender, socioeconomic, and racial characteristics as women, racialized women, recent immigrants, single parents and people with less than a high-school education are more likely to hold precarious employment.¹⁵⁶ In 2008, 40.7 per cent of recent immigrants who lived in Canada less than 10 years were in precarious work compared to 31.4 per cent of workers who were Canadian-born or who had immigrated more than 10 years prior.¹⁵⁷ In 2014, 14.9 per

¹⁴⁸ RSC 1985, c L-2, s. 87.6.

¹⁴⁹ RSA 2000, c L-1, s. 90.

¹⁵⁰ CCSM c L10, s. 12.

¹⁵¹ SS 2013, c S-15.1, s. 6-37.

¹⁵² Sheila Block, "A Higher Standard: The case of holding low-wage employers in Ontario to a higher standard" (June 2014) Canadian Centre for Policy Alternatives at p. 5.

¹⁵³ Andrea M. Noack and Leah F. Vosko, "Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context" (November 2011) Law Commission of Ontario at p. 24-25.

¹⁵⁴ *Ibid.* at p. 28.

¹⁵⁵ Wayne Lewchuk et al., "The Precarity Penalty: The impact of employment precarity on individuals, households and communities – and what to do about it: Executive Summary" (May 2015) Poverty and Employment Precarity in Southern Ontario at p. 5.

¹⁵⁶ *Ibid.* at p. 27.

¹⁵⁷ Noack and Vosko at p. 30.

cent of women employees in Ontario were working for minimum wage compared to 8.8 per cent of men.¹⁵⁸

A contributing factor to the rise of precarious employment is the low unionization rates for precarious workers. In Ontario, approximately 73.5 per cent of precarious workers lacked union coverage in 2008.¹⁵⁹ Moreover, while the employment growth in the building and support services grew by 39.2 per cent between 2000 and 2014, the union density in that sector remained low and at only 14.3 per cent in 2014.¹⁶⁰ One explanation of the low density rate is “flexibility-enhancing” labour strategies such as contract employment through tendering processes. When a service contract expires, the employees may lose their jobs and bargained rights if the service contract provider is not successful in its bid for another contract.

This model of contracting out work makes it difficult to maintain unionization. There is no requirement for the new service contract provider to hire the employees of the previous contract employer or to recognize and bargain with any trade union that represents those employees. Successor rights under the *Labour Relations Act, 1995* also do not apply, and the new contract service provider can choose to re-hire some of the employees at lower wages. In effect, the re-hired workers would be doing the same job but for a lower salary and fewer benefits, which further reinforces their precarity and vulnerability. This is prevalent in many industries including the school bus industry, which uses a Request for Proposal process that guides the procurement of school bus service contracts. The competitive tendering process has resulted in decreased wages and increased job insecurity for school bus drivers. Another prime example of how the contract tendering system perpetuates the precarious condition of low-wage workers is Unifor’s recent experience with the Greater Toronto Airport Authority (GTAA) and its parking lot workers.

Case Study: Parking Lot Workers at the GTAA

Like many institutions, the GTAA uses a tendering process for the contract of parking lot services. From May 1, 2008 to April 30, 2014, Imperial Parking held the contract and employed roughly 80 cashiers, customer service representatives, valet drivers and dispatch monitors who were represented by Unifor Local 2002.

In early 2014, Imperial Parking lost the contract to Vinci Park. The 80 employees of Imperial Parking lost their jobs. Vinci Park eventually re-hired 27 of them but without their collective agreement protections. The 27 employees were offered wages that were up to 20 per cent lower than what they had been making. They were also required to

¹⁵⁸ Block at p. 9.

¹⁵⁹ Noack and Vosko at p. 12.

¹⁶⁰ Block at p. 7

complete a new probationary period of three months even though the job did not change, and the employees were essentially doing the same work. The idea that an employee could go to work one day and have all the benefits and protections of the collective agreement, and the very next day, return to the same workplace and do the same job but be paid 20 per cent less without collective agreement protection and reduced to a probationary employee demonstrates the need for greater protection to precarious workers in service contract industries.

Identifying the Problem in Successor Rights for Contract Workers

Section 69 of the *Labour Relations Act, 1995*, which provides for successor rights in a sale of business, has been interpreted to not apply when a new contractor wins the bid through the tendering process. In these cases, the Board has reasoned that new contractors obtain the contract through a competitive bidding process without the benefit of any advantage derived from the previous contract that would support a sale of business finding.¹⁶¹ The OLRB's interpretation of section 69 means that successor rights do not apply to service contracts. Therefore, employees working in industries relying heavily on service contracts are at a disadvantage when it comes to unionization.

Unifor submits that s. 69 of the *Labour Relations Act, 1995* should be amended to extend successor rights for service contracts. We recommend that the provision be amended to reflect the model that was introduced in Bill 40, and legislated under s. 64.2 of the pre-1995 *Labour Relations Act*. That provision extended successor rights to service contracts involving building cleaning services, food services and security services. Under the previous legislation, a sale of business was deemed to have occurred:

- (a) if employees perform services at premises that are their principal place of work;
- (b) if their employer ceases, in whole or in part, to provide the services at those premises; and
- (c) if substantially similar services are subsequently provided at the premises under the direction of another employer.

Thus, if a contract for the provision of the covered services was terminated and replaced with a new contract with another employer, the successor employer was bound by any existing collective agreement and was required to make job offers to qualified employees on the same terms and conditions.

¹⁶¹ See for example *Ontario Clean Water Agency*, [2013] OLRB Rep. July/August 920. The 'classic' case is of course *CUPE v Metropolitan Parking Inc.*, [1979] OLRB Rep. 1193.

No rationale exists for limiting the protection to the industries listed in s. 64.2 of the pre-1995 *Act*. Contracted services are common in many other industries including warehousing, transportation, health care, etc.

This amendment would facilitate the acquisition and maintenance of collectively bargained rights, which is one of the primary purposes of labour relations legislation. More importantly, extending successor rights to service contracts workers would ensure that workers are not suddenly stripped of their bargaining rights and reduced once again to a position of precarity and insecurity.

4.8 Successor Rights in Federal to Provincial Sale of Business

Proposal 4(xv): Amend the *Labour Relations Act, 1995* to extend successor rights to apply also to a federal to provincial sale of business.

Section 69 of the *Labour Relations Act, 1995* provides for successor rights in a sale of business. Bargaining rights and collective agreements apply automatically where a business is transferred from one employer to another. A problem with the current provision is that it does not protect established bargaining rights and collective agreements in the case of a sale of business from a federally-regulated employer to a provincially-regulated one. The gap in the legislation has the potential to strip the collective bargained rights of workers. Unifor's current dispute with Nordia Inc. and Bell Canada aptly illustrates this problem.

Case Study: Transfer of Sales and Clerical Work from Bell Canada to Nordia Inc.

Unifor is the certified bargaining agent pursuant to the *Canada Labour Code* for bargaining units of office and sales employees and telephone operators of Bell Canada, a federally-regulated company. In 1999, Bell Canada and an American partner created Nordia.¹⁶² Bell Canada informed Unifor's predecessor in 1999 that the work of the telephone operator services employees would be outsourced to Nordia Inc., effectively transferring a part of Bell Canada's business to Nordia. The Union did not apply for relief under the successor employer provisions of the *Canada Labour Code*, as such relief was unavailable since Nordia appeared to be provincially regulated, and therefore the Canada Industrial Relations Board had no jurisdiction. There was also no relief under the *Labour Relations Act, 1995* because the successor rights provision did not extend to federal to provincial sales of business.

¹⁶² This history is set out in *USWA v Nordia Inc.*, [2003] CIRB No. 221 in which the CIRB initially determined Nordia to be a federally-regulated employer. That finding was later reversed. See *Nordia (Ontario) Inc.* (CIRB Order No. 8563-U; December 2, 2003).

More recently, Bell Canada has transferred work typically done by its unionized sales and clerical employees to Nordia. In effect, Bell Canada has transferred another part of its business to its subsidiary. Subject to litigation that is ongoing at the federal Board, the union's bargaining rights and collective agreement with Bell Canada do not extend to cover the employees of Nordia, even though they are essentially doing the same job as Bell Canada employees but are paid less. The transfer of work from Bell Canada to Nordia has resulted in job loss and reduction in hours for Bell Canada employees.

In the litigation at the Canada Industrial Relations Board, Unifor is seeking orders that the *Canada Labour Code* applies to Nordia's business, a declaration that there has been a partial sale of business from Bell Canada to Nordia Inc. or in the alternative, an order that the two companies are considered a single employer for the purposes of s. 35 of the *Canada Labour Code*. That depends on a finding that the CIRB has jurisdiction over Nordia. If CIRB finds that it has no jurisdiction, then there can be no relief under the *Canada Labour Code*. Since the *Labour Relations Act, 1995* does not extend successor rights in federal to provincial sales of business, there can be no relief under the *Labour Relations Act, 1995* either. This ought to be a straightforward sale of business issue but relief for unionized employees is frustrated by jurisdictional differences.

Unifor submits that the successor rights provisions of the *Labour Relations Act, 1995*, should be amended to extend successor rights in a federal to provincial sale of business. The amendment is not novel nor is it a radical departure from the norm as it had existed under s. 64.1 of the *Labour Relations Act* in 1992¹⁶³:

- (1) Section 64 applies with respect to the sale of a business when,
 - (a) before the sale, collective bargaining relating to the business by the predecessor employer is governed by the law of Canada; and
 - (b) after the sale, collective bargaining relating to the business by the successor employer is governed by the law of the Province of Ontario.
- (2) Paragraphs 1 and 2 of subsection 64(2.1) and subsections 64(2.2) do not apply with respect to the sale of a business described in subsection (1).
- (3) In determining applications under section 64 concerning the sale of a business described in subsection (1), the Board may make such additional orders as it considers appropriate in the circumstances.

¹⁶³ Section 64.1 of the *OLRA*, 1992 was repealed in 1995.

Similar provisions also exist in the labour relations legislation of British Columbia¹⁶⁴, Manitoba¹⁶⁵, Quebec¹⁶⁶ and Saskatchewan¹⁶⁷. For example, s. 36 of British Columbia's *Labour Relations Act* provides:

If collective bargaining relating to a business is governed by the laws of Canada and that business or part of it is sold, leased, transferred or otherwise disposed of and becomes subject to the laws of British Columbia, section 35 applies and the purchaser, lessee or transferee is bound by any collective agreement in force at the time of the disposition.

Amending the *Labour Relations Act, 1995* to extend successor rights in a federal to provincial sale of business would ensure that where a collective agreement has been established, the provisions of the agreement are not lost when a federally-regulated corporation transfers a part of its business to a provincially-regulated company. It would also prevent employers from avoiding their labour relations obligations to their employees, as well as facilitate procedural efficiency since the bargaining agent would be able to apply for relief under the provincial legislation. Most importantly, reforming the successor rights provision would preserve the freely bargained terms and conditions, which in turn, promotes job security and combats precarity in the workplace.

4.9 Combination and Consolidation of Bargaining Units

Proposal 4(xvi): Amend the *Labour Relations Act, 1995*, to allow the Ontario Labour Relations Board to consolidate and/or combine existing bargaining units.

The 1993-1995 *Act* sensibly gave the Ontario Labour Relations the statutory power to review bargaining unit structures and consolidate existing bargaining structures or combine existing bargaining units with newly certified units, provided that all the units being consolidated or combined were represented by the same trade union.¹⁶⁸ This power could be applied by the Board to: facilitate viable and stable collective bargaining, reduce fragmentation of bargaining units, and take into account the degree

¹⁶⁴ *Labour Relations Code*, RSBC 1996, c 244, s 36.

¹⁶⁵ *Labour Relations Act*, CCSM, c L-10, s 58.1.

¹⁶⁶ *Labour Code*, RSQ, c C-27, s. 45.3.

¹⁶⁷ *Saskatchewan Employment Act*, SS 2013, c S-15.1, s 6-19.

¹⁶⁸ *Labour Relations Act*, RSO 1990, c L.2, ss. 7(1), 7(2). Unifor recognizes that additional consideration of the appropriateness of restricting such applications to “the same union” is necessary. Without agreeing that broad multi-union reviews are desirable, Unifor agrees with others that the pre-1995 interpretation was too narrow in restricting it to locals of the same trade union.

to which consolidating and/or combining the bargaining units would cause serious labour relations problems.¹⁶⁹

At its heart, this provision enhanced the ability of the Ontario Labour Relations Board to promote its long-standing policy of creating stable collective bargaining relationships, a policy that can only otherwise be implemented at the certification stage. As articulated by the Ontario Labour Relations Board itself:

32. This is not to say that "bigger is always better". However, labour relations boards across the country have all recognized the utility of broader-based bargaining structures, because they are more likely to: promote stability, increase administrative efficiency, enhance employee mobility, and generate a common framework for employment conditions for all employees in an enterprise. Bigger bargaining units also have more critical mass, so that they are better able to facilitate and accommodate change. ...

33. In the absence of statutory prescriptions, there is, today, a pronounced preference for broader-based bargaining units, unless that objective collides in a serious way with the employees' ability to organize themselves. Indeed, the Board has often favoured broader-based bargaining units, even in certification situations, where the shape of the unit may well influence whether there will be any collective bargaining at all. The Board has recognized that the *structure* of collective bargaining "*matters*" ... Fragmented bargaining structures can pose serious labour-relations problems. Conversely, broader based bargaining units make collective bargaining go more smoothly and successfully. [Case citations omitted]¹⁷⁰

Restoring this former power of the Board would allow it to further its policy of promoting stable, efficient, and cohesive labour relations structures across an enterprise. Moreover, the reintroduction of this power would allow for the rationalization of bargaining units that evolve over time.

While parties do have the power to amend the scope of their collective agreements to expand bargaining units, this provision would allow the Board in appropriate cases to overcome employer resistance to the rationalization of bargaining structures that evolve

¹⁶⁹ *Ibid*, s. 7(3).

¹⁷⁰ *Humber/Northwestern/York-Finch Hospital*, [1997] OLRB Rep 872 at paras 32, 33, 1997 CanLII 15494; see also *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep 523 at para 7-14, 1993 CanLII 7839 for a review of decisions setting out these favoured policy conditions.

over time. Without this specific power, employers can resist voluntary expansions or rationalizations of the scope of collective agreements, and perpetuate fragmented bargaining unit structures.

This power was formerly used in Ontario in order to:

- Avoid situations where one bargaining unit has to negotiate basic provisions at the bargaining table that another bargaining unit represented by the same union at the same location already has.¹⁷¹
- Ensure that workers performing the same work in different locations due to the nature of the employer's operation are treated in a similar fashion.¹⁷²
- Combine units of part-time and full-time employees that were certified separately.¹⁷³

The power to consolidate and/or combine bargaining units would not be a novel one. A similar power is exercised by the Canada Industrial Relations Board and British Columbia Labour Relations Code.¹⁷⁴ Notably, Unifor does not propose that the Board should take on the administrative burden of maintaining a general supervisory oversight of all certifications as does the CIRB.

4.10 Good-Faith Bargaining about Workplace Closure

Proposal 4(xvii): Amend the *Labour Relations Act, 1995* to impose an ongoing duty on employers to bargain in good faith in the event of a workplace closure, and to provide a process of interest arbitration when negotiation of a closure agreement is unsuccessful.

Since the 2008 economic recession, Ontario's manufacturing industry has suffered immensely as evidenced by the many workplace closures that have occurred in recent years. Under the *Labour Relations Act, 1995*, the duty to bargain in good faith persists in a plant closure situation. However, when production has shut down, unions have little or no bargaining power to strike and enforce demands. The Union's experience in the case of Navistar in Chatham demonstrates the necessity of amending the *Labour*

¹⁷¹ Ibid, see Mississauga Hydro-Electric Commission at para 30.

¹⁷² *Premark Canada Inc.*, [1992] OLRB Rep 540, 1993 CanLII 7846; *The Hudson's Bay Company*, [1993] OLRB Rep 1042, [1993] CanLII 7901; *Metroland Printing, Publishing and Distributing Ltd.*, [1994] OLRB Rep 160, 1994 CanLII 9823; *Cineplex Odeon Corporation*, [1994] OLRB Rep 824, [1994] CanLII 9832.

¹⁷³ *Kingston Access Bus*, [1992] OLRB Rep 610, 1993 CanLII 7882; *Marriott Corporation (at Carleton University)*, [1994] OLRB Rep 151, 1994 CanLII 9820.

¹⁷⁴ *Canada Labour Code*, RSC 1985, c L-2, s. 18, 18.1; *Labour Relations Code*, RSBC 1996, c 244, s. 142.

Relations Act, 1995 to impose a duty to bargain in good faith on employers in a closure or mass termination situations.¹⁷⁵

Case Study: Navistar

CAW-Canada represented 1,135 hourly production workers and 101 office employees who were employed by Navistar at its truck-making plant in Chatham. In 2008 and 2009, all employees were laid-off. Navistar and the union had begun to bargain a renewal collective agreement but had not done so before the expiration date of the previous collective agreements. Navistar and the union continued to bargain while the workers remained on lay-off. In 2011, Navistar announced the closure. All 1,236 employees lost their jobs.

Following the announcement, the union and Navistar attempted to bargain the terms of a closure agreement. Negotiations took place between 2011 and 2012, but the parties were unable to agree on issues relating to severance pay and the terms and conditions of the pension plan. The union now lacked the ability to put pressure on the employer to bargain in good faith in a closure situation because production had ceased and all the employees were out of the plant. The union had little bargaining power because it could not impose the economic sanction of a strike. That situation continues to drag on during which time the union has unsuccessfully sought remedies from the Courts and the Labour Relations Board. All of this has delayed the payment of severance and pension entitlements that were owed to the employees.

Impose Ongoing Duty to Bargain in Good Faith in a Closure Situation

The example of Navistar demonstrates the problem in our current labour relations regime in addressing hostile labour disputes involving an unrelenting and unreasonable employer in a closure. There is no mechanism under the *Labour Relations Act, 1995* which facilitates this kind of collective bargaining.

The Union proposes that the *Labour Relations Act, 1995* should be amended to include a provision which would require the employer to bargain in good faith in mass terminations and closures and resort to interest arbitration if those discussions fail to produce an agreement. This is not a novel idea as the provision existed under Bill 40, and it is provided for under the *Canada Labour Code*.¹⁷⁶

In the pre-1995 Act, section 41.1 provided that there was a duty to bargain an adjustment plan in good faith when the employer gave notice of termination of 50 or more employees, or the employees had been terminated because of a closure of all or

¹⁷⁵ This history is well described by the Ontario Labour Relations Board in *Unifor v. Navistar*, 2015 CanLII 16341.

¹⁷⁶ RSC 1985, c L-2.

part of a business. Bargaining about an adjustment plan was required to begin within seven days of the request. The resulting adjustment plan was enforceable in the same manner as a collective agreement.

The *Canada Labour Code* requires employers to establish a joint planning committee to develop an adjustment plan after providing notice of mass termination. The objectives of the joint planning committee include eliminating the necessity for the termination of employment or minimizing the impact of termination of employment on the redundant employees and to assist them in finding other employment.¹⁷⁷ If an adjustment plan cannot be agreed upon, the parties may apply to the Minister for the appointment of an arbitrator to determine the outstanding issues.¹⁷⁸

In amending the *Labour Relations Act, 1995* to include an obligation on the employer to bargain in good faith in the event of a plant closure and a mechanism to access interest arbitration in the event negotiations break down, it would ensure that workers receive what they are owed in terms of severance, termination, and pension without delay. It may also act as an incentive for employers to engage in meaningful collective bargaining as the obligation to negotiate a closure agreement may affect its business decision to shut down an operation.

¹⁷⁷ Canada Labour Code at s. 221.

¹⁷⁸ Canada Labour Code at s. 223(1).

Part V: Strategies for Restoring Balance in the Labour Market: Just Cause and Collective Action in Non-Union Workplaces

5.1 Fundamental Principles of Workers' Rights

It is important to affirm the significant role the law can and must play to recognize and protect the legitimate exercise of workers collective right to act and "speak" about their workplace concerns, particularly when there is no collective bargaining agent present to express and press those concerns forward.

The Changing Workplaces Review has triggered a renewed examination of the matter of employee "voice" in the workplace. In particular, the capacity of unrepresented workers to make their voice heard, and their issues known, in order to contribute towards the fair and efficient administration of their workplaces is a key public policy concern.

While this discussion, of course, predates the Panel's review process, it has taken on new urgency in this review because of a growing consensus that an effective workers' voice is essential to establish lasting and meaningful standards of fairness for vulnerable workers.

In this context, Unifor sees "employee voice" as constituting a worker's right and capacity to have his/her concerns and issues heard, addressed and remedied in a space and environment properly and fully protected by appropriate legal rules enforced by the state.

In our labour relations system the voice of represented workers is carried by their trade union whose authority to bargain collectively, administer and enforce collective agreements and employment related statutes constitutes a key countervailing power to the employer's predominant role in the workplace.

Unifor favours extending provisions for workers' voice to unrepresented workers. We assert that such a voice has a clear labour relations purpose, and must be implemented in a manner that upholds essential rights, including:

(a) the legal right and capacity of an employee to enforce employment standards and other employment related statutes;

(b) the legal right and capacity of an employee to express through words and action to the employer primarily, their co-workers and to the community at large, their workplace concerns and issues in order to bring about change; and

(c) the independence of worker “voice” from employer influence or domination.

Based on these foundational principles, Unifor believes it is past time to provide all workers (union and non-union) with the legal right and capacity to make their views known through words and action.

5.2 Mandatory Joint Employer/Employee Work Councils: Experience with Ontario Occupational Health and Safety

We have considered carefully the prospect of a legislative rule requiring all workplaces in Ontario (above a certain minimum number of employees) to establish a joint employer/employee work council, mandated to discuss and review all employment related issues outside of health and safety. This would be one system for providing “voice” to non-union workers.

Our concern is that without other legislative rules providing robust protection for those workers who participate in such councils, and/or more importantly statutory shields for those persons who raise issues to be dealt with by the council, the effort, cost, and expenditure of resources required to make such councils function would be, on balance, not worth the advances achieved.

Ontario’s experience in Internal Responsibility Systems (IRS) Regulations in the Occupational Health and Safety environment does not bode well for similar approaches to the regulation of proper working conditions in workplaces without a collective bargaining agent.

Professor Wayne Lewchuk, in a significant article entitled “The Limits of Voice: Are Workers Afraid to Express their Health and Safety Rights?,”¹⁷⁹ observed that prior to the mid-1970’s “the emphasis in most jurisdictions in Canada was on protecting workers’ health via government regulations”, enforced by government inspection.

However, the trade union movement was unhappy with the lack of vigour and pace of government action. Further, workers and trade unions were dissatisfied with the lack of employee input and participation in dealing with health and safety issues. These same concerns animate today’s discussion about the state of the Province’s regulatory enforcement of *Employment Standards Act*, and the lack of voice afforded unrepresented workers.

Bill 70, the *Occupational Health and Safety Act*, passed in 1978, gave workers some voice with respect to health and safety concerns. This law obliged employers to create a

¹⁷⁹ (2013) 50 Osgoode Hall Law Journal, pages 789-812

joint health and safety committee, and importantly, gave workers the right to refuse dangerous work. However, the move to an IRS framework led to “a decline of government-regulated workplace inspections in Ontario by the mid-1990s to less than 1/3 of their level in the early 1970s, despite the growth in the economy.”¹⁸⁰

WORKPLACE PERSPECTIVE

“Magna has its own Concern Resolution process which is their resolution process for all Magna facilities, even their non-union plants. As part of the collective bargaining agreement in its unionized facilities, the union takes the resolution process a step further. This process with the union representation makes it real. There’s no hiding the issue and the union will ensure meaningful resolve at all levels of the process. Many workers unless there’s a union presence are not speaking out because they’re afraid of reprisal. When you have a union to help you are not alone.”

Jimmy D’Agostino, President, Unifor Local 2009AP

In the early 1990s, changes to Ontario law made joint health and safety committees mandatory at more workplaces, required committee members to be trained, and empowered certified committee members to stop work that they perceived to be dangerous. However, just a few years after these changes, a new Conservative government scaled back the bipartite initiatives, lessened the government’s commitment to worker participation, and gave greater weight to employer self-regulation in order to address health and safety issues.¹⁸¹ By the mid-1990s, the enforcement and review of health and safety issues in disputes were effectively off loaded to employers and workers (and their collective bargaining agents, if any).

What does the history of the IRS framework in *Occupational Health and Safety* tell us now about the prospect of employer and employee self-regulation through joint employer employee councils with respect to workplace conditions in an economy increasingly characterized by precarious employment?

¹⁸⁰ Wayne Lewchuk, “The Limits of Voice: Are Workers Afraid to Express their Health and Safety Rights”

¹⁸¹ Wayne Lewchuk, “The Limits of Voice: Are Workers Afraid to Express their Health and Safety Rights”

As Professor Lewchuk observed in his article, changes to the current IRS framework occurred at a special time when “the labour movement was near its post-war peak in terms of influence and the standard employment relationship was widespread. Workers in a number of economic sectors felt sufficiently secure that they were willing to demand changes to protect their health and to play more of a role in voicing their concerns to management. Where unions had effectively organized workers or where management was willing to co-manage the health and safety function with workers, the IRS had potential to reduce injuries. However, for many workers outside the organized labour movement or working at firms where management kept a firm grip on management rights, the shift from external protection to voice and internal responsibility had more limited effects. The small gains and participatory rights came at the cost of a general retreat by the government from its role as regulator.”

The vagaries of such a bargain for Ontario workers today are much less favourable given the profound shift from so-called “standard employment” to “non-standard” precarious employment relationships featuring part-time, casual, and temporary employment.

Consequently, the introduction of joint employer employee councils as strategy for enhancing the voice of unrepresented workers will likely not deliver the progress desired; and this is particularly the case if other amendments to the laws which define and protect the legal status of unrepresented workers are not introduced.

Professor Lewchuk adopted the remarks of another expert in the field of labour relations, John O’Grady, who found as follows:

*“Without the protection of a grievance system, few workers will be inclined to exercise their statutory right to refuse to perform unsafe work. Similarly, only a small minority of non-union members of health and safety committees will summon inspectors to rectify persistent non-compliance standards. While near universal unionization was not a presumption of the Internal Responsibility System, **widespread unionization**, at least in high incident sectors, **was an unstated premise of that system**. Indeed, trying to understand the system of internal responsibility in the role of the right to refuse without recognizing the central importance of unions is like trying to put on a production of Hamlet but leaving out the ghost. For an increasing number of workers, increasing both absolutely and relatively, **the unstated premise of the internal responsibility, that is the presence of a union, no longer holds.**”*

Professor Lewchuk stated further:

*“Differences between the labour relations context of permanent full time workers and workers in precarious employment relationships are critical to understanding the efficacy of voice in protecting the latter worker’s health and safety. The precariously employed have relatively weak entitlements to further employment with their current employer and have little recourse in labour law if their employment is terminated. They are less likely to be unionized and less likely to have an ongoing relationship with either an employer or a group of co-workers. **Lower rates of unionization in weaker ongoing links to co-workers make those in precarious employment relationships more vulnerable to retribution for defending their legal rights.**”*

Professor Lewchuk’s observations were supported by survey data gathered in connection with his article. His review of this data illustrated that a significant majority of workers in precarious employment, exposed to health and safety risks at work, feared that “using voice” to report health and safety concerns would have negative consequences for their future employment.

The conclusion drawn by Professor Lewchuk was as follows:

*“The findings reported above raise serious concerns regarding the ability of the Internal Responsibility System to deliver safer and healthier workplaces in the context of growing employment security. If in the 1970s it was true that workers could be expected to voice their concerns by participating in health and safety committees, by demanding to know about the risks they were facing and by refusing work, this seems to be less true for a growing number of workers in Ontario today. **I have shown that for many of the precariously employed, exercising those rights comes with a significant perceived risk of negative effects on future employment, possibly including losing their jobs.** These finding suggest that serious consideration needs to be given to increasing reliance on external regulations and inspection of workplace health and safety issues, and decreasing reliance on the IRS in sectors where employment is most insecure.”*

In our view, there is no reason to believe why the same lessons ought not to be drawn with respect to any shift towards a joint employer employee council framework based on an Internal Responsibility System. Just as precarious workers are increasingly apprehensive about asserting their health and safety rights, absent any supplementary legal protections and the enhanced availability of government regulatory assistance, similarly they will see no advantage in participating in joint councils based on an internal responsibility system framework, if other more meaningful protections and assistance are not forthcoming.

WORKPLACE PERSPECTIVE

In its founding constitution in 2013, Unifor implemented a new organizational structure aimed at opening new opportunities for workers to attain collective voice and representation in precarious and non-traditional work settings. Unifor's "Community Chapters" provide a path to union membership, with some (but not all) benefits of collective voice and power, for workers who would not normally be able to certify traditional bargaining units in their workplaces (such as freelancers, self-employed, agency workers, and other hard-to-organize occupations). Community Chapters are now being formed to advance the interests of freelance media workers, employees of religious organizations, part-time students, and others.

For more details on Community Chapters, see <http://unifor.org/en/about-unifor/community-chapters>.

5.3 Creating Basic Statutory Security and Fairness for Unrepresented Workers: Just Cause

Proposal 5(i): The rules found in Part III of the *Canada Labour Code* regarding just cause should be implemented in Ontario's labour law, supplemented by recommendations from the Harry Arthurs review for improving the adjudication system, and implemented under the general authority of the Ontario Labour Relations Board.

There are, however, several measures which can fortify the legal space in which workers can exercise their voice, and moreover eliminate a key aspect of the precarious nature of their employment. One such measure that can be introduced is already in place in the federal jurisdiction. It ensures that no employee may be dismissed from employment without just cause. The rules found in Part III of the *Canada Labour Code* are long overdue in the Province of Ontario. Section 240 of the *Canada Labour Code* permits an unrepresented employee with twelve consecutive months of continuous

employment to complain in writing that he or she has been dismissed from employment without just cause. Section 242 grants a neutral adjudicator the jurisdiction determine whether the dismissal of the employee was unjust. If such a finding is made the adjudicator has the power to reinstate the employee to employment and otherwise direct a “make whole” remedy.

Today, an employee in Ontario who alleges he/she was terminated without cause (in the absence of an allegation that a specific violation of the statute such as the *OLRA* or *OHS* etc.) has no option but to sue in Court or launch a complaint under the *Employment Standards Act* for the right to recover a limited amount of monetary damages in lieu of notice. The cost and complexity of litigation in Court makes such an effort a non-starter for most workers.

Access to *Employment Standards Act* minimum standards by way of a complaint to the Ministry of Labour to recover limited monetary damages is an insufficient substitute for the inherent unfairness of dismissal from employment without cause.

Commissioner Harry Arthurs had an opportunity to review how the provisions of sections 240-242 of Part III of the *Canada Labour Code* have operated since their introduction in 1978. In summary, Professor Arthurs, as well as his colleague Professor Geoffrey England in a supporting study, found that the system of adjudication of wrongful dismissal claims with respect to unrepresented workers set out in the federal Code was “fundamentally sound”. Indeed, Professor Arthurs noted that there appears to be a consensus amongst the employer, labour, and employee communities that these provisions of the *Canada Labour Code* should remain part of the legal matrix of rights and standards applicable to unorganized workers in the federal sector. Commissioner Arthurs did make some recommendations for improvement to the system of adjudication which may be of interest to this review panel:

“Recommendation 8.6: Access to adjudication by employees claiming to have been unjustly dismissed should continue to be provided under Part III to employees who have completed one year of service.”

Recommendation 8.7: The adjudication system should come under the direction of a Director of Adjudication Services (DAS) who should be administratively responsible for its fair and efficient operation. The DAS should have the authority to: (a) provide information to workers and employers concerning their procedural and substantive rights and responsibilities; (b) receive and process complaints concerning unjust dismissal; (c) assist the parties to such complaints to resolve their differences (d) dismiss claims that are patently frivolous or vexatious or belong elsewhere; (e) assign cases for adjudication; and (f) take all necessary steps to insure the proper operations of the adjudication system.

Recommendation 8.8: Adjudication should be undertaken by a new panel of permanent and full and part-time hearing officers, rather than by adjudicators appointed ad hoc, as at present. A detailed review of the procedural and remedial authority of hearing officers should be undertaken to ensure that they enjoy the full array of powers needed to conduct hearings and dispose of cases in a fair and effective manner that protects the rights of both workers and employers. If necessary, changes in their power should be enacted in legislation or by regulation. The power of hearing officers to award reinstatement should be retained in its present form.

Recommendation 8.9: Complaints of unjust dismissal based primarily on legal rights other than those conferred by Part III should be referred for adjudication to the appropriate Court or Tribunal. Unjust dismissal complaints that also allege violations of Part III should be dealt with in full by a hearing officer.”

We endorse these recommendations, subject to an important supplementary proviso. We say that the adjudicative system with respect to unjust dismissal complaints should come under the general authority and umbrella of the Ontario Labour Relations Board, which has the embedded expertise and institutional culture to decide these kinds of matters.

5.4 Protected Collective Activity: Creating Space for Workers to Speak and Act

Proposal 5(ii): The OLRA should be amended to include a new guarantee to protect and shield all employees and all persons who perform work or services for compensation when they engage in collective activities for the purpose of “mutual aid or protection.”

In order to make unrepresented workers’ free exercise of “voice” practical and effective in Ontario, another meaningful protection must be added to the OLRA, 1995. There should be a new guarantee to protect and shield all employees and all persons who perform work or services for compensation when they engage in collective activities for the purpose of “mutual aid or protection.” Such a measure should insulate employees and all those persons who perform work or services for compensation from any penalty or adverse treatment because they expressed through words or action concerns or protests about their working conditions

The creation of such a protected space for workers collective activity has been an objective of the American National Labour Relations Act (*NLRA*), the statute which governs the labour relations of most U.S. private sector employers (outside of the

railway industry) with business revenues of at least half a million dollars, or \$50,000 in “non-retail” enterprises.

While the National Labour Relations Board is traditionally associated with the administration and enforcement of rights of unionized workers under the *NLRA*, the NLRB also has important regulatory authority with respect to the scope of unrepresented workers’ capacity and legal space to “voice” their issues and concerns through words and action.

The NLRB statutory authority for regulating the affairs of non-union employers can be found in Section 7 of the *NLRA*, 29 U.S.C., paragraph 157. Section 7 provides non-supervisory employees, union and non-union, the right to engage in, or to refrain from engaging in, “concerted activity for the purpose of collective bargaining **or other mutual aid or protection.**” As broadly defined by the Supreme Court of the United States, “mutual aid or protection” includes employees’ efforts to “improve current terms and conditions of employment or otherwise improve their lots as employees through channels outside the immediate employee/employer relationship.

The *Act* does not expressly define “concerted activities.” The Board “has substantial authority to define the scope of section 7... as it considers the wide variety of pages that come before it.” The Board’s interpretations, however, must be “reasonably defensible.”

Employment policies and practices that violate section 7 may subject an employer to an unfair labour practice charge under section 8 of the *NLRA*. A charge must be filed within six months of the allegedly unlawful action. Intent is not a necessary element of all unfair labour practices under section 8. While subsections 8(a)(3) and (4) of the *NLRA* prescribe intent-based unfair labour practices, such as discrimination and retaliation on the basis of union membership or for filing NLRB charges, section 8(a)(1) is a “strict liability” statute which prohibits any interference with an employee’s exercise of section 7 rights.

Where an employer disciplines or terminates an employee for section 7 activity pursuant to a work rule or contract provision that violates the *NLRA*, the employer has violated section 8(a)(1) regardless of whether the employees’ conduct could have been prohibited by an otherwise lawful workplace rule.

While the majority of cases presented to the National Labour Relations Board have historically involved the section 7 rights of workers seeking union representation, or those who already have union representation, more recently, the NLRB has been

presented with cases based on employees challenging working conditions in non-union workplaces, where no union organizing activities have been contemplated.¹⁸²

It is, in our view, section 7 of the *NLRA* which has created and maintained protected space for recent organizing activities, demonstrations, and campaigns among fast food, retail and warehouse workers in the United States, which in turn have led to increases in local minimum wage rules, as well as “voluntary” corporate minimum wage increases at WalMart, Target, Gap, and company-owned McDonald’s restaurants. Further, section 7 has contributed to the legally protected space for workers to bring attention to shift scheduling and work hour issues,¹⁸³ all of which are similarly key concerns for precarious retail and fast food workers in Ontario.

It is important to recognize that under American law a concerted withdrawal of labour, a strike, may be a form of protected concerted activity even when the pertinent employees are governed by an existing collective agreement, so long as that agreement does not otherwise prohibit a mid-term cessation of labour. Under Section 7 of the *NLRA*, a withdrawal of labour (a strike) would be a concerted activity protected by law as long as it was not “indefensible” as defined by law: that is, that is it was not violent, in breach of contract, or unlawful (such as when employees fail to take reasonable precautions to protect the employer’s plant, equipment or products from foreseeable imminent danger due to a sudden cessation of work).

A seminal American authority in the matter of “protected concerted activity” characterizes the rights guaranteed under section 7 as a form of collective speech (ie. voice). In *Washington Aluminum*, 370 U.S. 9 (1962) workers were fed up with cold working conditions in their workplace. They resorted to collective action, a strike, to communicate their concern to the employer. The Court found that an employer violates the *NLRA* by imposing discipline upon workers for engaging in protected concerted activity in the course of a labour dispute. The Court declared that the workers in *Washington Aluminum* “legitimately resorted to strike activity to speak for themselves.” The court explained that “having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know they wanted a warmer place in which to work.”¹⁸⁴

¹⁸² *Bentley and Snyder*, Applying the Act to the non-union world, Committee on practice and procedure under the *NLRA*, mid-winter meeting 2014 paper.

¹⁸³ Catherine Fisk, Workplace Democracy and Democratic Worker Organizations, U.S. Irvine, School of Law, Legal Studies Research Paper

¹⁸⁴ *Washington Aluminum Company*, 370 U.S. 9 (1962) at page 15

Unifor recognizes that although the OLRA and the NLRA have common roots in the “Wagner Act” majoritarian model, there remain distinctive features of the Ontario and Canadian labour relations system which govern and regulate workers’ access to the right to strike **after** the establishment of a union mandate to bargain on behalf of a defined constituency – including specified processes for conciliation, determination of a strike mandate, notice, etc. These differences would need to be taken into account in the exercise of protected collective activity.

In any event, there are a myriad of other forms of collective activity and expressions explicitly protected by decisions rendered under section 7 of the *NLRA*, which correspondingly should be protected by the OLRA. They include:

- (a) complaining at a group meeting about a shared grievance, *Citizens Inv. Serv. Corporation v. NLRB*, 430 F. 3(d) 1195 (D.C.) Circuit Court, 2005.
- (b) speaking up at an employer organized meeting, *Grimway Enterprises Inc.* 315 NLRB 1276 (1995).
- (c) criticizing an employer in letters to other branches of the company or to clients, *Sierra Pub. Company v. NLRB*, 889 F. 2(d) 210, 214, 220 (9th Circuit 1989), *Emarco Inc.* 284 N.L.R.B. 832, (1987), and *Oaks Machinery Corporation*, 897 F. 2(d) 84, (Second Circuit 1990).

Generally, the NLRB has found that concerted activities are activities engaged in, with or on the authority of other employees, including actions taken by an individual to enforce a collective bargaining agreement. Actions taken solely on behalf of a single employee are not concerted activities, however concerted activities include “those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”¹⁸⁵

In an article entitled “The NLRB as the ‘Nonunion’ Labour Relations Board,” Stan Hill explains that the test for concerted activities requires an examination of the purpose for which an individual employee brings a complaint, which underlined factual circumstances. Section 7 demands this fact based inquiry by providing that concerted activities are protected only if undertaken “for the purpose of collective bargaining or other mutual aid or protection.”¹⁸⁶

There is a broad history of jurisprudence which defines the parameters of the protected right of concerted activity set out by section 7 of the *NLRA*. This submission is not the

¹⁸⁵ *Myers Industries Inc.*, 268 N.L.R.B. 493, affirmed, 281 N.L.R.B. 882.

¹⁸⁶ Stan Hill, “The NLRB as the ‘Nonunion’ Labor Relations Board,” 29 ABA Journal of Labour and Employment Law 43 (2014).

place to detail it. Suffice it to say that the *NLRA* protects concerted expressions and actions of workers concerning their working conditions as long as they do not cause foreseeable and significant danger, outside of business or economic loss, or are conducted in a malicious, defamatory or insubordinate way as defined by the caselaw.

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

The next section of this submission, dealing with sector-wide employment standards and bargaining structures, will also discuss other avenues to enhance the voice of non-union workers through the creation of new sectoral bodies.

Part VI: Strategies for Restoring Balance in the Labour Market: Sectoral Standards

6.1 Five Policy Goals for Addressing Precarious Work and Fairness

The Changing Workplaces Review must address a fundamental challenge for the future of labour market policy: what measures can effectively provide Ontario workers the dignity, security, and fair treatment they deserve, while maintaining the efficiency and success of Ontario's economy?

Unifor believes that in addition to the specific improvements to employment standards and industrial relations practices outlined in earlier sections, the Changing Workplaces Review should consider some more far-reaching, conceptual changes in our approach to lifting standards and outcomes in our labour market. The fundamental changes in the economy and labour market mapped out above, demand an evolution of our basic approach: one that is innovative, evidence-based, and rooted in established Ontario and Canadian principles and precedents.

Unifor submits that reconceptualizing the application of both employment standards and collective bargaining to apply on a sectoral basis, in addition to on an enterprise or workplace basis, holds great promise for modernizing our regulatory approach to reflect these challenging new realities. In our view, this sectoral thinking should incorporate five basic propositions:

- i. a) Sectoral minimum standards across defined labour markets are the most effective mechanism to provide security and fairness for workers, while reflecting sector-specific economic realities and ensuring business success.

b) Sectoral standards should reflect the labour market test of the outcomes that would be attained from free collective bargaining, in order to establish a set of prescribed minimum standards and provide for the extension of collective agreement provisions across a defined labour market. (In this submission, we call such an extension a "Sectoral Standards Agreement.")
- ii. c) New sectoral councils, including employers, trade unions and worker representatives within a Sectoral Standards Agreement, should be tasked with developing labour market partnerships, providing access to health and welfare benefits, and assuming a front-line role in the enforcement of minimum standards.
- iii. d) All Ontario workers should have a voice in their workplace, and it is time to provide for a "workers' voice" in the operation of sector councils and through basic freedoms established in the Ontario Labour Relations Act. However it is a bedrock provision of

Canadian labour law that a genuine workers' voice must have a labour relations purpose, and be protected from employer influence and reprisals, and include a concomitant protected right to collective action. Nothing in what we propose here should be interpreted as interfering with or replacing those rights.

- iv. e) While sectoral standards should reflect a broad community of interest between all workers, unionized and non-union, the institutions of collective bargaining must also adapt to the growing fragmentation of labour markets through the specific application of multi-employer certifications and bargaining rights. These include measures to enable organization and collective bargaining by workers in franchise operations, as well as within the growing workforce of self-employed and single dependent contractors.

6.2 Drawing on Canadian Precedents

Distinctive Features of Canada's Labour and Social Legislation

Unifor contends that each of these policy goals separately and in their totality would constitute an important evolution of long-standing Ontario and Canadian practices and precedents, which combine the distinct features of Canadian social legislation and the Canadian application of the "Wagner Act" majoritarian model of worker representation.

Canadian workplace and industrial relations law has always been distinct reflecting our federal system as well as evolving cultural and political consensus. Many distinctly Canadian provisions have defined key elements of work in this country. These include, among many others:

- Provincial and federal minimum wage and employment standards provisions, both universal and sectoral in scope.
 - Extensions of collective agreement provisions to cover non-union workers through the Rand Formula and through judicial extension or Decrees.
 - Legislatively mandated collective bargaining regimes in the construction sector, health care, education and other sectors.
 - Prohibitions on replacement workers in B.C. and Quebec.
 - Human rights law and adjudication federally, in Ontario and other provinces.
 - Ontario's Pay Equity Act.
 - Federal occupational and sectoral bargaining regimes for professional independent contractors in the arts.

These and other Canadian approaches to workplace regulation have evolved over time. They are diverse, but represent a broad Canadian consensus on the rights of workers and minimum standards in our economy.

Unifor recognizes the reversals and rebalancing of rights away from workers in Ontario during the years of the Harris government. However, as the Law Reform Commission of Ontario argued effectively in the context of employment standards, these reversals were at odds with the long sweep of Canadian tradition. Hence we demand a return to our progressive tradition to redress the needs of vulnerable workers.¹⁸⁷

Quebec: The Act Respecting Collective Agreement Decrees

From 1934 until today a significant percentage of Quebec's most vulnerable workers have enjoyed the protection of that province's "Decrees Act." While some critics attempt to dismiss the Decree System as a relic from a former era, it has in fact been subject to ongoing review and updating, most recently in May of 2015. The Decrees Act remains an integral part of workplace life in Quebec, covering 9,000 employers and about 75,000 employees.

The Decree System is relevant to Unifor's proposal in part because it demonstrates the effectiveness and practicality of extending collective agreements across a defined sector, and the role of a sectoral body (called in Quebec the "Parity Committee") in administering and enforcing these provisions.

The Act Respecting Collective Agreement Decrees sets out clearly the practical measures that have remained at the basis of the system for 80 years. The chief provisions in their current form are¹⁸⁸:

- The judicial extension of a collective agreement for a trade, industry or occupation to bind employees and employers in a stated region of Quebec (Section 2).
- The decree extends the agreement as minimum standards (Section 13).
- The decree applies to contractors and subcontractors (Section 14).
 - The parties to a collective agreement must form a committee responsible for overseeing and ascertaining compliance with the decree (Section 16).
 - The committee may enforce the decree and the Act, including imposing penalties of 20% of any amount of unpaid wages or compensation (Section 22).
 - The committee is self-financing through a levy no larger than 1/2% of the employer's total payroll (Section 22 r, 1).

The Evolution of the Decree System

The Decree system in Quebec has diminished over time in its sectoral scope, and it has been modified to be more flexible and to address concerns over competitiveness issues.

¹⁸⁷ Law Reform Commission of Ontario, *Vulnerable Workers and Precarious Work*, 2013

¹⁸⁸ Province of Quebec, *An Act Respecting Collective Agreement Decrees*

Major amendments to the Decree system were introduced in 1996. These amendments required decrees to consider “business implications” and to ensure that a Decree (Section 6 of the Act) meet the following criteria:¹⁸⁹

- (a) Have acquired a preponderant significance and importance for the establishment of conditions of employment;
- (b) May be extended without any serious inconvenience for enterprises competing with enterprises established outside Québec;
- (c) Do not significantly impair the preservation and development of employment in the defined field of activity; and
- (d) Do not result, where they provide for a classification of operations or for various classes of employees, in unduly burdening the management of the enterprises concerned.

The 1996 amendments also provided for a review of the sectors covered by Decrees and over the following decade the number of decrees was significantly diminished, particularly in manufacturing. Today, 14 decrees remain, covering close to 75,000 workers. Of these, three sectors represent 94% of the employees covered: automobile services, security agencies, and building services.¹⁹⁰

In considering the diminished scope of the Decree System in Quebec, it should be noted that the labour relations system in Quebec’s construction industry also has its origins in a Decree – which has now evolved into a legislated and highly regulated sectoral certification system covering about 250,000 workers.¹⁹¹

In 2012, the Decree System underwent yet another review, and in May 2015 the government tabled Bill 53 to update the Decree System. Bill 53 includes provisions to:¹⁹²

- Allow for applications at any time for an amendment to the decree after negotiations between the parties.
- Allow for appointment of a conciliation officer to assist in the negotiation of decree provisions.
- Allow for the minister to make changes to a decree after consultation.

¹⁸⁹ Province of Quebec Act, Respecting Collective Agreement Decrees

¹⁹⁰ Les différents régimes de représentation collective au Québec

Par Bianca Tanguay-Lavallée, Antoine Houde, Josée Marotte, Charles Nadeau et Martine Poulin*
Regards sur le travail, Vol 9, Forum 2012, Ministry of Labour, Province of Quebec

¹⁹¹ Commission de la construction du Québec, www.ccq.org

¹⁹² Bill 53, An Act to update the Act respecting collective agreement decrees mainly to facilitate its application and enhance the transparency and accountability of parity committees, Sam Hamad, Minister of Labour, 2015, Province of Québec

- Allow for the minister to recommend a repeal of a decree if it fails to meet criteria in Section 6 of the Act (noted above).
- Allow the minister to appoint an “observer” to participate in Parity Committee proceedings.
- Requiring Parity Committees to post information on its decisions and its audited financial statements.
- Allow greater access to workplaces and information by Parity Committee inspectors for enforcement of decrees.
- Increased fines for violations of decrees.

The Decree System in Automobile Services

Unifor has extensive experience with the Decree System, as the principal union participating in the Montreal automotive services decrees (which is the largest of six regional decrees in this sector). The Montreal Region Decree¹⁹³ provides minimum standards for wages, working hours, holidays, vacation pay, special leave, advance termination notices, and the training and qualification process for tradespersons.

The Montreal Region Decree is negotiated and administered by a 12 person Board (“Parity Committee”) equally comprised of union and employer representatives. The union representatives include Unifor Local 4511 and representatives and the Syndicat national des employés de garage du Québec inc. (SNEGQ). Six separate employer organizations make up the employer side of the Parity Committee.

The Decree defines, in great detail, the specific set of activities and occupations to be covered by its terms (listing over a dozen activities and exclusions), and its territorial coverage (catalogued in a list of over 30 municipalities). An important part of the Montreal Decree provides for a labour market partnership in training and qualifications for auto mechanics and other professions. Like other Quebec decrees, the Parity Committee is self-financing through a small levy on employers, and it employs inspectors to monitor and enforce provisions throughout the sector.

The Federal Status of the Artist Act

Another interesting precedent for the application of minimum standards and provisions across an entire sector or occupation is provided by the federal *Status of the Artist Act*. In 1992, the federal government adopted this ground-breaking labour relations statute which granted collective bargaining rights to “cultural workers” who were, as a matter of law, predominantly engaged in contracts for service as independent contractors.

¹⁹³ The Parity Committee of the automotive services industry in the Montreal region - CPA Montreal, www.cpamontreal.ca

The *Status of the Artist Act* applies to a wide range of persons involved in the arts, namely those who:

“(i) are authors of artistic, dramatic, literary or musical works within the meaning of the *Copyright Act*, or directors responsible for the overall direction of audio visual works,

(ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or,

(iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound recording, diving, or the recording of commercials, arts and crafts, or visual arts.”¹⁹⁴

While the *Status of the Artist Act*, S.C. 1992, C. 33 builds on the *Wagner Act* model, as expressed in Part I of the *Canada Labour Code*, it departs from conventional labour law paradigms in order to accommodate the features of freelance, project-based, temporary work undertaken by the constituency of self-employed “professionals” targeted by the statute.

The constituency of persons protected by the statute are artists who are identified as “professional” independent contractors. This group of “professional artists” does not include employed artists who are considered to be protected by conventional collective bargaining schemes and statutory standards. In many respects, the working conditions and environment of a “professional artist” covered by the *Status of the Artist Act* resembles closely the features of non-standard precarious employment undertaken by many self-employed contractors and service-providers across the economy (such as freelance translators; television, radio, and print media free-lance contractors, domestic workers, personal service care workers, etc.).

And while the working conditions of “professional artists” demonstrate some analogous features to the mobile and project-based employment of construction workers, there are significant differences, not least of which is the status of the professional artist as an

¹⁹⁴ Section 6, *Status of the Artists Act*, S.C. 1992, C.33

“independent contractor” and his/her desire to retain control or copyright over their work, and greater autonomy in performing their work.

Nevertheless, it was the precarious and insecure nature of the work experience of the “professional artists” that led the federal government to embrace and implement a new framework for sectoral certification, and rules governing the negotiation of so-called “scale” or basic minimum agreements to address the concerns of cultural workers.

Professor Judy Fudge summarized the federal *Status of the Artist Act* in the following way:

“In the case of artists, the federal *Status of the Artist Act* permits professional artists who are independent contractors to form associations and bargain collectively with federal producers. It introduced a collective bargaining regime centring on the production of artistic works rather than the performance of personal service, and it does so by extending collective bargaining rights to independent professional artists and certifying organizations that are representative of artists in a given sector. On certification by a Tribunal, artists associations gain the right to bargain on the behalf of all artists in the sector (MacPherson 1999). Yet, in contrast to most other collective bargaining regimes, artists associations then negotiate scale agreements with producers. These agreements are minimum terms and conditions for various types of artistic works. They allow individual artists to negotiate contracts, but prevent producers from paying any less than the amount provided in a given scale agreement to an artist working in a sector in which an artist’s association has been certified, thereby attempting to minimize precarious work relationships in the art. (Vosko 2005).”¹⁹⁵

Certification of a bargaining agent under the *Status of the Artist Act* follows an analogous path as that taken by an applicant under Part One of the *Canada Labour Code* before the federal Canadian Industrial Relations Board. Upon an application, the

¹⁹⁵ Judy Fudge, “Deemed to be Entrepreneurs: Rural Route Mail Couriers and Canada Post,” in Cynthia Cranford, Judy Fudge, Eric Tucker, and Leah F. Vosko (eds.), *Self Employed Workers Organized: Law and Policy and Unions* (Montreal: McGill Queen’s University Press, 2005), p.359.

adjudicative tribunal must delineate the scope of the sector targeted by the applicant for certification. Then the Tribunal must determine whether the applicant is the organization “most representative” of artists in the sector. The parameters of a “sector” are not spelled out by occupation or specific geographic limits. Rather, the statute provides the Tribunal with notable discretion.

The former Executive Director and General Counsel to the Canadian Artists and Producers Professional Relations Tribunal, and the former Chair of the Canada Industrial Relations Board, Elizabeth MacPherson has put it this way:

“Although the Tribunal has the discretion to determine a sector as finite as “all cellists engaged by the National Arts Centre Orchestra” it has in practice tended to prefer craft based units that are national in scope. However, when language is an essential part of the means of artistic expression (for example, writing), the Tribunal has defined sectors on a linguistic basis. It has explained its preference for national sectors as being intended to avoid potential over lacking conflict. Given the mobility of freelance artists, this would appear to be a sound approach.”¹⁹⁶

Once the sector is set out, then the CIRB must determine the degree of support enjoyed by the applicant. Here, the statute departs from the majoritarian principle of 50% plus 1 support conventionally applied in a membership card count or vote process under the *Wagner Act* model. Rather, if the Board is satisfied that an artists’ association is the “most representative” of artists in that sector, it shall certify that association.

MacPherson has observed that the Canadian Artists and Producers Professional Relations Tribunal (the predecessor adjudicative agency prior to the CIRB) has expressed the opinion that Parliament left it with significant discretion to determine representativeness within a sector in recognition of the fact that when dealing with independent contractors, it is often difficult if not impossible to determine the exact size of a sector (Tribunal Decision No. 027) July 24, 1998).

¹⁹⁶ Elizabeth MacPherson, *Collective Bargaining for Independent Contractors: Is the Status of the Artist Act a Model for other Industrial Sectors* (1999) 7 C.L.C.J. 355; also see Section 26(1) of the *Status of the Artists Act* which provides that the Board shall determine the sector or sectors that are suitable for bargaining taking into account (a) the common interests of the artist in respect of whom the application was made; (b) the history of professional relations among those artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagement of artists; and (c) any geographic and linguistic criteria that the Board considers relevant.”

6.3 Ontario Employment Standards Law and Regulations

In addition to these precedents drawn from other jurisdictions, there are several examples from Ontario practice which similarly highlight the importance and feasibility of developing employment standards and labour relations practices at the sectoral level.

The Industrial Standards Act

Ontario has a rich history of sector-based employment standards, that has many similarities to the Quebec experience. Influenced by the Quebec Collective Agreements Extension Act of 1934, and the similar labour market conditions in the Montreal and Toronto textile and garment industries, the Ontario government reacted to a perceived “sweatshop crisis” by enacting the 1935 *Industrial Standards Act*.¹⁹⁷ It was described as follows in the 1935 Labour Gazette¹⁹⁸:

“The Industrial Standards Act of Ontario, the text of which was printed in the LABOUR GAZETTE, June, 1935, page 534, provides that the Minister of Labour for Ontario may, upon petition of representatives of employees or employers in any industry, convene a conference or series of conferences of employees and employers in the industry in any zone or zones to investigate the conditions of labour and practices in such industry and, to negotiate standard rates of wages and hours of labour. The employees and employers in attendance may formulate and agree upon a schedule of wages and hours of labour for all or any class of employees in such industry or district. If in the opinion of the Minister a schedule of wages and hours for any industry is agreed upon in writing by a proper and sufficient representation of employees and of employers, he may approve of it, and upon his recommendation, the Lieutenant-Governor in Council may declare such schedule to be in force for a period not exceeding twelve months and thereupon such schedule shall be binding upon every employee or employer in such industry in such zone or zones to which the schedule applies, the schedule not coming into effect until ten days after publication of the Order in Council in The Ontario Gazette. The Minimum Wage Board has authority to enforce the provisions of the Act and of the regulations and schedules. Beginning with the July, 1935, issue of the LABOUR GAZETTE, summaries are given in this article of the schedules which have thus been approved.”

¹⁹⁷ Thomas, Mark, *Regulating Flexibility, Political Economy of Employment Standards*, McGill-Queens Press, 2009

¹⁹⁸ McMaster University <http://socserv.mcmasters.ca/oldlabourstudies/onlinelearning/article.php?id=470>

The Act provided for the appointment of Ontario's first "director of labour standards" with the authority to bring together a "conference" of workers and employers in an industry to negotiate a minimum schedule of wages and conditions that could be extended to the province or a region. Similar to Quebec, the minimum standards would be implemented and overseen by an "advisory committee" of unions and employers.

While the Act did not mention unions directly, it represented a "quasi-official" recognition of unions. In fact, the Industrial Standards Act applied chiefly to industries such as the textile and garment industry, construction, and forestry: sectors with emerging unions that could represent workers and press for industry standards.

There are strong points of reference and similarity between the prevailing economic and social conditions of 1935 and those faced by the growing precarious workforce of Ontario. The Liberal government of Mitchell Hepburn and labour minister Arthur Roebuck faced a labour market crisis in which full time workers could not earn a living wage. The government view was that extending the fledgling minimum wage provisions existing for women workers to the whole labour force could not be adequately enforced, in part because of the lack of provincial resources that would be needed.

Roebuck, the Attorney General and Minister of Labour, was convinced that Ontario should follow Quebec and other jurisdictions in the judicial extension of collective agreements by sector, based on self-regulation within the sector. As one history of the period described it: "By legislating industrial codes, the Ontario state aimed to mobilize organized capital and organized labour to combat unfair competition, stop the spread of relief subsidized labour, and halt the predations of sweatshop capitalism."¹⁹⁹

Within a decade, additional Ontario legislation on minimum wages and the 1944 *Hours of Work and Vacations With Pay Act*, eclipsed the *Industrial Standards Act* in setting minimum conditions for a majority of Ontario workers. Industrial Standards Act schedules continued in many industries, focusing on hours of work. However the framework for sectoral negotiations with minimum wage and conditions of work schedules remained in effect until the repeal of the ISA by the Harris government in 2000.

Sectoral Standards in the Employment Standards Act

With the adoption of the *Employment Standards Act* in 1969, Ontario's contemporary framework for minimum workplace regulations was established. However from the outset, this framework also provided for industry standards and the authority of the

¹⁹⁹ Klee, Marcus, *Fighting the Sweatshop in Depression Ontario: Capital Labour and the Industrial Standards Act*, *Labour Le Travail*, Volume 45, Spring 2000

government to establish regulations that broadly affect wages or working conditions in any industry or part of an industry.

In particular, Part XXVII, (1) 6 of the present Act states that the Lieutenant Governor in Council may make regulations “Defining an industry and prescribing for that industry one or more terms or conditions of employment that apply to employers and employees in the industry or one or more requirements or prohibitions that apply to employers and employees in the industry.”²⁰⁰

These powers are long established by a set of schedules and regulations applying to several specific industries, including²⁰¹:

- automobile manufacturing and parts (O. Reg 502/06)
- ambulance services (O. Reg 491/06)
- public transit (O. Reg 390/05)
- live performances and trade shows (O. Reg 160/05)
- mineral exploration and mining (O. Reg 159/05)
- women’s coat and suit industry, dress and sportswear (O. Reg 291/01)
- building services (O. Reg 287/01)
- temporary help agencies (O. Reg 398/09)

Moreover, the ESA incorporates a wide range of industry-specific provisions covering health care, hospitality services, agriculture, landscaping and retail services, among others.²⁰²

It is important to note that Ontario’s employment standards are integrated with collective agreement rights in substance as well as in administration and enforcement. Adjudication of reviews (appeals) of ESA orders are heard by the Ontario Labour Relations Board, and ESA matters comprised 30% of OLRB cases in 2013-2014:

Appeals Under the Employment Standards Act:

The Employment Standards Act deals with workplace rights such as minimum wage, hours of work, overtime, vacation or public holiday pay, violations of pregnancy or reprisal provisions, termination issues, and severance pay.

The Board dealt with 1,099 appeals during 2013- 2014, which includes 730 new cases filed. Of the 721 cases that were disposed of, 67 were granted, 129 were

²⁰⁰ Ontario, Employment Standards Act, 2000

²⁰¹ Ontario, Employment Standards Act regulations

²⁰² Industries and Jobs with Exemptions or Special Rules, Ontario Ministry of Labour, www.labour.gov.on.ca/english/es/tools/srt/

dismissed, 427 cases were settled and 98 were terminated. 377 cases were pending on March 31, 2014.²⁰³

Regulation of the Ontario Construction Industry

Ontario's approach to the construction industry is another important precedent to draw upon in considering the evolution of sector-based workplace regulation. Since 1962, labour relations in the Ontario construction industry has been governed by a specific law that centralizes collective bargaining on a provincial, regional and sectoral basis.

In the ICI sector (Industrial and Commercial construction), for example, over 105,000 tradespersons and 5,000 contractors are covered by industry agreements. The system also boasts successful labour market partnerships which have resulted in some 19,000 apprentices currently working in Ontario.²⁰⁴

In the case of construction, the labour relations model allows for regulated, centralized bargaining, and the attachment of new bargaining units to the master agreements. This has served to limit labour market fragmentation, and supported a relatively high level of union density and standard employment conditions across the sector.

Ontario construction law borrows from other industrial standards approaches by defining labour markets by trade, sector and by region. While ICI is a province-wide labour structure, residential construction is separated into six regional labour markets. However there are more than 30 Board Geographic Areas applicable to construction sectors for roads, sewers and watermains, heavy engineering, pipelines and electrical power systems.

Province-wide bargaining by trade was legislated in 1978. Similar initiatives were taken in other provincial jurisdictions across Canada. Why was this significant and novel step forward taken? Professor Joseph Rose provides a concise and helpful explanation in an article called *"Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry"*²⁰⁵

In his essay, Professor Rose explains:

"There was a consensus across Canada in the 1960s that collective bargaining had become dysfunctional in major building construction sectors, including the industrial,

²⁰³ Ontario Labour Relations Board, Annual Report 2013-2014

²⁰⁴ Ontario's Unionized ICI Construction Industry www.unionizedconstructionworks.com

²⁰⁵ (2013) 17 C.L.E.L.J. 403

commercial and institutional sectors. Strong economic expansion and fragmented bargaining structure had led to a major increase in strike activity and to higher wage settlements....Employers' associations lacked the legal cohesion to bargain collectively, and were vulnerable to union divide and conquer tactics. Depending on the location, bargaining might involve 15 or more building trades or sub-trades. Unions' strike leverage was enhanced by highly decentralized bargaining structures (local area and single craft union structures) and by the fact that trades persons could mitigate their loss of pay by working in nearby geographic areas where there was no strike.

Beginning in the 1960s and continuing into the 1970s, bargaining structures in the construction industry underwent a transformation. Policy makers were persuaded that centralized bargaining was the key to industrial relations stability. Legislation to promote stronger employer associations and centralized bargaining was introduced in every province but Manitoba. The magnitude of the change in bargaining structures was profound. In Ontario, for example, the number of bargaining units in major building construction declined from 250 to 25 during the 1970s.

The first of the two broad objectives of those legal reforms was to strengthen employer association bargaining by introducing a system of employer accreditation. This allowed employer associations to acquire the exclusive bargaining rights in relation to all union contractors in an appropriate bargaining unit. The second objective was to introduce centralized bargaining. Local area bargaining on a single trade basis was replaced by a province wide bargaining on either a single trade or multi trade basis. The extent to which centralized bargaining is coordinated varies. Where there is multi trade bargaining, formal coordination is practised by both parties. Where there is single trade bargaining, coordination occurs only on the employer side and only in some provinces, where it is done informally by employer associations. In other jurisdictions, single trade bargaining is not coordinated."

It should be noted that this major alteration to the rules pertaining to certification and collective bargaining in the construction sector was not based upon a multi-party consensus. There was “fierce union opposition”²⁰⁶ to the changes. However, the majority of the Ontario provincial legislature viewed these reforms as important steps towards achieving stability in construction labour relations, and a more “equal” playing field for the parties. Therefore, the governments of the day, in the late 1970s and early 1980s, like the Ontario government today, saw sectoral and multi-employer collective bargaining frameworks in the construction industry as consistent with the public interest.

Professor Rose found that following these structural reforms, there has been greater stability in labour relations in the construction sector. He concludes:

“Trends in strike activity and wage settlements reflect the emergence of stability in construction labour relations. The evidence is that strike activity has declined in absolute and relative terms, and that wage settlements were more moderate and broadly consistent with those in other industries. As a result, the construction industry is no longer a source of instability or a collective bargaining outlier.”²⁰⁷

Professor Rose has concluded that the advent of multi-employer “centralized” bargaining systems, along with supplementary legal reforms, macro-economic conditions, and competitive pressures, all contributed to stabilizing labour relations in the construction sector. He noted that centralized bargaining also led to the standardization of many terms and conditions of employment, both monetary (such as premiums and allowances) and non-monetary. In the past, as he put it, “Leapfrogging on these issues contributed to unstable labour relations in the construction industry,”²⁰⁸ a problem that was abated under the new centralized system.

The construction industry is based upon temporary project work where people, tools and physical assets move from place to place on an irregular, often seasonal basis. There is generally no fixed construction workplace. The results of the construction enterprise (i.e. buildings and structures) remain fixed, not the workers, equipment or skills. The

²⁰⁶ Joseph Rose, *“Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry”* (supra)

²⁰⁷ Joseph Rose, *“Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry”* (supra)

²⁰⁸ Joseph Rose, *“Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry”* (supra)

construction business is also characterized by the need to obtain a variety of skilled trades persons on a coordinated but fluid and temporary basis. It was the employer community that found itself vulnerable to the vagaries and characteristics of the nonstandard construction labour market, and hence they were open to creative institutional solutions.

In sum, the history of construction labour law reform in Ontario reveals a significant and ground-breaking government intervention by way of the introduction of sectoral, multi-employer, and province-wide bargaining and certification rules into the distinctive parameters of the construction labour market. This intervention was designed to redress what the state viewed as the relatively superior bargaining power of construction unions, and to rationalize the workings of the construction labour market.

The growing prevalence of nonstandard, casual, temporary, part-time, and insecure employment relationships in the retail, fast food, restaurant, accommodation, business services, personal care, and home work services sectors seems amenable to similar government intervention to enhance the opportunity of employees in these sectors to access collective bargaining rights. When those rights are acquired, it is imperative that labour law prescribe a reasonable, effective collective bargaining framework that can respond to the features of nonstandard employment.

The “Wagner Act” paradigm has not served these vulnerable employees. A new model must reflect a process by which several employers engaged in similar activities/businesses in a defined geographic area, in an industry marked traditionally by dispersion and fragmentation, are obliged to come together and deal with a collective bargaining agent that has demonstrated an appropriate level of support and consequently attained a bargaining mandate.

Transparency in Sectoral Standards

In sum, an industry-side and sector-wide approach to both labour relations and employment standards is already deeply rooted in Ontario’s historic and contemporary approach to workplace regulation. However, the widespread sectoral approach that presently characterizes current law in Ontario lacks transparency. For each sector-based standard, inclusion, and exclusion, there are doubtless arguments and reasons for these decisions. But this rationale is not necessarily known to the players in the industry or sector, and neither are these standards subject to any regular review or updating as economic and labour market conditions evolve.

Unifor respectfully submits that the more robust regime of sector standards we now propose would add significantly to both the rationale for sectoral standards, and

provide for more transparent, consultative, and democratic formulation of those standards, including subjecting them to relevant and timely labour market tests.

6.4 “Sectoral Standards Agreements”: The Next Stage in the Evolution of Ontario Sectoral Standards

As the Law Reform Commission of Ontario stated, Employment Standards in Ontario were “designed to set minimum standards for Ontario’s labour market and provide legislative protection for those most vulnerable to employer exploitation.”²⁰⁹

The imbalance in Ontario’s labour market today can be traced in part to departures from Ontario and Canadian principles and practices – notably in 1995 with the termination of the Employee Wage Protection Program, the freezing of minimum wages for almost a decade, and the significant diminishment of employment standards in the amendments to the ESA in 2000. Unfortunately these regressive measures were further entrenched by the 2010 Open for Business Act, which seriously undermined worker rights and Ministry of Labour enforcement functions.²¹⁰

The results of these measures, combined with low wage competition experienced in many sectors of the economy and the weakening of union density, has left Ontario workers facing widespread precarity and inequality (as described in earlier sections of this submission).

Unifor calls on Ontario to return to a more progressive and ambitious approach to labour market regulation. One means of doing so would be to extend principles of security, fairness, and minimum standards across distinct regional, sectoral, and occupational labour markets. This model draws on principles and precedents that have already been central to Ontario’s history and social progress.

At the heart of Unifor’s proposal is the extension of freely negotiated collective agreements to entire sectors or occupations, in defined regions of the province. Such an agreement is described in this proposal as a “Sectoral Standards Agreement.” Our proposal incorporates minimum standards, but would be an “agreement” because of its roots in negotiation, and its regular renewal through sectoral arrangements that give voice to all workers affected (both union and non-union), as well as to employers.

Criteria and Principles for Sectoral Standards Agreements

²⁰⁹ Law Reform Commission of Ontario, *Vulnerable workers and Precarious Work*, 2013

²¹⁰ IBID

Proposal 6(i): The *Employment Standards Act* be amended to amend the application of the authority currently residing with the Lieutenant Governor in Council under Part XXVII, (1) 6 of the ESA. This amendment would provide the same authority to the Ontario Labour Relations Board to define an industry and prescribe for that industry one or more terms or conditions of employment, that would apply to employers and employees in the industry.

Proposal 6(ii): These sectoral orders by the OLRB would be implemented through the formation of Sectoral Standards Agreements, setting basic minimum conditions applied to all workplaces within an identified regional, occupation, or industrial labour market.

The OLRB would be provided criteria for granting these sectoral regulations, including:

- The regulation would extend selected provisions of a collective agreement (Base Agreement) to a defined labour market as minimum standards (Sectoral Standards Agreement).
- The Sectoral Standards Agreement would require a determination by the OLRB that the regulation would substantially provide security and greater fairness for workers in the sector and discourage competition based on low wage and precarious working conditions.
- The Sectoral Standards Agreement would require a determination by the OLRB that it would not significantly adversely impact national or international competitiveness of the sector.
- A defined labour market would be determined by the OLRB on the basis of industry, region, trade and work classification, and other criteria deemed relevant.

Operative Principles of Sectoral Standards Agreements

An application for a Sectoral Standards Agreement could be made by a trade union or group of trade unions, a Council of unions, an employer or group of employers.

Only one Base Agreement for a Sectoral Standards Agreement can be extended for the same defined labour market. In the event that there are more than one collective agreement seeking extension, the OLRB shall determine the agreement most representative of employee representation and industry standards.

The scope of provisions to be extended to the defined regional/occupational/.industrial labour market will be determined by the OLRB. If that defined labour market has a union density below the Ontario average private sector union density, the provisions extended will be minimum wages and subject matters addressed by the ESA, including

continuity of employment (part IV), wages (part V and IX), records (part VI), hours of work (part VII), overtime (part VIII), public holidays (part X), vacations (part XI), equal pay (part XII), benefit plans (part XIII), leaves of absence (part XIV), termination and severance (part XV), lie detectors (part XVII).

On the other hand, if the defined regional/occupational/industrial labour market has union density equal or greater to the Ontario private sector average, a larger set of provisions can be extended if it is shown that the extension will provide competitive protection for unionized employers, and/or greater security for vulnerable workers, particularly with regard to layoff and recall, and job security provisions.

Proposal 6(iii): Corresponding to each Sectoral Standards Agreement, a Sector Council shall be established, providing for equal representation of employer and employee representatives, with responsibility to negotiate changes to the Sector Standards Agreement, supervise and enforce its provisions, develop systems to provide for pension and benefit coverage across the identified coverage area, facilitate investments in skills and training within the sectoral/regional/industrial labour market, and undertake other relevant tasks.

A Sectoral Standards Agreement shall require the establishment of a Sector Council comprised of the parties to the agreement. On a voluntary basis, any union or employer, employer associations, association of workers or committee of workers in the defined sector may participate in the Sector Council. Voting in a Sector Council shall be equally balanced between workers and employer representatives.

A Sectoral Standards Agreement may be amended by an application from the Sector Council or by a party to the Base Agreement following each re-negotiation of the Base Agreement. Other unions, employers or committees may make representation to the OLRB prior to the renewal of the Sectoral Standards Agreement to draw attention to concerns over the terms or scope of the amendment.

Sector Councils shall have mandates to develop labour market partnerships for training and skills development, and human resource planning issues. The mandate should also developing systems and programs to facilitate the provision of pensions and employment benefits across the covered sector where possible.

Sector Councils shall have mandates to administer and provide front line enforcement of Sectoral Standards Agreements, including access to workplaces and relevant information. A Sector Council Adjudication Committee with equal worker/employer representation and a neutral chairperson shall determine compliance issues, including

imposition of penalties. Enforcement, review or appeal of such orders shall be placed before the OLRB.

Sector Councils will be self-financing through a small administrative levy on employers, approved by the OLRB.

Worker Voice in Sectoral Councils and Sectoral Standards Agreements

Building on our earlier proposal (described in Part V of this submission) for the extension of just cause provisions and protection for collective actions to all Ontario workers (even those without union representation), our recommendation for sectoral structures and practices has the added benefit of further enhancing a needed and genuine voice for non-union workers in Ontario workplaces.

Representation of non-union workers through sectoral structures must meet the same criteria set out in Part V above: notably, a clear labour relations purpose for such representation, and a measure of assurance that worker representation will be free from employer influence. In the context of the structures and purposes of a Sectoral Standards Agreement within a defined labour market, and with the governance and oversight of the Ontario Labour Relations Board, these conditions for worker representation can be met and should be encouraged.

Proposal 6(iv): Associations of employees in non-union workplaces covered by a Sectoral Standards Agreement shall have opportunity to elect representatives to participate in the Sector Council corresponding to that Sectoral Standards Agreement.

Sectoral Standards Agreements should therefore provide that in any non-union workplace affected by the Agreement, an association of workers or a committee of workers from that workplace shall be recognized with a petition showing significant employee recognition of the Association or Committee. The association or committee would then be eligible to join the Sector Council and make representations to their employer or the Council on relevant matters to the Sectoral Standards Agreement.

This extension of worker voice to non-union employees under the protective framework of a Sectoral Standards Agreement model would provide an application of the workers' voice principles advocated by many labour law scholars, such as the "Graduated Freedom of Association" provisions proposed by Professor David Doorey.²¹¹

²¹¹ Doorey David, Associate Professor, York University, Law of Work Blog, Paper presented at Voices at Work workshop, Osgoode Hall Law School, 2012

6.5 Sectoral and Multi-Employer Representation

The Case for Sectoral Representation

The model of Sectoral Standards Agreements, extending minimum standards and contractual provisions throughout identified specific regional/occupational/industrial labour markets, would represent a first step in attempting to address inadequate compensation and working conditions – especially in particular sectors marked by precarious work, inadequate investments in skills, and low wages. However, in our vision the sectoral approach can and should go further, to include the development of full collective bargaining structures at the sectoral level.

Sectoral certifications and multi-employer collective bargaining have long been seen as valuable Canadian solutions to problems of non-standard employment, instability, and inequality. In the construction industry, for example, the non-standard features of employment led the employer community to support sectoral multi-employer bargaining. In the cultural industry, the non-standard features of “independent” contracting led the artistic community to seek a different legislative approach to facilitate a more just and even handed basis for producer/client relations.

Now is the time to implement similar, but not necessarily identical, approaches for addressing the particular issues of non-standard employment in sectors of the economy widely recognized to contain large swaths of precarious employment. Now is also the time to address the power imbalance between employers and self-employed contractors which renders the working environment of self-employed “worker” contractors so insecure. The public interest requires government to intervene in labour markets when forces of technological change, the mobility of capital, flexibility of business operations, and income inequality all call out for intervention, in order to attain more just, sustainable, and economically efficient outcomes.

Unifor submits that broader centralized sectoral bargaining systems would not only assist in lowering income inequality and reducing the insecurity suffered by workers in precarious employment (including self-employed “contractors”). Moreover, this model may also have positive effects on economic efficiency, stability, and employee training and skills.

Matthew Dimick, Associate Professor at SUNY Buffalo Law School, in an article entitled “*Productive Unionism*,” analyzes the consequences of “*Wagner Act*” style single firm collective bargaining structures versus centralized multi-employer or sectoral bargaining structures. He finds that when bargaining structures are highly decentralized, the rational response of unions to labour market risk (ie. job loss due to technological change, reorganization of work, fluctuation of product markets) is job control. Job

control restrictions are reactionary, may impede productivity advances, and restrict the employer's ability to adopt new technologies or reorganize jobs in the workplace. Because of the decentralized bargaining structure, the trade union does not have the means to influence labour market conditions beyond the particular firm or employer.

But in broader multi-employer centralized or sectoral bargaining structures, there is the potential for a broader collective bargaining response to labour market risk, including measures such as wage compression (that is, reducing the variance of wages across a given industry), thus reducing risk to any individual firm. These structures also hold potential for better multi-employer based job training and re-training. Professor Dimick finds:

“Thus, where decentralized unions favour job controls strategies as a way to address labour market risk, centralized unions prefer broader, universal and more political solutions. The key implication of these alternatives is their difference consequences for workplace productivity.”²¹²

Professor Dimick also finds that broader multi-employer bargaining structures may overcome potential barriers in the development of physical capital and human capital. Professor Dimick concludes that greater centralization and collective bargaining is likely to have positive impacts on economic productivity. Moreover, Professor Dimick illustrates that greater centralization of bargaining also reduces income inequality more effectively and extensively than decentralized bargaining. He writes:

“Rather than facing a trade-off between equality and efficiency, wage setting centralization remarkably appears to be able to deliver both...

All kinds of collective bargaining reduce income inequality, but centralized bargaining has a larger effect than decentralized wage bargaining. Decentralized bargaining reduced inequality primarily by compressing wages within firms. In addition, but to a lesser extent, decentralized bargaining also reduced inequality between firms through a kind of “union threat” effect: when organization of the work force seems like a reasonable possibility, employers will keep wages relatively high in order to stave off

²¹² Matthew Dimick “*Productive Unionism*” (supra) page 15

unionization. In comparison, centralized bargaining also reduces income inequality through both these channels, but with a more direct impact on the between firm channel, since agreements apply to all employers in the industry. Overall, centralized bargaining reduced income inequality to a dramatically greater extent than decentralized bargaining..... As is shown, the relationship is strongly negative: greater centralization is the associated with lower income inequality.”²¹³

Professor Dimick’s research is consistent with economic evidence compiled by the OECD and other international agencies (reviewed and summarized in the next section of this submission), which finds that higher levels of union membership *combined* with the existence of centralized bargaining structures, tends to be associated with stronger macroeconomic and labour market indicators (better human capital investments, lower unemployment, and reduced inequality). So from both a microeconomic and a macroeconomic perspective, the development of sector-wide collective bargaining structures would suggest ample potential for attaining more productive labour relations.

Returning to Sectoral Certification in the OLRA

Proposal 6(v): The *OLRA* be amended to allow an applicant union the discretion and flexibility to build a broader collective bargaining structure across several worksites with a single employer, in order to facilitate negotiations and the administration of labour relations.

This is not a radical step forward. This provision has been part of the *OLRA* before. And, as Professor Harry Glasbeek has put it, this proposal fits within the *Wagner Act* paradigm, which holds that unions should be able to organize and bargain vis-à-vis their “real employer”.²¹⁴

Franchise Operations

Proposal 6(vi): The *OLRA* be amended to allow the OLRB to provide for certification of common bargaining structures across groups of franchise-based operations associated with a given parent firm operating in a specific geographic area.

²¹³ Matthew Dimick “*Productive Unionism*” (supra) page 22

²¹⁴ Harry Glasbeek, Agenda for Canadian Labour Law Reform, Osgoode Hall Law Journal, Volume 31, #2 (Summer 1993) page 233

As one specific application of this principle, Unifor calls for a legislative measure to assist the progress of certification and collective bargaining in franchise operations such as fast food, retail, hospitality/hotel, and hospitality/restaurants. Franchise arrangements are typically organized between a large branded corporation (often multinational) and franchisees whose operations are functionally integrated with the parent firm, providing exceedingly common and homogeneous terms and conditions of employment. Franchising is fundamentally a form of business control. The franchisor need not and frequently does not direct the day-to-day operations of the franchisee (although very detailed benchmarks regarding production practices, menus, and other service criteria are typically specified). Nevertheless, functional inter-dependence and mutuality of operations characterize the franchisor-franchisee relationship. Detailed contractual arrangements and operations manuals ensure the franchisee operates according to defined standards, and guarantees that those standards are upheld across the franchise chain, leading to a branded and common customer experience.

An applicant union ought to be granted the discretion to apply to represent employees of the franchisees of the same franchisor (along with the franchisor's company-owned outlets) in a specific geographic area, on the basis that the franchisor and franchisees are deemed to be a common and related or single employer

In these circumstances, the OLRA should provide for the creation of an employer council, possibly made up of distinct corporations (including the individual franchise firms). Nevertheless the harmonized nature of franchise operations implies that each employer component of the council will well understand the business of their counterparts. Given their common business ventures, and common economic and technological parameters of their businesses, the corporations will share a "community of interest" among themselves which may support effective bargaining in the identified sphere targeted by the company-wide certification and or scope of bargaining rights.

Moreover, a union applicant ought to be able to call for and obtain a combination of existing collective agreements with more than one franchisee employer in a defined geographic area, into a new consolidated bargaining unit. As Professor Glasbeek has observed, multi-employer certification and bargaining responds to the functional integration of the franchisor/franchisee enterprise system and can thereby give collective bargaining true meaning for those workers who are employed in coffee shops, fast food restaurants and retail outlets in Ontario.

Sectoral Representation within Labour Market Agreements

Unifor further submits that its proposal for the extension of Sectoral Standards Agreements to defined labour markets offers an opportunity to strengthen the

institutions of collective bargaining and the role of unions and employers within this model. These Sectoral Standards Agreements would be strengthened by providing the OLRB the discretion to consolidate existing certifications or new certifications, with the aim of providing for multi-employer bargaining within the scope of the Sectoral Standards Agreement.

Proposal 6(vii): The OLRB be given authority to define and certify multi-employer bargaining units, in a manner integrated into and based upon the sectoral standard provisions reflected by each Sectoral Standards Agreement.

This criteria would ensure that the OLRB has already determined that the enterprises in question share many common features, thus providing a reasonable foundation for “sectoral” or multi employer bargaining. This application of multi-employer sectoral representation would also be constrained by the requirement that the national or international competitive position of the employers would not be significantly adversely affected by an obligation to bargain in concert with other similarly placed employers.

The employers potentially covered by coordinated multi-employer bargaining would have had the opportunity to work together in the Sector Council that oversees the labour market agreement.

No application could succeed with respect to existing bargaining units unless the bargaining agents affected agreed to such a step. Where the bargaining agent was the same for all pertinent units, this criteria would be easily met. Where the bargaining agents were different, then the law would require the creation of a trade union council vested with the authority to bargain on behalf of all the constituent unions before the consolidation of the agreements could occur.

Unifor further proposes that if a union participating in a Labour Market Agreement organizes a new bargaining unit within the scope of the Agreement, then the OLRB would have the ability to consolidate the new unit into the existing base agreement, and upon such consolidation would be covered by the base agreement. The organization of the new unit of workers would have to demonstrate their majority support for collective bargaining representation in the “normal” way called for by the statute.

We submit that this limited extension of a multi-employer sectoralism can be the basis of overcoming labour market fragmentation in important sectors of the Ontario economy. This enhanced level of worker representation would draw together a stronger community of interest between workers, and also enhance the labour market test for the extension of a sectoral standard. At a broader level, our proposal would

strengthen the institutions of collective bargaining in addressing precarious work and inequality in Ontario.

Sectoral Representation for Self-Employed and Independent Contractors

Furthermore, Unifor argues that the sectoral standards and representation proposed to address the issues of “precarious employment” are insufficient without also providing an evolution of rights and standards for self-employed workers, often freelancers, as well as workers who, while perhaps fitting the definition of a “dependent contractor” work alone, and thus have a very tenuous claim to the benefits and coverage of a collective bargaining regime.

The traditional majoritarian model of labour relations is predicated generally upon the organization of all employees (that is, at least more than one employee of an employer) who share a community of interest grounded in their common working conditions, with the same employer, at a particular and fixed work location. This has not provided an appropriate or feasible framework for self-employed workers, or single dependent contractors who enter into temporary relationships with different clients, employers, or businesses located at different addresses, all on a temporary basis.

The evolution of self-employment as an important form of work relationship calls for a different representational model that addresses the reality that self-employed workers frequently work at home, and/or in isolation, and lack statutory protection and benefits.

The self-employed workers or dependent contractors that we refer to are all in a position of economic dependency. The self-employed may be found in various sectors pursuing different kinds of activities such as freelance print, and electronic media, translation services, personal care services, child care work, couriers, home workers in the garment industry, and freelance artists.

The federal *Status of the Artist Statute* described above offers some key elements that should be reflected in legislative rules pertaining to the extension of collective representation to the self-employed and single dependent contractors. The federal statute offers an example of “occupational unionism” -- that is, whereby collective representational rights and benefits are tied to occupational membership, rather than a specific work site or a particular job-based affiliation.

Unifor submits that Ontario should now move to provide sectoral standards for these workers through a form of occupational unionism combined with sectoral standards.

Proposal 6(viii): The OLRB should be authorized to receive applications and to determine the scope of the sector appropriate for collective bargaining,

by reference to the occupation in question (ie. home daycare, or French/English translation services, or freelance magazine writing) and by geography (ie. in the City of Chatham, or in the City of Milton etc.).

Like the *Status of the Artist Act*, the law ought to require simple proof of the standing of an association of members working in the occupation in question, and a determination that the applicant association is the organization most representative of the self-employed or single dependent contractors in the proposed sector.

Again, in the same manner as contemplated by the *Status of the Artist Act*, the OLRB would issue a public notice upon receipt of an application for certification to permit all persons in the occupation and proposed sector the right to make submissions in writing or participate as part of a hearing process regarding the merits of the application.

The public notice would be distributed as widely as possible on as many media platforms as available. Since freelancers, self-employed persons, and single dependent contractors do not work at a specific workplace, the conventional rules pertaining to workplace postings do not apply.

As noted above, the *Status of the Artist Act* does not require evidence of majority support of the constituents in the proposed sector; neither should the special rules that we contemplate here. Given the fluidity of the freelance and self-employed labour market, it is often difficult if not impossible to determine the exact size of a sector.²¹⁵

It is useful to note that in a case decided under the *Status of the Artist Act*, the responsible Tribunal certified an association of periodical writers, despite the fact the association could demonstrate it had only about 16% of the “artists” working in the sector as members.

A certification order should furnish the applicant association with the authority to bargain a standard agreement for the sector. To ensure that the association can properly identify employers bound by the certificate, and ultimately the standard agreement, the law ought to require that all employers or contractors in the sector register with the Ministry of Labour, indicating their legal name, address, and name of employees or dependent contractors.

The law should require all employers in the sector to join in an employer association, or at least be bound by the agreement bargained. Unifor notes that such a creation of a multi-employer association would not be an unprecedented step in labour relations law

²¹⁵ Elizabeth MacPherson, *Collective Bargaining for Independent Contractors* (1999) 7 C.L.E.L.J. 355, at page 365

in Canada. The federal Canada Industrial Relations Board has, for many years, exercised the power to determine that two or more employers “actively engaged” in a specific sector (namely, long-shoring), within a defined geographic area, constitute a unit appropriate for collective bargaining.²¹⁶

As Elizabeth MacPherson, the former Executive Director, General Counsel to the Canadian Artists and Producers Professional Relations Tribunal has written²¹⁷:

“Under the *Canada Labour Code*, there are two processes for the recognition of an employer’s organization. Section 33 allows the Canada Industrial Relations Board to designate an employers’ organization to be the “employer” for collective bargaining purposes when such an organization already exists and a trade union applies for certification for a bargaining unit comprised of employees of two or more of the member employers. In such a case, the Board must satisfy itself that each of the employers that are a member of the organization has granted it appropriate authority to discharge the duties and responsibilities of an employer.

The second circumstance, governed by Section 34 of the *Code* relates to industries in which geographic certification is possible (primarily long shoring). When the Canada Industrial Relations Board certifies a trade union as bargaining agent for a unit composed of the employees of two or more employers engaged in long shoring in a particular geographic area, the Board must concurrently require those employers to appoint a representative for the purposes of collective bargaining with the union. In the event that the employers fail to choose a representative, the Board is empowered to appoint one. The statute contains provisions imposing certain duties on an employer representative (for example, a duty of fair representation) and grants it certain powers (for example, the ability to require each of the employers of the employees in the bargaining unit to share in the costs of negotiating and administering the collective agreement).”

This model of self-employed and independent worker representation would supplement traditional majoritarian institutions and provide for a form of bargaining for workers desperately in need of protection and collective voice. Unifor contends that the participants to these negotiations should also, of course, benefit from the charter protections of free association, including the right to protected collective action, as discussed in Part V.

²¹⁶ Section 34, Part I, *Canada Labour Code*

²¹⁷ Elizabeth MacPherson, *Collective Bargaining for Independent Contractors* (supra)

Drawing on these principles it follows that negotiations for sectoral standards for the self-employed and single dependent contractors should be assisted by the conciliation services of the Ministry of Labour and the authority of the OLRB to order interest arbitration should negotiations fail.

Part VII: Employment Standards, Labour Relations, and Economic Performance

Business and employer representatives routinely object to efforts to strengthen employment standards and expand the scope of collective bargaining. They suggest that such measures would push up employment costs – through higher wage and non-wage compensation, greater administrative costs associated with employment standards, costs and risks associated with labour disruptions, and other channels. Higher labour costs in turn imply reduced competitiveness for domestic businesses in domestic and export markets, and a resulting erosion of profitability, investment, production, and employment. Therefore, it is claimed, efforts to improve the lot of working people through employment standards or collective bargaining end up perversely reducing workers' well-being through a loss of employment and investment.

But this standard objection that more comprehensive and ambitious employment standards and collective bargaining systems are, in essence, “bad for business,” is driven more by the self-interest of business lobbyists, than by concrete empirical evidence about the determinants of job-creation and economic growth. To be sure, some of the proposals described in this submission would indeed increase some employment-related expenses borne by employers (and this, no doubt, is the predominant motivation behind business opposition). Yet the scale of those cost increases would be modest, and at the same time some other business expenses would decline as a result of the more humane and sustainable practices and standards we are advocating. Economic research consistently indicates that labour costs are just one component, and in many industries a relatively small component, of overall business competitiveness, profitability, and investment attractiveness. Yet employers also capture measurable and offsetting benefits as a result of attaining a higher-quality, more secure, and satisfied workforce. These benefits must also be taken into account, in considering the overall economic effects of policy measures aimed at fostering a more stable, inclusive, and egalitarian labour market.

This chapter will review existing research regarding the modest and in many cases ambiguous impact of employment standards and collective bargaining on business competitiveness and labour market performance, as well as reporting the results of some original research on these topics conducted by analysts at Unifor. We find that the assumption that competitiveness, profitability, and employment would suffer as a result of improving the quality, conditions, and compensation of work in Ontario, is not justified. There is ample empirical research attesting to the modest or even positive impact of unionization and strong labour standards on business and macroeconomic outcomes. Moreover, Ontario is already a highly competitive jurisdiction, with an established successful record attracting incoming foreign investment. This competitive advantage has been enhanced by the recent return of the Canadian-dollar exchange

rate to more appropriate and sustainable levels. The agenda of employment standards and labour relations reforms proposed in this submission can be pursued, in a gradual and sensible manner, with confidence that Ontario's economic performance will be enhanced, not sacrificed.

7.1 Labour Costs in Context

Direct labour costs typically comprise a small share of total costs for any business – ranging from under 10 percent in highly capital-intensive undertakings, to a larger share (one-third or more) in some labour-intensive services industries.²¹⁸ The direct impact of reforms to employment standards and labour relations practices on costs for any particular business is hence muted accordingly, based on the relative importance of direct labour costs in total costs.

Moreover, the impact of stronger labour standards and collective bargaining on the final unit labour costs of employers is not predictable – even if higher hourly compensation is indeed a result of those reforms. Remember, employers are interested in minimizing the *total unit cost* of production; that is not equivalent to minimizing *hourly labour expense*. Numerous other factors must also therefore enter a complete cost-benefit calculation of employers, including:

Employee turnover: Costs of ongoing recruitment and training can add significantly to the business costs of low-wage employers. Turnover in some low-wage precarious occupations can exceed 100 percent of employment per year. Treating workers like a “throw-away input” results in higher turnover, expense, and disruption. Progressive employers in some traditional low-wage high-turnover industries have begun to recognize the value of voluntarily paying higher wages, in order to enhance employee retention. Recent development in the retail industry, among others, indicates that some employers have begun to recognize the importance of retention and reducing turnover and training costs in setting wages (even in non-union contexts).²¹⁹

²¹⁸ Statistics Canada's Input-Output tables provide interesting industry-level detail on the relative importance of labour costs in total costs; see CANSIM Table 381-0024. 2011 data (most recent available) lists total labour costs (wages, salaries including managers, and benefits and other supplementary labour costs) as accounting for just 2.7% of total cost in petroleum refineries, 8.9% in motor vehicle manufacturing, and 9.3% in oil and gas extraction. In labour intensive services, on the other hand, the labour cost ratio is higher: such as 37.7% for food service establishments and 43.5% in retail trade. Importantly, however, those industries for which labour costs compose the largest share of total cost, are also those which are the least mobile between regions or countries. Across the economy as a whole, according to the same Statistics Canada data, labour costs account for just over one-quarter of direct business costs.

²¹⁹ See, for example, Wayne F. Cascio, “The High Cost of Low Wages,” *Harvard Business Review*, December 2006. He describes the difference in retention strategies between two otherwise-similar bulk retail firms: Costco and Sam's Club. Average wages at the former were two-thirds higher than at the latter, yet

Training and skills: Another benefit of a more stable and long-tenured workforce is the willingness and ability of workers to invest in improved skills and training over their careers. When they know that their positions are relatively secure, workers can have more confidence to invest in ongoing skills and training (measured in time, personal commitment, and financial expense). And those investments will more likely be ratified by the opportunity to use those new skills in subsequent work, and presumably benefit from greater opportunities for advancement and earnings.

Productivity: Unit labour costs are defined as the cost of compensation relative to the value of output in any given period of time. Even from a narrow labour cost perspective, therefore, employers should be as interested in boosting productivity as they are in reducing compensation (since the two have equivalent effects on unit labour costs). Moreover, since higher productivity can have beneficial spillover effects on employee morale and incomes, it is generally preferable for employers to target reductions in unit labour costs through higher productivity rather than through reduced compensation.²²⁰ The economic literature on “efficiency wages” recognizes the positive relationship running from compensation through to productivity.²²¹ When workers are paid more than a “rock-bottom” wage (even if employers could conceivably offer lower compensation and still fill desired positions), their loyalty to the job increases, their willingness to perform extra or creative efforts to boost performance is enhanced, and their need to be actively supervised is moderated.

management believed savings from lower turnover (turnover was less than one-third as high at Costco), lower training and recruitment costs, and higher morale and productivity more than compensated for the difference.

²²⁰ A powerful example of this logic is provided by the experience of Germany, where unit labour costs grew only 5% between 2000 and 2012 (most recent data), despite high and growing wages; very strong productivity growth is the most important force explaining stable unit costs, which in turn have contributed to Germany’s impressive export success. In Europe as a whole, unit labour costs grew by 5 times as much in the same period. Even in hard-hit countries like Greece, Ireland, and Portugal, unit labour costs grew by 15-20% over the same period, despite painful reductions in wages and supplementary labour benefits. Clearly, boosting productivity is a more sustainable and effective path to enhancing competitiveness than suppressing or reducing wages. Data from OECD, “Unit Labour Costs: Annual Indicators,” OECD.stat, https://stats.oecd.org/Index.aspx?DataSetCode=ULC_ANN#.

²²¹ Classic citations on efficiency wage theory include George A. Akerlof, “Labor Contracts as Partial Gift Exchange,” *Quarterly Journal of Economics* 97(4), 1982, pp. 543-569, and Carl Shapiro, and Joseph E. Stiglitz, “Equilibrium Unemployment as a Worker Discipline Device,” *American Economic Review* 74(3), 1984, pp.433-444. The model has stimulated a vast literature, emphasizing the profit-maximizing decisions of employers to pay wages higher than market equilibrium with the aim to eliciting greater retention, higher work effort, and higher productivity. An alternative stream of this literature explicitly positions the trade-off faced by firms within the context of uneven bargaining power between workers and employers in a private-sector economy; see, for example, Samuel Bowles, “The Production Process in a Competitive Economy: Walrasian, Neo-Hobbesian, and Marxian Models,” *American Economic Review*, 75(1), 1985, pp. 16-36.

Employee voice: It is widely recognized in the economic literature on collective bargaining that an important benefit of established labour relations is the creation of regular channels of communication through which workers can express their opinions and ideas without fear of reprisal or dismissal.²²² This further reduces employee turnover (since without an internal voice to express their opinions and grievances, workers can only exercise their “exit voice” by leaving the firm, once a problem or working conditions have become intolerable). Employee voice also reinforces productivity growth, since the enterprise can implement suggestions and improvements arising from an internal consultation process in which workers are protected and hence can express their views more honestly.

All of these countervailing impacts of stronger employment standards and bargaining arrangements on employment stability, performance, and productivity are important to consider in any complete analysis of the likely ultimate effects on bottom-line business costs of the reforms we propose here on employers. It cannot ever be assumed that stronger standards are inherently negative for businesses. While business employment practices and strategies will evolve along with the institutional environment (for example, companies might emphasize more value-added or capital-intensive practices, in order to take maximum advantage of a more stable, trained, and better-compensated workforce), it is an empirical matter whether higher compensation costs resulting from stronger standards and collective bargaining would outweigh the countervailing benefits described above, or the other way around. The net outcome of policy changes on any particular business depends on the specific nature of its activity, and the ways in which business leaders adapt their strategies in light of the new policy parameters.

7.2 Macroeconomic Effects of Employment Standards and Unionization

In addition to the ambiguity of the net economic effects of stronger labour laws and standards on the costs and operations of any individual business (at the microeconomic level), we also need to consider the impact of these measures on the functioning of the overall economy (at the macroeconomic level). By influencing important aggregate economic indicators (such as investment, employment, personal income, and consumption spending), labour market policies can alter the macroeconomic path of the broader economy in ways that will also ultimately impact individual businesses. Channels of causation which cannot be anticipated by any individual firm, may nevertheless come to influence their employment and investment decisions. For example, no individual employer would expect that they would be able to increase their

²²² This literature was spurred by initial work by Richard B. Freeman, recent incarnations of which are reported in Richard B. Freeman, Peter Boxall and Peter Haynes (eds.), *What Workers Say: Employee Voice in the Anglo-American Workplace* (Ithaca: Cornell University Press, 2007).

aggregate level of sales as a result of increasing the wages paid to their particular employees (since those employees likely buy little if anything from their own particular employer). But if an increase in wages is experienced broadly across the whole economy (as a result of broad policy measures aimed at lifting standards and compensation for all low-wage workers), then it becomes reasonable to expect some positive feedback effect on the level of overall consumer demand – which in turn will alter the overall cost-benefit impact of the policy measure on individual businesses.

Of course, market economies suffer from a general “coordination problem,” in the sense that actions that may seem rational for specific agents (say, an individual firm), such as cutting wages to enhance profit margins, can ultimately prove to be irrational for those agents in a collective sense (if widespread wage cuts reduce consumer spending and hence the market for every business’s output). Thus it falls to government to take the broader view, and implement policy measures which can guide the economy toward a healthier balance between individual self-interest and collective well-being. These macroeconomic feedback effects are especially important, in light of widespread evidence regarding the growing inequality of income distribution, rising personal debt (which inhibits consumer spending), and a consequent generalized weakness of consumer spending. In this context, measures aimed at spurring stronger income growth for low- and middle-income workers can have stimulative macroeconomic effects which further offset any costs of those measures for employers.

Canadian economist Marc Lavoie, and his colleague Engelbert Stockhammer, have analyzed recent trends in the major components of aggregate purchasing power, to investigate the relative stimulative effect of measures which enhance workers’ wages, compared to measures which enhance profit margins. They find, in the context of generalized and sustained weak spending power (such as continues to prevail in the wake of the 2008/09 global financial crisis), that most industrial economies are now in a situation whereby any change that shifts more spending power to working families (which demonstrate lower saving rates) tends to increase overall aggregate demand, more than offsetting any negative impact on business investment or other forms of demand resulting. In other words, most OECD economies now are “wage led.”²²³ In this regard, it is reasonable to expect significant positive macroeconomic payback from equality-enhancing labour policies – such as those we propose in this paper.

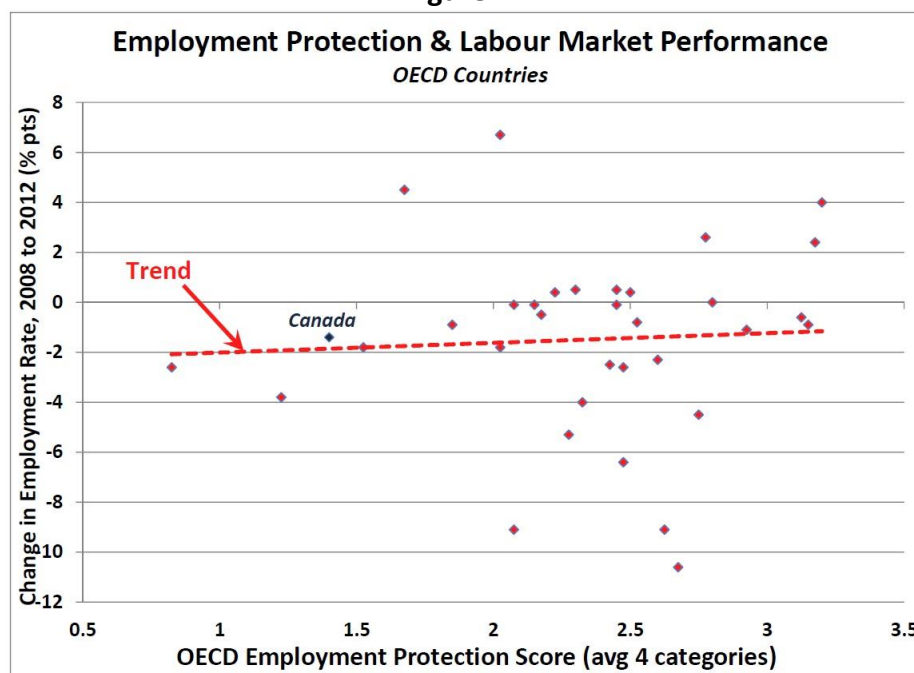
Other economists have studied the impact of cross-national differences in labour market institutions on other macroeconomic aggregates, including the effects on business investment, GDP growth, and overall employment outcomes. This literature considers both the effects of legal labour standards (such as minimum wages,

²²³ Marc Lavoie and Engelbert Stockhammer, “Wage-led Growth: Concept, Theories and Policies,” Conditions of Work and Employment Series No. 41 (Geneva: International Labour Organization, 2012).

employment protection legislation, and others), and the impacts of union membership and collective bargaining influence.

The Organization for Economic Cooperation and Development (OECD) publishes a quantitative index of the intensity of employment protection legislation in its 34 different member countries. The index considers several dimensions of labour standards, including several aspects of precarious work practices. Canada's employment protection rules are seen as among the least stringent of any industrialized country. In a 2013 review,²²⁴ the OECD reported that Canada ranks consistently at or near the bottom of the list on almost every one of the 21 criteria considered by the OECD in their index, including notice and severance pay; procedural inconvenience of dismissal; difficulty of dismissal (individual or collective); protection against dismissal (individual or collective); regulation of temporary contracts; and regulation of temporary agencies. Canada ranks near the bottom of each of four broad categories considered by the OECD. A simple average across those 4 categories gives Canada a score of 1.4 (out of 6); only New Zealand and the U.S. are found to have weaker employment protection standards.

Figure 7.1



Source: Authors' calculations from data published in *OECD Employment Outlook* (2013).

²²⁴ "Protecting Jobs, Enhancing Flexibility: A New Look at Employment Protection Legislation," *OECD Employment Outlook* (Paris: OECD, 2013), Chapter 2.

A traditional market-oriented analysis of labour market behaviour would suggest that stronger labour standards necessarily inhibit the "flexibility and efficiency" of market forces, resulting in less employment in the long-run; hence these policies are self-defeating with respect to their nominal purpose (namely, stabilizing and protecting employment). There is no evidence of that correlation in international comparisons of labour market performance, however. The U.S., of course, has had one of the worst-performing labour markets in the OECD in recent years – despite its extremely weak labour protections in all areas. Meanwhile, other countries with strong employment protection rules have achieved very good labour market outcomes (such as Germany).

Consider Figure 7.1, which provides a simple comparison of the OECD average employment protection score for each member country, against the change in its employment rate (job-creation measured relative to growth of the working age population) for a five-year period from 2008 through 2012 (this covers the onset of and recovery from the 2008-09 financial crisis, and hence is an appropriate opportunity to assess the purported benefits of the unconstrained “flexibility” of less closely regulated labour markets).²²⁵ There is no statistically significant correlation between intensity of regulation and labour market performance. According to the traditional narrative, there should be a clear negative pattern to Figure 7.1 (with countries with weaker standards enjoying stronger job growth relative to population). But in fact, the simple linear trend of the 34 observations suggests a weak (albeit statistically insignificant) *positive* relationship. In other words, countries with relatively stronger employment protection legislation performed slightly better during the crisis than those (like Canada) with very weak provisions. Moreover, the seven OECD countries with the strongest regulatory frameworks (according to the OECD metric) have all enjoyed better employment rate outcomes than Canada since the global financial crisis hit in 2008.

Following a similar approach, several published studies have also compared unionization rates and collective bargaining coverage against employment growth and macroeconomic performance. Investigators have repeatedly failed to identify any stable correlation between collective bargaining coverage and unemployment. For example, a comprehensive empirical comparison by four researchers from the U.S. and the U.K. noted that unionization rates, minimum wages, and employment protection policies have no statistically significant impact on employment, unemployment, or growth rates across OECD countries.²²⁶

²²⁵ Data on employment protection legislation and changes in the employment rate portrayed in Figure 7.1 are attained from the statistical annex of the OECD Employment Outlook, 2013.

²²⁶ Dean Baker, Andrew Glyn, David Howell, and John Schmitt, “Unemployment and Labour Market Institutions: The Failure of the Empirical Case for Deregulation,” Working Paper No. 43, Policy Integration Department, Statistical Development and Analysis Unit, International Labour Office, 2004.

A similar conclusion was reached by the OECD itself in a more recent comprehensive comparison of labour market policies and institutions across its member states.²²⁷ Union density was found to have no predictable effect on unemployment differentials across OECD member states; minimum wage laws and employment protection regulations were found to be similarly insignificant. In fact, if combined with structures of coordinated bargaining, unionization was associated with *stronger* labour market performance (not weaker). This would support this submission's emphasis on developing ways of coordinating and standardizing standards across entire sectors (rather than solely at the firm level). Spending on active labour market measures was also strongly correlated with lower unemployment.

Research published by the World Bank also supports the finding that greater coordination of collective bargaining, by allowing a more predictable and sustainable balance to be attained between productivity growth and broadly shared real wage gains, is also associated with stronger employment and macroeconomic outcomes.²²⁸ "Coordination among social partners can promote better investment climates while also fostering a fairer distribution of output," the Bank concluded.

In the Canadian context, research has also indicated that there is no correlation between union membership, collective bargaining coverage, and the performance of labour markets. A comprehensive historical and econometric review by Fortin, Keil and Symons rejected the hypothesis that unionization could help to explain differential unemployment rates for five regions and four demographic groups.²²⁹ Instead, the authors conclude that macroeconomic factors (and, in particular, monetary policy) have been the dominant explanation for the evolution of unemployment over time in Canada.

Differences in union coverage across U.S. states (resulting in large part from the stark difference between those states which have implemented Taft-Hartley prohibitions against union security, and those which permit union security arrangements) have given rise to an extensive and conflicting economic literature on the macroeconomic effects of union membership. Particularly when indicators are properly scaled for population growth, there is no consistent evidence from this literature that suppressing unionization (at a cost of lower wages, lower family incomes, and inferior social and

²²⁷ "Reassessing the Role of Policies and Institutions for Labour Market Performance," *OECD Employment Outlook* (Paris: OECD, 2006), Chapter 7.

²²⁸ Toke Aidt and Zafiris Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (Washington: World Bank, 2003).

²²⁹ Pierre Fortin, M. Keil, and J. Symons, "The Sources of Unemployment in Canada, 1967-91: Evidence from a Panel of Regions and Demographic Groups," *Oxford Economic Papers* 53(1), 2001, pp. 67-93.

health outcomes) is a recipe for accelerating job-creation and economic growth.²³⁰ As one extensive survey concluded, “right-to-work laws ... seem to have no effect on economic activity.”²³¹

While there is no consistent evidence that unionization harms job-creation or economic growth across countries, a growing body of research does confirm that the decline in unionization and collective bargaining has been a key contributor to the rise in income inequality typical of Canada and many other industrialized countries. This growth in inequality has negative implications for consumer spending, financial stability of households, social cohesion, and many other indicators. For example, recent research from the International Monetary Fund confirms that declining unionization has been a dominant cause of rising inequality, and recommends measures to stabilize and rebuild union coverage as part of a broader strategy to address and reduce inequality.²³² This effect is felt in part by the impact of weaker unionization in enhancing incomes for the very richest members of society (including business executives whose incomes and bonuses are boosted by stronger profitability resulting from lower labour costs). Another study by U.K. epidemiologists Richard Wilkinson and Kate Pickett, whose pioneering work on the broader economic, fiscal, and social consequences of inequality has been hugely influential in recent policy debates, also confirms that the erosion of unionization and collective bargaining coverage has been one of the most important factors behind the rise of inequality in industrial economies.²³³ In the Canadian context, researchers Mathieu Dufour and Ellen Russell also find that the erosion of collective bargaining coverage has been a primary determinant of the disconnection between labour productivity growth and labour incomes that is evident in recent decades.²³⁴ Reestablishing a predictable link between productivity growth and real earnings growth is essential, they argue, to winning active support from workers for productivity-enhancing measures, as well as for strengthening macroeconomic conditions.

Another Canadian review of income distribution data by Richard Shillington and Hugh Mackenzie confirms that union representation is an essential force behind the creation

²³⁰ A summary of this literature from a Canadian perspective is provided by Brynne Sinclair-Waters, *Understanding Union Security and its Effects* (Toronto: Canadian Centre for Policy Alternatives, 2014), 20 pp. See also Heidi Shierholz and Elise Gould, *The Compensation Penalty of ‘Right-to-Work’ Laws* (Washington: Economic Policy Institute, 2011).

²³¹ Belman, Dale, Richard Block, and Karen Roberts, “Economic Impact of State Differences in Labor Standards in the United States, 1998-2000.” Employment Policy Research Network, 2009.

²³² Florence Jaumotte and Carolina Osorio Buitron, “Power from the People,” *Finance and Development* 52(1), International Monetary Fund, 2015.

²³³ Richard Wilkinson and Kate Pickett, “The World We Need,” *International Journal of Labour Research* 6(1), pp. 17-34, 2014.

²³⁴ Mathieu Dufour and Ellen Russell, “Why Isn’t Productivity More Popular? A Bargaining Power Approach to the Pay/Productivity Linkage in Canada,” *International Productivity Monitor* 28 (2015), pp. 47-62.

of “middle class” jobs.²³⁵ Similarly, Jordan Brennan has confirmed, through an analysis of long historical data on factor and household income distribution, that collective bargaining was essential to the emergence of decent middle-income jobs during the initial decades after the Second World War – and, equivalently, the erosion of union coverage is a demonstrated cause of the relative disappearance of that “middle” in more recent times.²³⁶

We can summarize the major findings of this published Canadian and international research:

- Employment protection legislation does not negatively affect employment outcomes and economic growth.
- Unionization and collective bargaining coverage does not negatively affect employment outcomes and economic growth (and, when combined with coordinated bargaining structures as exist in some European countries, can reduce unemployment).
- The erosion of unionization and collective bargaining have contributed importantly to rising inequality.
- Inequality and weak growth in incomes for low- and middle-income working families have had negative consequences for aggregate demand and consumer spending.

In light of these findings, measures to strengthen employment standards and expand collective bargaining coverage (such as those we have presented in this submission) can be expected to have positive effects on the quality and compensation of jobs, contribute to reduced inequality in personal incomes, and consequently strengthen aggregate demand conditions – without causing measurable negative trade-offs in employment and economic growth.

7.3 Unions, Minimum Wages, and Labour Market Performance of the Canadian Provinces

In addition to the findings summarized above from the extant literature, we report here the results of two original empirical studies of the impact of collective bargaining and minimum wages on labour market outcomes in Canada, conducted by research staff in our own organization.

²³⁵ Hugh Mackenzie and Richard Shillington, *The Union Card: A Ticket Into Middle Class Stability* (Ottawa: Canadian Centre for Policy Alternatives, 2015), 36 pp.

²³⁶ Jordan Brennan, *The Creation of a Shared Prosperity in Canada: Unions, Corporations and Countervailing Power* (Ottawa: Canadian Centre for Policy Alternatives, 2014), 36 pp.

The first was an empirical investigation by Garry Sran and Jim Stanford of the impact of unionization rates and collective bargaining coverage on key labour market outcomes in Canadian provinces and U.S. states.²³⁷ The authors conducted an econometric analysis of province and state-level data on union density and employment and unemployment performance in both countries. In neither Canada nor the U.S. does unionization have any predictable impact on unemployment or employment, whether positive or negative. Previous research that is held to suggest that higher unionization causes lower employment and higher unemployment, is shown to be dependent on spurious correlations from time-trended data,²³⁸ and on a failure to include other obvious macroeconomic determinants of labour market performance in the quantitative analysis (resulting in omitted variable bias in the conclusions). Using stationary data series and a fully-specified econometric model (including other standard determinants of employment and unemployment), Sran and Stanford concluded (p. 31) that “an informed and correctly specified analysis of time series data from Canadian provinces shows conclusively that the claim that unionization in Canada has produced higher unemployment and lower employment is not supported by the empirical evidence.”

A second original Unifor contribution to the literature regarding the impact of employment standards on labour market performance consists of a similar empirical analysis by Jordan Brennan and Jim Stanford of the history of changes in minimum wages in Canada, and the resulting consequences (if any) for labour market outcomes.²³⁹ While the Changing Workplaces review is not directly addressing minimum wage issues, some of the measures proposed here could have parallel effects on wages for low-wage workers. The Brennan-Stanford analysis assembled a consistent data set on minimum wages in each of the ten Canadian provinces (adjusted for inflation), and then performed econometric regressions on 7 different indicators of labour market performance (including measures of employment for those sectors of the economy considered most sensitive to minimum wage policies: youth employment, and employment in the retail and hospitality sectors). Of the resulting 70 tests (7 indicators in each of the 10 provinces), no connection between minimum wages and employment or unemployment was found in 90% of the regressions. For the remaining 7 cases (where the minimum wage was found to be a significant determinant of the labour market outcome in question), results were evenly split between those where a higher

²³⁷ Garry Sran and Jim Stanford, “Further Tests of the Link Between Unionization, Unemployment, and Employment: Findings From Canadian National and Provincial Data,” *Just Labour: A Canadian Journal of Work and Society* 15 (November 2009), pp. 29-77.

²³⁸ Previous authors failed to adjust their data for non-stationary trends in unionization, employment, and other data used in their analyses.

²³⁹ Jordan Brennan and Jim Stanford, *Dispelling Minimum Wage Mythology: The Minimum Wage and the Impact on Jobs in Canada, 1983–2012* (Ottawa: Canadian Centre for Policy Alternatives, 2014), 24 pp.

minimum wage was seen to cause higher employment (or lower unemployment) and those where it seemed to weaken labour market outcomes.

These findings are consistent with the general conclusion of the extensive economic literature considering the employment effects of minimum wages. A summary of this literature, with a Canadian perspective, was recently provided by David Green, an economist at the University of British Columbia.²⁴⁰ Economic research does not support the standard assumption that by making labour “more expensive,” higher minimum wages necessarily imply that “less of it will be purchased” (that is, fewer workers will be hired) – and similar logic would apply to other employment standards and labour law reforms that may have a similar effect in lifting wages (especially for lower-wage workers and those in precarious positions). The countervailing and offsetting factors discussed above (such as reduced turnover, greater retention, reduced training costs, higher productivity, and stronger consumer purchasing power) would seem to have sufficient positive impact on employment decisions, to offset whatever disemployment effects might otherwise have been experienced as a result of higher minimum wages.

The OECD has recently published a similar review of the extensive literature on minimum wage effects,²⁴¹ which also confirmed the lack of evidence of any strong or consistent disemployment effects from increases in minimum wage thresholds in several OECD countries (including Canada) since the financial crisis and world recession of 2008-09. The OECD reviewed seven “meta-analyses” of minimum wage research,²⁴² and in no case did these studies find large or predictable negative impacts on employment (even for young workers); most of the research finds the employment impacts of higher minimum wages to be negligible or even ambiguous in direction. A similar conclusion is therefore justified regarding the minimal employment effects of the wage-enhancing measures (both through the strengthening of employment standards and the expansion of collective bargaining) advocated in this submission.

7.4 Ontario’s International Competitiveness

Business lobbyists often claim that Ontario has “priced itself out of the world market” with recent social and environmental initiatives. Is it true that Ontario is uncompetitive as a jurisdiction for business – and that this problem would get worse as a result of stronger employment standards and more widespread collective bargaining? To the

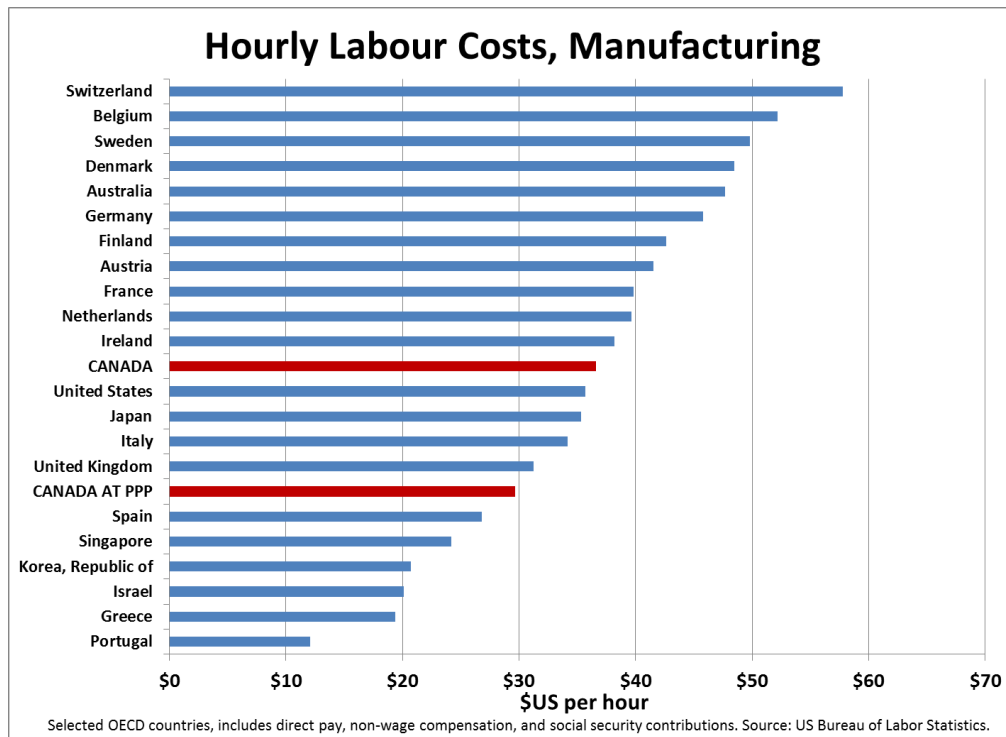
²⁴⁰ David Green, *The Case for Increasing the Minimum Wage: What does the academic literature tell us?* (Vancouver: Canadian Centre for Policy Alternatives, 2015), 12 pp.

²⁴¹ “Recent Labour Market Developments with a Focus on Minimum Wages,” *OECD Employment Outlook* (Paris: Organization for Economic Cooperation and Development, 2015), Chapter 1.

²⁴² A “meta-analysis” is a study of studies: an academic paper which reports and summarizes the findings of numerous individual research projects.

contrary, comparative international evidence suggests that Ontario is actually highly competitive on cost grounds relative to other advanced industrial countries. Moreover, Ontario's cost advantage is widening, not narrowing, thanks in part to the return of the Canadian-dollar exchange rate to normal and more sustainable levels. Let us consider some of this international evidence.

Figure 7.2



Source: U.S. Bureau of Labor Statistics, Hourly Compensation Costs in the Manufacturing Sector.

The U.S. Bureau of Labor Statistics has published surveys of international labour costs in the manufacturing sector (considered to be one of the most internationally mobile industries). The US BLS data includes direct pay, the cost of supplementary and non-wage benefits, and the employer portion of social security benefits and other payroll taxes.²⁴³ Countries are compared using market exchange rates. Figure 7.2 illustrates the BLS ranking of major countries for 2012, the most recent year covered by the data.²⁴⁴ Canada is shown as demonstrating all-in manufacturing labour costs that are

²⁴³ U.S. Bureau of Labor Statistics, *Hourly Compensation Costs in the Manufacturing Sector* (Washington: 2013), <http://www.bls.gov/fls/#compensation>.

²⁴⁴ Unfortunately the Bureau discontinued its international cost comparison project after this report, but other agencies (including the Conference Board) are planning to continue publishing the survey.

broadly comparable to U.S. levels, and below those of most other industrial countries in Europe and the Pacific.²⁴⁵

Moreover, it must be noted that the 2012 comparison was conducted at a time when the Canadian currency was still trading at par with the U.S. dollar – well above its long-run average or “benchmark” value. This overvalued exchange rate badly disadvantaged Canadian jurisdictions in cost comparisons at the time. Since then, however, the Canadian dollar has retreated back toward more typical levels (and is currently trading well below \$US0.80). It is interesting to note that the OECD estimates the long-run “purchasing power parity” value (PPP) of the Canadian currency²⁴⁶ at about 81 cents U.S. Therefore, Figure 7.2 also illustrates the relative positioning of Canada in international labour cost rankings, when evaluated at a PPP exchange rate (the second red bar on the graph). In this case, Canadian costs are well below those of the U.S. and most other industrial countries. The return of the currency to normal levels²⁴⁷ implies a substantial improvement in the international competitiveness of Ontario (and the rest of Canada) in international trade and the competition for international investment.

Another source of comparative information regarding labour costs in Ontario (versus competing jurisdictions) is provided by the comprehensive KPMG Competitive Alternatives benchmarking survey.²⁴⁸ This report develops a business cost model, and then compares over 130 potential site locations in 10 different countries. The model can be structured to consider service, manufacturing, and digital businesses (based on changing mixes of various input categories), and considers all expenses including capital, transportation, taxes, labour, infrastructure, and other inputs.

KPMG’s most recent analysis confirms that Canada is a highly competitive jurisdiction compared to other industrialized countries – and that Ontario is an attractive jurisdiction within Canada. Figure 7.3, for example, illustrates the KPMG ranking (on average across all industry categories considered) for total average labour costs

²⁴⁵ Hourly wages in Ontario averaged slightly below the Canadian average in 2014 (\$22.74 per hour for hourly-paid workers in Ontario, versus \$23.26 for Canada as a whole; data from Statistics Canada CANSIM Table 281-0030). Therefore, Ontario’s relative cost competitiveness relative to other countries is even stronger than indicated in the graph for Canada as a whole.

²⁴⁶ Purchasing power parity refers to the exchange rate that equalizes purchasing power of a unit of currency with an equivalent amount of that of its comparator, based on a representative bundle of goods and services. It is held by many economists to be a centre of gravity for currency market fluctuations, with arbitrage and other competitive pressures serving to push exchange rates toward that level over time. And indeed, the 40-year average value of the Canada-U.S. exchange rate is \$US0.81 – almost exactly equal to the PPP estimate. See OECD, “Purchasing Power Parities,” OECD.stat, for current estimates.

²⁴⁷ If the PPP level is accepted as a “fair value” benchmark, then the current exchange rate (in the high 70 cents U.S. range) cannot be sign as “low” in either historic or economic terms.

²⁴⁸ *Competitive Alternatives: KPMG’s Guide to International Business Location Costs* (Toronto, 2014), <http://www.competitivealternatives.com/>.

(including pay, non-wage benefits, and social security contributions or payroll taxes) for their representative business over a ten-year period. Labour costs in Canada were lower than all but one G7 economy (only UK costs were lower on average), and labour costs in three representative Ontario locations were lower still than the Canadian average.²⁴⁹ The exchange rate used in the KPMG 2014 report was \$US0.95 per Canadian dollar; but the Canadian currency has depreciated considerably since then. At current exchange rates (under \$US0.80 per \$C), the Ontario locations enjoy a considerable cost advantage even compared to the UK.²⁵⁰

For total costs (including facilities, taxes, logistics, and more), the Ontario locations were superior even compared to the UK (where higher non-labour costs more than offset the UK's labour cost advantage; see Figure 7.3). The three representative Ontario locations were thus judged to be some of the most competitive locations for new business investment anywhere in the G7.

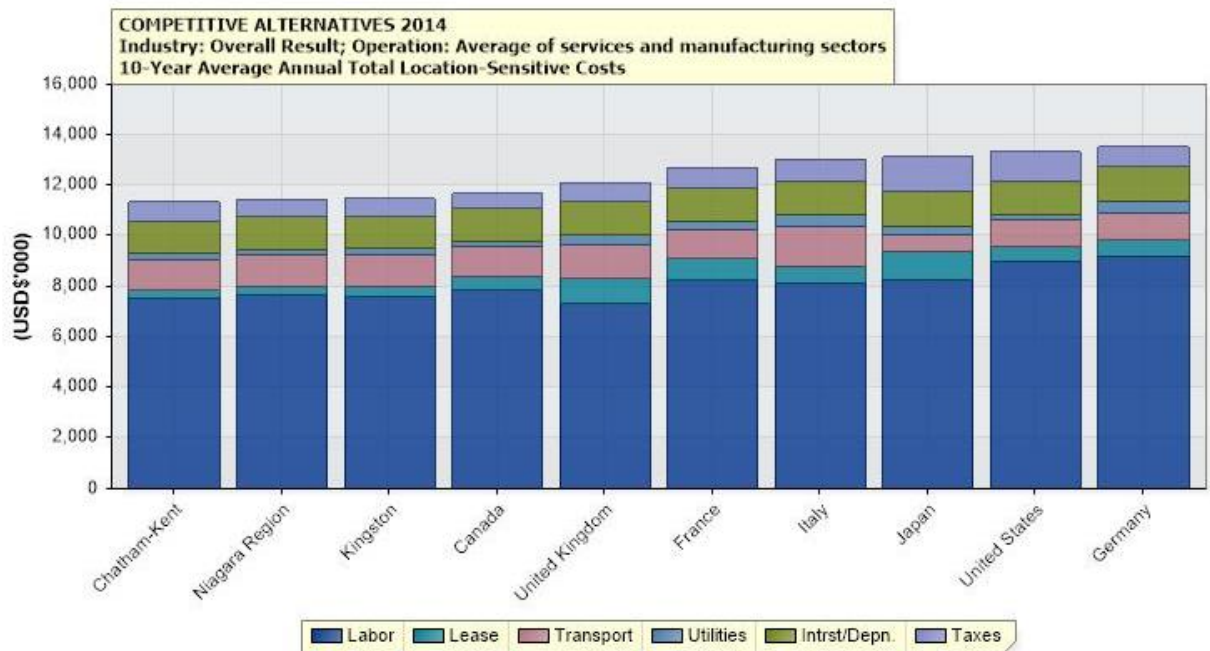
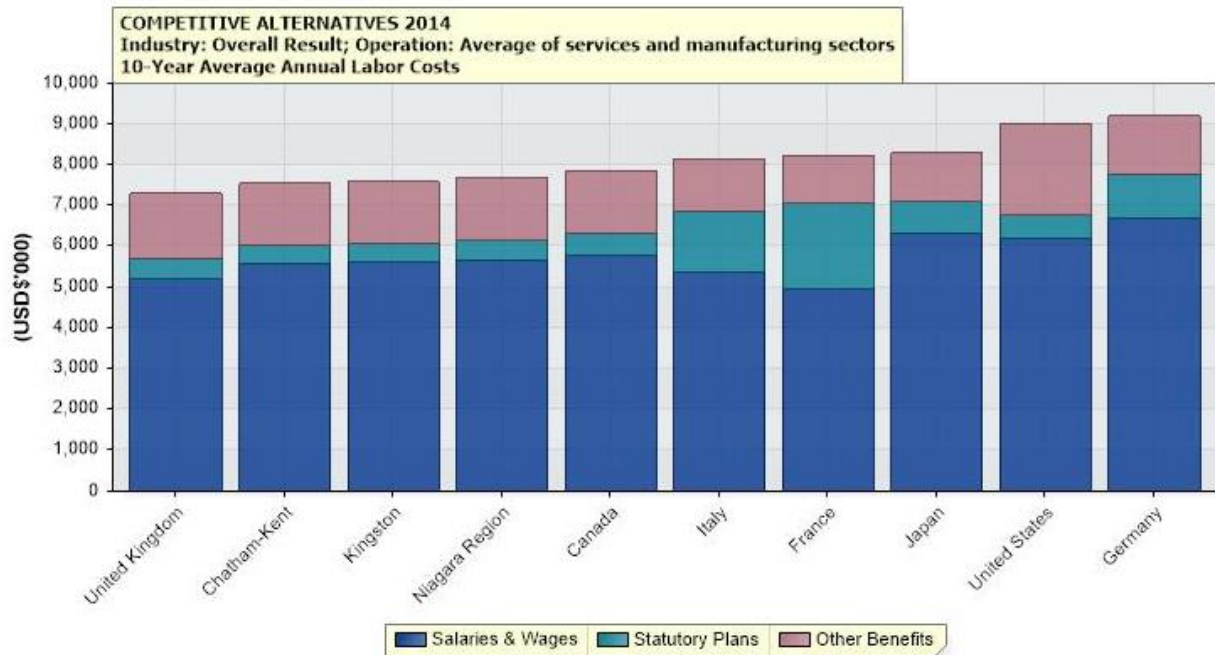
Ontario's combination of skilled labour, strong innovation clusters, high-quality infrastructure, and competitive labour market and tax regime, all combine to generate a very strong record in attracting new inflows of direct investment expenditure from global businesses. Indeed, for two years in a row Ontario has attracted more incoming foreign direct investment than any other sub-national jurisdiction in North America. In 2014, 12 percent of all inbound foreign investment expenditure to North America was destined for Ontario, generating a higher market share for Ontario even than U.S. states such as California, Texas, and New York.²⁵¹ Business complaints that Ontario has somehow "priced itself out" of competition for scarce investment expenditure, are not supported by empirical evidence.

²⁴⁹ Costs in the GTA are higher than the Canadian average because of location-specific costs associated with operating in the largest city in the country, such as facilities and real estate costs, but still lower than all other G7 economies except the UK.

²⁵⁰ Sensitivity analysis reported on p.15 of the KPMG report indicates that a 10% depreciation of the Canadian currency reduces total business costs by about 3%, and that is more than sufficient to reduce the Ontario costs below the UK levels illustrated in Figure 7.3.

²⁵¹ FDI Intelligence, The FDI Report 2015: Global Greenfield Investment Trends (London: Financial Times, 2015), 19 pp., <http://www.ftbsites.ft.com/forms/fDi/report2015/files/The-fDi-Report-2015.pdf>.

Figure 7.3
KPMG “Competitive Alternative” Cost Comparisons
Labour Costs, and Total Costs



7.5 Conclusions

In a simple-minded supply-and-demand model of the labour market, anything that increases the apparent cost of labour would seem to necessarily reduce the demand for workers. After all, if flat-screen televisions or espresso coffee drinks are more expensive, consumers tend to buy less of them – so why wouldn't this logic apply to workers, too? And this mode of analysis is invoked by business lobbyists seeking to prevent improvements in labour standards, limits on precarious or temporary work strategies, and the stabilization and eventual rebuilding of collective bargaining.

In the real-world labour market, however, this supposed trade-off between treating workers more fairly, and hiring them at all, is not nearly so visible. For many different reasons, businesses which respect higher labour standards, invest in retention and skills, and plan for upgrading, innovation, and productivity as drivers of success (rather than engaging in a labour-cheapening “race to the bottom” which few are likely to win) can actually experience stronger profitability and growth.

In a super-competitive global economy, Ontario must target a more positive, high-value vision of growth and prosperity. Ontario can succeed by investing in capital, innovating, making the most of our skills, and upgrading our labour force – not cheapening and degrading it. By closing off some of the most short-sighted and unfair low-wage labour strategies, the measures proposed in this submission will actually assist Ontario employers in attaining a more successful and encouraging path for success.

Part VIII: Conclusion and Summary of Recommendations

8.1 Summary of Recommendations

The specific recommendations contained in Unifor's submission have been organized into four broad categories (corresponding to Sections III through VI, above): incremental reforms in employment standards and their enforcement, incremental reforms in labour relations practices, protection of collective action by non-union workers, and a set of proposals for strengthening the application of both employment standards and collective bargaining at a sectoral level. Here is a numbered catalogue of the specific recommendations advanced in this submission, in those four categories:

Incremental Reforms in Employment Standards

Proposal 3(i): Require a minimum call-in period of four hours of work (or pay in lieu).

Proposal 3(ii): Require at least 14 days' notice of compulsory changes in work schedule.

Proposal 3(iii): Require employers to combine hours of work to create more full-time positions.

Proposal 3(iv): Where employers provide benefits to full-time employees, the *ESA* should require employers to provide proportional supplementary benefits to part-time workers, with the proportion linked to the proportion of hours worked on average over the preceding three months.

Proposal 3(v): Make employers jointly and severally liable with temporary employment agencies for *any* employment standards violations of workers employed in their worksites (not just lost wages) with no ceiling on potential claims and a five-year limit on filing claims.

Proposal 3(vi): Require that temporary agency employees are paid the same wages and benefits as permanent workers in the enterprise they are working in performing comparable work.

Proposal 3(vii): The *ESA* should be amended to prohibit systemic pay and benefits discrimination based solely on the hire date or age of an employee.

Proposal 3(viii): The *ESA* be amended to include the following protection: Workers facing situations of domestic abuse and violence shall be entitled to five days paid leave, with the right to extended unpaid leave as needed (with right to return to their jobs without reprisal once their personal situation has been secured). These leaves shall be contingent on adequate verification from a recognized professional (i.e. doctor, lawyer, professional counselor, social worker, intake worker from a women's shelter).

Proposal 3(ix): Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices model adopted in Manitoba's *Worker Recruitment and Protection Act* and the enhancements developed in Saskatchewan and Nova Scotia.

Proposal 3(x): Where migrant workers express complaints of employment standards violations, those complaints must be expedited so that they are heard before a worker is repatriated. Where there is a finding of reprisal, provision must be made for transfer to another employer or, where appropriate, reinstatement. The *ESA* should explicitly prohibit an employer from forcing "repatriation" on an employee who has filed an *ESA* complaint. Migrant workers must be able to make claims under the *ESA* whenever the legislation is violated.

Proposal 3(xi): Change the Canada-Ontario Immigration Agreement (COIA) to create an open work permit program for migrant workers who have filed complaints against recruiters, under the Employment Protection for Foreign National Act, and *ESA*.

Proposal 3(xii): Remove the ability of the Director to require that a worker must first contact their employer and request that the employer voluntarily remedy the *ESA* violation before being permitted to make a complaint to the Ministry of Labour.

Proposal 3(xiii): Shift away from the current complaint-driven enforcement process, and allocate more resources to pro-active enforcement initiatives (including spot checks, audits, and inspections).

Proposal 3(xiv): Give employees the right to file complaints directly with the Ontario Labour Relations Board for investigation and adjudication.

Filed complaints would be screened by OLRB staff (in conjunction with employment standards officers at the Ministry of Labour) to ensure they are not frivolous, and are supported by meaningful evidence.²⁵²

Proposal 3(xv): Establish a network of independent third party investigators and advocates should be established (on a community “clinic” model), funded in part with the funds attained from ESA-related fines and penalties. Those third party advocates will have rights (with the explicit approval of their clients) to receive relevant information from the employer in question, and to represent the complainant before the OLRB process. Trade unions and other labour advocacy organizations could partner with these clinics to support their work.

Proposal 3(xvi): Fines and penalties levied against employers will be assigned to dedicated funds, used to financially support the operation of third party clinics. Employers found in violation of ESA provisions will also be subject to an administrative fee,²⁵³ proceeds of which will also be assigned to that fund. Furthermore, OLRB adjudicators would have discretion to award costs incurred by third party advocates in the course of successfully investigating and prosecuting ESA violations. The network of third party advocates would also be funded, in part, through annual operating grants from the Ministry of Labour. We estimate that a network of 10 regional ESA clinics could be funded through a combination of fine revenue, administrative levies and cost recovery, and \$5 million in annual provincial operating grants.

Incremental Reforms in Labour Relations Practices

Proposal 4(i): Amend the purpose clause of Ontario’s *Labour Relations Act, 1995* to recognize Ontario’s long-standing tradition of collective bargaining and encouragement of constructive settlement of disputes, to reaffirm Ontario’s commitment to facilitating and promoting the maintenance and acquisition of collective bargaining rights, to empower worker participation, to enhance working conditions and to developing sound labour-management relationships in Ontario.

²⁵² Parallels for this principle of direct access to adjudication can be found in the operation of Ontario’s Human Rights Tribunal model (and other “social justice” tribunals), and in the ability of unionized workers to directly advance their grievances to arbitration.

²⁵³ Precedents for this approach exist in the 20% administrative levy on any charges applied under the Quebec sectoral decree system, and the criminal victim surcharges that are added to fines imposed on convicted persons under s. 737 of the *Criminal Code*, RSC 1985, C-34.

Proposal 4(ii): Section 48(16) of the *Labour Relations Act, 1995* should be amended to provide greater authority to the arbitrator to grant relief against missed time limits in the arbitration procedure as well as in the grievance procedure.

Proposal 4(iii): Amend the *Labour Relations Act, 1995* to allow the OLRB to certify a new bargaining unit on the basis of majority union membership in the proposed bargaining unit alone.

Proposal 4(iv): Where representation votes continue to be required, amend the *Labour Relations Act, 1995*, to permit forms of electronic voting.

Proposal 4(v): Where representation votes continue to be required, amend the *Labour Relations Act, 1995* to require the Board to consider whether any circumstances create reasonable doubt that an employer's own premises are capable of being a sufficiently neutral vote location and where not, require the Board to direct that a vote take place at a neutral site.

Proposal 4(vi): Amend the *Labour Relations Act, 1995*, to permit workers to sign electronic union cards.

Proposal 4(vii): Amend the *Labour Relations Act, 1995* to allow trade unions to apply to the Ontario Labour Relations Board to direct the employer to provide accurate lists of employees and contact information

Proposal 4(viii): Where s. 98(2) of the *Labour Relations Act, 1995* applies (i.e. applications for the interim reinstatement of an employee or restoration of terms and conditions of employment) amend the act to delete the requirement of preventing irreparable harm, and consolidate paragraphs 3 and 4 of s. 98(2) to require only a "balance of harm" approach in deciding whether or not the Board ought to exercise its remedial powers.

Proposal 4(ix): Amend the *Labour Relations Act, 1995* to grant expanded powers to the Ontario Labour Relations Board to provide expanded interim order powers to maintain industrial relations stability.

Proposal 4(x): Amend the *Labour Relations Act, 1995*, to give arbitrators broad interim order powers to balance the rights of grievors and employers pending the final adjudication of a grievance and protect the

integrity of the grievance procedure, that extend beyond procedural orders.

Proposal 4(xi): Amend the *Labour Relations Act, 1995* to remove barriers to first contract arbitration.

Proposal 4(xii): Amend the *Labour Relations Act, 1995*, to allow access to interest arbitration to settle long labour disputes that last over 180 days.

Proposal 4(xiii): Amend the *Labour Relations Act, 1995* to remove the six month time limit on the right to see unconditional reinstatement following a lawful strike.

Proposal 4(xiv): Amend the *Labour Relations Act, 1995*, to provide for successor bargaining rights where a new employer replaces another as the provider of a contracted service.

Proposal 4(xv): Amend the *Labour Relations Act, 1995* to extend successor rights to apply also to a federal to provincial sale of business.

Proposal 4(xvi): Amend the *Labour Relations Act, 1995*, to allow the Ontario Labour Relations Board to consolidate and/or combine existing bargaining units.

Proposal 4(xvii): Amend the *Labour Relations Act, 1995* to impose an ongoing duty on employers to bargain in good faith in the event of a workplace closure, and to provide a process of interest arbitration when negotiation of a closure agreement is unsuccessful.

Protection of Collective Action by Non-Union Workers

Proposal 5(i): The rules found in Part III of the *Canada Labour Code* regarding just cause should be implemented in Ontario's labour law, supplemented by recommendations from the Harry Arthurs review for improving the adjudication system, and implemented under the general authority of the Ontario Labour Relations Board.

Proposal 5(ii): The OLRA should be amended to include a new guarantee to protect and shield all employees and all persons who perform work or services for compensation when they engage in collective activities for the purpose of "mutual aid or protection."

Application of Employment Standards and Collective Bargaining at a Sectoral Level

Proposal 6(i): The *Employment Standards Act* be amended to amend the application of the authority currently residing with the Lieutenant Governor in Council under Part XXVII, (1) 6 of the ESA. This amendment would provide the same authority to the Ontario Labour Relations Board to define an industry and prescribe for that industry one or more terms or conditions of employment, that would apply to employers and employees in the industry.

Proposal 6(ii): These sectoral orders by the OLRB would be implemented through the formation of Sectoral Standards Agreements, setting basic minimum conditions applied to all workplaces within an identified regional, occupation, or industrial labour market.

Proposal 6(iii): Corresponding to each Sectoral Standards Agreement, a Sector Council shall be established, providing for equal representation of employer and employee representatives, with responsibility to negotiate changes to the Sector Standards Agreement, supervise and enforce its provisions, develop systems to provide for pension and benefit coverage across the identified coverage area, facilitate investments in skills and training within the sectoral/regional/industrial labour market, and undertake other relevant tasks.

Proposal 6(iv): Associations of employees in non-union workplaces covered by a Sectoral Standards Agreement shall have opportunity to elect representatives to participate in the Sector Council corresponding to that Sectoral Standards Agreement.

Proposal 6(v): The *OLRA* be amended to allow an applicant union the discretion and flexibility to build a broader collective bargaining structure across several worksites with a single employer, in order to facilitate negotiations and the administration of labour relations.

Proposal 6(vi): The *OLRA* be amended to allow the OLRB to provide for certification of common bargaining structures across groups of franchise-based operations associated with a given parent firm operating in a specific geographic area.

Proposal 6(vii): The OLRB be given authority to define and certify multi-employer bargaining units, in a manner integrated into and based upon the sectoral standard provisions reflected by each Sectoral Standards Agreement.

Proposal 6(viii): The OLRB should be authorized to receive applications and to determine the scope of the sector appropriate for collective bargaining, by reference to the occupation in question (ie. home daycare, or French/English translation services, or freelance magazine writing) and by geography (ie. in the City of Chatham, or in the City of Milton etc.).

8.2 Building the Capacity to Act

This submission has described the negative evolution of employment practices and compensation in Ontario in recent decades, citing the extensive literature regarding precarious work, wage stagnation, and the social and economic costs of inequality and exclusion. These negative trends were not random or inevitable developments. Rather, they are the predictable consequence of a labour market in which working people have been structurally disempowered (by a combination of economic, institutional, and cultural forces), and hence unable to demand decent, stable working conditions, and a fair share of the wealth they produce through their labour. The end results are stagnant wages, growing inequality (with its many widespread consequences), macroeconomic imbalances (including weak growth and steadily rising household debt), and chronic underperformance in productivity, innovation, and skills acquisition.

These costly imbalances will not be rectified, without an ambitious and wide-ranging reinvigoration of ambitious, equality-promoting labour market policy interventions. The workings of the “market” alone, so long as workers’ bargaining position is undermined by chronic unemployment and underemployment, capital mobility and threats of relocation, and passivity and non-interference from government, will not correct these imbalances. Rather, left to their own, things will clearly get worse.

After all, an active, equality-promoting policy approach is what underpinned the expansion of inclusive, “middle class” prosperity in the initial postwar decades. The spirit of redistributive labour market regulation has ebbed in recent decades, in the face of the growing dominance of “free market” and “business-led” values and policies. But a renewed emphasis on institutions and policies aimed at lifting the quality of jobs, empowering workers to demand fair treatment, and attaining a better and more

WORKPLACE PERSPECTIVE

“Windsor boasts an extremely high rate of temporary agencies, hovering around 60 – 70 Windsor has more temporary work agencies than it has Tim Horton’s restaurants. What I would like to see however is legislation or policies that make working for these agencies fairer to the individual worker.”

Dino Chiodo, President, Unifor Local 444, Windsor, and Chair, Unifor Ontario Regional Council

sustainable distribution of income, is now a prerequisite for arresting and reversing these negative trends.

Our submission has argued that there is ample reason and scope to revive this spirit of active labour market regulation. We have presented innovative proposals for strengthening the operation of labour market institutions, in a manner that reflects and responds to the economic trends (such as precarious work, the growth of small employers, and global competition) re-shaping Ontario's labour market. And we have argued that these policy changes can be implemented in ways that strengthen Ontario's economy, and enhance the genuine competitiveness of our industries, companies, and products. By fostering higher-value employment practices, which improve skills and retention, and reward productivity (rather than engaging in an unwinnable battle to be the "cheapest"), Ontario's policy-makers can nudge employers toward adopting more promising business strategies. We believe the policy directions outlined in this submission constitute an ambitious but appropriate first step in that direction.

In conclusion, Unifor once again thanks the Special Advisors for their attention, and we stand ready to participate in further dialogue regarding these and other proposals for improving work in Ontario.

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