Building Balance, Fairness, and Opportunity in Ontario's Labour Market

Submission by Unifor to the Ontario Changing Workplaces Consultation

UNIFOR
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Table of Contents

Executive Summary **2**

Part I: Introduction **4**

Part II: Stating the Problem: Precarious Work, Inequality, and its Consequences..... **9**

Part III: Employment Standards: Incremental Improvements **32**

Part IV: Labour Relations: Incremental Improvements **48**

Part V: Strategies for Restoring Balance in the Labour Market: Just Cause and Collective Action in Non-Union Workplaces **92**

Part VI: Strategies for Restoring Balance in the Labour Market: Sectoral Standards **104**

Part VII: Employment Standards, Labour Relations, and Economic Performance **132**

Part VIII: Conclusion and Summary of Recommendations **149**

Executive Summary

The Ontario Changing Workplaces Review occurs at an important juncture in the evolution of Ontario's labour market. The world of work in this province has been buffeted by a series of macroeconomic shocks (including the after-effects of the global financial crisis, and the erosion of Ontario's crucial manufacturing sector), but also by longer-run structural changes in the way work is organized, contracted, performed, and compensated. What was once known as "non-standard employment" – positions without permanent status or security, regular hours, or normal supplementary benefits – has unfortunately become the new norm in many segments of the labour market. And the institutional and structural factors which once helped working people attain a more stable and prosperous economic position, underpinning the development of healthy, inclusive communities, have been weakened. This institutional disempowerment is visible in indicators such as stagnant union membership, falling collective bargaining coverage, inadequacy of employment standards (including inadequate enforcement), and a generalized willingness (by employers, government, and even workers) to tolerate practices and conditions that are clearly unfair and ultimately unsustainable. These trends have produced a polarization of economic opportunity, and corresponding divisions that are increasingly evident across Ontario society. The dream of a stable and prosperous life seems out of reach for too many working Ontarians, despite their skills, productivity, and work ethic. Instead, they face a daunting reality of underemployment, precarity, inadequate income, and constant economic stress.

This submission represents a comprehensive effort by Unifor to analyze the causes and consequences of these negative trends in Ontario's labour market, and to propose a set of policy responses to the economic, cultural, and technological pressures that are reshaping the world of work. Our submission begins by documenting the broad evolution in Ontario's labour market, including the expansion of precarious work, growing inequality of income, the erosion of institutional bulwarks, and the consequent insecurity faced by most working people. It finds that a combination of cyclical and structural factors has contributed to a fundamental shift in economic bargaining power away from workers – and this shift has allowed employers to determine terms of employment that are increasingly precarious and exploitive.

The core of Unifor's submission then makes a total of 43 specific policy recommendations that together would make a significant positive difference in the functioning of Ontario's labour market. These recommendations are organized into four main sections. Part III of the submission proposes a set of incremental reforms to employment standards and their enforcement; Part IV proposes a corresponding set of reforms to labour relations laws and practices (recognizing the dual mandate of the Changing Workplaces Review to consider both employment standards and labour

relations policies). Then, in Parts V and VI of the submission, Unifor proposes two fundamental and far-reaching changes in approach, that in our view would help to restore fairer treatment in Ontario workplaces, and a more sustainable balance of economic power between workers and employers. The first of these fundamental changes, described in Part V, involves legal and regulatory protections for workers in non-unionized workplaces to meaningfully express their "voice," and undertake collective actions in support of their workplace interests. Our second far-reaching proposal, described in Part VI, is for a system of sectoral standards that would apply to both unionized and non-unionized workplaces; these sector-wide standards would establish norms of fairness and performance across specific regionally and industrially-defined sectors, hence establishing a sustainable "level playing field" for all enterprises.

The submission concludes by confronting concerns that improving fair treatment, protection, and compensation in Ontario workplaces would deeply damage Ontario's economy – perhaps by motivating an outflow of business investment, or making Ontario-produced goods and services "too expensive." We provide ample documentary and economic evidence regarding the positive spillover effects of stronger employment practices and collective representation for productivity, retention, skills acquisition, and other determinants of business success, concluding that Ontario's economy will be strengthened by our proposals for building higher-quality workplaces.

A summary listing of our 43 specific recommendations is provided in the conclusion.

Unifor thanks the Government of Ontario, and the Special Advisors, for this important opportunity to review the broad state of Ontario's evolving labour market, and to envision strategies – both incremental and far-reaching – for building a better one.

Part VI: Strategies for Restoring Balance in the Labour Market: Sectoral Standards

6.1 Five Policy Goals for Addressing Precarious Work and Fairness

The Changing Workplaces Review must address a fundamental challenge for the future of labour market policy: what measures can effectively provide Ontario workers the dignity, security, and fair treatment they deserve, while maintaining the efficiency and success of Ontario's economy?

Unifor believes that in addition to the specific improvements to employment standards and industrial relations practices outlined in earlier sections, the Changing Workplaces Review should consider some more far-reaching, conceptual changes in our approach to lifting standards and outcomes in our labour market. The fundamental changes in the economy and labour market mapped out above, demand an evolution of our basic approach: one that is innovative, evidence-based, and rooted in established Ontario and Canadian principles and precedents.

Unifor submits that reconceptualizing the application of both employment standards and collective bargaining to apply on a sectoral basis, in addition to on an enterprise or workplace basis, holds great promise for modernizing our regulatory approach to reflect these challenging new realities. In our view, this sectoral thinking should incorporate five basic propositions:

i. a) Sectoral minimum standards across defined labour markets are the most effective mechanism to provide security and fairness for workers, while reflecting sector-specific economic realities and ensuring business success.

   b) Sectoral standards should reflect the labour market test of the outcomes that would be attained from free collective bargaining, in order to establish a set of prescribed minimum standards and provide for the extension of collective agreement provisions across a defined labour market. (In this submission, we call such an extension a "Sectoral Standards Agreement."

ii. c) New sectoral councils, including employers, trade unions and worker representatives within a Sectoral Standards Agreement, should be tasked with developing labour market partnerships, providing access to health and welfare benefits, and assuming a front-line role in the enforcement of minimum standards.

iii. d) All Ontario workers should have a voice in their workplace, and it is time to provide for a "workers' voice" in the operation of sector councils and through basic freedoms established in the Ontario Labour Relations Act. However it is a bedrock provision of

Canadian labour law that a genuine workers' voice must have a labour relations purpose, and be protected from employer influence and reprisals, and include a concomitant protected right to collective action. Nothing in what we propose here should be interpreted as interfering with or replacing those rights.

iv. e) While sectoral standards should reflect a broad community of interest between all workers, unionized and non-union, the institutions of collective bargaining must also adapt to the growing fragmentation of labour markets through the specific application of multi-employer certifications and bargaining rights. These include measures to enable organization and collective bargaining by workers in franchise operations, as well as within the growing workforce of self-employed and single dependent contractors.

6.2 Drawing on Canadian Precedents

Distinctive Features of Canada's Labour and Social Legislation

Unifor contends that each of these policy goals separately and in their totality would constitute an important evolution of long-standing Ontario and Canadian practices and precedents, which combine the distinct features of Canadian social legislation and the Canadian application of the "Wagner Act" majoritarian model of worker representation.

Canadian workplace and industrial relations law has always been distinct reflecting our federal system as well as evolving cultural and political consensus. Many distinctly Canadian provisions have defined key elements of work in this country. These include, among many others:

- Provincial and federal minimum wage and employment standards provisions, both universal and sectoral in scope.
    - Extensions of collective agreement provisions to cover non-union workers through the Rand Formula and through judicial extension or Decrees.
    - Legislatively mandated collective bargaining regimes in the construction sector, health care, education and other sectors.
    - Prohibitions on replacement workers in B.C. and Quebec.
    - Human rights law and adjudication federally, in Ontario and other provinces.
    - Ontario's Pay Equity Act.
    - Federal occupational and sectoral bargaining regimes for professional independent contractors in the arts.

These and other Canadian approaches to workplace regulation have evolved over time. They are diverse, but represent a broad Canadian consensus on the rights of workers and minimum standards in our economy.

Unifor recognizes the reversals and rebalancing of rights away from workers in Ontario during the years of the Harris government. However, as the Law Reform Commission of Ontario argued effectively in the context of employment standards, these reversals were at odds with the long sweep of Canadian tradition. Hence we demand a return to our progressive tradition to redress the needs of vulnerable workers.[187]

Quebec: The Act Respecting Collective Agreement Decrees

From 1934 until today a significant percentage of Quebec's most vulnerable workers have enjoyed the protection of that province's "Decrees Act." While some critics attempt to dismiss the Decree System as a relic from a former era, it has in fact been subject to ongoing review and updating, most recently in May of 2015. The Decrees Act remains an integral part of workplace life in Quebec, covering 9,000 employers and about 75,000 employees.

The Decree System is relevant to Unifor's proposal in part because it demonstrates the effectiveness and practicality of extending collective agreements across a defined sector, and the role of a sectoral body (called in Quebec the "Parity Committee") in administering and enforcing these provisions.

The Act Respecting Collective Agreement Decrees sets out clearly the practical measures that have remained at the basis of the system for 80 years. The chief provisions in their current form are[188]:

- The judicial extension of a collective agreement for a trade, industry or occupation to bind employees and employers in a stated region of Quebec (Section 2).
- The decree extends the agreement as minimum standards (Section 13).
- The decree applies to contractors and subcontractors (Section 14).
- The parties to a collective agreement must form a committee responsible for overseeing and ascertaining compliance with the decree (Section 16).
- The committee may enforce the decree and the Act, including imposing penalties of 20% of any amount of unpaid wages or compensation (Section 22).
- The committee is self-financing through a levy no larger than 1/2% of the employer's total payroll (Section 22 r, 1).

The Evolution of the Decree System

The Decree system in Quebec has diminished over time in its sectoral scope, and it has been modified to be more flexible and to address concerns over competitiveness issues.

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[187] Law Reform Commission of Ontario, Vulnerable Workers and Precarious Work, 2013
[188] Province of Quebec, An Act Respecting Collective Agreement Decrees

Major amendments to the Decree system were introduced in 1996. These amendments required decrees to consider "business implications" and to ensure that a Decree (Section 6 of the Act) meet the following criteria:[189]

(a) Have acquired a preponderant significance and importance for the establishment of conditions of employment;
(b) May be extended without any serious inconvenience for enterprises competing with enterprises established outside Québec;
(c) Do not significantly impair the preservation and development of employment in the defined field of activity; and
(d) Do not result, where they provide for a classification of operations or for various classes of employees, in unduly burdening the management of the enterprises concerned.

The 1996 amendments also provided for a review of the sectors covered by Decrees and over the following decade the number of decrees was significantly diminished, particularly in manufacturing. Today, 14 decrees remain, covering close to 75,000 workers. Of these, three sectors represent 94% of the employees covered: automobile services, security agencies, and building services.[190]

In considering the diminished scope of the Decree System in Quebec, it should be noted that the labour relations system in Quebec's construction industry also has its origins in a Decree – which has now evolved into a legislated and highly regulated sectoral certification system covering about 250,000 workers.[191]

In 2012, the Decree System underwent yet another review, and in May 2015 the government tabled Bill 53 to update the Decree System. Bill 53 includes provisions to:[192]

- Allow for applications at any time for an amendment to the decree after negotiations between the parties.
- Allow for appointment of a conciliation officer to assist in the negotiation of decree provisions.
- Allow for the minister to make changes to a decree after consultation.

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[189] Province of Quebec Act, Respecting Collective Agreement Decrees

[190] Les différents régimes de représentation collective au Québec
Par Bianca Tanguay-Lavallée, Antoine Houde, Josée Marotte, Charles Nadeau et Martine Poulin*
Regards sur le travail, Vol 9, Forum 2012, Ministry of Labour, Province of Quebec

[191] Commission de la construction du Québec, www.ccq.org

[192] Bill 53, An Act to update the Act respecting collective agreement decrees mainly to facilitate its application and enhance the transparency and accountability of parity committees, Sam Hamad, Minister of Labour, 2015, Province of Québec

- Allow for the minister to recommend a repeal of a decree if it fails to meet criteria in Section 6 of the Act (noted above).
- Allow the minister to appoint an "observer" to participate in Parity Committee proceedings.
- Requiring Parity Committees to post information on its decisions and its audited financial statements.
- Allow greater access to workplaces and information by Parity Committee inspectors for enforcement of decrees.
- Increased fines for violations of decrees.

The Decree System in Automobile Services

Unifor has extensive experience with the Decree System, as the principal union participating in the Montreal automotive services decrees (which is the largest of six regional decrees in this sector). The Montreal Region Decree[193] provides minimum standards for wages, working hours, holidays, vacation pay, special leave, advance termination notices, and the training and qualification process for tradespersons.

The Montreal Region Decree is negotiated and administered by a 12 person Board ("Parity Committee") equally comprised of union and employer representatives. The union representatives include Unifor Local 4511 and representatives and the Syndicat national des employés de garage du Québec inc. (SNEGQ). Six separate employer organizations make up the employer side of the Parity Committee.

The Decree defines, in great detail, the specific set of activities and occupations to be covered by its terms (listing ovr a dozen activities and exclusions), and its territorial coverage (catalogued in a list of over 30 municipalities). An important part of the Montreal Decree provides for a labour market partnership in training and qualifications for auto mechanics and other professions. Like other Quebec decrees, the Parity Committee is self-financing through a small levy on employers, and it employs inspectors to monitor and enforce provisions throughout the sector.

The Federal Status of the Artist Act

Another interesting precedent for the application of minimum standards and provisions across an entire sector or occupation is provided by the federal *Status of the Artist Act*. In 1992, the federal government adopted this ground-breaking labour relations statute which granted collective bargaining rights to "cultural workers" who were, as a matter of law, predominantly engaged in contracts for service as independent contractors.

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[193] The Parity Committee of the automotive services industry in the Montreal region - CPA Montreal, www.cpamontreal.ca

The *Status of the Artist Act* applies to a wide range of persons involved in the arts, namely those who:

> "(i) are authors of artistic, dramatic, literally or musical works within the meaning of the *Copyright Act*, or directors responsible for the overall direction of audio visual works,
>
> (ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or,
>
> (iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound recording, doving, or the recording of commercials, arts and crafts, or visual arts."[194]

While the *Status of the Artist Act*, S.C. 1992, C. 33 builds on the *Wagner Act* model, as expressed in Part I of the *Canada Labour Code*, it departs from conventional labour law paradigms in order to accommodate the features of freelance, project-based, temporary work undertaken by the constituency of self-employed "professionals" targeted by the statute.

The constituency of persons protected by the statute are artists who are identified as "professional" independent contractors. This group of "professional artists" does not include employed artists who are considered to be protected by conventional collective bargaining schemes and statutory standards. In many respects, the working conditions and environment of a "professional artist" covered by the *Status of the Artist Act* resembles closely the features of non-standard precarious employment undertaken by many self-employed contractors and service-providers across the economy (such as freelance translators; television, radio, and print media free-lance contractors, domestic workers, personal service care workers, etc.).

And while the working conditions of "professional artists" demonstrate some analogous features to the mobile and project-based employment of construction workers, there are significant differences, not least of which is the status of the professional artist as an

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[194] Section 6, *Status of the Artists Act*, S.C. 1992, C.33

"independent contractor" and his/her desire to retain control or copyright over their work, and greater autonomy in performing their work.

Nevertheless, it was the precarious and insecure nature of the work experience of the "professional artists" that led the federal government to embrace and implement a new framework for sectoral certification, and rules governing the negotiation of so-called "scale" or basic minimum agreements to address the concerns of cultural workers.

Professor Judy Fudge summarized the federal *Status of the Artist Act* in the following way:

> "In the case of artists, the federal *Status of the Artist Act* permits professional artists who are independent contractors to form associations and bargain collectively with federal producers. It introduced a collective bargaining regime centring on the production of artistic works rather than the performance of personal service, and it does so by extending collective bargaining rights to independent professional artists and certifying organizations that are representative of artists in a given sector. On certification by a Tribunal, artists associations gain the right to bargain on the behalf of all artists in the sector (MacPherson 1999). Yet, in contrast to most other collective bargaining regimes, artists associations then negotiate scale agreements with producers. These agreements are minimum terms and conditions for various types of artistic works. They allow individual artists to negotiate contracts, but prevent producers from paying any less than the amount provided in a given scale agreement to an artist working in a sector in which an artist's association has been certified, thereby attempting to minimize precarious work relationships in the art. (Vosko 2005)."[195]

Certification of a bargaining agent under the *Status of the Artist Act* follows an analogous path as that taken by an applicant under Part One of the *Canada Labour Code* before the federal Canadian Industrial Relations Board. Upon an application, the

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[195] Judy Fudge, "Deemed to be Entrepreneurs: Rural Route Mail Couriers and Canada Post," in Cynthia Cranford, Judy Fudge, Eric Tucker, and Leah F. Vosko (eds.), *Self Employed Workers Organized: Law and Policy and Unions (Montreal:* McGill Queen's University Press, 2005), p.359.

adjudicative tribunal must delineate the scope of the sector targeted by the applicant for certification. Then the Tribunal must determine whether the applicant is the organization "most representative" of artists in the sector. The parameters of a "sector" are not spelled out by occupation or specific geographic limits. Rather, the statute provides the Tribunal with notable discretion.

The former Executive Director and General Counsel to the Canadian Artists and Producers Professional Relations Tribunal, and the former Chair of the Canada Industrial Relations Board, Elizabeth MacPherson has put it this way:

> "Although the Tribunal has the discretion to determine a sector as finite as "all cellists engaged by the National Arts Centre Orchestra" it has in practice tended to prefer craft based units that are national in scope. However, when language is an essential part of the means of artistic expression (for example, writing), the Tribunal has defined sectors on a linguistic basis. It has explained its preference for national sectors as being intended to avoid potential over lacking conflict. Given the mobility of freelance artists, this would appear to be a sound approach."[196]

Once the sector is set out, then the CIRB must determine the degree of support enjoyed by the applicant. Here, the statute departs from the majoritarian principle of 50% plus 1 support conventionally applied in a membership card count or vote process under the *Wagner Act* model. Rather, if the Board is satisfied that an artists' association is the "most representative" of artists in that sector, it shall certify that association.

MacPherson has observed that the Canadian Artists and Producers Professional Relations Tribunal (the predecessor adjudicative agency prior to the CIRB) has expressed the opinion that Parliament left it with significant discretion to determine representativeness within a sector in recognition of the fact that when dealing with independent contractors, it is often difficult if not impossible to determine the exact size of a sector (Tribunal Decision No. 027) July 24, 1998).

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[196] Elizabeth MacPherson, *Collective Bargaining for Independent Contractors: Is the Status of the Artist Act a Model for other Industrial Sectors* (1999) 7 C.L.C.J. 355; also see Section 26(1) of the *Status of the Artists Act* which provides that the Board shall determine the sector or sectors that are suitable for bargaining taking into account (a) the common interests of the artist in respect of whom the application was made; (b) the history of professional relations among those artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagement of artists; and (c) any geographic and linguistic criteria that the Board considers relevant."

6.3 Ontario Employment Standards Law and Regulations

In addition to these precedents drawn from other jurisdictions, there are several examples from Ontario practice which similarly highlight the importance and feasibility of developing employment standards and labour relations practices at the sectoral level.

The Industrial Standards Act

Ontario has a rich history of sector-based employment standards, that has many similarities to the Quebec experience. Influenced by the Quebec Collective Agreements Extension Act of 1934, and the similar labour market conditions in the Montreal and Toronto textile and garment industries, the Ontario government reacted to a perceived "sweatshop crisis" by enacting the 1935 *Industrial Standards Act*.[197] It was described as follows in the 1935 Labour Gazette[198]:

> "The Industrial Standards Act of Ontario, the text of which was printed in the LABOUR GAZETTE, June, 1935, page 534, provides that the Minister of Labour for Ontario may, upon petition of representatives of employees or employers in any industry, convene a conference or series of conferences of employees and employers in the industry in any zone or zones to investigate the conditions of labour and practices in such industry and, to negotiate standard rates of wages and hours of labour. The employees and employers in attendance may formulate and agree upon a schedule of wages and hours of labour for all or any class of employees in such industry or district. If in the opinion of the Minister a schedule of wages and hours for any industry is agreed upon in writing by a proper and sufficient representation of employees and of employers, he may approve of it, and upon his recommendation, the Lieutenant-Governor in Council may declare such schedule to be in force for a period not exceeding twelve months and thereupon such schedule shall be binding upon every employee or employer in such industry in such zone or zones to which the schedule applies, the schedule not coming into effect until ten days after publication of the Order in Council in The Ontario Gazette. The Minimum Wage Board has authority to enforce the provisions of the Act and of the regulations and schedules. Beginning with the July, 1935, issue of the LABOUR GAZETTE, summaries are given in this article of the schedules which have thus been approved."

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[197] Thomas, Mark, Regulating Flexibility, Political Economy of Employment Standards, McGill-Queens Press, 2009

[198] McMaster University http://socserv.mcmasters.ca/oldlabourstudies/onlinelearning/article.php?id=470

The Act provided for the appointment of Ontario's first "director of labour standards" with the authority to bring together a "conference" of workers and employers in an industry to negotiate a minimum schedule of wages and conditions that could be extended to the province or a region. Similar to Quebec, the minimum standards would be implemented and overseen by an "advisory committee" of unions and employers.

While the Act did not mention unions directly, it represented a "quasi-official" recognition of unions. In fact, the Industrial Standards Act applied chiefly to industries such as the textile and garment industry, construction, and forestry: sectors with emerging unions that could represent workers and press for industry standards.

There are strong points of reference and similarity between the prevailing economic and social conditions of 1935 and those faced by the growing precarious workforce of Ontario. The Liberal government of Mitchell Hepburn and labour minister Arthur Roebuck faced a labour market crisis in which full time workers could not earn a living wage. The government view was that extending the fledgling minimum wage provisions existing for women workers to the whole labour force could not be adequately enforced, in part because of the lack of provincial resources that would be needed.

Roebuck, the Attorney General and Minister of Labour, was convinced that Ontario should follow Quebec and other jurisdictions in the judicial extension of collective agreements by sector, based on self-regulation within the sector. As one history of the period described it: "By legislating industrial codes, the Ontario state aimed to mobilize organized capital and organized labour to combat unfair competition, stop the spread of relief subsidized labour, and halt the predations of sweatshop capitalism."[199]

Within a decade, additional Ontario legislation on minimum wages and the 1944 *Hours of Work and Vacations With Pay Act*, eclipsed the *Industrial Standards Act* in setting minimum conditions for a majority of Ontario workers. Industrial Standards Act schedules continued in many industries, focusing on hours of work. However the framework for sectoral negotiations with minimum wage and conditions of work schedules remained in effect until the repeal of the ISA by the Harris government in 2000.

Sectoral Standards in the Employment Standards Act

With the adoption of the *Employment Standards Act* in 1969, Ontario's contemporary framework for minimum workplace regulations was established. However from the outset, this framework also provided for industry standards and the authority of the

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[199] Klee, Marcus, Fighting the Sweatshop in Depression Ontario: Capital Labour and the Industrial Standards Act, Labour Le Travail, Volume 45, Spring 2000

government to establish regulations that broadly affect wages or working conditions in any industry or part of an industry.

In particular, Part XXVII, (1) 6 of the present Act states that the Lieutenant Governor in Council may make regulations "Defining an industry and prescribing for that industry one or more terms or conditions of employment that apply to employers and employees in the industry or one or more requirements or prohibitions that apply to employers and employees in the industry.[200]

These powers are long established by a set of schedules and regulations applying to several specific industries, including[201]:

- automobile manufacturing and parts (O. Reg 502/06)
- ambulance services (O. Reg 491/06)
- public transit (O. Reg 390/05)
- live performances and trade shows (O. Reg 160/05)
- mineral exploration and mining (O. Reg 159/05)
- women's coat and suit industry, dress and sportswear (O. Reg 291/01)
- building services (O. Reg 287/01)
- temporary help agencies (O. Reg 398/09)

Moreover, the ESA incorporates a wide range of industry-specific provisions covering health care, hospitality services, agriculture, landscaping and retail services, among others.[202]

It is important to note that Ontario's employment standards are integrated with collective agreement rights in substance as well as in administration and enforcement. Adjudication of reviews (appeals) of ESA orders are heard by the Ontario Labour Relations Board, and ESA matters comprised 30% of OLRB cases in 2013-2014:

> Appeals Under the Employment Standards Act:
> The Employment Standards Act deals with workplace rights such as minimum wage, hours of work, overtime, vacation or public holiday pay, violations of pregnancy or reprisal provisions, termination issues, and severance pay.
> The Board dealt with 1,099 appeals during 2013- 2014, which includes 730 new cases filed. Of the 721 cases that were disposed of, 67 were granted, 129 were

[200] Ontario, Employment Standards Act, 2000
[201] Ontario, Employment Standards Act regulations
[202] Industries and Jobs with Exemptions or Special Rules, Ontario Ministry of Labour, www.labour.gov.on.ca/english/es/tools/srt/

dismissed, 427 cases were settled and 98 were terminated. 377 cases were pending on March 31, 2014. [203]

Regulation of the Ontario Construction Industry

Ontario's approach to the construction industry is another important precedent to draw upon in considering the evolution of sector-based workplace regulation. Since 1962, labour relations in the Ontario construction industry has been governed by a specific law that centralizes collective bargaining on a provincial, regional and sectoral basis.

In the ICI sector (Industrial and Commercial construction), for example, over 105,000 tradespersons and 5,000 contractors are covered by industry agreements. The system also boasts successful labour market partnerships which have resulted in some 19,000 apprentices currently working in Ontario.[204]

In the case of construction, the labour relations model allows for regulated, centralized bargaining, and the attachment of new bargaining units to the master agreements. This has served to limit labour market fragmentation, and supported a relatively high level of union density and standard employment conditions across the sector.

Ontario construction law borrows from other industrial standards approaches by defining labour markets by trade, sector and by region. While ICI is a province-wide labour structure, residential construction is separated into six regional labour markets. However there are more than 30 Board Geographic Areas applicable to construction sectors for roads, sewers and watermains, heavy engineering, pipelines and electrical power systems.

Province-wide bargaining by trade was legislated in 1978. Similar initiatives were taken in other provincial jurisdictions across Canada. Why was this significant and novel step forward taken? Professor Joseph Rose provides a concise and helpful explanation in an article called "*Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry*"[205]

In his essay, Professor Rose explains:

> "There was a consensus across Canada in the 1960s that collective bargaining had become dysfunctional in major building construction sectors, including the industrial,

[203] Ontario Labour Relations Board, Annual Report 2013-2014
[204] Ontario's Unionized ICI Construction Industry www.unionizedconstructionworks.com
[205] (2013) 17 C.L.E.L.J. 403

commercial and institutional sectors. Strong economic expansion and fragmented bargaining structure had led to a major increase in strike activity and to higher wage settlements….Employers' associations lacked the legal cohesion to bargain collectively, and were vulnerable to union divide and concur tactics. Depending on the location, bargaining might involve 15 or more building trades or sub-trades. Unions' strike leverage was enhanced by highly decentralized bargaining structures (local area and single craft union structures) and by the fact that trades persons could mitigate their loss of pay by working in nearby geographic areas where there was no strike.

Beginning in the 1960s and continuing into the 1970s, bargaining structures in the construction industry underwent a transformation. Policy makers were persuaded that centralized bargaining was the key to industrial relations stability. Legislation to promote stronger employer associations and centralized bargaining was introduced in every province but Manitoba. The magnitude of the change in bargaining structures was profound. In Ontario, for example, the number of bargaining units in major building construction declined from 250 to 25 during the 1970s.

The first of the two broad objectives of those legal reforms was to strengthen employer association bargaining by introducing a system of employer accreditation. This allowed employer associations to acquire the exclusive bargaining rights in relation to all union contractors in an appropriate bargaining unit. The second objective was to introduce centralized bargaining. Local area bargaining on a single trade basis was replaced by a province wide bargaining on either a single trade or multi trade basis. The extent to which centralized bargaining is coordinated varies. Where there is multi trade bargaining, formal coordination is practised by both parties. Where there is single trade bargaining, coordination occurs only on the employer side and only in some provinces, where it is done informally by employer associations. In other jurisdictions, single trade bargaining is not coordinated."

It should be noted that this major alteration to the rules pertaining to certification and collective bargaining in the construction sector was not based upon a multi-party consensus. There was "fierce union opposition"[206] to the changes. However, the majority of the Ontario provincial legislature viewed these reforms as important steps towards achieving stability in construction labour relations, and a more "equal" playing field for the parties. Therefore, the governments of the day, in the late 1970s and early 1980s, like the Ontario government today, saw sectoral and multi-employer collective bargaining frameworks in the construction industry as consistent with the public interest.

Professor Rose found that following these structural reforms, there has been greater stability in labour relations in the construction sector. He concludes:

> "Trends in strike activity and wage settlements reflect the emergence of stability in construction labour relations. The evidence is that strike activity has declined in absolute and relative terms, and that wage settlements were more moderate and broadly consistent with those in other industries. As a result, the construction industry is no longer a source of instability or a collective bargaining outlier."[207]

Professor Rose has concluded that the advent of multi-employer "centralized" bargaining systems, along with supplementary legal reforms, macro-economic conditions, and competitive pressures, all contributed to stabilizing labour relations in the construction sector. He noted that centralized bargaining also led to the standardization of many terms and conditions of employment, both monetary (such as premiums and allowances) and non-monetary. In the past, as he put it, "Leapfrogging on these issues contributed to unstable labour relations in the construction industry,"[208] a problem that was abated under the new centralized system.

The construction industry is based upon temporary project work where people, tools and physical assets move from place to place on an irregular, often seasonal basis. There is generally no fixed construction workplace. The results of the construction enterprise (i.e. buildings and structures) remain fixed, not the workers, equipment or skills. The

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[206] Joseph Rose, "*Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry*" (supra)
[207] Joseph Rose, ""*Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry*" (supra)
[208] Joseph Rose, ""*Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry*" (supra)

construction business is also characterized by the need to obtain a variety of skilled trades persons on a coordinated but fluid and temporary basis. It was the employer community that found itself vulnerable to the vagaries and characteristics of the nonstandard construction labour market, and hence they were open to creative institutional solutions.

In sum, the history of construction labour law reform in Ontario reveals a significant and ground-breaking government intervention by way of the introduction of sectoral, multi-employer, and province-wide bargaining and certification rules into the distinctive parameters of the construction labour market. This intervention was designed to redress what the state viewed as the relatively superior bargaining power of construction unions, and to rationalize the workings of the construction labour market.

The growing prevalence of nonstandard, casual, temporary, part-time, and insecure employment relationships in the retail, fast food, restaurant, accommodation, business services, personal care, and home work services sectors seems amenable to similar government intervention to enhance the opportunity of employees in these sectors to access collective bargaining rights. When those rights are acquired, it is imperative that labour law prescribe a reasonable, effective collective bargaining framework that can respond to the features of nonstandard employment.

The "Wagner Act" paradigm has not served these vulnerable employees. A new model must reflect a process by which several employers engaged in similar activities/businesses in a defined geographic area, in an industry marked traditionally by dispersion and fragmentation, are obliged to come together and deal with a collective bargaining agent that has demonstrated an appropriate level of support and consequently attained a bargaining mandate.

Transparency in Sectoral Standards

In sum, an industry-side and sector-wide approach to both labour relations and employment standards is already deeply rooted in Ontario's historic and contemporary approach to workplace regulation. However, the widespread sectoral approach that presently characterizes current law in Ontario lacks transparency. For each sector-based standard, inclusion, and exclusion, there are doubtless arguments and reasons for these decisions. But this rationale is not necessarily known to the players in the industry or sector, and neither are these standards subject to any regular review or updating as economic and labour market conditions evolve.

Unifor respectfully submits that the more robust regime of sector standards we now propose would add significantly to both the rationale for sectoral standards, and

provide for more transparent, consultative, and democratic formulation of those standards, including subjecting them to relevant and timely labour market tests.

6.4 "Sectoral Standards Agreements": The Next Stage in the Evolution of Ontaraio Sectoral Standards

As the Law Reform Commission of Ontario stated, Employment Standards in Ontario were "designed to set minimum standards for Ontario's labour market and provide legislative protection for those most vulnerable to employer exploitation."[209]

The imbalance in Ontario's labour market today can be traced in part to departures from Ontario and Canadian principles and practices – notably in 1995 with the termination of the Employee Wage Protection Program, the freezing of minimum wages for almost a decade, and the significant diminishment of employment standards in the amendments to the ESA in 2000. Unfortunately these regressive measures were further entrenched by the 2010 Open for Business Act, which seriously undermined worker rights and Ministry of Labour enforcement functions.[210]

The results of these measures, combined with low wage competition experienced in many sectors of the economy and the weakening of union density, has left Ontario workers facing widespread precarity and inequality (as described in earlier sections of this submission).

Unifor calls on Ontario to return to a more progressive and ambitious approach to labour market regulation. One means of doing so would be to extend principles of security, fairness, and minimum standards across distinct regional, sectoral, and occupational labour markets. This model draws on principles and precedents that have already been central to Ontario's history and social progress.

At the heart of Unifor's proposal is the extension of freely negotiated collective agreements to entire sectors or occupations, in defined regions of the province. Such an agreement is described in this proposal as a "Sectoral Standards Agreement." Our proposal incorporates minimum standards, but would be an "agreement" because of its roots in negotiation, and its regular renewal through sectoral arrangements that give voice to all workers affected (both union and non-union), as well as to employers.

Criteria and Principles for Sectoral Standards Agreements

[209] Law Reform Commission of Ontario, Vulnerable workers and Precarious Work, 2013
[210] IBID

Proposal 6(i): The *Employment Standards Act* be amended to amend the application of the authority currently residing with the Lieutenant Governor in Council under Part XXVII, (1) 6 of the ESA. This amendment would provide the same authority to the Ontario Labour Relations Board to define an industry and prescribe for that industry one or more terms or conditions of employment, that would apply to employers and employees in the industry.

Proposal 6(ii): These sectoral orders by the OLRB would be implemented through the formation of Sectoral Standards Agreements, setting basic minimum conditions applied to all workplaces within an identified regional, occupation, or industrial labour market.

The OLRB would be provided criteria for granting these sectoral regulations, including:

- The regulation would extend selected provisions of a collective agreement (Base Agreement) to a defined labour market as minimum standards (Sectoral Standards Agreement).
- The Sectoral Standards Agreement would require a determination by the OLRB that the regulation would substantially provide security and greater fairness for workers in the sector and discourage competition based on low wage and precarious working conditions.
- The Sectoral Standards Agreement would require a determination by the OLRB that it would not significantly adversely impact national or international competitiveness of the sector.
- A defined labour market would be determined by the OLRB on the basis of industry, region, trade and work classification, and other criteria deemed relevant.

Operative Principles of Sectoral Standards Agreements

An application for a Sectoral Standards Agreement could be made by a trade union or group of trade unions, a Council of unions, an employer or group of employers.

Only one Base Agreement for a Sectoral Standards Agreement can be extended for the same defined labour market. In the event that there are more than one collective agreement seeking extension, the OLRB shall determine the agreement most representative of employee representation and industry standards.

The scope of provisions to be extended to the defined regional/occupational/.industrial labour market will be determined by the OLRB. If that defined labour market has a union density below the Ontario average private sector union density, the provisions extended will be minimum wages and subject matters addressed by the ESA, including

continuity of employment (part IV), wages (part V and IX), records (part VI), hours of work (part VII), overtime (part VIII), public holidays (part X), vacations (part XI), equal pay (part XII), benefit plans (part XIII), leaves of absence (part XIV), termination and severance (part XV), lie detectors (part XVII).

On the other hand, if the defined regional/occupational/.industrial labour market has union density equal or greater to the Ontario private sector average, a larger set of provisions can be extended if it is shown that the extension will provide competitive protection for unionized employers, and/or greater security for vulnerable workers, particularly with regard to layoff and recall, and job security provisions.

> **Proposal 6(iii):** Corresponding to each Sectoral Standards Agreement, a Sector Council shall be established, providing for equal representation of employer and employee representatives, with responsibility to negotiate changes to the Sector Standards Agreement, supervise and enforce its provisions, develop systems to provide for pension and benefit coverage across the identified coverage area, facilitate investments in skills and training within the sectoral/regional/industrial labour market, and undertake other relevant tasks.

A Sectoral Standards Agreement shall require the establishment of a Sector Council comprised of the parties to the agreement. On a voluntary basis, any union or employer, employer associations, association of workers or committee of workers in the defined sector may participate in the Sector Council. Voting in a Sector Council shall be equally balanced between workers and employer representatives.

A Sectoral Standards Agreement may be amended by an application from the Sector Council or by a party to the Base Agreement following each re-negotiation of the Base Agreement. Other unions, employers or committees may make representation to the OLRB prior to the renewal of the Sectoral Standards Agreement to draw attention to concerns over the terms or scope of the amendment.

Sector Councils shall have mandates to develop labour market partnerships for training and skills development, and human resource planning issues. The mandate should also developing systems and programs to facilitate the provision of pensions and employment benefits across the covered sector where possible.

Sector Councils shall have mandates to administer and provide front line enforcement of Sectoral Standards Agreements, including access to workplaces and relevant information. A Sector Council Adjudication Committee with equal worker/employer representation and a neutral chairperson shall determine compliance issues, including

imposition of penalties. Enforcement, review or appeal of such orders shall be placed before the OLRB.

Sector Councils will be self-financing through a small administrative levy on employers, approved by the OLRB.

Worker Voice in Sectoral Councils and Sectoral Standards Agreements

Building on our earlier proposal (described in Part V of this submission) for the extension of just cause provisions and protection for collective actions to all Ontario workers (even those without union representation), our recommendation for sectoral structures and practices has the added benefit of further enhancing a needed and genuine voice for non-union workers in Ontario workplaces.

Representation of non-union workers through sectoral structures must meet the same criteria set out in Part V above: notably, a clear labour relations purpose for such representation, and a measure of assurance that worker representation will be free from employer influence. In the context of the structures and purposes of a Sectoral Standards Agreement within a defined labour market, and with the governance and oversight of the Ontario Labour Relations Board, these conditions for worker representation can be met and should be encouraged.

> **Proposal 6(iv):** Associations of employees in non-union workplaces covered by a Sectoral Standards Agreement shall have opportunity to elect representatives to participate in the Sector Council corresponding to that Sectoral Standards Agreement.

Sectoral Standards Agreements should therefore provide that in any non-union workplace affected by the Agreement, an association of workers or a committee of workers from that workplace shall be recognized with a petition showing significant employee recognition of the Association or Committee. The association or committee would then be eligible to join the Sector Council and make representations to their employer or the Council on relevant matters to the Sectoral Standards Agreement.

This extension of worker voice to non-union employees under the protective framework of a Sectoral Standards Agreement model would provide an application of the workers' voice principles advocated by many labour law scholars, such as the "Graduated Freedom of Association" provisions proposed by Professor David Doorey.[211]

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[211] Doorey David, Associate Professor, York University, Law of Work Blog, Paper presented at Voices at Work workshop, Osgoode Hall Law School, 2012

6.5 Sectoral and Multi-Employer Representation

The Case for Sectoral Representation

The model of Sectoral Standards Agreements, extending minimum standards and contractual provisions throughout identified specific regional/occupational/industrial labour markets, would represent a first step in attempting to address inadequate compensation and working conditions – especially in particular sectors marked by precarious work, inadequate investments in skills, and low wages. However, in our vision the sectoral approach can and should go further, to include the development of full collective bargaining structures at the sectoral level.

Sectoral certifications and multi-employer collective bargaining have long been seen as valuable Canadian solutions to problems of non-standard employment, instability, and inequality. In the construction industry, for example, the non-standard features of employment led the employer community to support sectoral multi-employer bargaining. In the cultural industry, the non-standard features of "independent" contracting led the artistic community to seek a different legislative approach to facilitate a more just and even handed basis for producer/client relations.

Now is the time to implement similar, but not necessarily identical, approaches for addressing the particular issues of non-standard employment in sectors of the economy widely recognized to contain large swaths of precarious employment. Now is also the time to address the power imbalance between employers and self-employed contractors which renders the working environment of self-employed "worker" contractors so insecure. The public interest requires government to intervene in labour markets when forces of technological change, the mobility of capital, flexibility of business operations, and income inequality all call out for intervention, in order to attain more just, sustainable, and economically efficient outcomes.

Unifor submits that broader centralized sectoral bargaining systems would not only assist in lowering income inequality and reducing the insecurity suffered by workers in precarious employment (including self-employed "contractors"). Moreover, this model may also have positive effects on economic efficiency, stability, and employee training and skills.

Matthew Dimick, Associate Professor at SUNY Buffalo Law School, in an article entitled "*Productive Unionism,"* analyzes the consequences of "*Wagner Act*" style single firm collective bargaining structures versus centralized multi-employer or sectoral bargaining structures. He finds that when bargaining structures are highly decentralized, the rational response of unions to labour market risk (ie. job loss due to technological change, reorganization of work, fluctuation of product markets) is job control. Job

control restrictions are reactionary, may impede productivity advances, and restrict the employer's ability to adopt new technologies or reorganize jobs in the workplace. Because of the decentralized bargaining structure, the trade union does not have the means to influence labour market conditions beyond the particular firm or employer.

But in broader multi-employer centralized or sectoral bargaining structures, there is the potential for a broader collective bargaining response to labour market risk, including measures such as wage compression (that is, reducing the variance of wages across a given industry), thus reducing risk to any individual firm. These structures also hold potential for better multi-employer based job training and re-training. Professor Dimick finds:

> "Thus, where decentralized unions favour job controls strategies as a way to address labour market risk, centralized unions prefer broader, universal and more political solutions. The key implication of these alternatives is their difference consequences for workplace productivity."[212]

Professor Dimick also finds that broader multi-employer bargaining structures may overcome potential barriers in the development of physical capital and human capital. Professor Dimick concludes that greater centralization and collective bargaining is likely to have positive impacts on economic productivity. Moreover, Professor Dimick illustrates that greater centralization of bargaining also reduces income inequality more effectively and extensively than decentralized bargaining. He writes:

> "Rather than facing a trade-off between equality and efficiency, wage setting centralization remarkably appears to be able to deliver both…
>
> All kinds of collective bargaining reduce income inequality, but centralized bargaining has a larger effect than decentralized wage bargaining. Decentralized bargaining reduced inequality primarily by compressing wages within firms. In addition, but to a lesser extent, decentralized bargaining also reduced inequality between firms through a kind of "union threat" effect: when organization of the work force seems like a reasonable possibility, employers will keep wages relatively high in order to stave off

[212] Matthew Dimick "*Productive Unionism*" (supra) page 15

> unionization. In comparison, centralized bargaining also reduces income inequality through both these channels, but with a more direct impact on the between firm channel, since agreements apply to all employers in the industry. Overall, centralized bargaining reduced income inequality to a dramatically greater extent than decentralized bargaining….. As is shown, the relationship is strongly negative: greater centralization is the associated with lower income inequality."[213]

Professor Dimick's research is consistent with economic evidence compiled by the OECD and other international agencies (reviewed and summarized in the next section of this submission), which finds that higher levels of union membership *combined* with the existence of centralized bargaining structures, tends to be associated with stronger macroeconomic and labour market indicators (better human capital investments, lower unemployment, and reduced inequality). So from both a microeconomic and a macroeconomic perspective, the development of sector-wide collective bargaining structures would suggest ample potential for attaining more productive labour relations.

Returning to Sectoral Certification in the OLRA

> **Proposal 6(v):** The *OLRA* be amended to allow an applicant union the discretion and flexibility to build a broader collective bargaining structure across several worksites with a single employer, in order to facilitate negotiations and the administration of labour relations.

This is not a radical step forward. This provision has been part of the *OLRA* before. And, as Professor Harry Glasbeek has put it, this proposal fits within the *Wagner Act* paradigm, which holds that unions should be able to organize and bargain vis-à-vis their "real employer".[214]

Franchise Operations

> **Proposal 6(vi):** The OLRA be amended to allow the OLRB to provide for certification of common bargaining structures across groups of franchise-based operations associated with a given parent firm operating in a specific geographic area.

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[213] Matthew Dimick "*Productive Unionism"* (supra) page 22

[214] Harry Glasbeek, Agenda for Canadian Labour Law Reform, Osgoode Hall Law Journal, Volume 31, #2 (Summer 1993) page 233

As one specific application of this principle, Unifor calls for a legislative measure to assist the progress of certification and collective bargaining in franchise operations such as fast food, retail, hospitality/hotel, and hospitality/restaurants. Franchise arrangements are typically organized between a large branded corporation (often multinational) and franchisees whose operations are functionally integrated with the parent firm, providing exceedingly common and homogeneous terms and conditions of employment. Franchising is fundamentally a form of business control. The franchisor need not and frequently does not direct the day-to-day operations of the franchisee (although very detailed benchmarks regarding production practices, menus, and other service criteria are typically specified). Nevertheless, functional inter-dependence and mutuality of operations characterize the franchisor-franchisee relationship. Detailed contractual arrangements and operations manuals ensure the franchisee operates according to defined standards, and guarantees that those standards are upheld across the franchise chain, leading to a branded and common customer experience.

An applicant union ought to be granted the discretion to apply to represent employees of the franchisees of the same franchisor (along with the franchisor's company-owned outlets) in a specific geographic area, on the basis that the franchisor and franchisees are deemed to be a common and related or single employer

In these circumstances, the OLRA should provide for the creation of an employer council, possibly made up of distinct corporations (including the individual franchise firms). Nevertheless the harmonized nature of franchise operations implies that each employer component of the council will well understand the business of their counterparts. Given their common business ventures, and common economic and technological parameters of their businesses, the corporations will share a "community of interest" among themselves which may support effective bargaining in the identified sphere targeted by the company-wide certification and or scope of bargaining rights.

Moreover, a union applicant ought to be able to call for and obtain a combination of existing collective agreements with more than one franchisee employer in a defined geographic area, into a new consolidated bargaining unit. As Professor Glasbeek has observed, multi-employer certification and bargaining responds to the functional integration of the franchisor/franchisee enterprise system and can thereby give collective bargaining true meaning for those workers who are employed in coffee shops, fast food restaurants and retail outlets in Ontario.

Sectoral Representation within Labour Market Agreements

Unifor further submits that its proposal for the extension of Sectoral Standards Agreements to defined labour markets offers an opportunity to strengthen the

institutions of collective bargaining and the role of unions and employers within this model. These Sectoral Standards Agreements would be strengthened by providing the OLRB the discretion to consolidate existing certifications or new certifications, with the aim of providing for multi-employer bargaining within the scope of the Sectoral Standards Agreement.

> **Proposal 6(vii):** The OLRB be given authority to define and certify multi-employer bargaining units, in a manner integrated into and based upon the sectoral standard provisions reflected by each Sectoral Standards Agreement.

This criteria would ensure that the OLRB has already determined that the enterprises in question share many common features, thus providing a reasonable foundation for "sectoral" or multi employer bargaining. This application of multi-employer sectoral representation would also be constrained by the requirement that the national or international competitive position of the employers would not be significantly adversely affected by an obligation to bargain in concert with other similarly placed employers.

The employers potentially covered by coordinated multi-employer bargaining would have had the opportunity to work together in the Sector Council that oversees the labour market agreement.

No application could succeed with respect to existing bargaining units unless the bargaining agents affected agreed to such a step. Where the bargaining agent was the same for all pertinent units, this criteria would be easily met. Where the bargaining agents were different, then the law would require the creation of a trade union council vested with the authority to bargain on behalf of all the constituent unions before the consolidation of the agreements could occur.

Unifor further proposes that if a union participating in a Labour Market Agreement organizes a new bargaining unit within the scope of the Agreement, then the OLRB would have the ability to consolidate the new unit into the existing base agreement, and upon such consolidation would be covered by the base agreement. The organization of the new unit of workers would have to demonstrate their majority support for collective bargaining representation in the "normal" way called for by the statute.

We submit that this limited extension of a multi-employer sectoralism can be the basis of overcoming labour market fragmentation in important sectors of the Ontario economy. This enhanced level of worker representation would draw together a stronger community of interest between workers, and also enhance the labour market test for the extension of a sectoral standard. At a broader level, our proposal would

strengthen the institutions of collective bargaining in addressing precarious work and inequality in Ontario.

Sectoral Representation for Self-Employed and Independent Contractors

Furthermore, Unifor argues that the sectoral standards and representation proposed to address the issues of "precarious employment" are insufficient without also providing an evolution of rights and standards for self-employed workers, often freelancers, as well as workers who, while perhaps fitting the definition of a "dependent contractor" work alone, and thus have a very tenuous claim to the benefits and coverage of a collective bargaining regime.

The traditional majoritarian model of labour relations is predicated generally upon the organization of all employees (that is, at least more than one employee of an employer) who share a community of interest grounded in their common working conditions, with the same employer, at a particular and fixed work location. This has not provided an appropriate or feasible framework for self-employed workers, or single dependent contractors who enter into temporary relationships with different clients, employers, or businesses located at different addresses, all on a temporary basis.

The evolution of self-employment as an important form of work relationship calls for a different representational model that addresses the reality that self-employed workers frequently work at home, and/or in isolation, and lack statutory protection and benefits.

The self-employed workers or dependent contractors that we refer to are all in a position of economic dependency. The self-employed may be found in various sectors pursuing different kinds of activities such as freelance print, and electronic media, translation services, personal care services, child care work, couriers, home workers in the garment industry, and freelance artists.

The federal *Status of the Artist Statute* described above offers some key elements that should be reflected in legislative rules pertaining to the extension of collective representation to the self-employed and single dependent contractors. The federal statute offers an example of "occupational unionism" -- that is, whereby collective representational rights and benefits are tied to occupational membership, rather than a specific work site or a particular job-based affiliation.

Unifor submits that Ontario should now move to provide sectoral standards for these workers through a form of occupational unionism combined with sectoral standards.

> **Proposal 6(viii):** The OLRB should be authorized to receive applications and to determine the scope of the sector appropriate for collective bargaining,

by reference to the occupation in question (ie. home daycare, or French/English translation services, or freelance magazine writing) and by geography (ie. in the City of Chatham, or in the City of Milton etc.).

Like the *Status of the Artist Act*, the law ought to require simple proof of the standing of an association of members working in the occupation in question, and a determination that the applicant association is the organization most representative of the self-employed or single dependent contractors in the proposed sector.

Again, in the same manner as contemplated by the *Status of the Artist Act*, the OLRB would issue a public notice upon receipt of an application for certification to permit all persons in the occupation and proposed sector the right to make submissions in writing or participate as part of a hearing process regarding the merits of the application.

The public notice would be distributed as widely as possible on as many media platforms as available. Since freelancers, self-employed persons, and single dependent contractors do not work at a specific workplace, the conventional rules pertaining to workplace postings do not apply.

As noted above, the *Status of the Artist Act* does not require evidence of majority support of the constituents in the proposed sector; neither should the special rules that we contemplate here. Given the fluidity of the freelance and self-employed labour market, it is often difficult if not impossible to determine the exact size of a sector.[215]

It is useful to note that in a case decided under the *Status of the Artist Act*, the responsible Tribunal certified an association of periodical writers, despite the fact the association could demonstrate it had only about 16% of the "artists" working in the sector as members.

A certification order should furnish the applicant association with the authority to bargain a standard agreement for the sector. To ensure that the association can properly identify employers bound by the certificate, and ultimately the standard agreement, the law ought to require that all employers or contractors in the sector register with the Ministry of Labour, indicating their legal name, address, and name of employees or dependent contractors.

The law should require all employers in the sector to join in an employer association, or at least be bound by the agreement bargained. Unifor notes that such a creation of a multi-employer association would not be an unprecedented step in labour relations law

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[215] Elizabeth MacPherson, Collective Bargaining for Independent Contractors (1999) 7 C.L.E.L.J. 355, at page 365

in Canada. The federal Canada Industrial Relations Board has, for many years, exercised the power to determine that two or more employers "actively engaged" in a specific sector (namely, long-shoring), within a defined geographic area, constitute a unit appropriate for collective bargaining.[216]

As Elizabeth MacPherson, the former Executive Director, General Counsel to the Canadian Artists and Producers Professional Relations Tribunal has written[217]:

> "Under the *Canada Labour Code*, there are two processes for the recognition of an employer's organization. Section 33 allows the Canada Industrial Relations Board to designate an employers' organization to be the "employer" for collective bargaining purposes when such an organization already exists and a trade union applies for certification for a bargaining unit comprised of employees of two or more of the member employers. In such a case, the Board must satisfy itself that each of the employers that are a member of the organization has granted it appropriate authority to discharge the duties and responsibilities of an employer.
>
> The second circumstance, governed by Section 34 of the *Code* relates to industries in which geographic certification is possible (primarily long shoring). When the Canada Industrial Relations Board certifies a trade union as bargaining agent for a unit composed of the employees of two or more employers engaged in long shoring in a particular geographic area, the Board must concurrently require those employers to appoint a representative for the purposes of collective bargaining with the union. In the event that the employers fail to choose a representative, the Board is empowered to appoint one. The statute contains provisions imposing certain duties on an employer representative (for example, a duty of fair representation) and grants it certain powers (for example, the ability to require each of the employers of the employees in the bargaining unit to share in the costs of negotiating and administering the collective agreement)."

This model of self-employed and independent worker representation would supplement traditional majoritarian institutions and provide for a form of bargaining for workers desperately in need of protection and collective voice. Unifor contends that the participants to these negotiations should also, of course, benefit from the charter protections of free association, including the right to protected collective action, as discussed in Part V.

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[216] Section 34, Part I, *Canada Labour Code*
[217] Elizabeth MacPherson, Collective Bargaining for Independent Contractors (supra)

Drawing on these principles it follows that negotiations for sectoral standards for the self-employed and single dependent contractors should be assisted by the conciliation services of the Ministry of Labour and the authority of the OLRB to order interest arbitration should negotiations fail.