October 14, 2016

SENT VIA EMAIL

Honourable John C. Murray and
C. Michael Mitchell
Changing Workplaces Review
Employment Labour and Corporate Policy Branch
Ministry of Labour
400 University Ave 12th Floor
Toronto, ON M7A 1T7

Re: The Changing Workplaces Review Response to Interim Report

The following submissions are provided on behalf of an "informal coalition" of accredited employer bargaining agents, construction associations, and construction employers at large. The employers represented by this informal coalition provide good, stable employment to their employees, and are predominantly in mature, established bargaining relationships with some of the largest unions in the country.

These submissions are supplementary to our original submission dated September 18th, 2015, as attached. In our attached initial submission, our primary concerns were three fold:

1. Is the construction industry included or excluded from the review?

2. The *Employment Standards Act, 2000* (the "*ESA*") and the Ontario *Labour Relations Act, 1995* (the "*OLRA*") are base pieces of employment legislation, which contain many intricacies. Stability in the legislation has led to the creation and (for the most part) maintenance of a stable labour relations environment in Ontario, particularly in the construction industry. Parties are able to operate in a predictable environment based on the legislation, past practices, and jurisprudence. Reforms, regardless of their intent, will create unnecessary volatility for stakeholders and practitioners involved.

3. Ontario employers operate in an increasingly competitive environment. In order to ensure Ontario remains competitive in the future, unnecessary burdens on business need to be avoided. This will ensure a competitive position moving forward, which will promote economic growth, foster innovation, and ensure the health of Ontario and Ontario's vibrant construction industry as a whole.

Upon reviewing the Interim Report titled: "**Changing Workplaces Review Special Advisors' Interim Report**" (the "Interim Report"), our informal coalition seeks to expand on our initial submission, raise additional concerns and recommendations, and propose additional areas of review.

The impetus for these supplementary submissions is our understanding that although sections of the *OLRA* specific to construction are to be excluded, there seems to be an intent to alter the base provisions of both the *OLRA* and the *ESA*. This will have an impact on the construction industry as a whole.

The following paragraphs set out the potential impact of the changes to the *OLRA* and the *ESA* on the employers represented by this informal coalition.

A. The Impact of Changes to the "Base Legislation" on the Construction Industry

Minister Kevin Flynn stated the statutory changes envisioned by the Interim Report "clearly must be aimed at the bad guys, while allowing the good guys as much flexibility as you possibly can to allow them to compete". (http://dailycommercialnews.com/Labour/News/2016/8/Labour-law-review-aimed-at-the-bad-guys-says-Minister-Flynn-1017610W/)

In addition, the authors at page 7 of the Interim Report noted:

> There are many employers in Ontario who provide "good jobs", with decent wages, benefits, and reasonable hours of work for their employees where there is an opportunity for self-fulfillment and participation in the workplace. These employers know that there are vulnerable workers and precarious "bad jobs" in parts of the economy, but they are concerned that changes designed to address those workers if applied to all employers will negatively impact their businesses and undermine their competitive position.

The employers represented by the informal coalition providing these submissions fit squarely into the category of employers described in the above quote. These employers provide good jobs in a stable labour environment, and are deeply concerned about the "unintended" impact of changes to the *OLRA* and/or the *ESA*.

Many of the broad recommendations in the Interim Report will affect employers across all industries, regardless of the specific sectoral landscape, the collective bargaining history, or the environment in which the employers work.

Yet, such broad strokes are unlikely to solve the main issues in employment and labour-related statutes, which is often non-compliance. Regardless of the amendments, a lot of the identified issues seem to be based on a few employers who do not understand their obligations or who are actively attempting to avoid them. The complying employers, on the other hand, will bear the burden of changes that do not take into account its specific sector or industry. It can be further expected that unions will interpret such changes in a manner most favourable to their interests.

The construction industry, and particularly the Ontario residential construction sector, prides itself on having a fair and co-operative relationship between employers, workers, and unions. Many construction employers are in long-term and stable relationships with trade unions and the parties have worked steadfastly over numerous rounds of collective bargaining to achieve labour and market stability. Many of the suggested changes, including the proposal to amend the related and joint employer provisions of the *OLRA*, threaten this stability.

We suggest that the Ministry of Labour instead dedicate sufficient resources, including proactive inspectors who take on a more educational role, to educate employers and workers.

The following are some of the more significant examples of how changes to the *OLRA* or the *ESA* that are being considered by the authors could have a significant impact on the employers represented by this informal coalition. The below examples are not intended to be exhaustive, but rather to illustrate the potential impact of overly broad changes to these two pieces of legislation.

I. The Definition of an 'Employee'

Unions, including the Labourers' International Union of North America, Local 183 (the "Labourers"), have recommended an amendment to the *OLRA* that would introduce a rebuttable presumption that the entity that directly benefits from an individual's labour is the employer of that individual for the purposes of the *OLRA*. This would include workers who are dispatched to a construction contractor on a short or limited term basis. In support of this recommendation, the

Labourers rely on the additional time and expense that it incurs to organize these workers. The Labourers point to no other reason for this recommendation.

First, any harm that may result from a temporary help agency or other labour supply company shirking its employment-related obligations has already been relieved by the recent amendments to the *ESA* and *OLRA*. These amendments deem a temporary help agency and client employer to be jointly and severally liable for such obligations. Further, such harm simply does not exist in the unionized construction industry, as employers who require individuals on a short-term or limited basis, including those from a temporary help agency, are nonetheless required to ensure that the workers immediately become union members before performing any construction work. These individuals are treated no differently in the employment relationship than any of the employer's other workers. There is no suggestion of any harm in these types of relationships or at least any that would be resolved by changing the definition of an employee.

A change to the definition of an "employee" in such a manner will only raise a number of practical concerns for the construction industry. The construction industry, and particularly the residential building sector, is often transient and seasonal. Many construction entities retain the services of a temporary help agency to provide labour on a limited and short-term basis. Deeming any entity that benefits from an individual's labour to be the employer – for however long or for whatever reason – unduly exposes many construction employers to certification based on any individual who provides valuable service to that construction entity on any given day. Under this proposed definition, it would not matter what level of control is ultimately exercised over the individual, if any control at all. This is extremely burdensome in the construction industry where the services of many trades, contractors, and specialized services are "benefitted" from every day – many of whom may be operating their own business and exercising their own control. This is particularly problematic when certification in the construction industry is based only upon the "employees" at work on the application filing date.

Further, deeming a construction entity to be the employer of any worker from whose labour it benefits will lead to significant uncertainty in working relationships and ambiguity in many provincial or Board-area wide collective agreements. For example, if a residential home builder subcontracts framing work to a subcontractor who is also bound to the Labourers, who is the

employer of that framer for the purposes of complying with the collective agreement? Against whom do the Labourers file a grievance? Who makes the appropriate contributions and remittances on behalf of the worker? Who remits premiums based on his/her insurable earnings to the Workplace Safety and Insurance Board? Does the subcontractor retain the ability to move that particular worker to another jobsite or project as the need often arises? Or does the subcontractor lose control over its own worker because he was deemed to be the worker of the general contractor or home builder? What happens when the general contractor or home builder no longer needs the framer? Is the framer laid off or does he return to the subcontractor's employ or payroll? Does that worker's seniority or number of hours work reset to zero because he was deemed to be 'employed' by another contractor for a period of time? These are just some of the questions that would result from a sweeping change to the definition of "employee".

Another example is if a construction contractor subcontracts work to a specialty contractor. A construction company may contract out construction work that it otherwise never performs. For example, excavating a hole may lead to water and drainage issues that were unanticipated. Having no experience, the company may retain the services of another independent individual to perform concrete and drain work on that particular day or week, for example. This individual subcontractor may perform work for many contractors and/or other individuals. Does that specialized individual automatically become an employee of the construction contractor? Despite obtaining a clearance certificate from this individual, would the construction contractor have to remit premiums to the Workplace Safety and Insurance Board and under what rate group (if the nature of work is different from its regular business activities)? Would an accident appear on its WSIB cost statement or the individual contractor's cost statement? The construction contractor surely benefits from this labour but may not perform work in this area of construction again. Is the construction contractor exposed to becoming bound to the concrete and drain collective agreement even though it has no knowledge of the concrete and drain industry or any workers in this area? Assuming it is outside of the industrial, commercial and institutional ("ICI") sector, would the Labourers bargain a collective agreement with this construction contractor who performs no work in the particular trade and who has no intention of actually hiring any individuals?

This presumptive definition would also remove the incentive to use any temporary help agencies, which is prominent in the construction industry. Not only will this close down the business of

many law abiding and valuable agencies, but it may also result in more layoffs of individuals who will have no ability to supplement their income. A construction entity that directly benefits from individual subcontractors may have no choice but to keep the subcontractor on its payroll and just regularly lay them off whenever their services are not required. Workers will sit while being laid off and remain unable to work through a temporary help agency or unable to be dispatched to other entities requiring their services but who do not want the individual on its payroll in order to supplement their income. It is also very questionable whether any of these subcontractors will agree to or benefit from this relationship for a number of reasons, including the loss of its business and flexibility.

These are just a few of the practical issues that may arise. In the construction industry, these issues would be applicable to a wide range of positions or trades, including project managers, site superintendents or supervisors, health and safety consultants, machine and equipment operators, material transport workers, specialized contractors, just to name a few.

II. The Related Employer Provisions of the *OLRA*

Amending the related employer definition in the *OLRA* will also have a significant impact on the construction industry. Construction entities arrange their corporate affairs for many reasons that are unrelated to labour. In these circumstances, there is not an attempt to limit or avoid employment- or labour-related obligations.

For example, a residential home builder contracts with a number of different entities and subcontractors depending on the projects that are being built at any given time. Finding that a residential home builder is a joint or common employer with a framing subcontractor would result in the residential home builder having to "take on" a number of different workers for whom the home builder will have no use upon the completion of any given project. This would significantly add to the residential home builders' costs and will do nothing to provide stability in the construction industry as many workers would be left laid off. This would also largely eradicate the need for the Residential Framing Contractors Association, just to name one example, which has multiple employer members and a long-standing bargaining relationship with the Labourers.

The push for a common or joint employer declaration would also harm the independence and flexibility of many construction entities and business owners. Contractors are highly mobile and work for a number of construction contractors on different projects depending on their workload, preferences, experience, skill, *etc*. Expanding the definition of a joint or common employer would wrap these small business owners into the banner of larger construction entities, thus losing their flexibility and mobility.

III. Exemptions to the *Employment Standards Act, 2000* and Other Issues

Consideration must be given to the construction industry when considering amendments to the *ESA*. The removal or non-application of sector exemptions would significantly ignore proper industry practices, existing collective bargaining relationships, and costs. For example, an exemption from termination and severance pay has long been recognized as reflective of the transient, cyclical and mobile nature of the construction industry. For unionized construction employers, the requirement for severance and termination pay would have to be embedded in pre-existing collective agreements and is illogical for construction workers who are likely to return to the union's hiring hall and quickly be dispatched elsewhere. Construction employers would have to budget for termination and severance pay into its bidding process or project analyses, which would significantly increase its costs given the nature of the industry and regularity with which construction workers are required for short periods of time. It would also provide an incentive for contractors to avoid employing or retaining the services of long-serving construction workers due to the heightened costs and competitive nature of the supply market for tradespersons.

Other proposed additions to the *ESA* would have a significant effect on the construction industry. One example is the suggestion by some to require an employer to post work schedules two weeks in advance. This would be nearly impossible for construction employers to comply with without incurring significant costs. Work schedules and tasks change on a daily or hourly basis. Many factors go into the performance and scheduling of construction work, such as weather conditions, availability or delivery of materials, supply of labour, or the many other unexpected issues that often arise. Mandating a requirement to post a schedule, or otherwise face cost consequences, would significantly limit a construction contractor's flexibility in dealing with this plethora of issues. A construction contractor would be faced with either paying additional costs for improperly

guessing the weather or other uncontrollable conditions or to run its business on a short supply of workers that the construction contractor is comfortable with scheduling, which would result in significant delays in the completion of the work.

B. Any Recommendations Should be targeted to resolve a Specific Problem

The above paragraphs highlight the significant potential for unintended consequences for "good employers", such as those represented by this informal coalition, if the recommended changes are overly broad and sweeping. In order to avoid this potential issue, we submit that any recommended changes should be targeted to resolve a specific problem that has been identified, and *only that problem*.

Our primary proposal is that any revisions should be included in sector specific legislation, which is separate and apart from the *ESA* and the *OLRA.* As noted in our first submission, both the *ESA* and *OLRA* are base pieces of employment legislation. Focusing on the *OLRA*, one notes that it provides a base for the numerous pieces of labour legislation including, but not limited to:

- Ambulance Services Collective Bargaining Act, 2001 (ASCBA)
- Colleges Collective Bargaining Act, 1990 (CCBA)
- Crown Employees Collective Bargaining Act, 1993 (CECBA)
- Fire Protection and Prevention Act, 1997 (FPPA)
- Hospital Labour Disputes Arbitration Act, 1990 (HLDAA)
- School Boards Collective Bargaining Act, 2014 (SBCBA)
- Toronto Transit Commission Labour Disputes Act, 2011 (TTCLDRA)

In addition, the *OLRA* also obtains clauses specific to construction including both the ICI and residential sectors.

As noted above, any changes to base legislation will lead to changes in all sectors of the economy including construction. Our coalition puts forward that this would create volatility to the Ontario

labour relations environment, something which will create negative outcomes for all of Ontario. An alternative option, which has been past practice, would be to avoid widespread changes to base legislation opting for amendments and the creation of specific legislation as needed.

This approach and specifically the creation of an act which targets the service sector would allow the Ontario government to:

- address the issues identified by the Interim Report and exclude sectors (including the construction industry) like the construction industry, which were not intended to be the target of this review.

- allow for a focused discussion on the service sector of the economy, dedicating resources to the main focus on the Interim Report

- prevent disruption to the overall Ontario economy, construction industry, and labour relations landscape.

Ontario employers operate in an increasingly competitive environment. In order to ensure Ontario remains competitive in the future, unnecessary burdens on business need to be avoided. The proposed solution of sector specific legislation would address the bulk of these concerns and be consistent with historic labour law reform in Ontario. Because of the complex and interrelated nature of labour law, a minimal number of issues should be included any review. There is also historical precedent for this approach based on past reforms. Furthermore, by focusing on a small number of issues, it allows stakeholders to envision the future landscape as well as identify and prevent unintended consequences before they occur.

Alternatively, if the authors are not willing to consider sector specific legislation, we submit that great care should be taken to circumscribe the effect of any recommended changes to the *ESA* and *OLRA*. For example, at pages 69 and 70 of the Interim Report, the authors suggest the following options with respect to the related employer provision of the *OLRA*:

> 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.

Although this informal coalition is not of the view that any change from the status quo is needed, the importance of highlighting the above passage is to point out the difference in impact of Option 4 versus Options 2 and 3. Option 4 is a specific proposal aimed at a specific situation, where there may or may not currently be a problem. Options 2 and 3 would have a broad effect, and the unintended consequences would deeply impact many "good employers", including those represented by this informal coalition. Accordingly, if the authors believe that changes are necessary, and are not willing to recommend separate legislation, we strongly submit that any recommendations should be specific (similar to Option 4 in the quoted passed) rather than general (such as Options 2 or 3 in the same passage).

C. Additional Concerns

In reviewing the initial review guide, it was suggested that the *ESA* and *OLRA* would be updated. When examining the Interim Report, nearly all of the 50 issues and 225+ options appear to us to tilt the labour relations environment to the benefit of organized labour. While we respect our labour partners and understand that the service economy and workplace has changed, it is not abundantly clear why a labour legislation update would fail to address employer issues.

The Ministry of Labour, as outlined on its website, seeks a stable and constructive labour relations climate and fosters productive workplace relationships in Ontario.

Employer issues that could be addressed include:

- How an Employer is notified by a Union of an Application for Certification

Currently, employers of all size have the burden to identify, understand, and respond to a union's submissions to the Ontario Labour Relations Board that carry incredibly strict and unforgiving timelines. Countless examples exist where employers are denied their rights as they are unaware that someone or some machine in their office has received an Application for Certification. While this review examines several communication options for consideration, which would appear to benefit unionized organizing campaigns, it is mostly silent on improvement or updates that would reflect the 2016 business environment for employers.

- Abandonment of bargaining rights

Currently bargaining rights have no expiration regardless of inactivity within the bargaining unit. This seems to be at odds with the foundational labour relations principle that all Ontario workers have the right to choose whether or not they wish to join a union as well as which union they wish to belong to. Specifically, if a business shuts down for 5, 7 or 10 years or longer, there are no employees and / or union members to represent. If this business is later reopened, bargaining rights are typically imposed on new employees, instead of giving them the right to choose. One solution is to examine a clause which automatically removes bargaining rights if notice to bargain has not been issued for 10 years, the collective agreement has been expired for at least 10 years, and/or no bargaining unit employees have been employed for at least 10 years.

- Equalizing Employer and Union rights and obligations

Under the *OLRA* there are numerous examples of differing rights and obligations for employers and unions. This should be reduced and removed wherever possible, as labour relations legislation should promote equality for all employees, unions, and employers. For example, in the Interim Report, there are proposed changes to the certification process. However, to properly empower Ontarians and respect their right to join or not join a union, certification and decertification rules should be as close to identical as possible. Therefore, if changes are made to the certification provisions of the *OLRA*, the same revisions should be mirrored in the decertification provisions.

D. Conclusion

This informal coalition, as a group and individually as organizations, remains committed to the consultation process. We remain hopeful that a fulsome consultation, which includes meetings with Employer Associations, is planned and will be scheduled in the near future. While public consultations are appropriate for members of the public, we believe that meetings which combine similar employers and accredited bargaining agents should form part of any current and/or future review of the *OLRA* and/or the *ESA*.

We also wish to thank the authors for considering our submissions, and welcome any questions or clarification with respect to the above-noted issues.