

## **The Changing Workplaces Review Interim Report Executive Summary**

**August 2016**

### **What is this about?**

In February of 2015, the Government of Ontario announced it was going to review issues and trends that affect workers and employers in the modern workplace. Two Special Advisors were appointed to lead public consultations: C. Michael Mitchell, formerly of Sack Goldblatt Mitchell LLP, and the Honourable John C. Murray, a former justice of the Ontario Superior Court and prominent management labour lawyer. Public consultations began in May of 2015 focusing on how the *Labour Relations Act, 1995* (“LRA”) and *Employment Standards Act, 2000* (“ESA”) could be amended to keep pace with the changing needs of workers and employers.

On July 27, 2016, the Special Advisors published an Interim Report (the “Interim Report”) summarizing input they had received, and seeking additional input from Ontarians. More than 300 pages in length, the Interim Report identifies approximately **50 issues and more than 225 options** of varying size, scope and potential impact.

The Interim Report is divided into five Chapters:

- **Chapter 01** sets out the purpose of the Interim Report
- **Chapter 02** outlines the principles informing the Special Advisors’ deliberations
- **Chapter 03** identifies workplace pressures and trends, and groups of employees considered by the Special Advisors to be *vulnerable* and working in *precarious jobs*
- **Chapters 04 and 05** set out issues and options for reform in respect of each of the *LRA* and *ESA*

**Our goal at Sherrard Kuzz LLP is to inform our readers and engage your interest and participation in the next phase of the Changing Workplaces Review.** This Executive Summary focuses on Chapters 04 and 05 providing an overview of each of the issues. In addition, **Appendix A** to this Executive Summary identifies each of the roughly 225 options on a section-by-section basis.

**The Interim Report and a link to the research papers can also be found on our website at [www.sherrardkuzz.com](http://www.sherrardkuzz.com).**

**Get involved - Ontario employers need to make their voices heard!**

We expect the Special Advisors to provide a final report to the Government of Ontario on or before December 31, 2016. Until then, the Special Advisors have invited additional feedback to assist them to finalize the recommendations they will present.

- **August 31, 2016 is the deadline** for submissions on **personal emergency leave options**.
- **October 14, 2016 is the deadline** for submissions on **all other issues and options**.

We suspect we could see quick legislative moves as early as the 2016 Fall sitting of the Legislature in relation to paid emergency leave, and no later than Spring 2017 for more comprehensive amendments to the *LRA* and *ESA*.

## **Chapter 04 – Labour Relations**

The Special Advisors begin Chapter 04 with a review of the purpose of the *LRA*, tracing its evolution from the 1940s through decades of reform to its current state. In our view the opening paragraph sets the tone for the entire Interim Report. Under the heading, “Purpose of the Labour Relations Act” the Special Advisors quote from the Supreme Court of Canada’s 2015 decision in *Mounted Police Association of Ontario at para 82*:

*...purpose of freedom of association in the workplace is “to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties.”*

The Special Advisors leave the impression that a number of the current provisions of the *LRA* may not withstand a constitutional challenge in light of this comment from the Supreme Court of Canada.

The Special Advisors also discuss the decline in union density in Ontario’s private sector, suggesting higher numbers of ‘vulnerable’ workers in ‘precarious’ employment aligns with this decline.

**Based on these assumptions, employers in Ontario should be concerned the final recommendations from the Special Advisors will most certainly include amendments designed to increase union density and/or at least union coverage in Ontario.**

Chapter 04 contains seven sections, six of which are the focus of this Executive Summary:

1. Scope and Coverage of the *LRA*
2. Access to Collective Bargaining and Maintenance of Collective Bargaining
3. The Bargaining Process
4. Remedial Powers of the Ontario Labour Relations Board (“OLRB”)
5. Other Models
6. Additional *LRA* Issues

### **4.2 Scope and Coverage of the *LRA***

#### **4.2.1. Coverage and Exclusions**

The Interim Report begins by identifying those categories of workers currently exempted from the *LRA* (section 1(s) and 3 of the *LRA*). It questions whether the rationale for these exemptions continues to be relevant in light of recent pronouncements from the Supreme Court of Canada. The Special Advisors then address the constitutional validity of the exemptions and forecast an expanded scope of coverage of the *LRA*.

At present, the *LRA* does not apply to the following categories of workers:

*no person shall be deemed to be an employee,*

(a) *who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity; or*

(b) *who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.*

*a domestic employed in a private home;*

*a person employed in hunting or trapping;*

*an employee within the meaning of the Agricultural Employee Protection Act, 2002 (“AEPA”);*

*to a person other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture;*

*a member of the police force within the meaning of the Police Services Act;*

*except as provided in Part IX of the Fire Protection and Prevention Act, 1997, to a person who is a firefighter within the meaning of subsection 41(1) of that Act;*

*to a member of a teachers’ bargaining unit within the meaning of the School Boards Collective Bargaining Act, 2014, except as provided by the Act and by the Protecting the School Year Act, 2015 or to a supervisory officer, a principal or vice principal within the meaning of the Education Act;*

*to an employee of a college of applied arts and technology;*

*to a provincial judge;*

*to a person employed as a labour mediator or a labour conciliator;*

#### **4.2.1.1 Agricultural and Horticultural Employees**

The Interim Report reviews the historical exclusion of agricultural and horticultural employees, including the Supreme Court of Canada’s decision in *Dunmore v. Ontario (Attorney General)* (2001) 3 SCR 1016, in which the court considered the constitutionality of the exclusion from the *LRA* of agricultural workers.

In *Dunmore*, farm workers challenged the exclusion as a violation of their freedom of association under the *Canadian Charter of Rights and Freedoms*, preventing them from establishing, joining and participating in the lawful activities of a union, denying them a statutory protection enjoyed by most occupational groups in Ontario. The court declared the exclusion of agricultural workers from the *LRA* to be invalid and gave the government eighteen months to implement amending legislation.

In 2002, the Ontario Legislature enacted the *Agricultural Employees Protection Act, 2002* (“*AEPA*”) which came into force on June 17, 2003. Employees employed in agriculture are covered by the *AEPA*. Horticultural workers remain excluded from the *LRA*.

The *AEPA* creates a separate labour relations regime for agricultural workers, granting the right to form and join an employees’ association, to participate in its activities, to assemble, to make representations to their employers through their association and the right to be protected against interference, coercion and discrimination in the exercise of their rights. Complaints under the *AEPA* can be filed with the Agriculture, Food and Rural Affairs Appeals Tribunal.

The *AEPA* does not contain a statutory requirement for the employer to bargain in good faith with an employees’ association nor does it provide for strikes, lock-outs or for any other dispute resolution mechanism.

Ultimately, labour and employee advocacy groups assert agricultural and horticultural employees should be covered by the *LRA*, and we suspect, at a minimum, the final report will include recommendations with respect to agricultural workers.

#### 4.2.2 Related and Joint Employers

**This section of the Interim Report should be a focus for many employers.** The Special Advisors have taken a keen interest in the issue of *which entity (or entities) should bear responsibility for labour and employment related liability when an employer:*

- *subcontracts*
- *outsources*
- *franchises*
- *uses a temporary help agency (“temp agency”)*

**Employers should expect in the final report a direct attack on many of the commercial structures through which employers have historically serviced customers and carried on business.**

Many employers sub-contract, outsource and/or use temp agencies, to allow employers to focus on their core expertise while leaving it to these other entities to deliver goods and services in their own sphere(s) of expertise. For decades, the commercial economics arising from such arrangements have been predictable, budgeted and considered in pricing and investment strategies.

Many of the union submissions suggest collective bargaining cannot be successful unless the party having “primary economic interest and ultimate control over the business” (the lead employer) is at the bargaining table. A U.S. author (and Administrator of the Wage and Hour Division) often cited by the Special Advisors argues that any employer that benefits from the labour of employees, including of a subcontractor or temp agency, should be responsible, at least jointly, for labour and employment liability regarding those employees.

Unfortunately, these submissions completely miss the critical value of sub-contracting, outsourcing and the use of temp employees; namely, increased productivity and efficiency, and job creation. Instead, the Interim Report appears to adopt the argument that these business arrangements are designed to avoid employment related liability and have been a direct contributor to the increase in vulnerable workers in precarious jobs.

Take the case of the franchise industry. The Interim Report suggests control of a brand and business model necessarily means the franchisor ought to have responsibility, jointly with the franchisee, for all employment related liability. However, in fact, overwhelmingly franchisors have minimal impact on, or supervision over, the employment related decisions of franchisees. A typical franchise agreement leaves terms and conditions employment to the franchisee, to conform to local norms and laws, and does not dictate same. Most franchisors have been very careful to ensure they do not directly or indirectly control terms and conditions of employment.

The franchise business structure has also provided many small entrepreneurs the opportunity to start up and operate businesses that employ hundreds of thousands of Ontarians in communities of all sizes and in all locations, urban and rural. Upsetting this important balance between franchisor and franchisee would dramatically, and negatively, impact this important small business model.

Despite all of this, the Special Advisors appear to be looking for ‘deep pockets’ in which to anchor employment responsibility. As such, we fully expect their recommendations to include substantive changes to the current balance in the law. Should this occur, many Ontario employers will need to rethink their commercial structures, placing at risk future investment and jobs - the very things the Government of Ontario wants to encourage and support.

### **4.3 Access to Collective Bargaining and Maintenance of Collective Bargaining**

#### **4.3.1 The Certification Process**

The Interim Report reviews the current process by which a union may organize employees and establish bargaining rights through certification, specifically the secret ballot process.

While not noted in the Interim Report, the vast majority of employees in Canada and the United States enjoy the democratic right to a secret ballot process when deciding whether to be represented by a union. A secret ballot process provides employees time to consider their options and relevant information about the pros and cons of unionization. A card-based process (no time to consider or right to vote) provides no such opportunity, and for that reason is widely rejected across the vast majority of the United States and Canada, as undemocratic.

##### **4.3.1.1 Card-Based Certification**

The Special Advisors point to commissioned research that suggests a vote model is associated with fewer applications for certification, and a lower rate of union success.

While this may be statistically accurate, the research papers fail to acknowledge that the reason for this trend may be that when employees are informed about the pros and cons of unionization

and allowed to vote freely in a secret ballot, they choose ‘no’ to unionization more often than they choose ‘yes’.

Which begs the question – what is the Government of Ontario’s true objective? Ensuring fairness and respect for the wishes of employees, or increasing union density, regardless of employee wishes?

Eliminating the democratic vote process will be a step backwards. It is inconsistent with the process in almost every jurisdiction in Canada and the United States, and removes from employees the opportunity to have an ‘informed’ say in their individual and collective futures. It will also place Ontario employers at a competitive disadvantage. For all of these reasons, eliminating the vote cannot remain a realistic and appropriate option.

#### 4.3.1.2 Electronic Membership Evidence

Unions have asked for the option that a membership card be signed electronically. At present, only physical signing is allowed. At one point in the history of the *LRA*, there were a number of processes to validate an employee signature on a union membership card, and an employer had the ability to challenge the authenticity of membership evidence. However, those processes no longer exist in the *LRA*.

Assuming the final recommendations include a process whereby an employer and/or the OLRB can satisfy themselves membership evidence is authentic, we expect to see this recommendation make its way into the final report.

#### 4.3.1.3 Access to Employee Lists

At present, a union seeking to represent employees at a workplace is not entitled to a list of employees until *after* the union has filed an application for certification, as part of the employer’s response. However, the list does not contain contact information for employees.

Traditionally, this has also been the practice in the United States, until a recent change has required employers to provide, as part of their response to an application for certification, a list of employees and their contact information.

Unions in Ontario have asked the Special Advisors to recommend a process whereby a union will receive a list of employees and contact information in advance of the filing of an application for certification, upon demonstrating a certain number of signed cards (e.g., 20%).

Employee advocates suggest that without this information a union must guess at the number of employees in the workplace, making communication with employees difficult, and negatively impacting unionization.

The two most significant barriers to this request are the privacy rights of employees and the additional layer of OLRB litigation that will likely ensue regarding whether a union can demonstrate sufficient support (e.g., 20%). Insofar as privacy is concerned, it is difficult to envision how the Special Advisors will rationalize such a considerable intrusion into the rights of employees based solely on a minority of employees having signed a union card (e.g., 20%). In

terms of the impact on OLRB litigation, adding another layer of litigation will only delay and increase the costs associated with the entire certification process.

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

At present, when the OLRB conducts a certification vote each of the employer and union are entitled to have a representative attend to act as a scrutineer. The *LRA* does not dictate how or where a representation vote is to be conducted, although traditionally the OLRB has directed the vote occur in the workplace. The underlying policy rationale, at least in part, is to ensure employees have a reasonable opportunity to cast a ballot.

Unions are asking voting be allowed to occur off-site, over the telephone and/or through the internet. They argue this will reduce incidents of employers unlawfully influencing employee choice at the polling station. Unions also complain the OLRB's remedial orders have, to date, been insufficient to deter such employer conduct.

Employers argue the vote should take place at the workplace, to ensure the greatest number of employees have an opportunity to vote. Not only is this consistent with voting protocol across Canada, but employers do not accept the assertion that there is an issue with employers unlawfully influencing employee choice, nor that the OLRB has insufficient power to remedy unlawful conduct.

Ensuring the greatest number of employees have an opportunity to vote freely and voluntarily (without undue influence from any party, including a union), and the authenticity of the outcome of a vote, should be the Government's primary objective. Any transition to off-site, telephone or internet voting must keep this objective at the forefront.

#### 4.3.1.5 Remedial Certification

At present, the OLRB may order the certification of a union without a vote if the employer has contravened the *LRA* in a way that makes it unlikely the true wishes of the employees can be ascertained through another vote (referred to as 'remedial certification'). The OLRB may also take into consideration whether the union has adequate membership support for the purpose of collective bargaining.

Union submissions to the Special Advisors suggest the current power to remedially certify an employer is not a sufficient deterrent to an unfair labour practice. They seek total elimination of the potential for a second vote, and any assessment whether a union has support for collective bargaining.

Unfortunately, to date, there has been little employer comment on this proposal.

In our experience the OLRB's power to remedially certify an employer is more than sufficient to deter unlawful conduct. OLRB Vice-Chairs, the individuals empowered with the authority to exercise this remedy, typically have years of experience representing either unions or employers. Their experience affords the best opportunity to identify unlawful conduct, appropriate remedies and overall balance in the workplace.

### 4.3.2 First Contract Arbitration

The Interim Report provides a legislative review of the current provision (introduced in 1986) for first contract arbitration, and a comparison to other Canadian jurisdictions. The provision requires the applicant (typically a union) to demonstrate collective bargaining has been unsuccessful due to one of the following reasons:

- (a) the refusal of the employer to recognize the bargaining authority of the 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
- (d) any other reason the OLRB considers relevant.

Most union submissions call for automatic access to first contract arbitration with little if any pre-condition. Surprisingly, they also call for access to interest arbitration during mature rounds of collective bargaining. Either suggestion would be a game changer, and all employers ought to be wary of any recommendation along these lines.

While we understand the desire for there to be an appropriate balance of power between a union and employer for the purposes of negotiations, the remedial relief section of the *LRA*, combined with the duty to bargain in good faith and ancillary strike/lockout provisions of the *LRA*, already strikes an appropriate balance of power.

In our experience, the current structure of collective bargaining motivates parties to build trust relationships and consider workable solutions and compromises to achieve long-term, sustainable relationships. Any change to the remedial relief sections of the *LRA* must be measured against its potential negative impact on meaningful compromise and agreement.

### 4.3.3 Successor Rights

The objective of section 69 of the *LRA* is to protect union bargaining rights where there has been a sale of a business, ensuring those rights and collective agreement obligations flow through to the successor employer.

At present, section 69 captures several forms of business transactions but not contracting out or contract tendering as these commercial arrangements do not include the passing of assets from one party to another (earlier versions of the *LRA* (1993 to 1995) did capture contracting out and re-tendering with respect to certain building services).

Union advocates want section 69 to once again capture contracting out and re-tendering with respect to building services, but also to include home care, the transit industry and other industries. This would mean, for example, where an home care provider contracts or tenders work to a third party which is unionized, and that third party is replaced by a non-union provider, bargaining rights of the initial third party will apply to the subsequent party.

Employers remain opposed to encumbering the freedom to commercially contract out and/or to re-tender service contracts. They reject any legislative requirement to expand the reach of section 69 or the *LRA*.

#### 4.3.4 Consolidation of Bargaining Units

At present, the most common bargaining unit definition ordered by the OLRB is for a single workplace of a specific employer at a particular geographic location. Once the bargaining unit is defined, the OLRB has no general power to reconsider or revise the description of the unit. This wasn't always the case, as in the early 90s the OLRB had the power to combine bargaining units where necessary.

Unions advocates argue the OLRB should regain the power to amend the description of a bargaining unit after a union has been certified, where the original unit is no longer appropriate. They argue this is necessary in light of dramatic business decline in some sectors of the Ontario economy (*e.g.*, manufacturing – which traditionally had large, single site bargaining units) and business growth in other areas (*e.g.*, service and retail – which generally have multiple sites of smaller employee groups).

In our experience where labour boards are given the power to alter the scope of existing bargaining units, employee choice can be compromised. Smaller groups of employees that initially had a say in whether to be unionized, lose their voice as they are swallowed by larger employee bargaining units. For this reason, should the Special Advisors recommend giving to the OLRB the power to amend the description of a bargaining unit we hope protocols are also in place to ensure smaller employer groups have a discrete voice.

### 4.4 The Bargaining Process

#### 4.4.1 Replacement Workers

The Interim Report defines a “replacement worker” as a “worker hired to fulfill some or all of the functions of a worker who is either engaged in a legal strike or who has been locked out by the employer”. Today, in every Canadian jurisdiction (save British Columbia and Quebec) during a lawful strike or lockout, an employer is permitted to rely upon a replacement worker to continue to meet customer needs.

The ability of an employer to rely on a replacement worker encourages ongoing compromise toward a collective agreement, and ultimately labour relations stability. Without the ability to hire replacement workers, many unions will be in a position to effectively strangle their employers, undercutting any necessity the union compromise or reach meaningful ‘agreement’.

The fact that strike and/or lockout occurs in less than 5% of Ontario workplaces operating under a collective agreement, is strong evidence the current practice of allowing replacement workers has had a positive impact on the stability of labour relations. Altering this balance ought therefore to be very carefully assessed.

Unfortunately, the Special Advisors have made it clear they are not in favour of the use of replacement workers, and we expect to see substantive legislative change in this regard:

*... it is generally accepted by labour relations experts that using replacement workers adversely affects the progress of collective bargaining and can prolong labour disputes.*

#### 4.4.2 Right of Striking Employees to Return to Work

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

The current provisions of the *LRA* provide an employee with a protected right to return to work after a lawful strike or lockout provided the employee exercises this right within six (6) months of the commencement of the lawful strike or lockout. Ontario is the only Canadian province that provides for the six (6) month condition, and unions have asked that it be eliminated.

While in theory, an employee in Ontario is at risk of not being reinstated if he/she has not applied for reinstatement within the six (6) month window, in practice, more often than not, an employer will reinstate an employee who wants to return to work, even outside of the six (6) months window.

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

There are often contentious issues around the reinstatement of an employee an employer wishes to terminate for strike related misconduct. At present, the *LRA* does not provide “just cause” protection to such an employee, nor does it provide for access to a grievance or arbitration process.

Union submissions seek the addition of “just cause” protection when an employee is terminated for strike related conduct. Most employers argue the current unfair labour practice provisions of the *LRA*, and the OLRB powers generally, are more than sufficient to adjudicate any dispute(s) arising out of a lawful strike or lockout.

#### 4.4.3 Renewal Agreement Arbitration

As discussed in Section 4.3.2 - First Contract Arbitration - the *LRA* provides for an interest arbitration proceeding to establish the terms and conditions of the parties’ first collective agreement when negotiations have been unsuccessful due to certain employer actions (see s. 43(2) of the *LRA*). There is no similar process for interest arbitration regarding the renewal of a collective agreement.

Union advocates have asked for automatic access to interest arbitration at any time. Failing this, they want automatic access after the lapse of a defined period of time from the commencement of a lawful strike or lockout.

For the reasons addressed in Section 4.3.2, all employers should be concerned with the possibility of interest arbitration for the renewal of a collective agreement.

## 4.5 Remedial Powers of the OLRB

### 4.5.1 Interim Orders and Expedited Hearings

Following a historical review of the *LRA*, the Interim Report notes:

*Currently, the OLRB is empowered to make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate. Furthermore, the OLRB may make interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated, but whose terms and conditions of employment have been altered, or who has been subject to reprisal, penalty or discipline by the employer.*

Unions seek an expansion of the OLRB's power to issue a substantive interim order in any case involving a finding of an unfair labour practice on "such terms as the Board considers appropriate".

### 4.5.2 Just Cause Protection

At present, the *LRA* contains protection against an employee being terminated where the reason for termination has an element of anti-union *animus*. However, the *LRA* does not provide 'just cause' protection during any period in which no collective agreement is in force (three Canadian provinces do provide such protection). This includes the period between the issuance of the certificate (which gives a union the right to negotiate with the employer) and the successful negotiation of the first collective agreement, and during a lawful strike or lockout.

Unions submit current protections are insufficient and employees need "just cause" protection to address the power imbalance between employer and employee, particularly during the sensitive time when a collective agreement is being pursued.

While there was little employer comment in this area, in our experience the current provisions of the *LRA* provide the OLRB with more than sufficient power to protect employees and unions.

### 4.5.3 Prosecutions and Penalties

The Interim Report suggests it is important to evaluate whether current OLRB powers are a sufficient deterrent against unlawful employer activity. The OLRB's current power is restricted to compensatory awards, whereas a number of other Canadian labour boards also have the power to fine and/or penalize.

Many unions argue there is widespread disregard for the law in the employer community, but offer no objective evidence to support such a claim. They ask the Special Advisors to consider giving to the OLRB powers similar to that of the U.S. National Labor Relations Board, including pending U.S. legislation that includes:

- triple back pay for a worker unlawfully terminated or who suffered retaliation
- civil penalty up to a maximum of \$50,000 per violation and doubled penalty (maximum \$100,000) for a repeat violation
- private civil action for a worker injured by an unfair labor practice

- personal liability for an officer or director in certain circumstances
- joint and several liability for an employer where a violation of the *National Labour Relations Act* involves an employee supplied by another employer

The Interim Report also considers the creation of a prosecutorial government role (*i.e.*, Director of Labour Enforcement) that would appear before the OLRB to seek administrative penalties, and expanding OLRB power to award costs, including those associated with a government led investigation.

## 4.6 Other Models

### 4.6.1 Broader-Based Bargaining Structures

Many unions submit the current structure of the *LRA* is not capable of responding to a modern labour market characterized by small groups of employees and non-standard work. The Special Advisors suggest the way to address this is through broader-based or sectoral bargaining in which a sector (which may include several employers) would be covered by a single collective agreement.

A sector would have two defining characteristics: geographic scope and type of work involving “similar tasks”. Once a ‘historically underrepresented sector’ is identified, any union that can obtain at least 45% support at two or more employers in that sector may apply for a **sectoral certification**. The union would then have to win a vote at each location as well as win a majority of all employees combined. If the union is successful, it would obtain a sectoral certification.

If a union is certified for a sectoral unit, it would commence bargaining with all employers whose employees have been certified. For example, if a union obtained a sectoral certification for “fast food workers in Toronto” and was certified at one Wendy’s and one Burger King, the union would bargain with representatives from Wendy’s and Burger King toward a standard collective agreement that would apply to both employers. If the union then later organized workers at other stores of those employers, or at stores of other employers in the same sector, the new stores (and new employers if any) would be swept into the existing collective agreement. The new employers would be able to participate in the next round of collective bargaining, and the law would provide the OLRB flexibility to order alterations to the existing agreement or to open up the agreement for new collective bargaining.

In support of this recommendation, the Interim Report looks to sector bargaining in the construction industry, some of the hospital sector, and with professional artists and producers who engage their services. It also references various European sector arrangements, the decree system in the Province of Quebec, and the sectoral certification model proposed in British Columbia for “those smaller enterprises where employees have historically been underrepresented by trade unions”.

The Interim Report suggests sectoral agreements could be made available to sectors of the economy where ‘vulnerable workers’ are found working in ‘precarious jobs’, including for example the quick service restaurant sector. Though we do wonder whether this recommendation is merely an excuse to assist unions to unionize in a sector where they have been historically unable to do so.

Finally, while certain sectors of the Ontario economy experienced pattern or central bargaining in the 1970s and 1980s, the Interim Report acknowledges there has been a general shift away from this type of bargaining, as well from bargaining at the enterprise level.

#### 4.6.2 Employee Voice

The current structure of the *LRA* presupposes a union is a necessary vehicle through which employee concerns should be communicated to an employer. Against this backdrop, the Special Advisors consider a variety of alternative models including:

- “Minority unionism” whereby a union that represents a minority of employees can apply to be recognized as the representative of those employees
- European systems with particular focus on Germany and the United Kingdom
- “Works councils”
- “Concerted activity” - a model by which employees may advocate and influence management with respect to workplace conditions
- Other forms of workplace consultation between employers and workers.

#### 4.7 Additional *LRA* Issues

##### Ability of Arbitrators to Extend Arbitration Time Limits

The *LRA* contains a provision that allows parties to agree to remove the power of an arbitrator to relieve against the strict application of time limits in processing a grievance or referring a matter to arbitration. Unions want to eliminate this type of agreement on the ground denying a grievance on such a technical basis is unfair. The Special Advisors have invited further submissions.

##### Conciliation Boards

Under section 16 of the *LRA*, at any point after the delivery of the notice of desire to bargain, either the employer or union can request the appointment of a conciliation officer to assist with negotiations. Parties must go through this process as a pre-condition to a lawful strike or lockout. If a conciliation officer is unable to effect a collective agreement the Minister of Labour has authority to appoint a board of conciliation to further assist.

However, in reality, for at least the past 20 years, no conciliation board has been appointed. Instead, parties request the conciliation officer to issue a “No-Board” which starts the clock ticking toward a deadline for the commencement of a lawful strike or lockout.

The Interim Report acknowledges the futility in continuing to have in the *LRA* provisions for the appointment of a conciliation board. We expect a recommendation that those provisions be removed.

## **Chapter 05 - Employment Standards**

The *ESA* sets out minimum rights and responsibilities applicable to most employees and employers in Ontario. Together with its regulations, the *ESA* is a complex web of more than 85 exemptions, partial exemptions, and qualifying conditions, *etc.*

Two issues raised consistently in the submissions and for which the Interim Report seeks additional comment are as follows:

### **5.2 Scope and Coverage of ESA**

#### **5.2.1 Definition of Employee**

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

#### **Misclassification of Employees**

According to the Interim Report, 12% of Ontario's workforce of 5.25 million are reported as "own account self-employed". Yet the Ministry of Labour reports, relying primarily on anecdotal evidence, a significant portion of these "own account self-employed" workers are misclassified and ought to be classified as employees.

The Special Advisors point to a variety of reasons why an employer would prefer to classify an employee as an independent contractor, including that an employer is not obliged to pay a contractor vacation pay, public holiday pay, overtime pay, termination and severance pay and premiums for Employment Insurance ("EI") and Canada Pension Plan.

Little is said of the fact that many independent contractors prefer to be classified this way to trigger their own preferential tax treatment.

#### **Definition of Employee in the *ESA***

While the *LRA* defines "employee" to include a "dependent contractor", the *ESA* does not include a similar definition. The common law acknowledges employer liability for an intermediate category, between employee and independent contractor, referred to as "dependent contractor". As a result, we can expect the final recommendations to consider a similar definition be included in the *ESA* to harmonize the *ESA* and *LRA*.

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

Historically, the *ESA* has placed workplace responsibility and liability on the entity that directly employs the employee.

This section of the Interim Report recommends expanding responsibility to other parties in light of the growing incidence of subcontracting, outsourcing, use of temporary help agencies and the

proliferation of franchisor – franchisee arrangements (similar to the earlier discussion under the *LRA*).

In short, advocates of expanded responsibility argue if the lead employer ultimately receives the benefit of the work of employees of a subcontractor, outsource provider or temp agency, employment liability should flow up to the lead employer.

As noted earlier in this summary (in section 4.2.2), the argument for expanded responsibility misses (or disregards) important and beneficial commercial arrangements that have been negotiated and agreed to by employers, customers and suppliers.

### 5.2.3 Exemptions, Special Rules and General Process

The Interim Report starts with the assumption the *ESA* should apply to all employees, without exemption, to ensure every employee receives minimum terms and conditions of employment. That said, the Interim Report acknowledges application of the *ESA* could be modified for certain sectors and jobs without sacrificing fairness or the legitimate interests of employees. To this end, the Special Advisors will not recommend wholesale elimination of exemptions without further review (beyond the Changing Workplaces Review).

That being said, the Interim Report identifies one category of exemption that may face elimination or alteration without further review:

- information technology professionals
- pharmacists
- **managers and supervisors**
- residential care workers; residential building superintendents, janitors and caretakers
- special minimum wage rates for:
  - students under 18, and
  - liquor servers
- student exemption from the “three-hour rule”

**Submissions with respect to these exemptions – particularly managers and supervisors - should be provided to the Special Advisors as soon as possible.**

Another category of exemption will be reviewed in the future, including:

- public transit
- mining and mineral exploration
- live performances
- film and television industry
- automobile manufacturing
- ambulance services

A third category of exemption will be reviewed separate and apart from the Changing Workplace Review:

- architect
- chiroprapist
- chiropractor
- dentist
- engineer
- lawyer
- massage therapist
- naturopath
- physician and surgeon
- physiotherapist
- psychologist
- public accountant
- surveyor
- teacher
- veterinarian
- students in-training in profession
- ambulance driver, ambulance driver helper or first-aid attendant on an ambulance
- canning, processing, packing or distribution of fresh fruit or vegetables (seasonal)
- continuous operation employee (other than retail store employee)
- domestic worker (employed by the householder)
- commissioned automobile salesperson
- homemaker
- embalmer and funeral director
- firefighter
- fishers – commercial fishing
- highway transport truck drivers (“for hire” businesses)
- local cartage drivers and driver’s helper
- retail business employee
- hospital employee
- hospitality industry employee (hotels, restaurants, taverns, *etc.*)
- hunting and fishing guide
- Ontario government and Ontario government agency employee
- real estate salesperson and broker
- construction employee (other than road building and sewer and watermain construction)
- road construction
- sewer and watermain construction
- road construction sites – work that is not construction work
- road maintenance – work that is not maintenance work
- sewer and watermain construction site guarding
- road maintenance
- sewer and watermain maintenance
- maintenance (other than maintenance of roads, structures related to roads, parking lots and sewers and watermains)
- ship building and repair
- student employee at children’s camp

- student employee in recreational program operated by a charity
- student employee providing instruction or supervision of children
- swimming pool installation and maintenance
- taxi cab driver
- travelling salesperson (commissioned)

agricultural exemptions:

- farm employee – primary production
- harvester of fruit, vegetables or tobacco
- flower growing
- growing trees and shrubs
- growing, transporting and laying sod
- horse boarding and breeding
- keeping of furbearing mammals
- landscape gardener
- canning, processing, packing or distribution of fresh fruit or vegetables (seasonal)

#### 5.2.4 Exclusions

##### 5.2.4.1 Interns/Trainees

At present, the *ESA* does not apply to interns/trainees.

In 2014 and 2015 the Ministry of Labour initiated a high-profile, proactive enforcement blitz with a focus on interns/trainees. Submissions to the Special Advisors suggest employers have been benefiting improperly from free labour, and urge the elimination of this exclusion.

##### 5.2.4.2 Crown Employees

The following provisions of the *ESA* do not currently apply to employees of the Crown or a Crown agency:

- hours of work
- overtime pay
- minimum wages
- public holidays
- vacation with pay

Many of the submissions suggest there is no rationale to exclude Crown employees from the *ESA*, and further that Ontario is an outlier in this regard.

## 5.3 Standards

### 5.3.1 Hours of Work and Overtime Pay Employees

At present, the *ESA* provides:

- a maximum number of hours employees can be required to work in a day
- a maximum number of hours employees can be required to work in a week
- for rest periods (daily, weekly/biweekly, between shifts and meal periods)
- overtime pay thresholds and overtime averaging for the purposes of calculating overtime pay with informed employee agreement, for employees working more than the maximum daily or weekly hours of work

Union advocates argue the law is not sufficiently enforced and the government should be more proactive in regulating employer-employee agreements that provide for hours of work beyond the maximums.

Many of the employer submissions call for an overall simplification of the regulation process and elimination of the need for written employee consent and/or exemptions for certain industries (*i.e.*, “just in time” employers).

### 5.3.2 Scheduling

The *ESA* does not contain any provision regulating the scheduling of work by employers. Nor is there a requirement for advance posting of a work schedule, nor any rules, pre-conditions or consequences for last minute changes to a schedule. There is a requirement for a minimum of three hours pay where an employee who typically is scheduled for more than three hours works less than three hours.

The Interim Report suggests these practices make it very difficult for employees to plan child care, undertake further training and education, maintain or search for a second job, make commuting arrangements and plan other important activities. The Special Advisors say this uncertainty in scheduling contributes to making work *precarious*.

Employee advocates call for predictable schedules, minimum shift requirements, and compensation for workers who are on-call.

While there is a dearth of scheduling laws in other Canadian jurisdictions, the Special Advisors look to the United States where there has been movement toward predictable scheduling laws, enhanced employee flexibility laws and other non-legislative approaches. Many of the options listed in the Interim Report address the predictability of scheduling (*e.g.*, two weeks’ minimum advance notice) and penalties and/or costs associated with last minute changes.

These changes, should they become law, will be problematic for many employers across a broad range of industries.

### 5.3.3 Public Holidays and Paid Vacation

#### 5.3.3.1 Public Holidays

The *ESA* provides for nine (9) public holidays to which most employees in Ontario are entitled with public holiday pay.

Many of the submissions criticized the complexities involved in public holiday pay calculations, especially for employees who work irregular hours. Aside from the foregoing criticism there was little additional comment.

#### 5.3.3.2 Paid Vacation

Under the *ESA* an employee is entitled to two (2) weeks vacation time after each twelve (12) month vacation entitlement year. The *ESA* also provides for a minimum vacation pay of four percent (4%) of wages earned in the twelve (12) month vacation entitlement year. The *ESA* does not provide for an increase in these amounts based on length of employment.

The Interim Report notes Ontario provides the least generous provisions, and other Canadian jurisdictions increase paid vacation after a certain period of employment. Aside from the foregoing there was little additional comment.

### 5.3.4 Personal Emergency Leave

The *ESA* requires an employer that regularly employs 50 or more employees to provide to each employee up to ten (10) days unpaid personal emergency leave (“PEL”) days which may be used for personal illness, injury or medical emergency, or for the death, illness, injury or medical emergency or urgent matter concerning:

- the employee’s spouse
- a parent, step-parent or foster parent of the employee or the employee’s spouse
- a child, step-child or foster child of the employee or the employee’s spouse
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee’s spouse
- the spouse of a child of the employee
- the employee’s brother or sister
- a relative of the employee who is dependent on the employee for care or assistance

Employee advocates recommend removing the 50 or more employee threshold.

Employer advocates suggest the PEL provision should be assessed in the context of other leaves provided by an employer beyond the *ESA* minimums (*i.e.*, pregnancy leave, parental leave, family medical leave, *etc.*) to determine whether, in the aggregate, an employee has received a ‘greater right or benefit’ (per s. 5 of the *ESA*). If so, the PEL provisions should not apply. Employers are looking for clarity on this important issue.

In its 2016 budget, the Government of Ontario committed to addressing employer concerns with respect to PEL by seeking recommendations from the Ministry of Labour and Special Advisors. As a result, we expect that the Special Advisors will make final recommendations with respect to PEL in advance of the final report. Recommendations could include recognition of the greater right or benefit argument with increased clarity in the application of the concept. Or, a breakdown of the ten day entitlement into separate leave categories (*i.e.*, a separate number of days for personal illness/injury, bereavement, dependent illness/injury) creating further complexities.

**The Special Advisors are seeking submissions on PEL in advance of other submissions regarding the *ESA* and *LRA* generally. They have a set a deadline for the receipt of these submissions of August 31, 2016.**

### 5.3.5 Paid Sick Days

The *ESA* does not require the provision of paid sick days.

The Interim Report cites variation among Canadian jurisdictions (though most do not provide for paid sick days), as well as employers in terms of paid sick days as well as short and long term disability benefits. The Special Advisors also note a 2010 World Health Organization report suggesting that as many as 145 countries have some form of leave and wage replacement for illness, though there is considerable variation in terms of the length of leave and how and to what extent wages are replaced.

Employee advocates urge the Special Advisors to recommend paid sick leave days, the number of which could be determined on an accrual basis (not a static number).

### 5.3.6 Other Leaves of Absence

The *ESA* provides for ten (10) unpaid, job protected leaves of absence (in addition to PEL discussed earlier):

- pregnancy leave and parental leave
- family caregiver leave
- family medical leave
- critically ill child care leave
- crime-related child death or disappearance leave
- organ donor leave
- reservist leave
- income support and leave

While ‘unpaid’, during several of these leaves an employee is eligible to receive EI benefits or grants from the federal government.

Employee advocates urge the consideration of an additional protected leave for victims of domestic abuse.

Employer advocates urge consolidation of a number of leaves citing the unnecessary complexities associated with managing so many different types of leaves.

### 5.3.7 Part-time and Temporary Work –Wages and Benefits

According to the Interim Report, part-time workers make up approximately 19% of the Ontario workforce and generally experience lower wages, reduced access to benefits and are less likely to be in a unionized position.

While covered by the *ESA* in respect of minimum wage, regular pay days, and overtime, *etc.*, the *ESA* does not require an employer to compensate a part-time, temporary, casual or limited term contract employee in the same manner as a full-time employee doing the same work. The only type of wage discrimination prohibited under the *ESA* is gender discrimination to ensure women and men receive equal pay for performing substantially the same job.

Despite these differences in the law, many employers treat their employees equitably providing *pro rata* entitlements, and setting threshold hours to qualify for certain benefits, *etc.* Still, it is common to find part-time employees paid a lesser wage than full-time employees and without access to benefits.

Employee advocates urge the Special Advisors to recommend an amendment to the *ESA* that would require part-time and temporary employees to receive the same compensation as their full-time counterparts, subject only to differences in qualification, skill, seniority, experience or other objective factors.

### 5.3.8 Termination, Severance and Just Cause

#### 5.3.8.1 Termination of Employment

At present, the *ESA* provides that, in most cases, when an employer terminates the employment of an employee who has been continuously employed for three months or more, the employer must provide the employee with either written notice of termination, termination pay in *lieu* of notice, or a combination of the two. This period of notice increases with each year of employment and caps at a maximum of eight (8) weeks.

Employee advocates seek the elimination of the three month qualifying period and the eight week cap. They also argue work periods should be aggregated for those whose periods may be short and sporadic (*e.g.*, recurring seasonal, contract, temp agency, and construction employees).

#### 5.3.8.2 Severance Pay

The *ESA* requires the payment of severance pay if employment is terminated and the employee has worked for the employer for five (5) years or more and the employer either has a payroll in Ontario of at least \$2.5 million, or has severed the employment of 50 or more employees in a six (6) month period because all or part of the business has permanently closed. Severance pay increases with each year of employment and caps at a maximum of twenty-six (26) weeks.

Employee advocates seek the elimination of the various thresholds so a greater number of employees will be entitled to severance pay. Various parties also seek greater clarity with respect to the scope of the payroll included in the determination of the \$2.5 million.

#### 5.3.8.3 Just Cause

The *ESA* does not require an employer to have “just cause” to terminate an employee’s employment; only that an employer provide notice of termination or pay in *lieu* and, if the employee is eligible, severance pay.

Many employee advocates seek the implementation of a “just cause” standard. They point specifically to the plight of temporary foreign workers whose employment is typically tied to one employer and entitlement to remain in Canada, and who therefore need the added protection of a ‘just cause’ standard.

The Interim Report points to the practice in three other Canadian jurisdictions (Nova Scotia, Quebec and federal) in which an employee is able to contest termination and seek reinstatement by an independent arbitrator where no “just cause” is found.

#### 5.3.9 Temporary Help Agencies

Employee advocates argue temporary employees are fundamentally vulnerable and experience:

- lower pay
- difficulty understanding and exercising employment rights
- vulnerability in making complaints
- increased risk of injury on the job-site
- job instability
- deterioration of health
- unpredictable hours and income insecurity
- barriers to permanent employment

They argue many temporary employees are “trapped “in a precarious state as employers increasingly use temp agencies to avoid employment regulations and other costs. They point to inconsistency among Ontario’s employment-related statutes as they apply to temporary employees.

In response, employer advocates and temporary help agencies point to the *bona fide* need for temporary help in certain sectors of the economy specifically to respond to:

- unexpected business growth
- unexpected and long-term absences
- the need to bridge permanent replacements
- special projects
- seasonal rushes, and pre-selection of candidates

They stress the advantages temp agencies provide to immigrant workers, including:

- work which allows employers to evaluate employees whose credentials may be otherwise difficult to validate
- an opportunity to develop experience in the Canadian job market

The Special Advisors could consider a number of options with respect to temp agencies, including:

- temp employees be treated the same as direct employees (*e.g.* same rate of pay)
- a cap on the period of time a temp employee could be employed by a client before ‘converting’ to a direct employee
- a cap on the number of temp employees that can be employed at any one time as a percentage of the client’s overall workforce (for example 20%).

## **5.4 Other Standards and Requirements**

### **5.4.1 Greater Right or Benefit**

The *ESA* does not permit an employer and employee to contract out of, or waive, an employment minimum standard. However, the *ESA* does contemplate an employer providing to an employee a greater right or benefit than what is provided as a minimum under the *ESA*. This means if an established policy or collective agreement provides a greater right or benefit than a standard in the *ESA*, the terms of the policy or collective agreement apply instead of the *ESA* minimum.

Employer advocates have asked the Special Advisors to recommend the bundling of employment entitlements to determine ‘greater right or benefit’ as a whole, rather than analyzing rights and benefits in a piece-meal manner specific to each subject matter.

### **5.4.2 Written Agreements Between Employers and Employees to Have Alternate Standards Apply**

Under the *ESA*, parties can agree to amend the *ESA* in respect of the following standards:

- how and where wages can be paid
- limits to the hours of work limits
- minimum rest periods
- the formula for determining when overtime pay is earned
- taking overtime as paid time off instead of pay
- whether an employee works on a public holiday
- when vacation pay and vacation time are provided

Employee advocates argue employees do not have equal bargaining power with their employers, thus agreement to amend the *ESA* is not always ‘voluntary’. They have asked the Special Advisors to recommend eliminating these types of agreements.

### **5.4.3 Pay Periods**

The *ESA* requires an employer to establish a recurring pay period and a recurring pay day, and to pay wages earned during the pay period no later than the last day for that pay period. Common

pay periods are weekly, bi-weekly, semi-monthly or monthly. Several employment standards refer to a “work week” which is defined as a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work.

Ministry of Labour staff say they have difficulty assessing compliance with the *ESA* when an employer’s pay period does not correspond with its work week. They have asked for an *ESA* amendment requiring “pay period” to harmonize with “work week”.

## **5.5 Enforcement and Administration**

### **5.5.1 Introduction and Overview**

According to the Interim Report there is a serious problem with the enforcement of the *ESA*, citing the following statistics:

- 90% of the 15,000 complaints made every year are by people who have left their employment voluntarily or have been terminated
- of claims not settled or withdrawn the Ministry of Labour finds 70% to be valid
- between 2011 and 2014, proactive Ministry of Labour inspections found violations 75-77% of the time

The Special Advisors suggest there are a variety of factors contributing to non-compliance:

- ignorance by employee and employer regarding *ESA* rights and obligations
- complexity of the *ESA*
- some employers simply ignore their obligations and responsibilities
- some employers violate the *ESA* as a deliberate business strategy or because they think their competitors are not complying
- some employers think non-compliance is a risk worth taking
- widespread fear of reprisal among employees, enabling non-compliance

The Special Advisors have committed to further reviewing the issue of non-compliance, with emphasis on the following:

#### **5.5.1.1 Academic Review of the Enforcement Regime**

The Special Advisors commissioned two reports on compliance, enforcement and administration, and invite comments from the public.

#### **5.5.1.2 Overview of the Employment Standards Enforcement and Administration**

The *ESA* is administered and enforced through the Ministry of Labour Employment Standards Program, which has a number of the initiatives.

### **5.5.2 Education and Awareness Programs**

The Ministry of Labour engages in educational and outreach initiatives designed to help employees and employers understand rights and obligations under the *ESA*. Both employers and

employee groups seek an improvement in the Ministry's educational materials. The Special Advisors acknowledge *ESA* could be simplified and a variety of found to better communicate and increase awareness.

### 5.5.3 Creating a Culture of Compliance

The Special Advisors consider a variety of approaches that could enhance awareness and compliance including the internal responsibility system that already exists in Ontario workplaces under the *OHSA* (e.g., the success of the workplace joint health and safety committee and self-auditing).

### 5.5.4 Reducing Barriers to Making Claims

#### 5.5.4.1 Initiating a Claim

At present, an employee not covered by a collective agreement can file a claim with the Ministry of Labour if the employee believes their employer has not complied with the *ESA*. The *ESA* requires the employee to first contact his/her employer about the issue - referred to as a self-help requirement.

Research cited by the Special Advisors suggests the self-help requirement, and fear of reprisal, stifles complaints, the result of which is that most claims are filed by employees after they have left their employment.

Employee advocates seek the elimination of the self-help requirement, or alternatively, participation of third party.

Employers argue most non-compliance is innocent inadvertence or lack of understanding on the part of the employer. They therefore want to preserve their ability to resolve matters directly with their employees.

#### 5.5.4.2 Reprisals

The *ESA* prohibits reprisal against an employer, with the burden of proof to demonstrate 'no reprisal' resting with the employer. Any employee who believes he/she have been reprised against may file a claim with the Ministry which will in turn commence an investigation.

Employee advocates are critical of the current investigation system, arguing it is too slow and generally has little impact on employers.

### 5.5.5 Strategic Enforcement

In this section of the Interim Report, the Special Advisors review potential strategies to better enforce the *ESA*.

### 5.5.5.1 Inspections, Resources, and Implications of Changing Workplaces for Traditional Enforcement Approaches

Under the *ESA*, an Employment Standards Officer (“ESO”) may proactively attend at an employer’s place of business to ensure compliance with the act. However, given the Ministry’s limited resources, proactive inspections cover less than 1% of Ontario workplaces.

Many advocates argue proactive enforcement is more effective than a process that is complaints driven. They want the focus on workplaces with migrant and other vulnerable and precariously employed workers, and question the value of warning employers of upcoming blitz inspections (as opposed to surprise inspections).

Looking to the United States for possible solutions, the Special Advisors consider strategies designed to change employer behavior and improve compliance in sectors where non-compliance is most problematic. This would include industries that traditionally are heavy users of subcontracting, outsourcing and temp workers. The Special Advisors also consider the reallocation of resources so that not every complaint will be investigated – only those considered a priority.

### 5.5.5.2 Use of Settlements

The *ESA* permits parties to settle an *ESA* issue directly or with the assistance of an ESO. A Labour Relation Officer (“LRO”) can also facilitate settlement where a party has asked the OLRB to review the decision of an ESO. Historically, LROs have been successful at facilitating settlement of more than 80% of *ESA* reviews.

Employee advocates say employees are generally dissatisfied with the settlement process, primarily because they feel insufficiently knowledgeable, and unduly influenced. They suggest complainants be provided with government funded representation, and/or third parties be allowed to represent employees in the process.

### 5.5.5.3 Remedies and Penalties

In this section of the Interim Report, the Special Advisors review current enforcement mechanisms including:

- Voluntary Compliance
- Order to Pay Wages
- Order for Compensation
- Order for Reinstatement
- Director’s Order to Pay Wages
- Compliance Order
- Notice of Contravention
- Provincial Offences Act prosecution – Part I
- Provincial Offences Act prosecution – Part III

An employer can also be required to post in its workplace any notice an ESO considers appropriate or any report concerning the results of an investigation or inspection. The Ministry of Labour also publishes on its website the name of any person convicted under the *Provincial Offence Act* for contravening the *ESA*.

Employee advocates argue current remedies and enforcement are insufficient. They call for ‘penalties’ in addition to remedial orders. The question that remains is which body will have authority to penalize and also hear and decide resulting litigation.

There is also discussion whether government procurement contracts should be conditional on an employer having a clean *ESA* record.

### 5.5.6 Applications for Review

Generally speaking, a party that wishes to challenge an order issued by an ESO, or the refusal to issue an order, may apply to the OLRB which, in turn, is required to give the parties full opportunity to present their evidence and make submissions. The proceeding before the OLRB is referred to as *de novo* meaning the hearing is fresh, regardless of whatever happened before an ESO.

The Special Advisors are assessing means to:

- simplify the process
- include employee-representation (either through the Office of the Worker Advisor, *pro bono* legal services, or by providing a list of potential lawyers)
- place on the application the initial onus of demonstrating the ESO order was wrong

### 5.5.7 Collections

Employee advocates raise concern over the lack of an effective collections system, undermining compliance initiatives. They advocate for a review of the current system and options, including the authority to place a lien on real and personal property, and that past offenders be required to post a bond to cover future unpaid wages.

## Next Steps

The breadth and detail of the Interim Report demonstrates to Ontarians the importance of the Changing Workplaces Review. A product of more than 200 submissions and dozens of public consultations over several months, we fully expect the final report (anticipated to be submitted in December 2016) to include significant and fundamental changes to the *LRA* and *ESA*.

**Until then, the Interim Report is just that – interim. Parties are encouraged to make their voices heard to ensure the final report reflects the best possible outcome for Ontario.**

**The Interim Report suggests the voice of employers has not been as loud as it could or should be, and has invited additional feedback within the following deadlines:**

- **August 31, 2016 for submissions on PEL options.**
- **October 14, 2016 for submissions on all other issues and options.**

If you are interested in responding to the Interim Report, to ensure your comments, ideas and suggestions are heard, **contact a member of the Sherrard Kuzz team or provide your comments directly to the Special Advisors at:**

E-mail: CWR.SpecialAdvisors@ontario.ca  
Mail: Changing Workplaces Review, ELCPB  
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## CHAPTER 04 – LABOUR RELATIONS

### 4.2 Scope and Coverage of the LRA

#### 4.2.1 Coverage and Exclusions

**Options:**

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

#### 4.2.1.1 Agricultural and Horticultural Employees

**Options:**

1. Maintain the status quo by leaving the existing LRA exemption for agricultural and horticultural employees in place and maintaining the AEPA for agricultural workers.
2. Eliminate the LRA exclusions for agricultural and horticultural sectors under the LRA and repeal the AEPA for agricultural workers.
3. Enact new legislation, perhaps like the ALRA, for agricultural workers.
4. Include horticultural workers in any legislation covering agricultural workers.

#### 4.2.2 Related and Joint Employers

**Options:**

1. Maintain the status quo.
2. Add a separate general provision, in addition to section 1(4), providing that the OLRB may declare two or more entities to be “joint employers” and specify the criteria that should be applied (e.g., where there are associated or related

activities between two businesses and where a declaration is required in order for collective bargaining to be effective, without imposing a requirement that there be common control and direction between the businesses).

3. Amend or expand the related employer provision by:
  - a) providing that the OLRB may make a related employer declaration where an entity has the power to carry on associated or related activities with another entity under common control or direction, even if that power is not actually exercised; and
  - b) stating which factors should be considered when determining whether a declaration should be made.
4. Instead of a general joint employer provision, enact specific joint employer provisions such as the following:
  - a) regarding THAs and their client businesses:
    - i. create a rebuttable presumption that an entity directly benefitting from a worker's labour (the client business) is the employer of that worker for the purposes of the LRA; and
    - ii. declare that the client business and the THA are joint employers;
  - b) regarding franchises, create a model for certification that applies specifically to franchisors and franchisees (see Option 3 in section 4.6.1, Broader-based Bargaining Structures, below), and introduce a new joint employer provision whereby:
    - i. the franchisor and franchisee could be declared joint employers for all those working in the franchisee's operations; or,
    - ii. the franchisor and franchisee could be declared joint employers for all those working in the franchisee's operations only in certain industries or sectors where there are large numbers of vulnerable workers in precarious jobs.

## **4.3 Access to Collective Bargaining and Maintenance of Collective Bargaining**

### **4.3.1 The Certification Process**

#### **4.3.1.1 Card-based Certification**

#### **4.3.1.2 Electronic Membership Evidence**

***Options:***

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

#### **4.3.1.3 Access to Employee Lists**

***Options:***

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

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

***Options:***

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

#### **4.3.1.5 Remedial Certification**

***Options:***

1. Maintain the status quo.

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

#### **4.3.2 First Contract Arbitration**

***Options:***

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

#### **4.3.3 Successor Rights**

***Options:***

1. Maintain the status quo.
2. Expand coverage of the successor rights provision, similar to the law in place between 1993 and 1995, to apply, for example, to:
  - a) building services (e.g., security, cleaning and food services);
  - b) home care (e.g., housekeeping, personal support services); and
  - c) other services, possibly by a regulation-making authority.
3. Impose other requirements or prohibitions on the successor employer in a contract for service situation (e.g., provisions to maintain employment, employee remuneration, benefits and/or other terms of employment; a requirement that the union representing the employees under the former employer be provided with automatic access to the new employee list or other information).

#### **4.3.4 Consolidation of Bargaining Units**

***Options:***

1. Maintain the status quo.
2. Reintroduce a consolidation provision from the previous LRA where only one union is involved.
3. Introduce a consolidation provision with a narrow test (e.g., allowing it only in cases where the existing bargaining unit structure has been demonstrated to be no longer appropriate).
4. Introduce a consolidation provision with a test that is less restrictive than proving that the existing bargaining unit is no longer appropriate. This provision could be broad enough to allow for the federal labour relations board's previous practice under the Canada Labour Code, as it was prior to the incorporation of the amendments recommended by the Sims Task Force in Chapter 6 of "Seeking a Balance: Canada Labour Code, Part I" with respect to bargaining unit reviews.<sup>71</sup>
5. Amend section 114 of the LRA to provide the OLRB with the explicit general power to alter a bargaining unit in a certificate or in a collective agreement.

#### **4.4 The Bargaining Process**

##### **4.4.1 Replacement Workers**

1. Maintain the status quo.
2. Reintroduce a general prohibition on the use of replacement workers.
3. Adopt an approach similar to the Canada Labour Code, whereby the use of replacement workers would not be prohibited except if used for the "purpose of undermining a trade union's representational capacity."

##### **4.4.2 Right of Striking Employees to Return to Work**

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

***Options:***

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

#### **4.4.2.2 Refusal of Employers to Reinstate Employees Following a Legal Strike or Lock-out**

***Options:***

1. Maintain the status quo.
2. Provide for arbitration:
  - a) of any discipline or termination of an employee by an employer during the course of a legal strike or lock-out; or
  - b) of the refusal to reinstate an employee at the conclusion of a strike or lock-out.
3. As in Manitoba, provide that the refusal to reinstate an employee at the conclusion of a legal strike or lock-out is an unfair labour practice, unless the refusal was because the employee's conduct:
  - a) was related to the strike or lock-out;
  - b) resulted in a conviction for an offence under the Criminal Code (Canada); and
  - c) would, in the opinion of the OLRB, be just cause for dismissal of the employee even in the context of a strike or lock-out.
4. Adopt an approach similar to the LRA, as it was in 1993 to 1995, providing that at the end of a strike or lock-out:
  - a) the employer is required to reinstate each striking employee to the position he or she held when the strike began;
  - b) striking employees generally have a right to displace anyone who performed the work during the strike; and
  - c) if there is insufficient work, the employer is required to reinstate employees as work becomes available, based on seniority.

#### **4.4.3 Renewal Agreement Arbitration**

***Options:***

1. Maintain the status quo.
2. As in Manitoba, provide for access to arbitration after a specified time following the commencement of a strike or lock-out provided that:
  - a) certain conciliation and/or mediation steps have been followed;

- b) the applicant for interest arbitration has bargained in good faith; and
  - c) it appears that the parties are unlikely to reach a settlement.
3. Empower the OLRB to order interest arbitration as a remedy following a finding of bargaining in bad faith after the commencement of a strike or lock-out, provided that:
- a) certain conciliation and/or mediation steps have been followed;
  - b) the applicant for interest arbitration has bargained in good faith; and
  - c) it appears that the parties are unlikely to reach a settlement.
4. As in British Columbia, provide for a mediation-intensive dispute resolution process which does not involve interest arbitration or mediation/arbitration, unless agreed to by the parties, but does provide a number of tools to facilitate dispute resolution, including the making of recommendations by a mediator or fact finder.

## 4.5 Remedial Powers of the Ontario Labour Relations Board

### 4.5.1 Interim Orders and Expedited Hearings

#### ***Options:***

1. Maintain the status quo.
2. Implement one or more of the following:
  - a) restore the power of the OLRB to issue interim orders and decisions pursuant to section 16.1(1) of the Statutory Powers Procedure Act;
  - b) broaden the scope of the OLRB's remedial power by providing the OLRB, in cases of alleged unfair labour practices, with the ability to grant interim relief on "such terms as the Board considers appropriate";
  - c) eliminate the requirement that an applicant for interim relief prove that the relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives, and/or substitute less demanding standards;
  - d) eliminate statutory requirements that must be met by an applicant for interim relief and leave it to the OLRB to develop its own jurisprudence about when it will issue interim orders; and

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

#### **4.5.2 Just Cause Protection**

***Options:***

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

#### **4.5.3 Prosecutions and Penalties**

***Specific Options:***

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

### **4.6 Other Models**

#### **4.6.1 Broader-based Bargaining Structures**

***Options:***

***Introduction to Options***

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

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

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

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

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

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

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

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

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

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

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

### Summary of Options

1. Maintain the status quo.
2. Adopt a model that allows for certain standards to be negotiated and is then extended to all workplaces within a sector and within a particular geographic region, etc. This could be some form of the ISA model or variations on this approach that have been proposed in a very detailed way (as discussed above).
3. Adopt a model that would allow for certification of a unit or units of franchise operations of a single parent franchisor with accompanying franchisees; units could be initially single sites with accretions so that subsequent sites could be brought under the initial agreement automatically, or by some other mechanism.
4. Adopt a model that would allow for certification at a sectoral level, defined by industry and geography, and for the negotiation of a single multi-employer master agreement, allowing newly organized sites to attach to the sectoral agreement so that, over time, collective bargaining could expand within the sector, along the lines of the model proposed in British Columbia.
5. Adopt a model that would allow for multi-employer certification and bargaining in an entire appropriate sector and geographic area, as defined by the OLRB (e.g., all hotels in Windsor or all fast-food restaurants in North Bay). The model would be a master collective agreement that applied to each employer's separate place of business, like the British Columbia proposal, but organizing, voting, and bargaining would take place on a sectoral, multi-employer basis. Like the British Columbia proposal, this might perhaps apply only in industries where unionization has been historically difficult, for whatever reason, or where there are a large number of locations or a large number of small employers, and, perhaps only with the consent of the OLRB.

The following could be the technical details.

- a) A sectoral determination by the OLRB would precede any application for certification.
- b) To trigger a sectoral determination by the OLRB, itself a serious undertaking, a union (or council of unions), would have to demonstrate a serious intention and commitment to organize the sector, including a significant financial commitment.
- c) The OLRB would be required to define an appropriate sector, both by industry and geography, or could find that there was no appropriate sector. All interested parties could make representations on the appropriateness of the sector (e.g., all hotels in Windsor, or all fast-food outlets in North Bay).

- d) Employers in the sector would be required, at some stage of the sectoral proceedings, to produce employee lists to demonstrate the scope of the proposed sector and the union's apparent strength, or lack thereof.
  - e) A secret ballot vote and a *majority* of ballots cast (the current rule) would be required for certification.
  - f) Instead of the double majorities that could be required in the British Columbia model, this model would require only a single majority of employees because, as a result of the certification, all employers in the sector would be covered by the master agreement, whereas in the British Columbia-based proposal, almost by definition, there would be a non-union portion of the sector.
  - g) In the special case of an application for an entire sector in a large, multi-employer constituency, given the difficulties inherent<sup>99</sup> in determining an accurate constituency as of any given date and, therefore, whether a numerical threshold to trigger a vote has been met, the union(s) in this model would not be required to meet a numerical threshold to be entitled to a vote. Rather, to be entitled, the union(s) would be required to persuade the OLRB that it had significant and sufficient broad support in the sector. The union would have the obligation to make full, confidential, disclosure to the OLRB, as is required now, with respect to its membership evidence, including all of its information on the size of the unit, the number of employers, etc. Any effort to misrepresent the size of the unit could lead to the dismissal of the application.
  - h) Cards could be signed electronically, with the same safeguards now used by the OLRB for mailed membership evidence.
  - i) An OLRB-supervised secret ballot vote would take place electronically. Voters would "register," at the time they voted, listing their employer, work and home address, last hours worked, etc. The OLRB would have the authority and responsibility to quickly and administratively determine the eligibility of voters, including any status issues, and ensure that only eligible voters voted.
  - j) Such applications could only be brought at fixed intervals, and, if unsuccessful, could not be brought again, either by the same applicant or by any other applicant, for a period of one or two years.
  - k) If the union was certified, the OLRB would have the authority to accredit an employers' organization to represent the employers and to conduct the bargaining, directing that dues be paid from each employer on a pro-rata, per-employee basis.
6. Create an accreditation model that would allow for employer bargaining agencies in sectors and geographic areas defined by the OLRB (e.g., in industries like

hospitals, grocery stores, hotels, or nursing homes), either province-wide, if appropriate, or in smaller geographic areas. This model is intended for industries where unionization is now more widespread, but bargaining is fragmented. Employers could compel a union to bargain a master collective agreement on a sectoral basis through an employers' organization, and be certified by an accreditation-type of model, similar to the construction industry accreditation model. This might be desirable for employers in industries where unions decline to bargain on a sectoral basis, and where the union could otherwise take advantage of its size, vis-à-vis smaller or fragmented employers, to "whipsaw" and "leapfrog."

7. Create specific and unique models of bargaining for specific industries where the Wagner Act model is unlikely to be effective or appropriate because of the structure or history of the industry, (e.g., home care, domestic, agriculture, or horticulture workers, if these industries were included in the LRA).
8. Create a model of bargaining for freelancers, and/or dependent contractors, and/or artists based on the Status of the Artist Act model.
9. Apply the provisions of the LRA to the media industry as special provisions affecting artists and performers.

#### **4.6.2 Employee Voice**

##### ***Options:***

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

#### **4.7 Additional LRA Issues**

*Ability of Arbitrators to Extend Arbitration Time Limits*

*Conciliation Boards*

*Excluded Submission*

## CHAPTER 05 – EMPLOYMENT STANDARDS

### 5.2 Scope and Coverage of the ESA

#### 5.2.1 Definition of Employee

**Options:**

Misclassification of Employees

1. Maintain the status quo.
2. Increase education of workers and employers with respect to rights and obligations.
3. Focus proactive enforcement activities on the identification and rectification of cases of misclassification.
4. Provide in the ESA that in any case where there is a dispute about whether a person is an employee, the employer has the burden of proving that the person is not an employee covered by the ESA and/or has an obligation, similar to section 1(5) of the LRA in relation to related employers, to adduce all relevant evidence with regard to the matter.

Definition of Employee in the ESA

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

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

**Options:**

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

3. Create a joint employer test akin to the policy developed by the DOL in the US as outlined above.
4. Make franchisors liable for the employment standards violations of their franchisees:
  - a) in all circumstances;
  - b) where the franchisor takes an active role;
  - c) in certain industries; or
  - d) in no circumstances.
5. Repeal the “intent or effect” requirement in section 4 (the “related employer” provision).
6. Enact a remedy similar in principle to the oppression remedy set out in the OBCA, but make it applicable to employment standards violations. It would apply when companies are insolvent or when assets are unavailable from one company to satisfy penalties and orders made under the Act, and the principal or related persons set up a second company or business, or have transferred assets to a third or related person. (Section 248(2) of the OBCA defines oppression as an act or omission which effects or threatens to effect a result which is oppressive, unfairly prejudicial or unfairly disregards the interests of, among others, a creditor or security holder of a corporation. Bad faith could or could not be an element of the activity complained of. Under the OBCA a court has broad remedial authority to take action it seems fit when it finds an action is oppressive, or unfairly prejudicial or unfairly disregards the interests of a creditor. This remedy could be sought in court or before the OLRB).
7. Introduce a provision that would allow the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA.
8. Encourage best practices for ensuring compliance by subordinate employers through government leading by example.

### **5.2.3 Exemptions, Special Rules and General Process**

We outline below an approach to current exemptions by creating 3 categories:

1. exemptions where we may recommend elimination or alteration without further review beyond that which we will undertake in this review process;
2. exemptions that should continue without modification because they were approved pursuant to a policy framework for approving exemptions and special rules with appropriate consultation with affected stakeholders including employee

representatives (these are the SIRs that were put into regulations since 2005); and

3. exemptions that should be subject to further review in a new process (i.e., those exemptions not in categories 1 and 2; this category covers most of the current exemptions).

***Options:***

*Approach for Existing Exemptions*

As noted above, existing exemptions are divided into 3 categories.

1. Existing exemptions that might be recommended for elimination or variation without a further review (see below for a detailed discussion on these exemptions and potential options for each).

For category 1 exemptions, we ask for submissions on whether there are reasons to maintain, modify or eliminate such exclusions. Our preliminary view is that these exemptions need not be subject to a subsequent review. If there are reasons why these exemptions should be referred to a subsequent review process and not be dealt with as part of the Changing Workplace Review, we invite stakeholders to make submissions on this issue as well. These exemptions are:

- information technology professionals;
  - pharmacists;
  - managers and supervisors;
  - residential care workers;
  - residential building superintendents, janitors and caretakers;
  - special minimum wage rates for:
    - students under 18; and
    - liquor servers; and
  - student exemption from the “three-hour rule” (see description below).
2. Exemptions that we do not currently think warrant review and which should be maintained.

Category 2 exemptions are recent modifications (i.e., SIRs) created since 2005 in accordance with a policy framework and after a thorough consultative process involving stakeholder representation. Our preliminary view is that a current or

subsequent review to consider the modification or elimination of these exemptions is not warranted. We ask for submissions from stakeholders on whether there are reasons to review these recent special rules at this time. These exemptions are:

- public transit (2005);
  - mining and mineral exploration (2005);
  - live performances (2005);
  - film and television industry (2005);
  - automobile manufacturing (2006); and
  - ambulance services (2006).
3. Exemptions that should be reviewed in a new process.

Category 3 contains the remaining exemptions (see the end of section 5.2.3 for list of remaining exemptions) that we think should be reviewed using a transparent and consistent review process to determine whether an exemption is justifiable. For these exemptions, we seek submissions as to the proper process to be implemented for the review and assessment of the current exemptions as well as for the review of proposed new exemptions that may be proposed in the future. We have set out some options for such a review process below.

### ***Approaches for a New Process***

**Option 1:** Use the policy framework developed by the Ministry for the SIRs process described above and use the criteria developed by the Ministry in the SIRs process to evaluate the exemptions.

**Option 2:** Create a new statutory process to review exemptions with a view to making recommendations to the Minister for maintaining, amending or eliminating exemptions/special rules as follows:

- a review process would be initiated by the Ministry either on its own initiative or where the Ministry agrees with a request for a new exemption/special rule or a revision of an existing one;
- a sectoral, sub-sectoral or industry committee facilitated and chaired by a neutral person outside the Ministry would review the existing or any proposed new rules and make recommendations to the Minister;
- the Ministry's current policy framework could be maintained or revised, and it would govern the parameters of the work of all committees; or, the

statute would contain the criteria under which exemptions would be evaluated;

- the onus of showing that existing exemptions/special rules or new proposed ones meet the criteria would be on the proponents of the exemption;
- there would be representation from employers and employees –
  - there could be participation by unions in the sector, if any, and/or persons designated to represent employee interests; and
  - representatives of affected or related industries and interests could be invited to participate; for example, the grocery industry and consumer interests could be asked to participate in an agricultural committee;
- the committee would have the flexibility to conduct surveys or votes among employees and or employers, if appropriate;
- the Chair would seek and the Ministry fund, if appropriate, any needed independent expert advice as in the case of complex hours of work issues;
- the Ministry would provide the parties with all available estimates of the costs of maintaining and eliminating the exemption;
- the Chair of the Committee would try to fashion consensus recommendations, but would have the right to make recommendations to the Minister; and
- the government would consider the recommendations in making its final decision on whether to maintain, amend or eliminate the exemption.

**Option 3:** Create a new statutory process where the OLRB would have the authority to extend terms and conditions in a collective agreement to a sector.

Essentially this option is one where the Cabinet's power to enact terms and conditions of employment for an industry would be given to the OLRB:

- provide authority to the OLRB to define an industry and prescribe for that industry one or more terms or conditions of employment that would apply to employers and employees in the industry (union and non-union) through "sectoral orders";
- sectoral orders by the OLRB would be implemented through the formation of "Sectoral Standards Agreements", setting basic minimum conditions applied to all workplaces within an identified regional, occupation, or industrial labour market; and

- an application for a “Sectoral Standards Agreement” could be made by a trade union or group of trade unions, a Council of unions, an employer or group of employers.<sup>135</sup>

### ***Existing Exemptions – Category 1***

Existing exemptions that we might recommend for elimination or variation without a further review beyond the Changing Workplaces Review:

- information technology professionals (Issue 1);
- pharmacists (Issue 2);
- managers and supervisors (Issue 3);
- residential care workers (Issue 4);
- residential building superintendents, janitors and caretakers (Issue 5);
- special minimum wage rates for:
  - students under 18 (Issue 6a); and
  - liquor servers (Issue 6b); and
- student exemption from the “three-hour rule” (Issue 7).

### **Issue 1 – Information Technology Professionals**

#### ***Options:***

1. Maintain the status quo.
2. Remove the exemption from overtime pay, or create a different rule.
3. Remove the exemption from hours of work and overtime pay, or create some different rule.
4. Amend the definition to try to make its scope clearer.

### **Issue 2 – Pharmacists**

#### ***Options:***

1. Maintain the status quo.
2. Remove the exemption from some of the provisions while retaining others.
3. Remove all exemptions.

### **Issue 3 – Managers and Supervisors**

#### ***Options:***

1. Maintain the status quo.
2. Define the category generally by looking at the primary purpose of the job and not how often or in what circumstances non-managerial or non-supervisory work is performed.
3. Include in the definition of managers and supervisors those who:
  - a) earn more than a certain amount in wages/salary; and/or
  - b) managers only and not supervisors; and/or
  - c) exempt only supervisors and managers who regularly direct the work of two or more full-time employees or their equivalent, or some other number (and the employee must have the authority to hire or fire other employees, or have an effective power of recommendation with respect to hiring, firing, advancement, promotion or any other change of status); or
  - d) the employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; or
  - e) the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.

### **Issue 4 – Residential Care Workers**

#### ***Options:***

1. Maintain the status quo.
2. Remove the exemption and special rules.

### **Issue 5 – Residential Building Superintendents, Janitors and Caretakers**

#### ***Options:***

1. Maintain the status quo.
2. Remove or reform the exemption.

### **Issue 6a – Minimum Wage Differential for Students Under 18**

#### ***Options:***

1. Maintain the status quo.
2. Eliminate the lower rate.

**Issue 6b – Minimum Wage Differential for Liquor Servers**

***Options:***

1. Maintain the status quo.
2. Eliminate the lower rate.

**Issue 7 – Student Exemption from the “Three-hour Rule”**

***Options:***

1. Maintain the status quo.
2. Remove the exemption.

**ESA Exemptions That Should be Reviewed Under a New Process – Category 3**

1. Architects
2. Chiropodists
3. Chiropractors
4. Dentists
5. Engineers
6. Lawyers
7. Massage Therapists
8. Naturopaths
9. Physicians and Surgeons
10. Physiotherapists
11. Psychologists
12. Public Accountants
13. Surveyors
14. Teachers

15. Veterinarians
16. Students In-Training in Professions
17. Ambulance Drivers, Ambulance Driver's Helper or First-aid Attendant on an Ambulance
18. Canning, Processing, Packing or Distribution of Fresh Fruit or Vegetables (seasonal)
19. Continuous Operation Employees (Other than Retail Store Employees)
20. Domestic Workers (Employed by the Householder)
21. Commissioned Automobile Salesperson
22. Homemakers
23. Embalmers and Funeral Directors
24. Firefighters
25. Fishers – Commercial fishing
26. Highway Transport Truck Drivers ("For Hire" Businesses)
27. Local Cartage Drivers and Driver's Helpers
28. Retail Business Employees
29. Hospital Employees
30. Hospitality Industry Employees (hotels, restaurants, taverns, etc.)
31. Hunting and Fishing Guides
32. Ontario Government and Ontario Government Agency Employees
33. Real Estate Salespersons and Brokers
34. Construction Employees (Other than Road Building and Sewer and Watermain Construction)
35. Road Construction
36. Sewer and Watermain Construction
37. Road Construction Sites – Work that is Not Construction Work

38. Road Maintenance – Work that is Not Maintenance Work
39. Sewer and Watermain Construction Site Guarding
40. Road Maintenance
41. Sewer and Watermain Maintenance
42. Maintenance (Other than Maintenance of Roads, Structures Related to Roads, Parking Lots and Sewers and Watermains)
43. Ship Building and Repair
44. Student Employee at Children's Camp
45. Student Employee in Recreational Program Operated by a Charity
46. Student Employee Providing Instruction or Supervision of Children
47. Swimming Pool Installation and Maintenance
48. Taxi Cab Drivers
49. Travelling Salespersons (Commissioned)

Agricultural Exemptions:

50. Farm Employees – Primary Production
51. Harvesters of Fruit, Vegetables or Tobacco
52. Flower Growing
53. Growing Trees and Shrubs
54. Growing, Transporting and Laying Sod
55. Horse Boarding and Breeding
56. Keeping of Furbearing Mammals
57. Landscape Gardeners
58. Canning, Processing, Packing or Distribution of Fresh Fruit or Vegetables (seasonal)

## 5.2.4 Exclusions

### 5.2.4.1 Interns/Trainees

#### **Options:**

1. Maintain the status quo.
2. Eliminate the trainee exclusion.
3. Provide that intern/trainee exemption is permitted only if a plan is filed by the employer and approved by the Director as complying with the Act and with reporting obligations as determined by the Director.

### 5.2.4.2 Crown Employees

#### **Options:**

1. Maintain the status quo.
2. Remove the exception.
3. Narrow the exception to only certain provisions such as hours of work and overtime pay.

## 5.3 Standards

### 5.3.1 Hours of Work and Overtime Pay

#### Summary of Current Law for Hours of Work and Overtime Pay

- maximum daily hours: 8 hours, or the number of hours in an established regular workday;
- maximum weekly hours: 48 hours;
- need written employee consent to work more daily or weekly hours;
- also need ministry director approval to work more than 48 weekly hours;
- compulsory daily rest period of at least 11 hours, meaning an effective limit on workdays of 12 hours (no exceptions possible except by formal exemption);
- 8 hour rest required between two shifts of more than 13 hours combined duration;

- weekly/bi-weekly rest periods: 24 consecutive hours off per week or 48 consecutive hours off per 2 weeks;
- mandatory 30-minute eating period for every 5 hours worked;
- overtime pay after 44 hours at 1.5 times the regular rate; and
- overtime averaging permitted with employee written consent and ministry director approval.

**Options:**

1. Maintain status quo.
2. Eliminate the requirement for employee written consent to work longer than the daily or weekly maximums but spell out in the legislation the specific circumstances in which excess daily hours can be refused.

For example, in *Fairness at Work*, Professor Arthurs effectively recommended that employers should be able to require employees to work, without consent, up to 12 hours a day or 48 in a week (with exceptions where they could be required to work even longer) but that there should be an absolute right to refuse where: the employee has unavoidable and significant family-related commitments; scheduled educational commitments or a scheduling conflict with other employment (part-time workers only). This change would mean employers could require employees to work excess daily hours without consent as set out above.

3. Maintain the status quo employee consent requirement, but:
  - a) in industries or businesses where excess hours are required to meet production needs as, for example, in the case of “just-in-time” operations, the need for individual consent would be replaced by collective secret ballot consent of a majority of all those required to work excess hours; and
  - b) employees required to work excess hours as a result of (a), would still have a right to refuse if the employee has unavoidable and significant family-related commitments; scheduled educational commitments or a scheduling conflict with other employment (part-time workers only); or protected grounds under the Human Rights Code such as disability. This “right to refuse” would also apply to unionized employees.
4. The same as option 3, except that instead of a blanket legislative provision as in (3a), where a sector finds it difficult to comply with the daily hours provisions, exemptions could be contemplated in a new exemption process, the possibility of which is canvassed in section 5.2.3.
5. Eliminate daily maximum hours, but maintain the daily rest period requirement of 11 hours, and the weekly maximum hours of work of 48.

6. Eliminate or decrease the daily rest period below 11 hours which would effectively increase the potential length of the working day above 12 hours.
7. Enact a legislative provision similar to one in British Columbia that no one, including those who have a formal exemption from the hours of work provisions, can be required to work so many hours that their health is endangered.<sup>159</sup>
8. Codify that employee written agreements can be electronic for excess hours of work approvals and overtime averaging.
9. Eliminate requirement for Ministry approval for excess hours (i.e., only above 48 hours in a week). Maintain requirement for employee written agreement.
10. Eliminate requirement for Ministry approval for excess weekly hours between 48 and 60 hours. Maintain requirement for Ministry approval for excess hours beyond 60 hours only. Maintain requirement for employee written agreement.
11. Reduce weekly overtime pay trigger from 44 to 40 hours.
12. Limit overtime averaging agreements – impose a cap on overtime averaging (e.g., allow averaging for up to a 2- or 4-week or some other multi-week period). Maintain requirement for employee written agreement. Ministry approval could (or could not) be required.

### 5.3.2 Scheduling

#### **Options:**

1. Maintain the status quo.
2. Expand or amend existing reporting pay rights in ESA:
  - a) increase minimum hours of reporting pay from current 3 hours at minimum wage to 3 hours at regular pay;
  - b) increase minimum hours of reporting pay from 3 hours at minimum wage to 4 hours at regular pay; or
  - c) increase minimum hours of reporting pay from 3 hours at minimum wage to lesser of 3 or 4 hours at regular rate or length of cancelled shift.
3. Provide employees job-protected right to request changes to schedule at certain intervals, for example, twice per year. The employer would be required to consider such requests.
4. Require all employers to provide advance notice in setting and changing work schedules to make them more predictable (e.g., San Francisco Retail Workers Bill of Rights). This may include (but is not limited) to:

- require employers to post employee schedules in advance (e.g., at least 2 weeks);
- require employers to pay employees more for last-minute changes to employees' schedules (e.g., employees receive the equivalent of 1 hour's pay if the schedule is changed with less than 2 days' notice and 4 hours' pay for schedule changes made with less than 24 hours' notice);
- require employers to offer additional hours of work to existing part-time employees before hiring new employees;
- require employers to provide part-timers and full-timers equal access to scheduling and time-off requests;
- require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted.

5. Sectoral regulation of scheduling – encourage sectors to come up with own arrangements:

Recognizing the need for predictable and stable schedules for employees in certain sectors, and the variability of scheduling requirements, the government would adopt a sectoral approach to scheduling as follows:

- the government would be given the legislative authority to deal with scheduling issues, including by sector;
- the policy of the government would be to strongly encourage sectors which required regulation to come up with their own scheduling regimes but within overall policy guidelines of best practices set by the Ministry;
- to develop the overall policy guidelines for scheduling, the government would appoint an advisory committee, comprising representatives from different sectors:
  - representatives of employers;
  - representatives of employees;
  - individuals with expertise in scheduling; and
  - others who may facilitate an educated discussion of the issues (e.g., representatives of community service agencies and academics with relevant expertise).

The advisory committee would be chaired and discussions facilitated by a neutral person from outside the Ministry of Labour. Once the guidelines were in place, sectoral committee structured as described in the exemptions section of this

report (see [section 5.2.3](#)) could be established as required to advise the Minister on the scheduling issues in that sector.

### 5.3.3 Public Holidays and Paid Vacation

#### 5.3.3.1 Public Holidays

**Options:**

1. Maintain status quo – maintain the current public holiday pay calculations – i.e., total amount of regular wages earned and vacation pay payable to the employee in the 4 work weeks before the work week in which the public holiday occurred, divided by 20.
2. Revert to the former ESA’s public holiday pay calculation –
  - Employees whose work hours do not vary: regular wages for the day;
  - Employees whose work hours differ from day to day/week-to-week (i.e., there is no set schedule of hours for each day of the week):
    - the average of the employee’s daily earnings (excluding overtime pay) over a period of 13 work weeks preceding the public holiday; or
    - the method set out under a collective agreement.
3. Combined calculation – revert to the former ESA’s public holiday pay calculations for full-time employees and commission employees and maintain the current ESA’s formula for part-time and casual employees –
  - Full-time and commission employees: regular wages for the day;
  - Part-time and casual employees: total amount of regular wages earned and vacation pay payable to the employee in the 4 work weeks before the work week in which the public holiday occurred, divided by 20.
4. Set a specified percentage for public holiday pay – e.g., employees receive 3.7% of wages earned each pay period. This would be the equivalent of wages for 9 regular working days to reflect the 9 public holidays in a year.<sup>175</sup> Under this option public holiday pay would essentially be “pre-paid” throughout the year – employees would not receive public holiday pay on each individual holiday and existing qualifying criteria would no longer apply.

Employees who worked on a public holiday would still be entitled to premium pay (or a substitute day off).

### 5.3.3.2 Paid Vacation

#### **Options:**

1. Maintain the status quo of 2 weeks.
2. Increase entitlement to 3 weeks after a certain period of employment with the same employer – either 5 or 8 years.
3. Increase entitlement to 3 weeks for all employees.

### 5.3.4 Personal Emergency Leave

#### **Options:**

1. Maintain the status quo.
2. Remove the 50 employee threshold for PEL.
3. Break down the 10-day entitlement into separate leave categories with separate entitlements for each category but with the aggregate still amounting to 10 days in each calendar year. For example, a specified number of days for each of personal illness/injury, bereavement, dependent illness/injury, or dependent emergency leave but the total days of leave still adding up to 10.
4. A combination of options 2 and 3 but maintaining different entitlements for different sized employers.

### 5.3.5 Paid Sick Days

#### **Options:**

1. Maintain the status quo.
2. Introduce paid sick leave –
  - a) Paid sick leave could:
    - i. be a set number of days (for example: every employee would be entitled to a fixed number of paid sick days per year); or
    - ii. have to be earned by an employee at a rate of 1 hour for every 35 hours worked with a cap of a set number of days;
  - b) Permit a qualifying period before an employee is entitled to sick leave, and/or permit a waiting period of a number of days away before an employee can be paid for sick days;
  - c) Require employers to pay for doctor's notes if they require them.

### 5.3.6 Other Leaves of Absence

#### **Options:**

1. Maintain the status quo.
2. Monitor other jurisdictions and the federal government's approach to leaves and make changes as appropriate (e.g., to family medical, pregnancy and parental and family caregiver leave).
3. Introduce new leaves:
  - a) Paid Domestic or Sexual Violence Leave<sup>183</sup> for a number of days followed by a period of unpaid leave;
  - b) Unpaid Domestic or Sexual Violence Leave;
  - c) Death of a Child Leave, either through:
    - i. expansion of the existing Crime-related Child Death or Disappearance Leave or Critically Ill Child Care Leave; or
    - ii. creation of a separate leave of up to 52 weeks for the death of a child.<sup>184</sup>
4. Review the ESA leave provisions in an effort to consolidate some of the leaves.

### 5.3.7 Part-time and Temporary Work – Wages and Benefits

#### **Options:**

1. Maintain the status quo.
2. Require part-time, temporary and casual employees be paid the same as full-time employees in the same establishment unless differences in qualifications, skills, seniority or experience or other objective factors justify the difference.
3. Option 2 could apply only to pay or to pay and benefits, and if to benefits, then with the ability to have thresholds for entitlements for certain benefits if pro rata treatment was not feasible.
4. Options 2 or 3 could be limited to lower-wage employees as in Quebec where such requirements are restricted to those earning less than twice the minimum wage.
5. Limit the number or total duration of limited term contracts.

### **5.3.8 Termination, Severance and Just Cause**

#### **5.3.8.1 Termination of Employment**

***Options:***

1. Maintain the status quo.
2. Change the 8-week cap on notice of termination either down or up.
3. Eliminate the 3-month eligibility requirement.
4. For employees with recurring periods of employment, require employers to provide notice of termination based on the total length of an employee's employment (i.e., add separate periods of employment as is done for severance pay). For example, if an employer dismisses a seasonal employee during the season, the employee could be entitled to notice based on his/her entire period of employment (not just the period worked that season).
5. Require employees to provide notice of their termination of employment.

#### **5.3.8.2 Severance Pay**

***Options:***

1. Maintain status quo.
2. Reduce or eliminate the 50 employee threshold.
3. Reduce or eliminate the payroll threshold.
4. Reduce or eliminate the 5-year condition for entitlement to severance pay.
5. Increase or eliminate the 26-week cap.
6. Clarify whether payroll outside Ontario is included in the calculation of the \$2.5 million threshold.

#### **5.3.8.3 Just Cause**

***Options:***

1. Maintain the status quo.
2. Implement just cause protection for TFWs together with an expedited adjudication to hear unjust dismissal cases.
3. Provide just cause protection (adjudication) for all employees covered by the ESA.

### 5.3.9 Temporary Help Agencies

#### **Options:**

(Note: See Chapter 4 for options in the labour relations context).

1. Maintain the status quo.
2. Expand client responsibility:
  - a) expand joint and several liability to clients for all violations – e.g., termination and severance, and non-monetary violations (e.g., hours of work or leaves of absence);
  - b) make the client the employer of record for some or all employment standards (i.e., client, agency, or make both the client and the THA joint employers).
3. Same wages for same/similar work:
  - a) provide the same pay to an assignment worker who performs substantially similar work to workers directly employed by the client unless:
    - i. there are objective factors which independently justify the differential; or
    - ii. the agency pays the worker in between assignments as in the EU; or
    - iii. there is a collective agreement exception, as in the EU; or
    - iv. the different treatment is for a limited period of time, as in the UK (for example, 3 months).
4. Regarding mark-up (i.e., the difference between what the client company pays for the assignment worker and the wage the agency pays the assignment worker):
  - a) require disclosure of mark-up to assignment worker;
  - b) limit the amount of the mark-up.<sup>243</sup>
5. Reduce barriers to clients directly hiring employees by changing fees agencies can charge clients:
  - a) reduce period (e.g., from 6 to 3 months);
  - b) eliminate agency ability to charge fee to clients for direct hire.

6. Limit how much clients may use assignment workers (e.g., establish a cap of 20% on the proportion of client's workforce that can be agency workers).<sup>244</sup>
7. Promote transition to direct employment with client:
  - a) establish limits or caps on the length of placement at a client (i.e., restrict length of time assignment workers may be assigned to one particular client to 3, 6, or 12 months, for example);
  - b) deem assignment workers to be permanent employee of the client after a set amount of time or require clients to consider directly hiring assignment worker after a set amount of time;
  - c) require that assignment workers be notified of all permanent jobs in the client's operation and advised how to apply; mandate consideration of applications from these workers by the client.
8. Expand Termination and Severance pay provisions to (individual) assignments:
  - a) require that agencies compensate assignment workers termination and/or severance pay (as owed) based on individual assignment length versus the duration of employment with agency (as is currently done). For example, if an assignment ends prematurely and without adequate notice provided but has been continuous for over 3 months or more, the assignment worker would be owed termination pay;
  - b) require that clients compensate assignment workers termination and/or severance pay (as owed) based on the length of assignment with that client. Assignment workers would continue to be eligible for separate termination and severance if their relationship with agency is terminated.
9. License THAs<sup>245</sup> or legislate new standards of conduct (i.e., code of ethics for THAs).

## 5.4 Other Standards and Requirements

### 5.4.1 Greater Right or Benefit

#### **Options:**

1. Maintain the status quo.
2. Allow employers and employees to contract out of the ESA based on a comparison of all the minimum standards against the full terms and conditions of employment in order to determine whether the employer has met the overall objectives of the Act.

## 5.4.2 Written Agreements Between Employers and Employees to Have Alternate Standards Apply

### *Options:*

1. Maintain the status quo.
2. Amend the ESA to reflect the Ministry of Labour ES Program policy that electronic agreements can constitute an agreement in writing.
3. Amend the ESA to remove some or all of the ability to have written agreements.

## 5.4.3 Pay Periods

### *Options:*

1. Maintain the status quo.
2. Amend the ESA to require employers to harmonize their pay periods with their work weeks by, for example, permitting only weekly or biweekly pay periods, and requiring the start and end days of the pay period to correspond to the employer's work week.
3. Extend, either as-is or with modifications, the application of the special rule that applies only to the commission automobile sales sector to other sectors in which wages are earned by commission (e.g., appliance, electronics, furniture sales).

## 5.5 Enforcement and Administration

### 5.5.1 Introduction and Overview

Accordingly, in considering our recommendations, we need to assess the existing system and try to address in a significant way all the causes of the current state of non-compliance. We will consider the following:

- whether to recommend measures that contribute to education and knowledge by both employers and employees of rights and obligations in the workplace;
- whether to recommend changes that remove or reduce barriers to complainants;
- what can be done to try to deal with the fear of reprisals by providing speedy and effective adjudication of reprisal claims;
- how to provide greater access to justice for employees and employers;

- the desirability of providing for greater deterrence for employers who do not comply with the ESA; and
- the need to find more efficient and effective ways to collect monies owing to employees.

Finally, it is necessary to consider a new strategic approach to enforcement because of many fundamental changes in the workplace. There are many employees in precarious jobs whose basic employment rights are being denied, at the same time as there are limited government resources. Below we explore some dimensions of a strategic shift.

#### **5.5.1.1 Academic Reviews of the Enforcement Regime**

#### **5.5.1.2 Overview of the Employment Standards Enforcement and Administration**

### **5.5.2 Education and Awareness Programs**

It is clear that the Act could be simplified and a variety of new and better ways found to communicate and to increase awareness, knowledge and understanding of workplace rights and obligations and to make such information accessible to all Ontarians. We welcome specific ideas in this regard that anyone may wish to advance.

### **5.5.3 Creating a Culture of Compliance**

#### ***Options:***

1. Implement an ESA Committee, as an expansion of the Joint Health and Safety Committee.

An Employment Standards compliance IRS could be accomplished by expanding the jurisdiction of existing joint health and safety committees and representatives (a committee is generally not required in small workplaces with fewer than 20 workers; a workplace representative is generally required only in workplaces with 6 to 19 workers):

- to give them authority to deal with ESA matters; or
- to have other committees/representatives appointed in the workplace with jurisdiction to deal with ESA compliance.

It would not be necessary for every member of a health and safety committee to take on responsibility for both health and safety matters as well as ESA matters as some members could be added to deal only with ESA matters. ESA training would have to be made available to committee members and representatives that deal with ESA matters.

Unlike health and safety committees, there would be no obvious need for an ESA Committee in unionized workplaces as the union already has the responsibility to deal with ESA issues and to monitor compliance. Accordingly it would not appear to be necessary to have an internal ESA responsibility system in unionized workplaces.

The fundamental obligations of the employer would be:

- to conduct a simplified self-audit developed and prescribed by the Ministry, to check that the employer is complying with the ESA; and
- to meet with the committee/representative and review the employer's compliance audit.

A copy of the compliance and confirmation of the meeting with the committee/representative may be required to be sent to the Ministry.

Conducting the simplified audit and meeting with the committee/representative should mean the employer would not only be aware of the requirements of the Act but also review compliance with the representative or the committee. This would raise not only awareness of rights and obligations but also compliance.

Two possible models for the ESA Committee – a basic model and an enhanced model – are set out for discussion.

a) Basic Model:

Under this model, the basic requirement of the committee/representative would be to meet with the employer to receive and review the employer's compliance audit.

In addition, if the employee committee members/representative requested that the employer address ESA issues or complaints, the employer would be obligated to do so, but the committee would have no on-going duty to monitor compliance or to investigate any alleged violations discovered by them or brought to their attention.

b) Enhanced Model:

Under an enhanced model, in addition to the requirement to review with the employer its compliance audit, the committee/representatives would have an on-going responsibility to promote awareness of – and compliance with – the ESA.

Committees/representatives would be authorized under the Act to look into any ESA matter identified by them, the employer or by any employee(s) and have the right to be provided by the employer with all

information necessary to establish whether there is compliance with the ESA.

The committees/representatives would have an on-going duty to monitor compliance, to meet regularly with the employer, to communicate to employees and to look into any alleged violations discovered by them or brought to their attention.

2. Require employers to conduct an annual self-audit on select standards with an accompanying employee debrief.

Pursuant to this option, employers would be required to audit compliance with select standards identified by the Ministry (e.g., the Ministry may select 1, 2 or 3 standards per year). These standards would be announced to employers and employees in advance with targeted communications and education. To promote accountability and awareness, the results of these audits would be shared with all employees.

## 5.5.4 Reducing Barriers to Making Claims

### 5.5.4.1 Initiating the Claim

#### ***Options:***

1. Maintain the status quo with a general requirement to first raise the issue with employers but at the same time maintain the existing policy exceptions and maintain current approach of accepting anonymous information that is assessed and potentially triggers a proactive inspection.
2. Remove the ESA provision allowing the Director to require that an employee must first contact the employer before being permitted to make a complaint to the Ministry.
3. Allow anonymous claims, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.
4. Do not allow anonymous complaints, but protect confidentiality of the complainant, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.
5. Allow third parties to file claims on behalf of an employee or group of employees, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.

#### **5.5.4.2 Reprisals**

***Options:***

1. Maintain the status quo.
2. Require ESOs to investigate and decide reprisal claims expeditiously where there has been a termination of employment (and other urgent cases such as those involving an alleged failure to reinstate an employee after a leave).
3. Require the OLRB to hear applications for review of decisions in reprisal on an expedited basis if the employee seeks reinstatement.

#### **5.5.5 Strategic Enforcement**

Strategic enforcement is increasingly important when the workplace environment is becoming more complex and governments with limited resources are faced with high public expectations. In this section we will canvass different strategies for enforcing the ESA.

##### **5.5.5.1 Inspections, Resources, and Implications of Changing Workplaces for Traditional Enforcement Approaches**

***Options:***

1. Maintain the status quo.
2. Focus inspections in workplaces where “misclassification” issues are present, and include that issue as part of the inspection.
3. Increase inspections in workplaces where migrant and other vulnerable and precarious workers are employed.
4. Cease giving advance notice of targeted blitz inspections.
5. Adopt systems that prioritize complaints and investigate accordingly.
6. Adopt other options for expediting investigation and/or resolution of complaints.
7. Develop other strategic enforcement options.

##### **5.5.5.2 Use of Settlements**

***Options:***

1. Maintain the status quo.
2. In addition to the current requirement that all settlements be in writing, provide that they be subsequently validated by the employee in order to be binding. For

example, provide that a settlement is binding only if, within a defined period after entering into the settlement, the employee provides written confirmation of her or his willingness to settle on the terms agreed to and acknowledges having had an opportunity to seek independent advice.

3. Have more legal or paralegal assistance for employees in the settlement process at the OLRB as set out below in section 5.5.6.

### **5.5.5.3 Remedies and Penalties**

#### ***Options:***

1. Maintain the status quo.
2. Increase the use of Part III prosecutions under the POA particularly for repeat or intentional violators and where there is non-payment of an Order.
3. Increase the frequency of use of NOCs by the ES Program. This could be supported by:
  - a) requiring employers to pay an amount equal to the administrative monetary penalty into trust in order to have a NOC reviewed by the OLRB;
  - b) removing the “reverse onus” provision that applies to the Director of Employment Standards when a NOC is being reviewed at the OLRB.
4. Require employers to pay a financial penalty as liquidated damages to the employee whose rights it has contravened, designed to compensate for costs incurred because of the failure to pay (i.e., borrowing costs), in a specified amount or an amount that is equal to or double the amount of unpaid wages and a set amount for non-monetary contraventions.
5. Increase the dollar value of NOCs.
6. Increase the administrative fee payable when a restitution order is made, to include the costs of investigations and inspections.
7. Use the existing authority of officers to require employers to post notices in the workplace where contraventions are found in claim investigations.

#### **Interest**

8. Have the Director of Employment Standards set interest rates pursuant to the authority to do so in section 88(5) so that interest can be awarded in the circumstances currently allowed for.
9. Amend the Act to allow employers to be required to pay interest on unpaid wages.

Other Options (as discussed below):

10. Make access to government procurement contracts conditional on a clean ESA record.
11. Grant the OLRB jurisdiction to impose administrative monetary penalties.

Since compliance is an important public policy objective, it has been suggested that employers who have a record of contravention of the ESA should be denied the ability to bid on government contracts. It is argued that such a policy would ensure that non-compliant employers are not “rewarded” and that bidders do not build non-compliance into costing estimates. There has been little discussion about this option. Should stale-dated records of non-compliance always disqualify an employer? Should inadvertent non-compliance by an employer who has quickly remedied any issue of non-compliance operate as a disqualifier? There may be many questions that require thoughtful consideration before any policy is recommended. We welcome comments from stakeholders.

As a result of some of the submissions received, there have been discussions about the advisability of giving the OLRB jurisdiction to impose, where appropriate, significant administrative penalties on non-compliant employers. This would be in addition to other remedial authority, for example, the authority to make orders to compensate employees where violations are shown to have occurred and to issue prospective compliance orders.

One of the advantages of giving the OLRB such jurisdiction would be that the Board could – over time – develop consistent jurisprudence and clearly articulate circumstances where non-compliance may result in an administrative monetary penalty against a non-compliant party as well as other remedies to rectify the wrongdoing. This would not only allow the thoughtful and reflective development of jurisprudence by the tribunal with the relevant expertise but also the imposition of administrative monetary penalties in appropriate cases would act as a significant deterrent to all employers as well as providing a penalty for non-compliance to a particular employer.

It may not be prudent or appropriate to give the OLRB jurisdiction to impose administrative monetary penalties in litigation between private parties. The imposition of an administrative monetary penalty would then be seen as an outcome that should be the result of state action and in the public interest. Therefore, we have been considering a model in which complaints could be initiated directly by the Ministry of Labour or by the MAG against a named respondent or respondents where an administrative monetary penalty is one of the remedies sought. Some office, perhaps a Director of Enforcement, would be given responsibility to determine when to initiate a case in which an administrative monetary penalty is sought and to take carriage of such cases as the applicant in the proceedings.

With thousands of contraventions found every year, it is impractical for a Director of Enforcement to have carriage of each complaint that appears meritorious. If a Director

of Enforcement were given the authority to have carriage of and to take cases directly to the OLRB, the Director could limit the cases taken on to those where, after receiving advice from the Director of Employment Standards, he/she determines that there is a public policy interest in achieving an outcome that would better reflect the seriousness of the violation(s) alleged, for example – where after an investigation:

- it appears that there are reasonable and probable grounds to believe a serious reprisal has occurred; or
- in any other case where the Director of Enforcement determines it is appropriate and advisable to proceed directly to the OLRB (for example, where there are multiple violations disclosed either by an ESO investigation or by an inspection or an audit or where the employer has been found to have violated the ESA on previous occasions).

An employer or other respondent would know in advance the potential risks arising from a Ministry initiated complaint. If the Director of Enforcement were going to seek an administrative monetary penalty over and above a remedy for the claimant(s) or other employees whose rights have been violated, the respondent would be advised not only of the details of the alleged violations but also of the amount of the administrative monetary penalty that is being sought by the Director. At any hearing, the burden of proof would be on the Ministry.

The current complaints driven process is essentially a two-party process with the complainant and a respondent employer/corporate director being the parties. With some exceptions, the parties are therefore in a position to resolve their own litigation. A settlement with respect to one or more employees should not bar the Director from assuming carriage of a case and taking it to the OLRB to seek an administrative monetary penalty and/or compensation for employees with whom there is no settlement and for whom no complaint has been made – for example compensation for others if violations are uncovered during an inspection or during the investigation of an individual claim. In a process where the Director of Enforcement decided to take carriage of a complaint or to initiate a complaint, the employee claimant(s) would not be responsible for preparing the case or for taking the matter to a hearing before the OLRB. Carriage of the case would be the responsibility of the Director.

A complaint initiated by the Director of Enforcement would not – and should not – preclude a settlement agreement between the Director and the employer on the question of remedy for adversely affected individuals and on the question of the administrative penalty – the latter perhaps subject to the approval of the OLRB. The Director will be in the best position to assess the strengths and weaknesses of the case, to assess how best to serve the public interest and to take into account the views and the rights of adversely affected employees all of which would – of necessity – be taken into account by the Director of Enforcement in deciding whether and on what terms to settle. One would assume that – as a matter of policy – counsel acting on behalf of the Director of Enforcement would do his/her best to ensure that the claimants received

what they ought to receive based on the proper application and interpretation of the ESA.

Giving the OLRB jurisdiction to impose monetary sanctions for violation of employment standards law would not only underscore the important public policy objectives of compliance, but would also act as a deterrent to respondents and others from engaging in future conduct that violates the ESA.

Other tribunals have statutory authority to impose administrative monetary penalties. The Securities Commission, if in its opinion it is in the public interest to do so, may make an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply with Ontario securities law (see section 127(1)(9) of the Securities Act). The Securities Commission also has jurisdiction in appropriate cases, after conducting a hearing, to order a respondent to pay the cost of the investigation and the cost of the hearing incurred by the Commission.

Finally, the Securities Act provides that revenue generated from the exercise of a power conferred or a duty imposed on the Commission does not form part of the Consolidated Revenue Fund but can be used for various purposes including: for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets. In *Rowan v. Ontario (Securities Commission)*, 110 O.R. (3d) 492, 350 D.L.R. (4th) 157, at para. 52, the Court of Appeal approved the following statement of the Commission:

*In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than “the cost of doing business”. In the current securities regulation and today’s capital markets context, a \$1,000,000 administrative penalty is not prima facie penal.*

This is language that may resonate with others trying to create a workplace environment in which compliance is the norm and non-compliance is the exception. Unfortunately, non-compliance with the ESA currently affects thousands of Ontarians and is a significant societal problem. Giving the OLRB jurisdiction to impose monetary penalties may have the desired effect and be, as the Securities Commission stated, “appropriate legislative recognition of the need to impose sanctions that are more than the cost of doing business.”

If the OLRB were to be given an expanded jurisdiction to impose significant monetary sanctions up to \$100,000 per infraction, there is also reason to consider giving the OLRB jurisdiction to order an unsuccessful respondent to pay the cost of the investigation and the costs of the hearing incurred by Director of Enforcement. Similarly, it may be prudent to consider stipulating that revenue generated from the exercise of a

power conferred or a duty imposed on the OLRB does not form part of the Consolidated Revenue Fund but could be used for various purposes including:

- paying any outstanding orders against the respondent;
- paying unpaid wages to any other employee of the respondent who has not received his/her entitlement under the ESA;
- educating employees and employers about their rights and obligations under the ESA;
- funding legal and other support for employees who wish to file complaints including funding representation costs at before the OLRB; and
- using the revenue generated by fines and penalties to help fund increased enforcement activity.

### 5.5.6 Applications for Review

#### ***Options:***

1. Require ESOs to include all of the documents that they relied upon when reaching their decision (e.g., payroll records, disciplinary notices, medical certificates) when they issue the reasons for their decision. This will ensure that the OLRB has a record before it of the documents relied on by the ESO in making an order or in denying a complaint. Such a mandatory process should lead to a more consistent quality of decision-making by ESOs and would help explain the decision to the affected parties and to the OLRB as well as providing a more complete record to the OLRB sitting in review. For an employee who seeks a review of a decision, this procedure would also alleviate – at least to some extent – any obligation to produce some, or all, of the documentary evidence relevant to a review.
2. Amend the ESA to provide that on a review, the burden of proof is on the applicant party to prove on a balance of probabilities that the order made by the ESO is wrong and should be overturned, modified or amended.
3. Increase regional access to the review process. To facilitate this, the Ministry of Labour might appoint part-time vice chairs in various cities around the province (perhaps in the main urban centres in each of the 8 judicial districts in Ontario or in the 16 centres where the Office of the Worker Adviser (OWA) has offices) who would have training and expertise in the ESA only (not in labour relations) and who could conduct reviews on a local basis. This would make attending and participating in the review process more accessible and less expensive for both employees and employers.

Special procedures, like pre-review meetings with the parties could be scheduled in advance to ensure narrowing of the issues, agreement on facts and perhaps

settle cases, much like pre-trials in civil cases. The appointment of local ESA Vice-Chairs of the OLRB is similar to a proposal Professor Arthurs made to the federal government to deal with the special needs of distant communities (see: *Fairness at Work*, p. 207).

4. Request OLRB to create explanatory materials for unrepresented parties. There will always likely be a significant number of unrepresented parties at the OLRB. One straightforward way to assist is by ensuring that memoranda in plain language are prepared to assist self-represented individuals, both employees and employers, with respect to both the procedure and the applicable principles of law, including the burden of proof and basic rules of evidence. These sorts of memoranda have proven to be of great assistance to self-represented individuals in other legal proceedings including in criminal prosecutions where an understanding of the burden of proof and the rights of the accused in a criminal prosecution are of fundamental importance to the accused.
5. Increase support for unrepresented complainants. The criticism of the settlement process at the OLRB set out above in section 5.5.5.2 would be addressed at least in part if currently unrepresented complainants were represented in the review process at the OLRB. We set out below two possibilities that have been raised with us.

#### Increase resources and expanded mandate for the Office of the Worker Adviser

##### Pro Bono Assistance

### 5.5.7 Collections

#### **Options:**

1. Maintain the status quo.
2. Amend the ESA to allow collection processes to be streamlined and to provide additional collection powers in order to increase the speed and rate of recovery of unpaid orders. This could include incorporating some of the collections-related provisions in the Retail Sales Tax Act – which is another statute under which the MOF collects debts – into the ESA, such as:
  - a) removing the administrative requirement to file a copy of the Order in court in order for creditors' remedies to be made available;
  - b) creating authority for warrants to be issued and/or liens to be placed on real and personal property;
  - c) providing the authority to consider someone liable for a debtor's debt if he/she is the recipient of the debtor's assets, in order to prevent debtors from avoiding their ESA debt by transferring assets to a family member.

3. Amend the ESA to allow the Ministry to impose a wage lien on an employer's property upon the filing of an employment standards claim for unpaid wages.
4. Require employers who have a history of contraventions or operate in sectors with a high non-compliance rate to post bonds to cover future unpaid wages.
5. Establish a provincial wage protection plan.
6. Provide the Ministry with authority to revoke the operating licences, liquor licences, permits and driver's licences of those who do not comply with orders to pay.