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Changing Workplaces Review
400 University Ave., 12th Floor
Toronto, ON M7A 1T7

Dear Sir/Madam:

Re: Changing Workplace Review: Special Advisors' Interim Report

The Ministry of Labour is to be commended for its commitment to reviewing Ontario's *Labour Relations Act* ("LRA"), and its *Employment Standards Act* ("ESA"). Both pieces of legislation serve important and significant functions in the everyday lives of Ontarians and provincially regulated employers.

We are pleased to provide the following submissions on some of the options and recommendations detailed in the Changing Workplace Review Interim Report (the "Interim Report"). We hope that these submissions will be of assistance in your pending deliberations.

Background

Emond Harnden LLP is management-side labour and employment law boutique law firm based in Ottawa. Founded in 1987, Emond Harnden is one of Canada's largest firms with a practice restricted to advising employers on all aspects of labour, employment and human resources management in both official languages. We have a recognized track record as the trusted advisor to many of Canada's largest private, public and not-for-profit organizations.

Submissions

General Comments

Businesses across Ontario are facing significant pressures. Since 2008, the economy of Ontario has been plagued by uncertainty and tepid economic growth. An increase in globalization, technological change, and, in the case of Ontario, losses in the manufacturing sector have presented numerous challenges. Some commentators indicate that "precarious employment" and the number of "vulnerable workers" are on the rise. While increasing pressures have been placed on employees due to precarious employment, employers are also

facing additional pressures to remain competitive in an increasingly globalized economic environment.

We agree that the ways in which businesses operate and deliver their services is changing. However, businesses have never been static, and have always gone through periods of adaptation to reflect changing external business pressures. Legislation must evolve, but it cannot be used to trade off short-term solutions for long-term problems.

To allow Ontario to remain competitive, legislation must encourage economic growth and a healthy business climate, not stifle it. At present, a wholesale change of the LRA and ESA is not advisable. We advocate a cautious approach when introducing new legislation that will amend current labour and employment laws in Ontario.

Specific Comments – The Labour Relations Act

Certification:

The Interim Report includes significant discussions on the expansion of card-based certification beyond the construction sector. In our view, card-based certification cannot be expanded; a vote-based certification model must be the only means for a union to acquire bargaining rights in Ontario. Therefore, it is necessary to end card-based certification in the construction sector and return to a vote-only model.

Card-based certifications are not devoid of unethical conduct, including questionable union tactics in obtaining union cards. For example, a union representative may downplay the significance of signing a card, indicating that it only represents membership in a union. While partially true, a signed union card can be used to secure a certification vote or, in a card-based certification, demonstrate union support to meet the current "more than 55%" threshold to certify a union.

There are instances where language barriers prevent employees from fully appreciating the impact of signing a card. There are situations where employees may feel intimidated into signing a union card. Once signed, it is very difficult for an employee to "renege" on his/her signed card. When confronted with allegations of improper union conduct in obtaining cards, there is an assumption that employees are rational and understand what they are signing. It is simply not appropriate, or realistic, to make such a bold assumption. Accordingly, there must be checks and balances in place to allow an employee to fully express his/her true intentions and wishes.

An appropriate check and balance is the certification vote. One of the purposes of the LRA is facilitate collective bargaining between employers and trade unions that are *freely-designated representatives* of the employees. A secret ballot vote is the best means for an

employee to express his/her true wishes regarding unionization. In vote-based certifications, if an employee has signed a union card without knowing the true significance of signing the card, the employee still has the ability to express his/her interests at the vote.

A vote allows an employer to participate in the process, thereby providing employees with more information to facilitate informed decision making. The legislation must allow for an environment where employees can obtain as much information as possible prior to making such a significant decision. Contrary to some prevailing views, employers have a significant role in ensuring that its employees are truly aware of the impacts of unionization.

The Interim Report noted that some labour groups claim that a vote is ripe for employer interference. The majority of the claims of employer interference and/or intimidation are baseless. There are practices and procedures currently in place to ensure that the true wishes of employees are ascertained at a vote. Both unions and employers have recourse to the unfair labour practice provisions of the LRA. The Ontario Labour Relations Board also has broad remedial authority up to and including the authority to grant a remedial certification to guard against improper conduct.

Recommendation: to best promote the purposes of the LRA, we recommend that certifications be conducted by way of a vote only, and remove card-based certification from the construction sector in favour of a vote-only model.

Expanding First Contract Arbitration and Renewal Contract Arbitration:

An optimal agreement in a unionized workplace is an agreement that is negotiated between the parties without third party intervention. Labour legislation must assist in fostering an environment that encourages parties to freely resolve their disputes, including collective bargaining disputes.

Studies on compulsory interest arbitration workplaces provide insight into the effects on parties when outstanding disputes are resolved by an arbitrator. Ideally, interest arbitration should be seen as a measure of last resort and one that should be used sparingly. Experience suggests that parties become dependent upon the arbitration process at the expense of fruitful collective bargaining, thereby promoting "chilling" and "narcotic" effects. The parties become less inclined to bargain, knowing that when the impasse is resolved by an arbitrator, there is a good chance that the arbitrator will award some of their positions (the chilling effect). In addition, parties become dependent upon interest arbitration as a substitute to bargaining, and are more inclined to go through the motions of bargaining knowing that interest arbitration is on the horizon (the narcotic effect).

There is a risk that a similar trend will emerge in non-compulsory interest arbitration workplaces if the LRA is amended to facilitate access to final and binding interest arbitration (especially non-first contract arbitration). The LRA must be used as a mechanism to

encourage bargaining and the settlement of collective agreement disputes. It should not discourage bargaining and settlements by substituting the collective bargaining process with interest arbitration. The Interim Report suggests that a qualifier to access interest arbitration under the LRA is that the party applying for the arbitration must have bargained in good faith. Parties to a collective agreement are already under a general obligation to bargain in good faith, making the proposed qualifier redundant.

Provisions that make access to interest arbitration more readily available are to be discouraged given the risks of parties becoming dependent upon the process at the expense of bargaining. If any amendments are deemed necessary, amendments should focus on promoting mediation as a dispute resolution process.

Recommendation: It is recommended that no amendments be made to the LRA that will alter access to first contract arbitration. It is further recommended that, in order to ensure the fulfilment of the purposes of the LRA, the LRA is not amended to create or facilitate access to interest arbitration for mature collective bargaining relationships. Any legislative provisions that serve as an incentive to have a third party settle a collective agreement must be avoided except in the limited circumstances that currently exist under the LRA.

Related/Joint Employers:

The Interim Report details various business structures that have become more prevalent in Ontario workplaces. For example, the Interim Report cites an increased use in the following:

- temporary agencies and labour brokers to supplement workforces;
- the subcontracting of parts of an organization together with staffing;
- businesses structured so that different entities have responsibilities for different facets of the business; and
- the use of franchisor/franchisee arrangements.

It is claimed that these business structures can make it difficult to determine who the actual employer is, and collective bargaining relationships may be challenged if the parties with the most control over the employment relationship are not at the bargaining table. For example, where a lead business, such as a franchisor, is closely involved with the work performed by a franchisee, labour relations difficulties can arise if the franchisor is not bargaining.

The LRA contains adequate provisions to allow the Ontario Labour Relations Board to make related/common employer declarations to relieve against labour relations mischief in the appropriate circumstances. For example, the construction sector is heavily dependent upon subcontracting arrangements. Over the years, as subcontracting arrangements have evolved, the Ontario Labour Relations Board has adapted its analysis to ensure that an appropriate employer is identified so that the purposes of the LRA are achieved. The Ontario Labour Relations Board has recently moved towards a more subjective analysis to determine which

party has the most control over all aspects of the work, consistent with the pronouncements of Supreme Court of Canada in *Pointe-Claire (City).* In this regard, the Ontario Labour Relations Board is equipped with the necessary legislation and analytic tools to determine which entity should be designated an employer in a given set of circumstances to ensure that the purposes of the LRA are achieved.

It is troubling from a business and economic perspective to place restrictions on the ways in which businesses structure their operations. In an increasingly competitive and global economic environment, a focus must be placed on creating an environment that affords businesses with the flexibility to adapt to external business pressures. Rules cannot be implemented that challenge the ability of businesses to enter into legitimate subcontracting, or similar, arrangements.

Recommendation: maintain the status quo. The LRA currently contains sufficient protections to ensure that a true employer can be identified to ensure the fulfilment of the purposes of the LRA.

Specific Comments - The Employment Standards Act

Non-Standard Employment:

As noted, the Interim Report details a rise in precarious and vulnerable workers in Ontario. Sometimes referred to as "non-standard employment", there has been a rise in self-employment, temporary employment, and situations where individuals hold more than one job. One cause is a shift from manufacturing to a more service-based economy. Another cause is a drive to become competitive in a more global environment where access to less expensive labour markets are more readily available. The rise of non-standard employment is not unique to Ontario; there is an increase of such work in other regions in Canada, and elsewhere in North America.

Non-standard workers do not generally qualify for many of the benefits extended to employees in more traditional types of employment relationships. The shift towards non-standard work is not a reflection of employers consciously trying to usurp basic employment standards, but rather a response to changes and challenges to the underling structures of the economy and the pressures of operating in an increasingly globalized economy.

A fundamental question that must be addressed is whether amendments to the ESA will resolve issues arising from non-standard work, or whether the factors contributing to the rise of non-standard work are macro in nature; in the latter scenario, while changes to the ESA may alleviate some of the impacts of non-standard work, creating additional rules and restrictive regulations will negatively impact job creation. It is our view that creating more

restrictions, rules, and transforming the ESA will not, and cannot, address the root causes of the rise in non-traditional work.

Recommendation: A complete overhaul of the ESA is not the appropriate mechanism to address issues that accompany the rise of non-traditional work.

Who is the Employer and Scope of Liability:

There is significant commentary in the Interim Report regarding "fissured" work environments and the increased practice of organizations contracting out portions of their work. In many cases, employers contract out for strategic business reasons; the catalyst behind contracting out is not to avoid ESA obligations. The Interim Report also identifies franchisor/franchisee arrangements as requiring a review from an ESA enforcement perspective.

One suggestion in the Interim Report is that lead companies or employers who contract out should have some liability for employment standards of the employees in the business from which they benefit. The practice would create obligations higher up the chain of contracting. For example, franchisors who control a brand, a business model, and the details of how a business must operate should have some responsibility for employment standards compliance. One possibility is making these "higher ups" jointly and severally liable for ESA obligations of subcontractors and intermediaries.

Businesses may contract out work for a variety of reasons, including the downloading of work to an entity that has more expertise in performing the work in question, and for efficiency purposes. Contracting out jobs creates spin-off employment in the broader economy. Holding a contractor responsible for the employment of a contractee has the potential of threatening the contracting out model. Further, making franchisors jointly and severally liable for employment standards compliance of its franchisees is a threat to the franchisor/franchisee model in Ontario. The enforcement of the proposals in the Interim Report will be cumbersome, and potentially costly for the "high up" entities who may become liable for workplaces over which they cannot control whether ESA requirements are followed. Alternatively, these "high up" entities will have no choice but to push down their increased liability in other ways, thereby threatening the viability of the small business franchisee in Ontario.

Recommendation: Maintain the status quo. Businesses require the flexibility to use contractors and/or subcontractors as a part of their business models. Placing potential liabilities on contracting parties and/or franchisors will have negative impacts on business growth in Ontario.

Minimum Wage, Hours of Work and Overtime Thresholds:

The Interim Report suggests numerous options relating to changes to specific provisions of the ESA. We will not comment on all of the options. However, we start with the notion that there is a balance that must be maintained: employers must have the flexibility to quickly adapt to external market and economic forces, and employees must continue to have the protection of, at the very least, minimum employment standards afforded by the ESA.

The Interim Report cites as an option the adoption of a "$15 minimum wage". In our view increasing the minimum wage so quickly and dramatically will not have the beneficial impacts that supporters suggest. A significant rise in the minimum wage will have a disproportional impact on small businesses, a sector of the economy that is an important contributor to employment in Ontario. Faced with increased labour costs, smaller businesses will be required to increase the cost of their products, thereby passing the increases along to consumers. If employers are forced to increase prices too significantly, there is the real possibility that some business will close as it will no longer be economically viable to continue operating.

In addition to paying more in wages, employers will also see increases in CPP, EI, and workers' compensation costs. Increasing the minimum wage so dramatically can remove the opportunity to reward for good work, or result in across the board wage increases. Citing the experiences with a dramatic rise in the minimum wage level in other regions is not helpful, either. In Alberta, for example, the introduction of a $15 minimum wage will have less of an impact due to already higher wages resulting from years of labour shortages and the oil boom. The same cannot be said for Ontario, where its manufacturing sector has been in decline, and there has been little to no sustained growth in other sectors to off-set the loss of manufacturing jobs. Any increases to the minimum wage should be gradual to allow businesses to manage and plan for the increased costs associated with the increases.

A further option outlined in the Interim Report is to lower the weekly hours of work in a workweek, and a lower number of threshold hours prior to overtime premiums arising. In our view lowering these thresholds will have an impact on precarious employment in Ontario. The current hours of work provisions provide adequate protections to employees, and do not require employees to work inordinate hours without attracting additional premiums. The current system of excess hours/overtime agreements affords businesses with the flexibility to modify hours to meet business needs, while allowing employees the opportunity to determine whether they wish to work in accordance with such agreements (individual employee consent is a requirement). There are situations, such as seasonal workers, who rely on excess hour agreements to ensure that they can work as much as possible in a season prior to the season winding down and coming to an end.

Recommendation: Maintain the status quo. The impact of a $15 minimum wage in Ontario (in its current economic state) is not advisable and could serve to deter and stifle business

development. Further, to maintain flexibility, the current rules surrounding hours of work and overtime thresholds remain appropriate and need not be changed.

Importing Just Cause into the ESA:

At present, a non-union employee in Ontario may be terminated without cause (subject to the ESA's anti-reprisal provisions) provided that he/she is provided with reasonable notice, or pay in lieu of notice, pursuant to the ESA. In addition, an employee may also be entitled to severance pay in specific circumstances.

The Interim Report includes the suggestion that the ESA be amended to create statutory unjust dismissal protections, including "make whole" remedies and, specifically, the possibility of reinstatement. The Interim Report notes that collective agreements contain just cause provisions, and many cases of industrial discipline and discharge are contested in arbitration proceedings "on a daily basis in Ontario".

It is disingenuous to proceed on the assumption that employers simply terminate their employees at will without just cause. There are certainly some employers who engage in questionable practices when deciding to terminate an employee. Many employers, however, do not. Further, it is an overstatement to indicate that daily labour arbitrations take place that concern the termination of a unionized employee's employment. Such prevailing attitudes cloud a proper analysis of the negative impact of including just cause provisions in the ESA.

The common law affords significant protections to non-union employees. The common law provides employees with the ability to negotiate enhanced separation packages or, in the appropriate circumstances, proceed with a civil action (in addition to receiving the minimum benefits pursuant to the ESA). We note that unionized employees do not have access to the common law. Common law notice of termination tends to be more generous than similar benefits under collective agreements.

In many instances, the employment relationship has become irreparably harmed at the point of termination. The employer no longer wants the employee in its workplace, and the employee does not want to return to the workplace. In this regard, the common law affords adequate protections to non-union employees. A just cause provision in the ESA would, in all probability, be subject to abuse, in that it would then be possible for an employee with no interest in returning to the workplace to use the threat of a "make whole" remedy as a negotiating tool to increase any settlement offered by the employer.

Reinstatement is a double-edged sword. While some may claim that it provides employees with the protections afforded to unionized employees, it will create negative incentives. For example, the Interim Report notes that proponents of just cause provisions in the ESA indicate that the protections could be limited to employees who have been employed for a certain minimum period. The *Canada Labour Code*, as an example, provides just cause protection

to those who have been employed for 12 consecutive months of continuous employment (or more). The effect of including similar provisions in the ESA will be to encourage employers to terminate employees prior to an employee's tenure reaching, for example, 12 months of continuous employment. Marginal employees, who may otherwise have their employment maintained and allowed additional time to reach acceptable levels of performance, will face termination prior to the expiration of a minimum period of employment if the employer's alternative is the prospect of a reinstatement. The result has the real potential of creating less stable employment that is neither beneficial for employees or employers.

Further, just cause provisions mainly serve to protect average employees whose work habits are not so poor that there is a valid claim for just cause dismissal, but whose performance and/or behaviour in the workplace is far from exemplary. It will be difficult for employers to motivate these employees to perform better if the employees realize that reinstatement is a possibility in the event of a termination. This latter negative incentive is particularly troublesome for employers, who must maintain competitive workplaces in an era of ever increasing competition.

While employees cannot be terminated at will without just cause in Ontario, they do not own their jobs. As Ontario has experienced in recent years, economic forces beyond an employer's control often necessitate workforce restructuring and accompanying terminations without cause. The ability of employers to "weather the storm" – to budget and plan to operate their businesses sustainably – will be jeopardized if they must face the prospect of employees being reinstated to positions which, in many cases, will no longer exist.

Recommendation: maintain the status quo. The ESA and the common law provide non-union employees with entitlements and legal recourse in the event of a termination of employment. As noted, legislative amendments cannot have the effect of trading off short-term solutions that create long-term problems. Importing just cause provisions into the ESA will encourage employers to terminate employees early in the employment relationship to avoid facing the prospect of a reinstatement.

Thank you for taking the time to review these submissions. We trust that the submissions will provide you with useful information to ensure that any future legislative changes will result in Ontario continuing to be an attractive location to live, work, and invest.

Sincerely,
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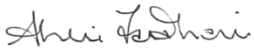

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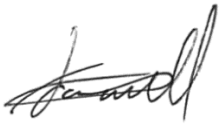

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