Submission to the Changing Workplaces Review

September 2015

Submitted by: The Association of Management, Administrative & Professional Crown Employees of Ontario

AMAPCEO

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A. Introduction

AMAPCEO is the second largest union representing employees in the Ontario Public Service. We have members in every ministry and in a number of agencies, boards and commissions working in over 130 communities across the province. We also represent employees at seven broader public sector agencies. In total, AMAPCEO represents over 12,000 employees, many of whom work in professional or supervisory roles.

The employees represented by AMAPCEO are far from the most vulnerable in Ontario. For the most part our members are professionals, are relatively well paid, and enjoy access to over time and vacation pay. They are all lucky enough to belong to a union.

The trends that have prompted the Changing Workplaces Review affect all workers in the province. Every worker, including those in AMAPCEO's membership, is impacted by transformations wrought by globalization, rapid technological change, and a restructured labour market. These changes are well documented and include, as examples, an increasing reliance on short term and temporary work relationships; an ongoing downward pressure on wage and benefits; and long-term declines in union density rates. Our members and their families experience these impacts in their work, their personal lives and their communities.

In our brief, we have touched on some of the broader reforms that will no doubt have been proposed by other worker organizations. These address areas such as the intolerably low level of compliance with the *Employment Standards Act*, 2000 (the ESA), and the urgent need for reforms aimed at improving the organizing capacity of bargaining agents under the *Ontario Labour Relations Act*, 1995 (the OLRA). However, we have also included several recommendations which draw on the unique experience of AMAPCEO and its membership. These include proposals that the Government re-examine and reduce the number of exclusions in both the ESA and the OLRA; that more be done to protect employee digital privacy; and that the Government adopt methods to increase the use of interest arbitration during labour disruptions.

The scope of the current review is wide ranging and presents a generational opportunity. We urge the Changing Workplace Review to go beyond addressing only those most pressing legislative deficiencies, or to simply recommend that previous reforms which may have produced unbalanced results be tempered. In order to ensure decent and secure employment in Ontario into the coming years, we ask that you also seriously consider those recommendations which seek fundamental, forward looking changes in both Acts.

B. Recommendations on Changes to the *Employment Standards Act, 2000*

Eliminate or Reassess Exclusions in the Employment Standards Act, 2000

The list of occupations that are subject to full or partial exclusion from the ESA's coverage is overwhelmingly long, practically confusing and unprincipled as a matter of policy. Taking as an example only the standard that applies to overtime pay, we find excluded from coverage (in a non-exhaustive list): fishing guides, landscape gardeners, swimming pool installers, mushroom growers, sod layers, keepers of furbearing mammals, taxi drivers, and information technology professionals. It seems reasonable to offer the conjecture that this particularly odd assortment of exclusions has much more to do with a lack of desire on the part of certain employers to pay overtime (not to mention successful lobbying efforts on the part of industry associations) as opposed to any sort of occupation-specific requirement.

Over time, various exclusions have steadily found their way into the Act and its regulations as barnacles might progressively attach themselves to the hull of a sea vessel. Currently, full exclusions include secondary students taking part in authorized work experience programs, holders of elected office in trade unions, police officers, and "any other prescribed individuals"; partial exclusions from ESA coverage exempt an extremely broad range of professionals[1] (among others) from the ESA's provisions regarding hours of work, overtime pay, minimum wage, public holidays, and paid vacation.[2]

For AMAPCEO, exclusion from the ESA impacts the overwhelming majority of our membership. Section 3(4) of the Act exempts employees of the Crown from much of the Act's protective provisions.[3] The justification for this partial exclusion from ESA coverage appears to be lost in the sands of time. As the essential guidebook to labour law in the Ontario Public Service has it:

> *There is no clearly stated policy or rationale underlying the non-applicability of the other substantive positions to the Crown. Since the introduction of the Act in 1968, the various iterations of the ESA have always exempted the Crown and Crown employees from various provisions in the Act. A review of Hansard, since the first ESA was debated in the legislature, indicates that the issue of the applicability of the Act to the Crown or its employees has never received comment in any of the legislative debates.*[4]

Hadwen *et al* go on to speculate that perhaps Crown employees were excluded owing to coverage under the *Public Service Act* or coverage under their respective collective agreements.[5]

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[1] O. Reg 285/01 s.2 provides exclusion for duly qualified or registered practitioners of architecture, law, professional engineering, public accounting, surveying, veterinary science, chiropody, chiropractic, dentistry, massage therapy, medicine, optometry, pharmacy, physiotherapy, and psychology.

[2] O. Reg. 285/01, s. 2.

[3] *Employment Standards Act, 2000*, R.S.O. 2000, c.41 s. 3(4).

[4] Timothy Hadwen *et al.*, *Ontario Public Service Employment & Labour Law*, (Toronto: Irwin Law, 2005) at 330.

[5] *Ibid.* at 331.

Whatever the provenance of the exclusion from certain of the ESA's protections, these exclusions do from time to time —despite the existence of collective agreements and other legislation—expose Crown employees to harm. A case in point concerns AMAPCEO members working for the Ontario Public Service (OPS) on fixed-term contracts. In our 2012 bargaining round, the government-as-employer engaged in a rather punitive type of hard bargaining. Not content to merely enforce the government's austerity agenda, the government-as-employer demanded a variety of pernicious concessions, some of which resulted in our fixed-term (i.e. contract/non- permanent) members being required to cede such a significant number of paid days off that they fell below the two-week threshold set out in section 33(1) of the *ESA*. Falling, as it does, in Part XI of the Act, these Crown employees were not covered by this section. Thus, many AMAPCEO members found themselves enjoying less than the legislated minimum amount of vacation, while employed for a government that ostensibly championed this standard.

In short, the current level of exclusions is simply absurd. The animating intent of the *ESA*, as an archival analysis by Professor Mark Thomas of York University convincingly demonstrates, is to provide a set of minimum standards to govern Ontario workplaces by providing a floor beneath which one's working conditions may not fall.[6] While it is possible some discrete exemptions from the ESA's reach have a sound policy basis, it is abundantly apparent that many no longer do, if they ever did. They should therefore be eliminated.

Recommendation #1

Given that the *ESA* is meant to provide minimum workplace standards, eliminate exclusions from its coverage.

In the alternative, if there are to be any exclusions, the Ontario government should undertake a review of all current exclusions with a view to reducing the total amount. If there are to be any occupations excluded, there must be a rational public policy basis for the exclusion. This basis must have its grounding in some essential public interest aspect of the occupation in question, as opposed to, for instance, the convenience of the employer, or the lobbying capacity of a given industry group.

Increase Compliance with the Act

Worker's advocates and the law reform community have spoken with unanimity: employer compliance with the Act's provisions remains intolerably low.[7] In AMAPCEO's submission, any recommendations made by the current review must be accompanied by proposals aimed at improving enforcement, lest they risk being delegitimized by chronic employer non-compliance with the Act.

[6] Mark Thomas, "Setting the Minimum: Ontario's Employment Standards in the Postwar Years, 1944-1968" (2004) 54 Labour/Le Travail 49 at 77.

[7] See Leah F. Vosko, *et al.* "New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada" (Toronto: Law Commission of Ontario, 2011).

The ESA has traditionally relied on an enforcement model wherein investigations are generated by individual complainants. This is problematic insofar as it places the onus of policing law breaking employers upon those same employees who are vulnerable to them within their existing employment relationship. In Ontario, the *Open for Business Act*, 2010 has made matters worse by foisting the additional requirement upon complainants that they must address complaints with their employer prior having investigatory services provided by the Ministry. This approach ignores the inherent power imbalance between employers and employees which is at the very core of what the Act seeks to address.

Recommendation #2
Repeal the requirement that employees must address employment standards concerns with their employer prior to initiating an MOL complaint.

A wholly reactive approach to enforcement system naturally tends to discourage complaints from employees who remain in an active employment with their employer. Moreover, by relying on individual employees to initiate a complaint, the province is essentially guaranteed a haphazard approach to enforcement where investigations are determined by the fortitude and resources available to potential complainants. Recently, the Ontario government appears to have at least initially accepted the logic of increasing strategic approaches to investigations aimed at maximizing compliance and addressing newly developing forms of work organization. In doing so, they appear to have taken the counsel of many notable academics, the Law Commission of Ontario and members of the worker advocate community.[8] We urge the Review to recommend the expansion of the province's efforts to implement proactive model in tandem with the individual claims process, which continues to be a necessary and valuable public resource for workers.

Recommendation #3

Immediately implement an expanded system of proactive employment standards investigations.

Proactive inspections should include inspections of employers found to have violated the Act against a single complainant in order to ensure compliance with other current employees. Initiate a third-party complaints hotline which could trigger proactive investigations.

Proactive enforcement should be supported by a policy infrastructure alert to changes in the labour market and trends in employment, and enhanced via consultation with workers and worker advocate organization regarding particularly problematic sectors and practices.

Enforcement of the Act is not currently backstopped by a sufficiently resourced administrative system. While the public is well served by the civil servants responsible for the enforcement program, chronic

[8] Law Commission of Ontario. *Vulnerable Workers and Precarious Work* (2012) Toronto.

backlogs in individual investigations have become notorious.[9] Increased funding, albeit temporary, was partially successful in combating backlogs following the striking of a provincial taskforce in 2010, but it was only in 2013 that the Province allocated $3 million in permanent funding for proactive employment standards enforcement. This measure fell well short of the $10 million in permanent funding the Ontario government had promised as part of its poverty reduction strategy in 2008.[10] Unsurprisingly, many of the employees hired as a result of the 2013 funding were assigned to assist in clearing the persistent individual claims backlog.

Recently, the government has removed the previous $10,000.00 cap that applied to lost wage claims, and increased the limitation period for making complaints with the MOL. These latter measures, while sensible, were not accompanied with the appropriate permanent staffing improvements to offset the increased caseload which inevitably resulted. Funding is therefore necessary not only to implement the proactive system of enforcement recommended above, but to ensure the current over-burdened claims system is made sustainable. This need will of course be even more acute should this Review make recommendations which would have the effect of increasing demands upon the Ministry of Labour (MOL) enforcement program.

Recommendation #4

Provide significant new permanent funding to implement expanded proactive investigations, eliminate any remaining individual claims backlog, and prevent such backlogs from occurring in the future.

Under the traditional model, employers are rarely penalized for infractions. Thus, even in the uncommon situation where an employer is the subject of an investigation as a result of an employee complaint, the only penalty is that they will likely face is an order to pay what they were originally obliged to. One method of combating this problem would be to recommend the adoption of a more stringent set of increased fines to act as a deterrent to non-compliance. In addition, AMAPCEO recommends the Government consider reducing the public cost of investigations by requiring employers who violate the Act to bear the cost of investigations and inspections. This would not only have a deterrent effect on employers tempted to breach the Act, but would assist in alleviating the cost pressures of maintaining a sustainable and effective enforcement program.

Recommendation #5

[9] See Law Commission of Ontario*, ibid*; Workers' Action Centre, *ibid.* pg. 35; Gellatly, Grundy, Mirchandani, Perry, Thomas and Vosko, "'Modernizing' Employment Standards? Administrative Efficiency, Market Regulation, and the Production of the Illegitimate Claimant in Ontario, Canada" (2011) Annual Meeting of the Canadian Political Science Association, Waterloo, Ontario.

[10] Government of Ontario. *Breaking the Cycle: Ontario's Poverty Reduction Strategy*, pg. 22. 2008.

Establish increased set fines for employers found to be in violation of the Act and require employers to fund the cost of investigations that result in findings of significant non-compliance. Use any monies collected from fines and investigations costs to support the enforcement program.

Protect Employee Digital Privacy

Many observers have noted that there is a gap in Ontario's employment laws as they relate to employee privacy.[11] Currently, only federally regulated workers in the province enjoy any kind of statutory privacy code during the course of their employment. Over the past 20 years, the use of and reliance on digital communication such as e-mail, inter/intranet use and various forms of social media in Ontario's workplaces has increased dramatically. Correspondingly, employers now find themselves in the unregulated possession of troves of both work related and personal employee information. Much of this information may be reasonably construed as intimate and touches, as described by the Supreme Court of Canada, on "the biographical core" of the employee.[12]

AMAPCEO's membership depends on and is expected to routinely participate in a range of digital communications in the workplace. They, like most workers in the province, are hugely vulnerable to the aforementioned regulatory gap. The growing problem of diminished employee workplace privacy is too consequential to left to be filled in via an unpredictable patchwork of common law and arbitral jurisprudence. For this reason, we urge the Changing Workplace Review to recommend the adoption of an employee workplace privacy code, enshrined within the ESA.

There is precedent within the *ESA* to regulating the legitimate privacy concerns confronting employers and employees. For example, Part XVI of the Act (Lie Detector Tests) has for decades unproblematically protected workers from the use of intrusive and unreliable lie detectors by their employers. This approach to protecting one element of employee privacy, of course, seems spartan when compared against the kinds of highly sensitive employee information employers may now regularly avail themselves with limited statutory guidance or limitation.

The adoption of a workplace privacy code may require further study and consultation prior to implementation. However, we recommend as a starting point, the ESA could draw from the "ground rules" established by the Office of the Privacy Commissioner of Canada in relation to federal employer's *PIPEDA* obligations.[13] They might include the following basic rules:

1. Employers must say what kinds of information it collects from employees, why this information is collected, and how it will be used;

[11] See *e.g.* D. Michaluk, "The Limits of the Application Game – Why Employee Privacy Matters". Hicks Morley Hamilton Stewart Storie LLP.
[12] *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 32, at para. 2.
[13] *Privacy Toolkit: Canada's Personal Information Protection and Electronic Documents Ac.* Officer of the Privacy Commissioner of Canada (2014). Accessible at: https://www.priv.gc.ca/information/pub/guide_org_e.pdf.

2. Employers collection and use of personal employee information must be subject to informed employee consent;
3. Personal employee information should be collected by Employers only for a stated purpose, and must be collected fairly and lawfully;
4. Employee personal information should only be kept for as long as it is needed to meet the stated purpose for collection;
5. Employees should have venues through which to access the personal information their Employers collect, and be provided with mechanisms to challenge the accuracy or completeness of this information;
6. Exceptions to the above principles should be made when Employers are legally required to use or disclose personal information for other purposes.

Recommendation #6

The Ontario Government should undertake the study and adoption of a workplace privacy code in the ESA that encompasses some of the baseline protections set out above.

Adopt the Proposals of the Workers' Action Centre

The rise of low wage and precarious work in Ontario has been epidemic. Even in the Ontario Public Service, which portrays itself as a "model" employer in the province, there has been a troubling increase in reliance on temporary help agency workers contracted into the workplace.[14] While these workers often perform the same tasks as AMAPCEO members, they are contingent, receive lower wages, and receive none of the benefits or protections of our Collective Agreement.

AMAPCEO has reviewed the recommendations of the Workers' Action Centre in their report *Still Working on the Edge: Building Decent Jobs From the Ground Up.*[15] We are in agreement with the Workers' Action Centre that the *Employment Standards Act, 2000* (*ESA*) requires comprehensive reform in order to adequately protect low-wage and precarious workers in Ontario. In our view, the proposals set out in this report would help address many of the key problems flowing from the current iteration of the Act. We urge the Review to consider them thoroughly.

Recommendation #7

Except where modified by our specific recommendations above, AMAPCEO endorses the recommendations of the Workers' Action Centre and urges the Changing Workplace Review to provide due consideration to them.

[14] See Chapter 3.14 of the 2005 Annual Report of the Office of the Ontario Auditor General, accessible at: http://www.auditor.on.ca/en/reports_en/en05/en_2005%20AR.pdf.
[15] Gellatly, M. *Still Working on the Edge: Building Decent Jobs From the Ground Up* (2015) Workers' Action Centre.

C. Recommendations on Changes to the *Ontario Labour Relations Act*, 1995

Improve the Organizing Provisions of the OLRA

AMAPCEO joins with other labour organizations and bargaining agents in imploring this Review to propose changes that would facilitate union organizing, in addition to reversing some of the more unbalanced reforms of the Harris government. It is without question that these reforms have accomplished their objective of diminishing the organizing capacity of unions in Ontario and decreasing union density.[16] The ability of a worker to join a union and participate in collective bargaining continues to act as a significant check against the rise of low wage and precarious work. For this reason, we urge the review to consider the changes set out below.

Recommendation #8

Improve the ability for unions to organize by making the following changes:

- Re-establish card-based union certification (Card-Check);
- Mandate the early disclosure of employee lists to unions seeking to organize a workplace;
- Improve interim reinstatement processes for union organizers during and following organizing drives;
- Introduce neutral and off-site voting for any certification votes.

Reform Employee Exclusions in the OLRA

At present, the OLRA deprives many employees in Ontario of the right to join a union. Over the years, these exclusions to the Act have developed out of concern for a variety of public policy rationales. However, especially over the last 15 years, the protections afforded to employees and their unions under the *Canadian Charter of Rights and Freedoms* have matured and expanded[17]. Statutory amendment is required in order for the OLRA to stay in step with Charter values which were not yet fully developed during previous phases of labour relations reform in Ontario. It is no longer appropriate for the

[16] See, for example, S. Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification" (2004) *Canadian Labour and Employment Law Journal*, Vol. 11, pp. 259-301.

[17] Beginning in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94; continuing in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27; and see more recently *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245.

government to preference its discrete policy interests over the right of Ontarians to join together and participate in collective bargaining with their employer.

Of particular concern to AMAPCEO are those workers who are excluded from the Act without the provision of an alternative legislative route to collectively bargaining with their employer. The occupations excluded are wide-ranging and include lawyers, architects and doctors[18] alongside domestic workers, hunters and trappers and horticulturalists[19]. To be sure, some members of this group (for example, doctors and judges) have been able to leverage the bargaining power inherent in their professions in order to organize effective collective bargaining relationships with the government, notwithstanding their exclusion from the OLRA. However, for many of the excluded occupations (for example, domestic workers and horticulturalists) this type of organizing is a practical impossibility. In any case, in our submission the above exclusions are unnecessary, punitive and may well be inconsistent with the Charter. The Review should propose the deletion of them from the Act.

Recommendation #9:

Abolish the occupational exclusions in s.1(3)(a) and s.3 of the Act which are not already subject to a separate collective bargaining regime.

Beyond those exclusions which are premised on employment in a specific occupation, the OLRA also contains exclusions for any employees who exercise managerial functions or are "employed in a confidential capacity in matters related to labour relations"[20]. At present, the Ontario Public Service contains more than 10,000 excluded managerial or confidential employees[21]. The same is true in large employers across Ontario's public and private sectors. AMAPCEO urges the Review to recommend amendments to the Act designed to better facilitate access to collective bargaining for employees, notwithstanding their exercise of managerial functions.

Justifications for the managerial and confidential exclusions in the Act have been premised upon the avoidance of conflict of interests. The conflicts traditionally identified are twofold. The first is the conflict which might arise if those employees tasked with implementing labour relations are placed in a bargaining unit they are to supervise and negotiate with on behalf of the employer. In addition, managerial exclusions have been justified owing to a second, more amorphous conflict of interest that suggests employer require a supervisory cohort of employees that are kept free from a divided loyalty as between their employer and their bargaining agent.

AMAPCEO's experience as a bargaining agent demonstrates that this latter justification is rooted in outdated conceptions of how collective bargaining operates in the modern workplace. In our experience, employers are not deprived of staff who can provide them with effective managerial

[18] Excluded in s.1(3) (a) of the OLRA.
[19] Excluded in s.3 of the OLRA.
[20] s.1(3)(b) of the OLRA.
[21] Excluded by nearly identical language in s.1.1(3) of the *Crown Employees Collective Bargaining Act, 1993*.

services when those staff also engage in collective bargaining on their own behalf. Simply put, the antiquated presumption that membership in a trade union subverts the loyalty and integrity of managerial employees is no longer a sufficient basis upon which to disallow them the exercise of their freedoms of association.

Statutory reform to address this issue is necessary as Ontario's labour relations jurisprudence has, over time, taken a relatively broad approach - at least as compared to the federal jurisdiction - to applying the managerial exclusion.[22] We therefore recommend that these exclusions be abolished, and that managerial and confidential staff be treated as employees under the Act. However, in addition, we recommend the Review consider the adoption of a new process that would apply to managerial and labour relations staff who may seek to be represented by a bargaining agent.

In our submission, new statutory guidance should be put in place which emphasizes that these employees should be permitted, to the greatest extent possible, to access collective bargaining. At the same time, the Act should acknowledge the potential for conflicts of interest that may burden employers if certain individuals were to be placed in the same bargaining unit, or trade union, as the employees they supervise. For example, a similar type of provision to that which currently applies to security personnel[23] might be put in place for managerial employees. Such a provision could proscribe that where the Board determines that a conflict of interest indicates that these employees are unsuitable for entrance into a mixed bargaining unit, they should be required to organize within another trade union altogether. Alternatively, the Review could consider the adoption of more explicit rules to be applied by the Board regarding which employees may appropriately be placed within a managerial/confidential bargaining unit without frustrating the ability of an employer to operate. In the further alternative, the Review could consider proposing a new type of exclusion which would apply only to the most senior level of management, or those individuals who act as the "controlling mind" for organizations as whole.

Regardless of whatever form an amendment ultimately takes, we ask that the Review promote modifications to the Act that recognize that the number of managerial employees in Ontario currently excluded from collective bargaining is unnecessarily high, and should be refocused to facilitate the engagement of Charter-protected associational rights.

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[22] For example, in the federal jurisdiction, the Canadian Industrial Relations Board has historically rooted its interpretation of a similar exemption in "the presumption that individuals who wish to exercise and bargain collectively are entitled to such rights" and taken strong notice of the Canadian government's various commitments to freedom of association. It may be noted that the narrow approach taken in the federal jurisdiction has yet to present the kinds of labour relations problems that a broadly applied exclusion would purportedly avoid.

[23] Currently, s.14 of the OLRA provides employers with a process under which they may ask that a union satisfy the Board that the inclusion of security personnel into a "mixed" bargaining unit with regular employees would not create a conflict of interest. If this onus is not met, the Board will not certify the mixed unit.

Recommendation #10

Remove the managerial and confidential exclusions. Consider the introduction of new provisions to facilitate the entry of managerial staff into collective bargaining relationships with their employer, while addressing potential conflict of interest concerns that may result.

Increase the Availability of Binding Arbitration

Historically, AMAPCEO's membership has voiced near-unanimous support for adopting some form of interest arbitration in both the civil service and in the broader public sector. We would urge that the Review take the opportunity to advance the use of independent interest arbitration in the province's main labour relations statute.

Several recent labour relations trends in both the private and public sectors suggest that the increased use of independent binding interest arbitration could help better resolve impasses in collective bargaining. In the private sector, it has been observed that in the globalized economy, larger international employers have become more comfortable with the tactic of "starving out" local workforces in order to extract dramatic concessions at the negotiating table[24]. This has led to several notable work stoppages in Ontario, and devastating consequences for employees.[25]

In the public sector, we have taken notice of the fact that employers are displaying an increased willingness to threaten the imposition of terms and conditions on their employees as an alternative to traditional lock outs[26]. In our view, the threat of such actions is an inappropriate circumvention of the bargaining agent and works to undermine positive labour relations.

In both of the situations described above, access to interest arbitration has the potential to achieve balanced bargaining outcomes without a resort to the kinds of sanctions which are disruptive for employers, employees and the public.

One method to accomplish this would be for Ontario to adopt a similar provision as already exists in s.87.1 of Manitoba's *Labour Relations Act*[27]. The Manitoba provisions provides their labour board, upon application by an employer or union, with the power to terminate an existing strike or lockout and settle

[24]See, for example, Stanford, J. "Management has warmed to work stoppages". The Globe and Mail. http://www.theglobeandmail.com/globe-debate/management-has-warmed-to-work-stoppages/article4241512/

[25] For example, employees at Crown Holdings recently ratified a concessionary agreement following a 22-month long strike. See also Olive, D. "Why Caterpillar has the upper hand in London plant lockout" Toronto Star, Jan. 3, 2012. http://www.thestar.com/business/2012/01/03/olive_why_caterpillar_has_the_upper_hand_in_london_plant_lockout.html

[26] The City of Toronto and the University of Windsor are two public employers who have recently made use of this threat in negotiations with their bargaining agents.

[27] *The Labour Relations Act*, C.C.S.M. c. L10.

the collective agreement, to refer the parties to neutral third party interest arbitration. In Manitoba, such an application can only be made after a work stoppage has been in effect for 60 days and where conciliation has not been successful. Further, the Board will refuse to terminate a work stoppage if the parties are bargaining in good faith and it appears they are likely to conclude a collective agreement within 30 days if they continue bargaining.

A similar provision in Ontario would preserve the system of incentives which are foundational to our longstanding collective bargaining regime. At the same time the risk of hugely lengthy disputes, and their attendant economic and public consequences, would be significantly reduced.

Recommendation #11

The Changing Workplace Review should recommend the adoption of interest arbitration language patterned after s.87.1 of the Manitoba Labour Relations Act.

Mandate Benefits Continuance During Labour Disruptions

In Ontario, the LRA holds that it is up to a union and employer to make arrangements concerning the continuation of benefits during strike or lockout. This may take the form of an agreement that the Employer will continue to pay their usual share of the premiums for these benefits; in other situations, the union may pay the premiums, but the employer would agree to continue coverage under the existing insurance policy. However, nothing obligates an employer to consent to any type of continuance. Indeed, there may well be a temptation to increase leverage at the bargaining table by ensuring benefit discontinuance.

Generally speaking, the current framework means that unions and employers must engage in distracting and laborious side negotiations concerning the parameters of this benefits continuance. It would significantly simplify the process for both parties—and, frankly, serve as an additional aspect of a balanced approach to labour relations—if the LRA simply legislated that unions must be allowed to assuming carriage of benefits coverage during strike or lockout. The province of Saskatchewan has precisely this language in its *Saskatchewan Employment Act*, at s. 6-36:

> *Benefits during strike or lockout*
>
> *6-36 (1) In this section, "benefit plan" means a medical, dental, disability or life insurance plan or other similar plan.*
>
> *(2) During a strike or lockout, the union representing striking or locked-out employees in a bargaining unit may tender payments to the employer, or to a person who was, before the strike or lockout, obliged to receive the payment:*
>
> > *(a) in amounts sufficient to continue the employees' membership in a benefit plan; and*
> >
> > *(b) on or before the regular due dates of those payments.*

(3) The employer or other person mentioned in subsection (2) shall accept any payment tendered by the union in accordance with subsection (2).

(4) No person shall cancel or threaten to cancel an employee's membership in a benefit plan if the union tenders payment in accordance with subsection (2).

(5) On the request of the union, the employer shall provide the union with any information required to enable the union to make the payments mentioned in subsection (2).[28]

In our submission, a similar provision in Ontario would represent a balanced solution to the issue outlined above. Benefits would be required to continue during throughout the challenging straits of a labour disruption; however, no obligation would be placed on an employer to financially contribute to insured benefits at time when its workforce may be inactive.

Recommendation #12

AMAPCEO recommends the inclusion of Saskatchewan's benefits continuance language in the OLRA.

D. Conclusion

AMAPCEO wishes the special advisors on the Changing Workplaces Review project well as they continue their important role in helping to update Ontario's labour and employment laws. Should the advisors have any questions or desire any further information from AMAPCEO, we invite them to get in touch with us via email at president@amapceo.on.ca

[28] *The Saskatchewan Employment Act*, R.S.S. 2013, c. S-15.1.