Submission to the Changing Workplaces Review

To the Ministry of Labour

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President

Marshall Jarvis
General Secretary

September 2015

www.oecta.on.ca

ONTARIO ENGLISH
Catholic Teachers
ASSOCIATION

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The Ontario English Catholic Teachers' Association (OECTA) represents 45,000 women and men who have chosen teaching careers in the Catholic schools in Ontario. These teachers are found in the elementary panel from junior kindergarten to Grade eight, in the secondary panel from Grade nine through Grade twelve, and occasional teachers in both panels, in publicly funded Catholic schools.

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TABLE OF CONTENTS

1. INTRODUCTION

1.01 The Ontario English Catholic Teachers' Association (OECTA) represents nearly 50,000 teachers in the province's elementary and secondary English Catholic schools. Our members' professional standing and working conditions are always top of mind. However, we also advocate on behalf of our students, their parents and guardians, and all workers in Ontario. We believe the *Employment Standards Act* (ESA) and *Labour Relations Act* (LRA) must be modernized to recognize the increasing precarity of the labour market and the shifting nature of employment relationships. The legislative changes proposed here will help to ensure that all workers are able to enjoy stability and fairness in their working lives.

2. EMPLOYMENT STANDARDS ACT

2.01 As the consultation guide has acknowledged, Ontario's labour law regime was designed to respond to an economy and labour market that no longer exists. Whereas secure, full-time employment once dominated, and households were generally supported by a single (usually male) breadwinner, the last few decades have seen a considerable influx of workers and the proliferation of new, non-standard employment relationships.

2.02 Structural shifts have created what is known as an "hourglass economy": there are a good number of stable and high-paying jobs in technology and financial services at the top, but a growing proportion of the jobs are in retail and hospitality sectors (Zizys 2011). These tend to be low-skill, low-paying, temporary and/or part-time (Tiessen 2014). More than one-fifth of workers in Ontario are now in "precarious" jobs (LCO 2012). Certain groups are more likely to be in precarious work, such as women, racial minorities, immigrants, Aboriginals, and persons with disabilities (Block et al. 2014).

2.03 The consequences of non-standard employment relationships are most obvious in the low incomes they provide. However, many other quality of life issues are involved. Recent research has shown that the unstable, unpredictable nature of these jobs can, among other things, lead to: poor health, tensions in the home, difficulty maintaining relationships, and limited engagement in the community (Lewchuck et al. 2015). Often these problems are the direct result of shortcomings in the existing legislation, or employers' determination and ability to bend the rules.

2.04 The *Employment Standards Act* must evolve to meet the needs of today's workers. Some reforms will be more controversial and involve greater balancing of employers' and employees' needs, but there are several changes that can be made to immediately rebuild the minimum floor of workplace standards.

2.05 Exemptions and Special Rules

Over time, a complex system of exemptions and special rules has been developed, leaving many workers outside the scope of the ESA. Farm workers, youths, and employees in information technologies industries are just a few examples of people working in the province of Ontario who are not covered by employment standards legislation.

2.06 Business interests will no doubt claim the exemptions and special rules reflect distinct, sector-specific structures and needs. However, labour law experts have pointed out that the rationale often appears more political than economic (Doorey 2009; England 2005). Unless a cogent, contemporary case can be made otherwise, all people performing work for compensation in the province of Ontario should be considered employees and entitled to the rights and protections afforded by the *Employment Standards Act*.

2.07 In other cases, different classifications of workers are experiencing differential working conditions and levels of protection. Employers are exploiting these exceptions, often misclassifying employees to deny pay, benefits, breaks and vacation time from workers.

2.08 As teachers, we have been particularly concerned and vocal about the rise of unpaid internships and how these are affecting young Ontarians entering the labour market. But there are also many adults who are being misclassified by their employers as independent contractors, even though they have no control over how the work is done, no ability to negotiate pay and deadlines, and are clearly part of the business. These workers miss out on important entitlements, including benefits and termination pay, and are often left responsible for the employer portion of Canada Pension Plan and Employment Insurance contributions. Workers have been pointing out the trend toward misclassification for years (Daly 2007), and the problem is not limited to small businesses that desperately need to cut costs or do not understand the rules - even large, highly profitable corporations have been implicated (Kestler-D'Amours 2015).

2.09 Temporary employment, especially involving staffing agencies, is another relationship that has proliferated in recent years. Temporary workers often receive less pay than regular employees, and there is a lack of clarity around when and how a temporary employee can be dismissed, or conversely when they should be considered a permanent employee. Recent legislation sought to better regulate temporary employment, but failed to define the maximum length of a so-called temporary assignment. Stories abound of "perma-temp" relationships, where the bulk of the staff at a business is considered temporary, and workers are considered temporary even though they have been on the job for months or years (Gellatly 2015).

2.10 Even the rules around part-time work, which is a relatively standard form of employment, have been stretched to reduce employers' obligations at great cost to workers. There are legitimate reasons for businesses to hire part-time workers, and many people work part-time by choice, as they balance their jobs with the demands of school or family care, or simply wish to increase their leisure time (Taylor 2012). But these are not grounds to deny basic rights, protections, and equal treatment for part-time workers. When there is no justification based on skill level, experience or job description, pay discrepancies are unfair to part-time workers and can reduce standards for all workers. The negative consequences are especially troubling when we consider that women, racial minorities and recent immigrants – who are already disadvantaged in the labour market – are more likely to work part time (LCO 2012).

2.11 As several submissions to this review have already noted, the European Union addressed the discrimination of part-time workers almost 20 years ago. The directive aimed to facilitate *voluntary* part-time work and the flexible organization of working time, while at the same time prohibiting less favourable employment conditions for part-time employees. There is no reason why Ontario should not bring our standards up-to-date and prevent employers from denying wages and benefits from employees solely because they work part-time schedules.

Recommendations:

That the definition of employee be broadened.

That all exemptions and special rules be reconsidered, and eliminated where there is no policy justification.

That workers receive the same pay and working conditions, regardless of classification.

That the term of assignment for temporary workers be limited.

2.12 Just-in-Time Scheduling

Ontario's employers do not have to provide workers with their schedule in advance. There is no obligation to guarantee a certain number of hours, and there are no penalties for cancelling shifts.

2.13 As the *Toronto Star* illustrated earlier this year, while employers reap the benefits of flexibility and minimized labour costs, workers struggle mightily with the consequences of unpredictability (Mojtehedzadeh 2015a). Part-time workers who have to combine several (usually low-income) jobs to make ends meet are unable to make necessary plans and commitments. Even full-time employees are under constant stress not knowing when they will be expected at work from week to week or even day to day. This affects not only their working lives, but also their personal relationships and ability to participate in social and civic activities. The problem is most common for those working in the retail sector, which makes up a growing proportion of Ontario's economy.

2.14 The lack of standards around scheduling is particularly challenging for parents and guardians. Child care is incredibly difficult to access, especially when it is needed outside of standard working hours. Just-in-time scheduling exacerbates the problem for the parents who can least afford it. Workers whose schedules are made and/or changed at the last minute have a limited range of childcare options. They might be forced to accept conditions for their children they otherwise would avoid, or they might have to depend on their partner or other family members, which limits employment options for everyone in the household (Lewchuk et al. 2015).

2.15 After years of pressure from labour organizations, several major retailers in the United States have recently announced they will no longer be practicing on-call scheduling (Ferro 2015). Here in Ontario, Loblaws has launched a pilot project in which part-time employees at some stores will be given 10 days' notice of upcoming shifts (Mojtehedzadeh 2015b). But workers should not have to depend on the goodwill of select employers. The law should guarantee a reasonable amount of predictability for all workers.

Recommendation:

That employers be required to give 10 days' notice of work schedules, with compensation to employees if schedules are changed thereafter.

2.16 Critically Ill Child Care Leave

There are other, more specific exemptions or exceptions to ESA provisions that we find quite troubling. Often these have to do with leave. For example, parents only have access to critically ill child care leave if they have been employed by their employer for at least six consecutive months.

2.17 Removing the requirement that employees need to have been employed for a specified period would bring the critically ill child care leave provision in line with similar provisions, such as family care leave. It would also more accurately reflect the realities of the modern labour market. Many Ontarians are in a cycle of temporary employment in which they are regularly changing jobs. It is unfair that these parents should not have access to leave just because the tragedy of a critical illness to their child does not coincide with a period of relative stability in their working life. The requirement also has a disparate and discriminatory impact on women, who will overwhelmingly be the ones to take such leaves.

Recommendation:

That s. 49.4(2) of the *Employment Standards Act* be changed to delete "who has been employed by his or her employer for at least six consecutive months."

2.18 Personal Emergency Leave

Only employees who work for employers that regularly employ at least 50 employees are eligible for personal emergency leave. It is reasonable that very small employers should be exempt from the provision, as they might find it difficult to accommodate such leaves. However, the 50-employee threshold excludes almost all employers in Ontario. Given that the leave is without pay and can only be taken in emergencies, it should be available for many more workers.

Recommendation:

That the minimum employee threshold for the emergency leave provision be reduced to 10.

2.19 Proactive Enforcement

The current system of enforcement relies primarily on complaints by individual employees. Where proactive enforcement does exist, it is often geared primarily toward education and future, voluntary compliance.

2.20 As Gellatly (2015) notes, individual claims are a successful way to detecting ESA violations. However, with such an uncertain and competitive labour market, in which jobs are difficult to obtain even for workers with high levels of education, it is unfair to put the bulk of the onus on employees to make complaints against their employers. This is especially true given that employers are notified of complaints, and employees are only protected by weak anti-reprisal provisions. Thus, some 90 per cent of complaints are made only after an individual has left his or her job (Vosko 2013). And where one employee in a workplace is being treated unfairly, it is likely that other employees are also having their rights violated. A more proactive system that seeks to deter employers from violating the ESA, and makes sure current employees are receiving the appropriate treatment and/or remedies, is the only way to incentivize employers to respect the law.

2.21 The value of proactive enforcement was demonstrated during recent inspection blitzes targeting businesses with unpaid interns. One campaign in the Greater Toronto Area found that nearly half the inspected businesses were violating the ESA, denying wages and vacation pay to workers who should have been classified as employees rather than interns (Oved 2014). It is unlikely the young people involved – fearing damage to their own reputation in their chosen field of work – would have felt empowered to make complaints against these employers. The government has a duty to protect vulnerable workers by ensuring compliance with the legislation covering workplace standards.

Recommendation:

That a more proactive system of enforcement be developed and maintained.

3. LABOUR RELATIONS ACT

3.01 As the Supreme Court of Canada recently put it, "Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals."

3.02 The law should constantly aim to facilitate free and fair bargaining between unions and employers, and to provide mechanisms that will deter employers from violating collective agreements. There are a handful of glaring examples where the *Labour Relations Act* fails to do so.

3.03 Replacement Workers

Especially when dealing with large, multi-national corporations, employees often have little bargaining power, and few means of recourse when they believe the employer is being unfair and obstinate at the bargaining table. The legal right to strike is the last resort for unionized employees to make their collective voices heard. Allowing employers to bring in replacement workers undermines the purpose and reduces the efficacy of this course of action. Also, experience and research shows that allowing employers to use replacement workers negatively affects trust between employees and employers and creates division in communities, while management claims about anti-replacement worker laws increasing the frequency and duration of strikes remain unproven (Savage and Butovsky 2009).

3.04 Ontarians have had several recent opportunities to witness the consequences of the lack of anti-replacement worker legislation. Difficult negotiations at Vale in Sudbury and Crown Holdings in Toronto forced workers to walk off the job, and the use of replacement workers by the employers only aggravated and protracted the disagreements. Ontario should once again respect the legal right to strike by banning replacement workers.

Recommendation:

That ss. 73.1 and 73.2 of the *Labour Relations Act* be reintroduced.

3.05 Grievance Arbitration

Recently, teachers in several school boards have seen administrators make unilateral changes to staffing provisions. Although the grievances were eventually settled through arbitration, the effects of the structural changes imposed by administrators were irreversible. The relief issued in the final arbitration decisions was of little value to the aggrieved teachers.

3.06 These experiences highlight the need for changes in legislation that will enable arbitrators to issue interim relief prior to the final arbitration decision. This power could remedy illegal employer behaviour where any relief would be moot by the time of the final arbitration decision.

Recommendation:

That s. 48(12) of the *Labour Relations Act* be amended to include the following words: "To grant such interim orders, including interim relief, as the arbitrator or arbitration board considers appropriate."

3.07 Teacher Collective Bargaining Assistance

The Education Relations Commission (ERC) was created in 1975 to guide collective bargaining between teachers' unions and school boards. The commission monitored negotiations, appointed fact-finders and mediators, supervised last-offer and strike votes, advised the government on whether work stoppages would jeopardize students' education, and maintained data on collective agreements. The ERC continues to exist under s. 57(2) of the *Education Act*, but only for the purpose of so-called "jeopardy hearings."

3.08 The ERC was created to de-politicize the bargaining process (Rose 2002). However, when the commission was called upon earlier this year to rule on strikes by public high school teachers in three school boards, it looked very much like a political maneuver on the government's part. No open hearings were held where witnesses could be examined or positioned challenged, and there was considerable skepticism that the government was merely looking for cover to implement "back to work" legislation.

3.09 If jeopardy hearings are to continue, such powers should be given to the Ontario Labour Relations Board (OLRB). Moreover, the OLRB, or a division of the Ministry of

Labour, should be given some of the additional powers previously held by the ERC. Specifically:

- to maintain an awareness of negotiations between teachers and school boards;
- to compile statistical information on the supply, distribution, professional activities and salaries of teachers;
- to provide such assistance to parties as may facilitate the making or renewing of agreements;
- and to select, where necessary, to train persons who may act as conciliators, mediators or facilitators in teacher collective agreements.

3.10 In the past, these powers provided appropriate and valuable assistance to all parties during bargaining. Going forward, they will help to smooth some of the turbulence experienced under the new bargaining process.

Recommendation:

That the Ontario Labour Relations Board or a division of the Ministry of Labour be given powers similar to those previously held by the Education Relations Commission.

4. CONCLUSION

4.01 There is no doubt the economy has shifted, and workplaces must adapt to the changing times. Employers might legitimately demand some objective measures that allow for flexibility in order to remain efficient and competitive in a volatile economy. But such actions should never unreasonably compromise employees' stability and dignity. Economies and employment law regimes that primarily serve employers' profit motive fail to satisfy what should be their guiding principle: ensuring a decent quality of life for all workers and citizens. The recommendations offered here will help to restore much needed balance in Ontario's employment laws.

5. RECOMMENDATIONS

Employment Standards Act

5.01 That the definition of employee be broadened.

5.02 That all exemptions and special rules be reconsidered, and eliminated where there is no policy justification.

5.03 That workers receive the same pay and working conditions, regardless of classification.

5.04 That the term of assignment for temporary workers be limited.

5.05 That employers be required to give 10 days' notice of work schedules, with compensation to employees if schedules are changed thereafter.

5.06 That s. 49.4(2) of the *Employment Standards Act* be changed to delete "who has been employed by his or her employer for at least six consecutive months."

5.07 That the minimum employee threshold for the emergency leave provision be reduced to 10.

5.08 That a more proactive system of enforcement be developed and maintained.

Labour Relations Act

5.09 That ss. 73.1 and 73.2 of the *Labour Relations Act* be reintroduced.

5.10 That s. 48(12) of the *Labour Relations Act* be amended to include the following words: "To grant such interim orders, including interim relief, as the arbitrator or arbitration board considers appropriate."

5.11 That the Ontario Labour Relations Board or a division of the Ministry of Labour be given powers similar to those previously held by the Education Relations Commission.

6. WORKS CITED

Block, Sheila, Grace-Edward Galabuzi, and Alexandra Weiss. (2014). *The Colour Coded Labour Market: A National Household Survey Analysis*. Toronto: Wellesley Institute.

Daly, Rita. (2007). "Contract job workers left without hope." *Toronto Star* (March 10).

Doorey, David. (2009). "Employment Standards Act Exclusions: The 'Crown' Exclusion." *lawofwork.ca* (October 6).

England, Geoffrey. (2005). *Employment Law in Canada, 4th Edition*. Toronto: LexisNexis Butterworths.

Ferro, Shane. (2015). "Another Sign Low-Wage Workers Are Finally Gaining Some Power." *Huffington Post* (August 28).

Gellatly, Mary. (2015). *Still Working on the Edge: Building Decent Jobs from the Ground Up*. Toronto: Workers' Action Centre and Parkdale Community Legal Services.

Kestler-D'Amours, Jillian. (2015). "Deloitte sued for $384 million in lawyer class action." *Toronto Star* (March 13).

Law Commission of Ontario (LCO). (2012). *Vulnerable Workers and Precarious Work*. Toronto: Law Commission of Ontario.

Lewchuk, Wayne, Michelynn Lafleche, Stephanie Procyk, Charlene Cook, Diane Dyson, Luin Goldring, Karen Lior, Alan Meisner, John Shields, Anthony Tambureno, and Peter Viducis. (2015). *The Precarity Penalty*. Hamilton: Poverty and Employment Precarity in Southern Ontario (PEPSO) Research Group.

Mojtehedzadeh, Sara. (2015a). "'Wild West' scheduling holds millions of Ontario workers hostage." *Toronto Star* (May 3).

Mojtehedzadeh, Sara. (2015b). "Loblaws rings in better scheduling for part-time workers." *Toronto Star* (August 22).

Oved, Marco Chown. (2014). "Blitz finds nearly half of companies with interns break the law." *Toronto Star* (September 30).

Rose, Joseph. (2002). "The Assault on School Teacher Bargaining in Ontario." *Industrial Relations* 57, no. 1: 100-128.

Savage, Larry, and Jonah Butovsky. (2009). "A Federal Anti-Scab Law for Canada? The Debate Over Bill C-257." *Just Labour* 13: 15-28.

Taylor, Peter Shawn. (2012). "In praise of 'precarious' work." *Canadian Business* (October 24).

Tiessen, Kaylie. (2014). *Seismic Shift: Ontario's Changing Labour Market*. Toronto: Canadian Centre for Policy Alternatives – Ontario.

Vosko, Leah. (2013). "'Rights without Remedies': Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs." *Osgoode Hall Law Journal* 50, no. 4: 845-873.

Zizys, Tom. (2011). *Working Better: Creating a High-Performing Labour Market in Ontario*. Toronto: Metcalf Foundation.