SUBMISSION

BY THE
ONTARIO FEDERATION OF LABOUR

TO THE
MINISTRY OF LABOUR

ON
MODERNIZING THE
ONTARIO LABOUR RELATIONS ACT

DECEMBER 2004

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Introduction

The Ontario Federation of Labour (OFL) is the central labour body, chartered by the Canadian Labour Congress, representing the majority of unions in the Province of Ontario. Approximately 700,000 affiliated members in more than 1,500 affiliated local unions constitute the membership. OFL members include hundreds of occupations from public sector employees to construction workers, from teachers to manufacturing workers, plus a growing number of private service sector employees. The OFL provides its affiliated unions, union locals and labour councils with services in the fields of communications, education, health care, research, legislative and political action, human rights, health and safety and workers' compensation.

As a central labour body for so many thousands of affiliated members, the OFL is most interested in any and all changes to employment and labour legislation. Today, more than ever, working people want fair and enforced legislative protections.

In representing the interests of our affiliated members, we are also cognizant of the needs and aspirations of those working people in Ontario without the collective representation necessary to improve their standard of living and ensure their health and safety. Indeed, it is for this reason that this submission is largely concerned with the rights of employees to make free and uncoerced decisions concerning the right to associate, join a union of their choice and bargain collectively with their employer for better terms and conditions of employment.

Unions and Freedom of Association

We believe that freedom of association is a fundamental right for people in a democratic society. Indeed, such rights are codified in constitutions, charters and world bodies such as the International Labour Organization (ILO). Convention #87 of the ILO, to which Canada is a signatory, endorses freedom of association and protection of the right to organize (1948). Further, legislative change needs to consider the Declaration on Fundamental Principles and

Rights at Work adopted at the 86th Session, in Geneva, June 1998, which requires all member states of the ILO "to respect, to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining...."

Union Advantage

It has long been recognized by objective observers as well as union members, that union membership through the collective bargaining process brings considerable monetary advantages. The three tables below outline in general terms the advantage of union membership. While more detailed data would differentiate by occupation and gender and adjust for differences such as size of bargaining unit and region, these factors do not change the basic point that union membership brings with it considerable and demonstrable benefits.

Table 1

UNION v. NON-UNION AVERAGE HOURLY EARNINGS
CANADA-WIDE

Average Hourly Earnings	Union Members	Non-Union Members	Hourly Union Advantage	Percentage Difference
All Employees	$ 21.05	$ 16.65	$ 4.40	26%
Full-Time Employees	$ 21.51	$ 18.09	$ 3.42	19%
Part-Time Employees	$ 18.28	$ 11.03	$ 7.25	66%

Source: Wages: Statistics Canada, Labour Force Survey, 2003.

Table 2

UNION v. NON-UNION AVERAGE HOURLY EARNINGS ONTARIO

Average Hourly Earnings	Union Members	Non-Union Members	Hourly Union Advantage	Percentage Difference
All Employees	$ 21.88	$ 17.75	$ 4.13	23%
Full-Time Employees	$ 22.59	$ 19.36	$ 3.23	17%
Part-Time Employees	$ 17.15	$ 11.14	$ 6.01	54%

Source: Wages: Statistics Canada, Labour Force Survey, 2003.

Table 3

UNION v. NON-UNION BENEFITS

Benefits (Canada)	Union Members	Non-Union Members	Hourly Advantage
Dental Care Plan Coverage	77%	45%	? Union
Employees Covered by Pension/Group RRSP	83%	33%	? Union
Paid Vacation Leave Entitlement	84%	65%	? Union
Paid Vacation - Four Weeks or More	60%	30%	? Union
Sick Leave	77%	45%	? Union
Supplemental Health Care Plan	84%	45%	? Union

Sources: Benefits: Human Resources Development Canada, W-79-2F, 1998.

Yet the differences in compensation between union and non-union workers should not be interpreted solely in the narrow terms of more or less dollars and cents. The CLC 2003 Vector Poll finds that non-union workers see unions having a positive influence on health and safety (36% of non-union workers indicate that unions improve health and safety), improve job security (35%), improve benefits (34%) and improve pensions (31%). To this bread-and-butter view of unions as organizations pushing for tangible benefits must be added the central role of unions in promoting workplace fairness and dignity. Unionization plays an important role in limiting arbitrary and unfair treatment through the due process of the grievance procedure, collective bargaining and monitoring changes in the workplace. Through their union, workers are able to participate productively in ensuring that the rights of their fellow employees are respected. Unionization is an essential vehicle for the enforcement of human rights, minimum standards, workers' compensation, vacations and equal pay for work of equal value.

At the provincial and national level, unions contribute positively to political debate. They advocate on behalf of disadvantaged groups and present views on fair public policy. Unions constitute "an important subsystem in a democratic market-economy system."[1] Unions help to balance the political forces which shape Ontario society.

It therefore follows that trade unions should be supported by fair and equitable government legislation, both for their role in improving workers' standard of living and for "intangibles" of dignity and fairness.

It is sometimes argued that the union advantage shown on Tables 1 - 3 comes at the expense of jobs. Yet studies such as those by the Organization of Economic Cooperation and Development (OECD), 1996, analysing low-paid work and earnings inequality, found there is little evidence for this view. In countries where there is a prevalence of high-wage work, their study finds that it has not been at the cost of higher unemployment rates (OECD Employment Outlook, 1996).

Richard Freeman, a leading US labour economist, also finds, on the basis of a number of recent studies, that union wage effects, such as higher wages and greater wage compression, do not cause higher unemployment or come at the expense of productivity.

Similarly, the World Economic Report (1995) of the ILO, argues that it is wrong to view unions or good labour standards as the fundamental cause of unemployment and takes issue with the view that labour market "rigidities" have been a key source of Europe's unemployment problems. It further emphasizes that there are many negative features of "flexible" US-style labour markets for working people.

It is on the basis of concerns such as these that the Ontario Federation of Labour advocates a positive change in direction for Ontario. This change should moves collective bargaining along with other concerns such as equality, full employment and health and safety, from a low level of priorities to the top level.

The Importance of Unions in Ensuring Occupational Health and Safety

The present Liberal government has stated that it is a priority to make Ontario workplaces safer. A primary means of accomplishing that objective is to ensure that more of Ontario's workplaces are unionized. Unions act as workplace champions of health and safety. Unionized workers more confidently assert their basic rights to a safe workplace. Unscrupulous employers are less likely to compromise health and safety when dealing with a unionized workforce. The current Minister of Labour could perhaps do more for health and safety in the workplace through measures that increase the rate of unionization in Ontario than through any other means.

The Ontario system of Joint Health and Safety Committees (JHSCs) does not reduce the importance of the health and safety role of unions. "Merely mandating employers to create JHSCs is not a guarantee of a healthier and safer workplace. … Where parties lack commitment to the co-management of workplace health and safety, JHSCs are likely to be ineffective, and the Internal Responsibility System will not yield the intended benefits."[2]

If the Government is truly concerned with the health and safety of Ontarians it must of necessity be concerned with the growth, development and indeed expansion of trade unions into all sectors of employment as health and safety and unionization are inextricably linked. The higher the union density level the better the health and safety of the population. Union health and safety awareness programs and enforcement mean less deaths and injuries in the workplace. Workers collective organizations – unions – provide the factual information, the education and the job security to identify workplace hazards and act to eliminate them.

It is therefore our view that whether it be acting to raise people's standards of living, improving health and safety or in other significant areas such as equal pay for work of equal value, the *Ontario Labour Relations Act (OLRA)* needs significant reforms so that non-unionized workers can freely choose whether or not to join a union.

KEY CHANGES NECESSARY TO RESTORE FAIRNESS IN THE WORKING LIVES OF ONTARIANS

I: Return Card-Based Certification to All Workers

Priority One

It is fundamental to any meaningful labour law reform to restore what was a key feature of the Ontario labour relations system for over forty years – card-based certification and eliminate mandatory certification votes. The card-based system for selection of a union is prevalent in most Canadian jurisdictions and ensures effective freedom of association. The mandatory vote system, which replaced it, by its nature, leaves employees vulnerable to employer coercion and unfair labour practices so they cannot fully and freely express their true wishes.

While the OFL welcomes the Government's recent initiative to return card-based certification to the construction sector, simple fairness requires that all Ontario workers be governed by a return to a card-based system. The defects of the vote system as discussed below do not apply only in the construction industry, but rather in all sectors of the economy. They can only be remedied by a return to the card-based system. Further, while there may be problems of

transience which make the vote system especially difficult for the construction industry, transient workforces do not exist only in construction. There are numerous industrial sectors where employers rely upon temporary workers. Further, unique problems in organizing the retail and financial sector can only be rectified if employees are granted the right to select a bargaining agent free of any potential employer interference. If freedom of association is to be meaningful for workers in sectors with large numbers of immigrant workers, who are be particularly vulnerable to employer intimidation, a return to card-based certification must be seen as a priority.

The card-based system was in effect for decades in Ontario and endorsed under Conservative, Liberal and NDP governments. Where a clear majority of employees (55 percent) indicated that they wished to be represented by a union by signing a membership card, the Ontario Labour Relations Board (OLRB) would certify the union as the bargaining agent without a vote.

The former Conservative government, with no independent study and no meaningful consultation, abolished this cornerstone of our labour relations system. A legislative measure with profound consequences for Ontario workers was eliminated with a mere four hours of debate and no public hearings.

Contrary to the views of its proponents, the introduction of mandatory representation votes does not ensure democracy and "freedom of choice" for workers. Instead the use of representation votes creates an opportunity for an employer to engage in both subtle and not so subtle intimidation and coercion, such that any vote will not constitute an accurate reflection of employee wishes. Mandatory representation votes give employers significant opportunities to frustrate and interfere with the democratic decisions taken by workers to unionize, as Karen Bentham's research on eight Canadian jurisdictions documents.[3]

It is vital to understand that a vote at an employer's workplace cannot be equated with a democratic parliamentary style vote. Courts, labour boards and labour relations specialists have all recognized the overwhelming imbalance of power which is the hallmark of the

employment relationship. Given that employers' literally hold the economic life of employees in their hands, their ability to influence the results of a vote cannot be overestimated. Any indication of employer preference, where an employer exercises complete control over an employee's economic future, cannot help but skew the results of a vote.

Compared to the employer's unlimited access, the union has only a fleeting ability to make its case to workers. Representation votes take place on employer property where the employer has a daily opportunity to influence employees, while at the same time union organizers are barred from the employer's property. Employers have complete and up-to-date information about their employees, including addresses and telephone numbers. Unions do not have access to this information.

Imagine a parliamentary election where one of the political parties had the power to fire, layoff or reduce the wages of the voters; where the same party had total access to the voters and the other parties were barred from communicating with employees at vital locations and where only one party had a complete voters' list. This gives you some idea of the actual dynamic of mandatory votes in the workplace.

More often than the public realizes, employers have used the time prior to voting to exert unfair pressure on their employees, often engaging in anti-union campaigns and using a variety of legal and illegal tactics to influence workers and thereby inhibit their choice. When votes are mandatory, the legal structure gives the employer both the opportunity and the incentive to use illegal tactics. In both Canada and the United States, where mandatory representation votes have been permitted, there has been a corresponding increase in the number of unfair labour practices committed by employers during certification drives. In British Columbia, after the mandatory votes were introduced in 1984, the rate of unfair labour practices committed by employers per certification tripled. Statistics indicate that in the United States, where representation votes are used in every case, the number of unfair labour practice complaints has reached unprecedented levels.

Ontario experience has also confirmed the failure of a mandatory vote system to allow for effective freedom of association. Since the elimination of the card-based system, the number of employees who have been able to exercise their right to join trade unions has fallen significantly with fewer applications for certification being filed, a substantial reduction in success rates in certification applications and a consequent decline in the number of employees unionized.[4]

It is for these reasons that independent studies have affirmed the fairness and effectiveness of the card-based system. The findings in a recent article by Professor Sara Slinn, of Queen's University Law School, demonstrate that not only is the overall proportion of certification applications lower under the vote system than under the card system, but that it is particularly in the largely low-wage service and contingent worker sector that one finds a significant decline in certification activity. Slinn reports that the Harris-Conservatives "Bill 7 has had a disparately negative effect on relatively weaker employees, such that employees who may most benefit from unionization are less able to access union representation."[5]

In 1991 a study conducted by the former BC Board Chair, Stan Lanyon, and Robert Edwards after studying the effect of both card-based and mandatory vote systems concluded :

> "The use of representation votes as a condition of certification does not further democratic rights but instead serves the interests of the employer who would wish to influence his employee's decision on the question of union representation."[6]

Similarly, at the federal level after an extensive independent review of the Canada Labour Code in 1995, the Simms Commission, chaired by Andrew Simms, Q.C., concluded:

> "The card-based system has proven to be an effective way of gauging employee wishes and we are not convinced that it is unsound or inherently convincing to employers. It requires a majority of all workers, not just those who vote. It reduces the opportunities for inappropriate employer interference with the employee's choice."[7]

Even in the United States, all of the candidates for the 2004 Democratic nomination endorsed a card-based certification system to remedy the ills of the American labour relations regime.

Our labour relations system ensures that unions have majority support since unions can only mount effective strikes if a majority of the bargaining unit support the union's actions. As noted, labour relations expert Paul Weiler, has written:

> "In practice there must not be just a bare majority but a solid one to be credible at the bargaining table. This is the crucible in which the durability of the union's majority will be tested."[8]

Further, to the extent a majority of employees are dissatisfied with their union, they are entitled to select a new union or terminate the union's bargaining rights.

The card-based system which worked well in Ontario for over forty years must be restored. It is the only system which allows employees to select their bargaining agent freely and minimize conflict over union recognition. The card-based system effectively reduces the temptation of employers to use coercive tactics. Without such a system, workers are left open and vulnerable to employer influence and pressure. In the workplace environment, it is vital that the law fulfil its obligation to protect and safeguard the right of freedom of choice with respect to collective bargaining.

As a result the OFL recommends section 8 of the *Act* be amended:

New, Section 8

8 (1) Upon receiving an application for certification if the Board is satisfied that at least 40 percent but not more than 55 percent of the employees in the bargaining unit are members of the trade union on the date the application is filed, it shall direct that a representation vote be taken.

(2) If the Board is satisfied that more than 55 percent of the employees in the bargaining unit are members of the trade union on the date the application is filed the Board may certify the trade union as the bargaining agent of the employees in the bargaining unit or order a representation vote.

(3) Within two days (excluding Saturdays, Sundays and holidays) after receiving notice of an application for certification the employer shall provide the Board with,

(a) the names of the employees in the bargaining unit proposed in the application, as of the date the application is filed; and

(b) if the employer gives the Board a written description of the bargaining unit that the employer proposes, in accordance with subsection 7 (14), the names of the employees in that proposed bargaining unit, as of the date the application is filed.

Matters to be determined

(4) On receiving an application for certification from a trade union the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (2),

(a) the bargaining unit; and

(b) the percentage of employees in the bargaining unit who are members of the trade union.

Exception: allegation of contravention, etc.

(5) Nothing in subsection (3) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76 has been contravened or that there has been fraud or misrepresentation, if the Board considers it appropriate to consider the evidence and submissions in making a decision under this section.

Hearing

(6) The Board may hold a hearing if it considers it necessary in order to make a decision whether to certify the trade union as the bargaining agent of the employees in the bargaining unit.

Dismissal: insufficient membership

(7) Subject to section 11, the Board shall not certify the trade union as bargaining agent of the employees in the bargaining unit and shall dismiss the application if it is satisfied that fewer than 40 percent of the employees in the bargaining unit are members of the trade union on the date the application is filed.

Remedial dismissal

(8) Subsection (9) applies where the trade union or person acting on behalf of the trade union contravenes this Act and, as a result, the membership evidence provided in or with the trade union's application for certification does not likely reflect the true wishes of the employees in the bargaining unit.

Same

(9) In the circumstances described in subsection (8) and despite subsection (2), on the application of an interested person, the Board may dismiss the application for certification if no other remedy, including a representation vote directed under clause (12) (b), would be sufficient to counter the effects of the contravention.

Bar to reapplying

(10) If the Board dismisses an application for certification under subsection (8), the Board shall not consider another application for certification by the trade union as the bargaining agent for any employee that was in the bargaining unit proposed in the original application until one year after the application is dismissed.

Same

(11) Despite subsection (10), the Board may consider an application for certification by the trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.

Representation votes

(12) If the Board directs that a representation vote be taken,

(a) the vote shall, unless the Board directs otherwise, be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the direction for a representation vote is made;

(b) the vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made;

(c) the Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs;

(d) subject to section 11.1, the Board shall certify the trade union as bargaining agent of the employees in the bargaining unit if more than 50 percent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union; and

(e) subject to section 11, the Board shall not certify the trade union as bargaining agent of the employees in the bargaining unit and shall dismiss the application for certification if 50 percent or fewer of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

II: Restore Unfair Labour Practice Certification

The Ontario Federation of Labour strongly supports the Government's decision to reinstate unfair labour practice certification. However, there are some amendments to the legislation which should be enacted.

Nothing could be more symptomatic of the Harris government's failure to maintain a fair and balanced Labour Relations System than its elimination of the power of the Board to grant

certification in cases where, because of employer unfair labour practices, the true wishes of employees could not be determined in a representation vote.

Until 1998, the OLRB had the power to grant certification without a vote where the employer had engaged in particularly serious unlawful conduct during an organizing campaign so that employees' true wishes could not be ascertained and no other remedy could effectively counter the employer's violations of the *Labour Relations Act*. This provision was first introduced by the Conservative government in 1975. While the Board used its powers sparingly, the ability of the Board to invoke this power acted as a powerful disincentive to serious employer misconduct.

The rationale behind section 11 of the *Act* was to ensure that employees could not be deprived of their right to union representation because of unlawful employer conduct. Section 11 was an effective brake on employer unfair labour practices since employers who violated the *Act*, in the hope of interfering with employee's true wishes, would still be required to deal with the union and, as a result, could not benefit from their own wrongdoing.

The Wal-Mart Amendment

In 1998, the Harris government removed this fundamentally important power after the Board used section 11 to certify the notoriously anti-union American department store chain, Wal-Mart. But the facts in the Wal-Mart case only underline the need for such a provision.

The Wal-Mart case arose out of a 23 year old clerk's successful attempt to organize the first store ever in the 2,600 store chain. Before the vote, the employer assigned five managers who moved about the store continuously warning employees about the effects of unionization. The mangers reinforced the message contained in the store's written handouts, which raised the spectre of store closure in the event of unionization.

As the OLRB Chair found, the employer's behaviour "transforms the question from one of union representation to one of whether employees wish … to keep their jobs." It was to deal

with these types of extensive unfair labour practices designed to render the vote meaningless that the Board exercised its powers, where based on its labour relations expertise, it determined that no vote could meaningfully test the employee's true wishes in light of the employer's conduct.

Other situations in which the Board has exercised its remedial powers under section 11 include cases where the employer:

- laid off, suspended or terminated union supporters;
- contracted-out work to prevent unionization;
- cut employee benefits and /or wages during an organizing drive;
- engaged in a campaign of terror or surveillance of union supporters; and
- threatened to close its business if the employers chose to unionize.

The Baron Metal Industries Case

The predictable results of the elimination of the section 11 power are nowhere more evident than in examining the facts of the Baron Metal Industries case. The employer, part of the Royal Technologies group which employs 5,000 employees in Canada and 8,500 worldwide, operated a plant which manufactured doors and frames. A week before the employees were to vote on unionization, the employer hired two new employees. The two men were allowed to come and go as they pleased and circulated freely among bargaining unit employees, asking about the organizing drive, advising employees that the two had links to organized crime and warning of the dire effects of victory by the union: "If by any chance the union wins, we will shoot you," one employee was told. The Board found that management initiated the reprehensible conduct of the two men and that its purpose was "to discourage … employee's voting for the union."

While the Board made an extensive remedial order, it was prevented by the Harris government's elimination of section 11 from granting the only remedy which would have been effective and appropriate in these circumstances – certification without a vote. The Board was limited to ordering a new vote which ended in a tie. Months after there was a third vote in which the union was unsuccessful. An employer who had engaged in conduct of the most reprehensible kind had prevailed by intimidating employees and the Board was powerless to prevent it.

Conclusion

Under the *Labour Relations Act* crime does pay. There is no effective deterrent for an employer engaging in wholesale unfair labour practices, secure in the knowledge that the worst that can happen is the ordering of a second representation vote in which employees will be unwilling to express their true wishes precisely because of the employer's misconduct. No matter how extreme the employer conduct and how repeated the breaches, the Board cannot effectively ensure freedom of association having been stripped of its section 11 powers.

Most other Canadian jurisdictions provide either for unfair labour practice certification or certification without a vote based on membership evidence alone. Only Alberta requires a vote in each case, irrespective of membership support or employer misconduct. Even in the United States, the National Labor Relations Board and the Courts have approved orders requiring an employer to bargain with a union without a vote where the employer has committed serious unfair labour practices which have undermined the vote process.

It is imperative that this Government make sure that employers are not encouraged to commit unfair labour practices and that employees are provided with a meaningful remedy where a certification vote cannot gauge the employees' real wishes. Only by providing the Board with the power to certify without a vote can an effective remedy be imposed to counter serious unfair labour practices, so that employers think twice before concluding it is in their best interest to flaunt the provisions of the *Labour Relations Act*.

Amendment to Statutory Language Proposed

The Ontario Federation of Labour is concerned that the language proposed by the Government might be interpreted to require the union establish affirmatively it was only because of the employer's actions that it was unable to obtain 40 percent membership evidence. While the union will be able to establish a circumstantial case that it was the employer conduct which led the certification campaign to founder, it is virtually impossible to establish with certainty that the employer's actions were the sole cause. This is why the previous enactments required only that the union establish it was **likely** that the true wishes of employees could not be ascertained as a result of the employer's conduct. This test of likelihood should apply to both branches of the test set out in the new section 11. In this respect, the OFL suggests that the enactment be amended to read as follows:

11 (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result **of the contravention the Board is satisfied** that it is **likely** that

(a) the true wishes of the employees in the bargaining unit were not reflected in a representation vote; or

(b) a trade union was not able to demonstrate that 40 percent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed.

III: Reinstate the Board Power to Make Interim Decisions

The complete failure of the previous Government to act in a balanced and principled manner in its approach to labour law is also evident in its decision to strip the Board of any power to issue interim decisions prior to issuing a final decision on the merits of an application. It is widely recognized that in matters dealing with labour relations, time is of the essence. As the Courts have repeatedly stated, "labour relations delayed is labour relations defeated and denied." As a result the removal of the power of the Board to issue quick interim orders, to prevent significant harm while a matter is being litigated, greatly weakened effective labour relations in Ontario.

The OFL supports the Government's initiative to reinstate the Board's interim powers but suggests that the power to issue interim relief must continue until a collective agreement is entered into and that the Board's previous more flexible test for granting interim relief developed by the Board should govern. Under the Government's amendments, an employer would be free to terminate union supporters on the day certification was granted as a means of reprisal and the Board would be powerless to remedy the situation by means of an interim order.

Every administrative tribunal in Ontario governed by the *Statutory Powers Procedure Act (SPPA),* except the Ontario Labour Relations Board, presently has the power to issue both procedural and substantive interim decisions. In addition, the Labour Relations Board was granted the specific power in 1993 to issue interim orders as it considered appropriate.

Thus, for example, where a union organizer was discharged, the Board was able to issue an interim decision to reinstate the employee until the unfair labour practice complaint was heard. The termination of a union organizer has a devastating effect on a union organizing drive – not only removing an important actor in the organizing drive – but intimidating other employees by demonstrating to them the adverse consequences of supporting a union's efforts. The harm which such action causes cannot be remedied after the vote by Board orders upon completion of litigation. The damage has been done. The ability to respond quickly to situations and to ensure rapid relief putting employees back to work while the matter is being litigated, is critical to employees in the workplace believing that their right to

organize would be protected by Ontario law. This is particularly the case given the lengthy delays which now characterize the completion of hearings at the OLRB. The existence of the interim power acted as a powerful disincentive to employers terminating a union organizer since they knew that the employee could well be reinstated prior to the representation vote. As a result, many applications were settled when employers realized that they would not be able to benefit from their misconduct.

This ability to deal with matters quickly to prevent irreparable harm while a matter is being litigated is the very reason Courts exercise injunction powers. The Board was called upon in a wide variety of circumstances to determine whether, given the delay which necessarily occurs in litigating an issue, an employer or union should be prevented from taking action which could cause significant harm.

In 1995, the Conservative government removed the power of the Board to make interim orders except as they relate to procedural matters and specifically denied the Board the power to reinstate employees on an interim basis, one of its most effective weapons in preventing unfair labour practices and ensuring employees felt protected during an organizing campaign. The removal of the power to reinstate sent the not so subtle message to employers that they can use whatever means are necessary to destroy a union's organizing drive and drag out any litigation relating to such violations until well after the vote.

Further, in 1998, in an unparalleled case of discriminatory treatment, the Government removed the power to issue interim orders under the SPPA, a power which every other tribunal governed by that *Act* possessed. As a result, by 1998, the one tribunal which most needed the power to act quickly to respond to emergencies and to ensure the effectiveness of its governing legislation was stripped of the power to do so.

Ironically, injunctive relief may still be available from the Courts exercising their injunctive power. However, this state of affairs just means added significant expense, particularly for smaller unions who simply cannot afford Court applications. Further, it places these disputes in a forum which is not suitable for their resolution, given the universal understanding that

labour relations matters are best dealt with by expert tribunals and by granting the Labour Relations Board the power to provide timely and effective litigation.

One particular bargaining circumstance deserves special attention, that of the union leaders in a newly certified bargaining unit. Their relationship with the employer may be quite contentious until the parties make the transition to a settled relationship. Employers may seek to avoid a first collective agreement by intimidating the union bargaining team. The workers concerned have no ready protection. Prior to ratification of the first collective agreement, there is no right to grieve, and so these employees have no access to quick administrative justice. A discharged union activist should not lose access to intermim relief on the day the certificate is issued. Access to interim relief should be maintained at least until ratification of the collective agreement allows grievances to be filed, or until a strike or lockout. Under the Government's amendments an employer would be free to terminate union supporters on the day certification was granted as a means of reprisal and the Board would be powerless to remedy the situation by means of an interim order.

Simple fairness demands that the *Act* be amended to provide for an effective interim order power which would include the power to reinstate employees **terminated prior to a collective agreement being entered into**.

The OFL suggests that the proposed amendment to the *Labour Relations Act* be amended to read:

98 (2) The Board may exercise its power under clause (1) (b) or (c) only if the Board determines that all of the following conditions are met:

1. The circumstances giving rise to the pending proceeding **occurred commencing at a time when a campaign to establish bargaining rights was underway and continuing until a collective agreement is entered into between the parties**.

2. There is an **arguable case** to be decided in the pending proceeding.

3. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.

IV: Anti-Scab Legislation

Back in 1992 when the NDP government's labour law reforms were passed, commonly referred to as Bill 40, Ontario became the second province in Canada, Quebec being first, to implement what is known as "anti-scab legislation". This legislation was aimed at limiting the number and type of replacement workers that an employer can use to maintain operations during a legal strike or lockout.

The purpose of such legislation is to avoid the bitter and sometimes violent confrontations that are often associated with the use of scab labour by placing legal restrictions on its use. The *Quebec Labour Code* of 1977 came out of just such a turbulent context. Indeed, violence in Quebec labour relations had reached the point that several striking workers were shot by security officials at the Robin Hood Flour Mills in Montreal.

Most evidence suggests that since its introduction the provisions of the *Quebec Labour Code* concerning replacement workers have been successful in restoring "a healthy balance between the parties and eliminating practices which lead to tension and violence during disputes" (Ontario Ministry of Labour, 1991:33). The data also shows that labour disputes in Quebec have been less violent since the introduction of anti-scab legislation.

But no matter the facts, the Harris Conservative government repealed the anti-scab reforms along with numerous other reforms for short-sighted political reasons. We maintain that it is time to move beyond such ideological blinkers and examine the merits of the case.

An anti-scab provision, contrary to the belief of some employer representatives, does not cripple industrial relations. Over 95% of all collective agreements are settled without a strike

or lockout. Less than 5% of collective agreements end in a dispute and most of these do not involve scab labour. The only employers who are affected, therefore, are that very small minority who make a deliberate decision to be confrontational.

If the right to resort to economic sanctions forms an integral part of the collective bargaining process in a democratic society and we, like most others, maintain it does, then the pros and cons of anti-scab provisions must be viewed from this perspective. We suggest that a union's primary economic sanction, the strike, is effectively negated by allowing employers to use scab labour. To render more equality in the alleged "balance of power" between employers and employees, it is vital that employers be prohibited from using replacement workers during a legal strike or lockout.

As the Ministry of Labour's own discussion paper of 1991 stated, the failure to place restrictions on the use of replacement workers in such circumstances can "reduce the willingness or ability of both parties to engage in meaningful and effective collective bargaining" (33). Further, anti-scab legislation focuses the efforts of both parties on the real bargaining issues that divide them as opposed to picket line instances that can only embitter the situation and inhibit settlement.

We further suggest that if the goal is more fairness, less confrontation and a more equal balance in labour relations, anti-scab provisions are an important part of the solution and we therefore ask you enact such a provision.

V: Restore Independence of the Labour Board

The OFL has been concerned for a number of years that the OLRB had moved from a position of independence from government and non-partisanship to one of dependence on and interference from government and partisanship.

A number of moves of the previous Harris-Eves Conservative government sparked our concern:

- In 1997, the Conservative government refused to follow the long-standing tradition of renewing appointments to the OLRB and the Workers' Compensation Appeals Tribunal (WCAT). The Government's dismissal of several OLRB vice-chairs was subsequently overturned in the courts [Hewat v. Ontario (1998), 37 O.R. (3rd) 161 (Ont. C.A.)].

- Bill 136, *The Public Sector Transition Stability Act,* of 1997 was designed to restrict collective bargaining and remove the right to strike of public sector workers during the period of municipal and hospital amalgamations. Key sections of this Bill were later withdrawn under pressure of a special OFL Convention which promoted the taking of strike votes in thousands of Ontario workplaces.

- Then in the following year, 1998, the Conservative government began appointing retired judges to hear interest arbitrations in place of recognized arbitrators. November 2000 saw the Court of Appeal for Ontario, in a case launched by the Canadian Union of Public Employees (CUPE) and the Service Employees International Union (SEIU), rule unanimously that the Government's imposition of retired judges on union/management interest arbitration cases was an attempt "to seize control of the bargaining process" [Canadian Union of Public Employees v. Ontario (Minister of Labour 2000), 51 O.R. (3d) 417 (Ont. C.A.)].

  This case then proceeded to the Supreme Court of Canada. Here Ontario's Minister of Labour was found to have exercised his powers in a "patently unreasonable" manner when he appointed retired judges to act as arbitrators. The Court declared that arbitrators selected by the Minister of Labour must not only be independent and impartial, but that they must also possess labour relations expertise and be recognized in the labour relations community as generally acceptable. The Minister's appointments were found not to meet that standard, but rather to be "antithetical" to the credibility of the arbitration process [Canadian Union of Public Employees v. Ontario (Ministry of Labour 2003) 1 S.C.R. 539].

Despite such rulings the Conservative government proceeded to float its consultation paper, *Looking Forward: A New Tribunal for Ontario's Workplaces,* which supported the closing of existing Boards and Tribunals and establishing a Megatribunal. This attempt to create a new institution with presumably new appointments also collapsed in ignoble defeat.

It is for these reasons and more that the OFL and its affiliated unions remain highly cognizant of the need for independence and impartiality of the Labour Relations Board. We view with some considerable relief therefore the Liberal government's support of the impartiality of the OLRB and other Boards, Commissions and Tribunals.

We intend to continue to monitor the situation as it is essential that appropriate processes and structures are put in place. It is important, for example, that a non-partisan and transparent process be established for the appointment of neutral vice-chairs. This process needs to involve structured input from all sections of the labour relations community. We look forward to participating in discussions on this process and its formalization. It is also important that both labour and management continue their traditional input into the selection of labour and employer sides persons.

We note with favour that Board appointments, including those of labour and employer sides persons and appointments to other Boards, Commissions and Tribunals are moving to a longer length of tenure such that appointees can concentrate on the cases before them without worry of the need for reappointment every six months.

Under the previous government adjudicative bodies created to hear appeals under the *Employment Standards Act* and the *Occupational Health and Safety Act* were abolished. Adjudication concerning these Acts was placed under the jurisdiction of the Labour Relations Board. One of the results of these changes has been the lack of financial and human resources at the Board. Delays at the Board work primarily to the detriment of employees rather than employers. It is our view the resources at the Board need to be re-examined by the current government to ensure that administrative justice occurs in a timely manner.

VI: Return Successor Rights for Ontario Crown Employees

Successor rights form an integral part of the *Labour Relations Act*. The employees of an ongoing enterprise should not suffer employment disruption simply because of a change in ownership. Successor rights are designed to preserve bargaining rights and "to prevent the subversion of the bargaining rights with respect to work which has accrued to the benefit of employees as a result of the union becoming the bargaining agent." [(*Aircraft Metal Specialists Ltd.* [1970] OLRB Rep. Sept. 702, at p. 704)].

Successor rights for Ontario's Crown employees began in 1974 under the *Crown Transfers Act* and were subsequently incorporated into the *Crown Employees Collective Bargaining Act* (*CECBA*). Then, in 1995, those rights were stripped away by the Tory government.

There is no justification for this removal of successor rights for Crown employees, and the Premier has personally promised to correct this. He has stated, "As Premier, I will restore successor rights to Crown employees. Public employees should have the same rights as those in the private sector." To date, this promise has not been kept. The Liberal government talks of having the finest public service in the world, yet continues to deny basic equality of labour relations treatment to its public servants.

The mechanism for re-establishing equality of successor rights for Crown employees is a simple one. The *Crown Employees Collective Bargaining Act* sets the framework for Crown employees. It incorporates most of the *Labour Relations Act* but currently excludes successor rights (*CECBA*, s. 3 and 10). Simply repealing that exclusion will restore successor rights to Crown employees.

VII: Return Successor Rights to the Contract Service Sector

Contract employment is a growing reality confronting more and more working people in Ontario. The difficulties and lack of fairness in this form of work has historically initiated a

number of submissions from the OFL and affiliated unions calling for needed reforms and even motivated a short-lived provision in the *Act* that served to protect employees successor rights where the service contract changed from one company to another.[9]

Unfortunately, this successor rights provision was one of the many repealed by the previous Ontario Conservative government for purely ideological reasons. Currently, where a company provides cleaning services, contract security or food services and then a client contracts another service provider, there are no successor provisions. The successor provisions of the *Act* do not apply as there has been no "sale of a business" between the former contractor and the new contractor. The result is that the current OLRA provides no protection for those employees that have chosen to be represented by a union. The employees not only lose the protections of a collective agreement, but also lose the benefits of collective bargaining in terms of wages, vacations and other benefits.

In our view, the former section 64.5 of the pre-1995 OLRA, the provision that extended the successorship provisions to the *Act* where a contract was re-tendered, should be reinstated. Workers in Ontario should not be stripped of their democratic right to join and be a member of the union of their choice or lose their hard won contractual rights merely because a third party has decided to change contractors.

VIII: Democratic Representational Rights for Agricultural Workers

Agriculture is the second largest industry in Ontario. It is estimated that between 80,000 and 100,000 people in Ontario make their living in agriculture. Yet, the Conservative government in Ontario, under Premier Mike Harris, repealed the *Agricultural Labour Relations Act* enacted by the previous government which enabled agricultural workers to unionize. Agricultural workers were thereby stripped of their union and bargained rights and the applications for certification that were in progress were terminated. Currently agricultural workers remain excluded from the *Labour Relations Act* legally unable to exercise any democratic right of freedom of association for purposes of collectively bargaining to improve the quality of their work life.

In 1995, the United Food and Commercial Workers Union (UFCW) initiated a legal challenge regarding the exclusion of agricultural workers from the Ontario *Labour Relations Act*, the case of *Dunmore v. Ontario (Attorney General),* [2001] 3 S. C. R. 1016, taking the challenge all the way to the Supreme Court of Canada. In December 2001, the Supreme Court of Canada found that excluding agricultural workers from the *Labour Relations Act* violated their freedom of association guaranteed under the Charter of Rights and Freedoms. The court gave the Ontario Conservative government 18 months to draft appropriate legislation.

In response to the Dunmore decision and direction, the Eves-Conservatives government enacted the *Agricultural Employees Protection Act*, 2002. Under this new *Act* and the *Labour Relations Act (1995),* agricultural workers continued to be excluded from key workplace rights such as collective bargaining which acts to protect freedom of association.

As opposed to other workers in Ontario, agricultural workers:

- have no mechanism to democratically choose, on the basis of majority support, an independent trade union to represent them;

- face employers in this sector that are not bound by law to recognize and bargain in good faith with the unions that enjoy majority support among their employees;

- are confronted with a situation wherein there is no obligation to negotiate an enforceable collective agreement nor any right to grievance arbitration;

- unlike under the Ontario *Labour Relations Act* where there is a Labour Relations Board (OLRB) of experts in labour relations, the *Agricultural Employees Protection Act* is enforced by the Agricultural, Food and Rural Affairs Appeal Tribunal which lacks adjudication expertise and lacks the labour/management representation of the OLRB.

The current Government of Ontario needs to ensure that new legislation is drafted enabling agricultural workers to unionize under the *Labour Relations Act* and thereby enjoy the same rights as other workers in Ontario, rights which agricultural workers in many other provinces already enjoy. Indeed, agricultural workers in all other provinces, territories and the federal sector, except Alberta, have extended agricultural workers bargaining rights and protections in their basic labour relations legislation (although New Brunswick and Quebec exclude agricultural workers on farms with fewer than five or three employees respectively).

IX: Collective Bargaining Rights For Community College Part-Timers

The *Colleges Collective Bargaining Act* (*CCBA*) governs labour relations at the province's community colleges. That *Act* sensibly establishes the province-wide bargaining units appropriate for a province-wide community college system. However, part-time employees are excluded.

The academic unit excludes "teachers who teach for six hours or less per week" and the support staff unit excludes "persons regularly employed for not more than twenty-four hours a week" (*Colleges Collective Bargaining Act*, s. 2(1), s. 1 and Schedules 1 and 2). As a result, part-time employees do not have the right to participate in collective bargaining under the *CCBA*.

In addition, those employees cannot unionize under the *Labour Relations Act* as that *Act* does not apply to community colleges (*LRA*, s. 4(1)(b)).

Part-time employees are a particularly vulnerable class of worker. They often have an ongoing employment relationship but are treated as second class workplace citizens in respect of salaries, working conditions and job security. That is the current state of community college part-timers.

The vast majority of Ontario's part-time employees have some opportunity to address their working conditions by participating in collective bargaining. Those workers can form part of combined units or are placed in part-time units. Part-timers participate in collective bargaining in universities, public schools and high schools, hospitals and the broader public sector. There is no justification for treating community college part-timers differently.

College part-timers form an integral part of the delivery of community college education, but cannot participate in its collective bargaining. This is an antiquated and unusual exclusion that should be ended by amending the *Colleges Collective Bargaining Act* to include part-time employees.

X: Expedited Hearings

As emphasized elsewhere in this brief, the importance of expedition in labour relations proceedings cannot be overstated. The climate in which labour relations matters are conducted, including organizing drives and bargaining, are such that quick legal responses to emerging problems or violations of the *Act* is a necessary component of its effective application. Where legal proceedings are delayed or drawn out, the law creates incentives for flaunting it and remedies which are granted after the fact render rights contained in the *Labour Relations Act* illusory.

A trade union which loses a certification application as a result of unfair employer practices cannot be made whole after the fact. The prejudice both to the certification process and the union retaining the support and faith of the employees who have committed themselves to is dependent upon the quick vindication of employee rights. Employees cannot be fearful that joining a union will have repercussions which are not quickly and immediately answered. The existing legal arrangements with respect to conducting hearings carry with them a perception that there is no rhyme or reason to the hearings which are expedited under the *Labour Relations Act*.

Further, there is certainly a perception that the *Act* is applied in a one-sided manner where the Board is able to consistently hold hearings on an expedited basis in respect of illegal strike applications but cannot make the same arrangements where an unfair labour practice has been committed.

Some of the difficulty in respect of expediting proceedings is a matter of resources. However, the Board has been able to expedite certain proceedings with available resources, such as the illegal strike applications, and, clearly, legislative mandates to deal with unfair labour practices on an expedited basis will be of some assistance even without additional resources being dedicated. However, the Ontario Federation of Labour is of the view that, to the extent that Board hearings are not being conducted in an expedited fashion as a result of a failure to provide resources, all available resources must be provided so that the right to freedom of association under the *Labour Relations Act* is a meaningful one. Too often, Labour Relations hearings take place over a seemingly infinite span of time with no ready conclusion to the hearings. This practice must stop if employees are to be secure in the knowledge that their rights under the *Labour Relations Act* will be protected and vindicated.

XI: Lift Certification Bars

As a result of amendments made in 2000, the *Act* now contains an automatic bar prohibiting trade unions and **any union from applying for certification** for a period of one year where a union withdraws its application for certification for the same group of employees before a representation vote is taken twice in a six-month period, where a union withdraws its application for certification after a representation vote, or where a union's application is dismissed by the Board after a vote.

Prior to 1995 there was no automatic bar imposed on a subsequent certification application. Rather the Labour Board was given the power to bar an unsuccessful applicant from further applications exercising its own Labour Relations judgment. It generally imposed a bar for a period of six months where the employees' desire had been tested by a representation

vote, and the application for certification was dismissed for lack of employee support. The bar only applied to the trade union in question.

There is simply no justification for barring a different trade union from seeking to represent employees as a result of an unsuccessful application made or withdrawn by a rival trade union. Indeed the existence of this provision can create significant mischief in that a trade union can apply for certification merely to spoil the efforts of another rival trade union which would seek to represent the employees. There are often good reasons why a trade union must withdraw its application, or where it may be unsuccessful in a vote, which should not preclude the union from applying again in a relatively short period of time. The automatic nature of the existing bars simply cannot be justified. The Labour Board itself has sufficient expertise to determine in what cases it would be abusive for a trade union to re-apply given that the purpose of the *Labour Relations Act* is to encourage the organization of the employees. These rights can only be meaningfully asserted if employees are free to apply for certification without the type of draconian bars presently contained in the legislation.

As a result, we would suggest the following amendments to the existing provisions of the *Labour Relations Act*. These amendments are intended to replace the mandatory bars contained in the existing *Act* with discretionary bars of up to six months to be determined by the Labour Relations Board exercising its expertise in particular cases as to whether a bar is appropriate. The amendments are also intended to remove provisions which penalize unrelated unions from making application for certification where another union has made an application which is withdrawn or dismissed.

Finally, consequential amendments are made to Bill 144.

Amendments to Existing *Act*

1 (1) In this *Act*,

“Affiliated trade union” means the parent or local of the same union or any other local affiliated with the union or its parent union.

7 (9) If the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit **until six months** or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn.

(9.1) If the trade union withdraws the application before a representation vote is taken, and that trade union had withdrawn a previous application under this section not more than six months earlier, the Board **may refuse to consider another application for certification by the trade union or an affiliated trade union as the bargaining agent of the employees in the proposed bargaining unit until six months or such shorter period as the Board considers appropriate** after the second application was withdrawn.

Exception

(9.2) Subsection (9.1) does not apply if the trade union that withdrew the application is a trade union that the Board is prohibited from certifying under section 15.

Same

(9.3) Despite subsection (9.1), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.

Same

(10) If the trade union withdraws the application after the representation vote is taken, the Board **may refuse to consider another application for certification by the trade union or an affiliated trade union as bargaining agent of any employee that was in the bargaining unit proposed in the original application until six months or such shorter period as the Board considers appropriate**.

Same

(10.1) Despite subsection (10), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.

Exception

(10.2) Subsection (10) does not apply if the trade union that withdrew the application is a trade union that the Board is prohibited from certifying under section 15.

10 (3) If the Board dismisses an application for certification under this section**, the Board may refuse to consider another application for certification by the trade union or an affiliated trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until six months or such shorter period the Board considers appropriate after the original application is dismissed**.

Same

(3.1) Despite subsection (3), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.

Exception

(3.2) Subsection (3) does not apply if the trade union whose application was dismissed is a trade union that the Board is prohibited from certifying under section 15.

Same

(4) For greater certainty, subsection (3) does not apply with respect to a dismissal under paragraph 7 of subsection 8.1 (5).

111 (1) (k) To bar an unsuccessful applicant for any period not exceeding **six months** from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding **six months** from the date of the dismissal of the unsuccessful application.

160 (3) If the Board dismisses an application for certification under this section, the Board **may refuse to consider another application for certification by the bargaining agency** or the affiliated bargaining agent **as bargaining agent for the employees in the bargaining unit proposed in the original application until six months or such shorter period as the Board considers appropriate** after the dismissal.

Amendments to Bill 144:

Note: Alterations Must also be made to Some of the Headings to indicate that the Bars Are Not Mandatory

Section 8

128.1(14) If the Board dismisses an application for certification under clause (13) (e), the Board **may refuse consider another application for certification by the trade union or an affiliated trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until six months or such shorter period the Board considers appropriate after the original application is dismissed.**

128.1(22) (d) if the Board dismisses the application for certification under clause (13) (e), the Board may refuse to consider another application for certification by the employee bargaining agency or the affiliated bargaining agent or agents to certify the trade unions as bargaining agent for the employees in the bargaining unit until six months or such shorter period as the Board considers appropriate after the dismissal.

XII: Restore Arbitrators Power to Extend Time Limits for Referral to Arbitration

Perhaps nowhere is the need for a review and remediation of the existing *Labour Relations Act* evident as in the case of the treatment of time limits for the referral of grievances to arbitration. Under section 48 (16) the legislature has provided that arbitrators are entitled to relieve against failure to comply with time limits contained in the Collective Agreement where there are reasonable grounds for the delay and where the other opposite party is not substantially prejudiced by the extension. However, as a result of a court case in 1997, the Divisional Court held that the Board was limited to extending time limits contained in the grievance procedure but could not extend the time limits for referral to arbitration, which in its view were part of the arbitration procedures in the collective agreement and not the grievance procedures. In part the Court relied upon the fact that where as prior to 1992 the *Labour Relations Act* specifically referred both to the grievance and arbitration provisions of the Collective Agreement. Whereas when the Harris government amended the *Labour Relations Act* to remove most of Bill 40 improvements it reverted to language which only allowed arbitrators to extend the time limits contained in the grievance procedure.

This artificial distinction between time limits in the grievance and arbitration provisions has led to significant injustice. As a result of a minor failure to comply with time limits for a referral to arbitration, unions have been precluded from access to arbitration even with respect to important matters. There is simply no justification for allowing an arbitrator to relieve against time limit failures so far as filing the grievance and moving the grievance on to the next step, but not allowing arbitrators to exercise the same jurisdiction with respect to the critically important referral of a grievance to arbitration. It must be remembered that the grievance of arbitration process is handled by lay people often volunteers with busy work schedules. The reliance upon technical time limit violations that deprive employees of having their grievances heard creates real hardship on working people and is not in accord with sound labour relations policy. The OFL would urge the government to amend the *Labour Relations Act* to make it clear that arbitrators have the power to relieve against non-compliance with time limits both with respect to any step in the grievance procedures, or procedures relating to the arbitration process itself.

As a result the OFL suggests the following amendment:

Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance **and arbitration** procedure under a collective agreement…".

XIII: Fairly Balance the Essential Service Regime

Crown employees are required to provide essential services, even during a strike or lockout, pursuant to the provisions of the *Crown Employees Collective Bargaining Act* (*CECBA*). Crown employees recognize this obligation, but it is socially desirable and only fair that the right to strike is not limited any more than is truly necessary. In the words of the Ontario Labour Relations Board, " the underlying threat of economic conflict is what drives the vast majority of uneventful negotiations and contract settlements. To the extent that the designation of essential services renders the strike sanction relatively toothless, the salutory

effect of economic pressure is likely to be correspondingly impaired" which "may unduly protract a labour dispute".

The current CECBA essential services regime was introduced in 1993 by the NDP government and then the legislation was skewed against unions and employees by Tory amendments. The Liberal government has stated an appropriate interest in "balancing the essential services regime to the benefit of all parties".

Due to a Tory amendment, CECBA s. 32 (2) presently states that "the number of employees in the bargaining unit that are necessary to provide the essential services shall be determined without regard to the availability of other persons to provide essential services". This means that no account is taken of the availability of managers and other excluded employees to do essential services. In the private sector, such employees are commonly used during a strike or lockout to provide skeleton staffing. Under CECBA, such staff are not even counted when determining essential service staffing levels, with the result that those levels are set artificially high, and certainly in excess of the levels actually needed to provide essential services.

Due to a further Tory amendment, CECBA s. 41.1 (1) presently states that "An essential services agreement shall not directly or indirectly prevent the employer from using a person to perform any work during a strike or lockout". This has been interpreted by the OLRB to mean that CECBA allows the Government to use both essential services workers **and** replacement workers. The Board has further noted that it actually "makes labour relations sense" **not** to have both at the disposal of the employer. Such a situation removes economic pressure from the employer, causes employee resentment and will only serve to prolong a strike or lockout. But this what the current legislative provision permits. In apparent recognition of this unfairness, the current Liberal government has pledged that, as government employer, it will never use replacement workers during a labour disruption. It should match the legislation with this promise.

XIV: Rights While Waiting for a First Collective Agreement

(a) Just Cause:

The Ontario Federation of Labour maintains that it is essential that employees be given just cause protection as soon as they have voted to be represented by a union.

Virtually every collective agreement contains a just cause provision. Prior to 1995 legislation also stipulated that employees had the right to just cause protection between such a vote and until a first collective agreement was settled. There was no time limit on this provision, it held until the parties had negotiated a collective agreement.

By reinstating such a provision an employee who was terminated without just cause, could turn to the union which could file an application to the OLRB seeking the reinstatement of that employee. Thus, with such a provision, the employer would have no incentive to try to get rid of union supporters and activists.

(b) Dues Check-Off:

Upon certification of a new bargaining unit a union has representation responsibilities for the employees. If it so chooses, the union should be able to collect union dues to fulfill those responsibilities. Such dues could, for example, assist in funding the negotiations for a new collective agreement.

(c) First Contract Arbitration:

Compounding the difficulties and risks experienced by workers trying to unionize under the current restrictive legislative amendments initiated by the previous Tory government, there is also the unnecessary challenge of gaining a first collective agreement. There exist a number of nefarious activities undertaken by employers in an effort to avoid negotiating a fair collective agreement. Central to which has been the power to delay

negotiations and a settlement in an attempt to weaken the resolve of newly organized workers in the hopes that they will give up on their attempt to improve their working lives.

In order to overcome such roadblocks to establishing a first collective agreement the position of the Ontario Federation of Labour is that the OLRB should be provided the power to settle the terms of a first collective agreement upon the application of either workplace party. Such a provision was in the *Labour Relations Act* prior to 1995.

During the time when the *Act* provided the parties with automatic access to first agreement arbitration the overwhelming majority of first contract negotiations resulted in an agreement. It was only those employers who sought to undermine and defeat the will of employees to unionize that were confronted with first contract arbitration. In such circumstances access to first contract arbitration was an invaluable tool for employees seeking to exercise their democratic right to chose to be represented by a union.

XV: Abolish Decertification Poster

We support the Government's recent decision to repeal the legislation implemented by the previous government obliging decertification posters to be posted in all unionized workplaces across the province in violation of conventions signed by Canada at the International Labour Organization (ILO).

XVI: Reinstate the OLRB's Ability to Dismiss Decertification Applications Due to Employer Involvement

One of the most regressive features of the Conservative government's amendments to labour law was its treatment of termination application under the *Labour Relations Act*. Under the *Act*, prior to the 1995 amendments, termination applications circulated by employees were considered with significant care by the Labour Relations Board to determine whether or not the petition was in fact a voluntary one or influenced by employer actions. In order to make this determination the Board was required to inquire into the

voluntariness of the petition. Only if the Board was satisfied that the written evidence in support of the petition was voluntary in nature, would the Board go on to order a representation vote. This process provided assurances to the Board that the application itself had not been initiated by the employer and that the application itself was untainted by employer influence and was entirely voluntary. These requirements were founded in the well known labour relations reality that given the responsive nature of the relationship between employer and employee, and the influence in which the employer can exert economically on employees, the least employer involvement would fatally taint the process.

Under the provisions enacted by the Conservative government the burden of proof has been entirely reversed and it is necessary for the union to establish positively that the employer initiated the application or engaged in threats, coercion or intimidation. Placing the onus of proof on to the union cannot be justified. Often the union is entirely unaware of what led up to the petition of being filed and the circumstances on which it originated, how it was paid for and what prompted its initiation.

The previous practice of requiring the petitioners of providing evidence in this regard, made sense since all of the knowledge was in the petitioner's hands which the union was not usually aware of, particularly if the termination process were undertaken surreptitiously by the employer. As a result, given that the purpose of the *Labour Relations Act* is to encourage employees to freely organize, any provisions relating to termination should reintroduce those necessary safeguards to ensure any denial of employees of their right to unionize occurs only where the Board is fully satisfied that the application is a product of the employees own initiative, and not orchestrated by the employer. The only effective way of ensuring this is to re-establish previous practice in which the burden was on the party who circulated the petition to explain the origins and method by which the petition was circulated among employees.

XVII: Construction Trades Provisions

The key aforementioned provisions in this submission speak to the needs of both construction and non-construction workers. While cognizant of the unique needs of various occupations and sectors – particularly construction – the overall direction of legislative reform is to a large extent all encompassing. This can best be evaluated by examining the submission of the Provincial Building and Construction Council of Ontario's submission entitled *Levelling the Playing Field for Working Families.*

XVIII: Purpose Clause

The purpose clause of the *Ontario Labour Relations Act* spells out the core intentions of the legislation. The clause is an important element in interpreting provisions of the statute as a whole, particularly where there is any ambiguity.

Unfortunately, the present purpose clause, in LRA s.2, was drafted by the previous Tory government to have a blatantly pro-employer bias. There is reference to "adapting to change", "flexibility", "productivity" and "the importance of economic growth" without any mention of improving working conditions, health and safety, social justice or workplace democracy. There is an attempt to cast doubt on the naturally democratic and voluntary nature of trade unions through a reference to promoting "collective bargaining between employers and trade unions **that are** the freely-designated representatives of the employees".

A balanced purpose clause should be reinstated. The Government should return to the formulation introduced in Bill 40 by the NDP government in 1993. This would be the preference of the OFL. Failing such, the Government could return to the time honoured pre-1993 purpose clause, which stated:

> Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

XIX: Interest and Rights Arbitration Appointment Process

Under the mandatory interest arbitration legislation, such as the *Hospital Labour Disputes Arbitration Act (HLDAA)*, the provisions for the appointment of arbitrators are biased in favour of the funder. Government, which has a significant interest in the outcome of the proceedings, nonetheless appoints the arbitrator to resolve the dispute. The legislation should require the use of respected mutually acceptable arbitrators in all cases, and should provide for an independent authority at arms length from government to make such appointments.

Similarly, the appointment of rights arbitrators should be done on the basis of transparent criteria and through an independent body.

Finally, previously under s. 45 of the OLRA, Grievance Settlement Officers (GSOs) from the Ministry of Labour expedited matters by fostering harmonious dispute resolution quickly and inexpensively. These officers successfully resolved hundreds of disputes significantly reducing arbitration costs for unions and employers and reducing conflict between workplace parties. Their elimination has been at the expense of timely dispute resolution and industrial peace and stability. The Government of Ontario should move to re-establish GSOs and their valuable services.

XX: Future of Collective Bargaining

There are a range of new and innovative ways to modernize the *Labour Relations Act* and extend the democratic right to unionize to all those who so choose. One could simply end the exclusion of certain professional occupations, for example, or design mechanisms to enable domestics to collectively organize in order to improve their conditions. The large contingent workforce (part-time, contract, casual, temporary) is not only confronted with an instability of hours and income, but very often low pay and no benefits. As currently structured, Ontario's industrial relations system largely excludes this growing and highly differentiated sector.

While it is not our purpose here to launch into a full discussion of how best to modernize the *Act*, we do present some initial proposals designed to at least begin to bridge the structural mismatch between the current legislation, based on the *Wagner Act* / PC1003 model, and the ever changing nature of work in the contemporary labour market.

Status of the Artist

A typical example of work that does not fit the "standard" full-time, one employer model is that of Ontario artists and cultural workers. They contribute significantly to our cultural and social richness, yet continue to be denied many basic rights enjoyed by other workers. They seek equal and fair treatment: not special status.

The current Federal Status of the Artist Legislation establishes a framework to govern professional relationships between artists and producers, but its scope is extremely limited as most cultural work falls under provincial jurisdiction. Ontario artists and cultural workers have waited far too long for positive action on the part of governments in Ontario. Provincial status of the artist legislation already exists in Quebec and Saskatchewan.

Ontario needs to restructure and modernize its labour relations legislation in a manner that recognizes the unique nature of the work performed by Ontario artists and cultural workers. Currently, many of these workers need a significant improvement in social benefits, compensation, living and working conditions and time is of the essence. Legislation would also need to recognize the importance of current labour relations structures within the industry inclusive of existing bargaining agents and collective agreements.

The OFL calls upon the Government of Ontario, in consultation with the potential parties, to demonstrate leadership on this issue and initiate the necessary steps to develop collective bargaining legislation for Ontario's artists and cultural workers.

Broader-based labour relations:

i) Consolidation of bargaining units

The OFL's Submission to the Ministry of Labour regarding *Proposed Reform to the Ontario Labour Relations Act* of February 6, 1992, considered the consolidation of bargaining units "of fundamental importance to the trade union movement." The context of economic restructuring, the difficulty of union representation for employees in the private service and small workplace sector, the challenge for trade union representation and bargaining in an industrial relations system based on a workplace-by-workplace structure when the scale of enterprise has so greatly expanded, all suggest change is long overdue.

The OLRB should therefore be empowered to consolidate certifications on an application from either party where bargaining rights are held by the same union with the same or related employer. This could occur at the same location or in multi-location situations. This provision was in s. 8, of the *Act* during the life of Bill 40, *An Act to Amend Certain Acts Concerning Collective Bargaining and Employment.* It proved itself useful in streamlining bargaining and adapting Ontario's industrial relations system to Ontario's modern economy.

Given that this change involves the same union, a single or related employer, and has already been in force, it should be viewed as distinct from the notion of broader-based bargaining. Broader-based bargaining has no history of prior implementation in Ontario, with the exception of the construction industry and previously the garment industry, and therefore needs careful study, full consultation and knowledge of systems in other jurisdictions, with the aim of developing a consensus amongst the parties prior to implementation. Provision for the consolidation of bargaining on the other hand, should be implemented expeditiously and would constitute a significant step beyond enterprise bargaining and toward industrial relations modernization.

ii) Joinder of newly certified units

There should be provision for joinder or consolidation of newly organized bargaining units of the same employer. This will facilitate organizing in the retail, financial and other elements of the service sector and elsewhere, particularly where employees are employed in small units or companies.

iii) Broader-based bargaining

Employees in small workplaces are often predominantly women, youth or immigrants whose work arrangements are non-standard or contingent and low-paid. While it could well be argued that such employees are even more in need of collective representation than others, such employees are, as we noted above, less likely to belong to a trade union. They are thus particularly vulnerable to the wage-based exigencies of market competition and arbitrary employer practices.

The pervasive growth of small workplaces and the concomitant increase in precarious employment represents a significant and costly challenge to trade unions in their efforts to increase the standard of living and job security of such employees. In many cases, even where trade unions are successful in representing such employees, collective bargaining is not effective due to the size of the workplace and structure of work arrangements. Hence, in our view, consideration should be given to mechanisms which make bargaining more effective and enable non-union employees in small workplaces to exercise their democratic right to join a union and collectively bargain with others in the same sector or region to improve their quality of life.

Government has also been faced with a challenge of designing effective mechanisms through which basic employment standards can be enforced in small workplaces and equity initiatives can be effectively implemented. Trade union representation would alleviate this situation.

Although enlightened employers have also been concerned with the duplication and multiplicity of bargaining in some sectors with a union presence, most employers have

been supporters of a status quo which, without broader-based bargaining mechanisms, effectively operates as a union avoidance system denying employees their democratic right to be represented in a trade union should they so choose.

The suggestions in this submission go part way in addressing the severe structural problems for labour relations in this sector. Recognition of this has, since the 1990s, led the Ontario Federation of Labour to a discussion of:

a) the extent to which it is appropriate to shift the locus of collective bargaining from the workplace level, the obvious norm of the current industrial relations system, to a sectoral or regional level; and

b) which alternative representation structures are most capable of responding effectively to the representation gap in small workplaces and in "non-standard" forms of employment thereby ensuring that employees (and employers) interests and decision-making at the enterprise level and the sectoral/regional level are appropriately assured.

In the 1990s the OFL and a number of other stakeholders in Ontario (and British Columbia)[10] proposed that the issue of broader-based bargaining be explored by a special task force. A preliminary study of the Quebec Decree system was prepared for the Ministry of Labour and a consultant provided the Ministry with advice on the terms of reference for a task force.[11] The perspective at that time was that the anticipated effect of various models of broader-based bargaining, inclusive of wage structures and rates, the gender gap in wages, competitiveness, the impacts on employee/employer representation, collective bargaining, together with modernizing and streamlining industrial relations in the small workplace sector. These issues were to be investigated and legislative recommendations forthcoming.

In view of the fact that broader-based bargaining, namely structures of worker and employer representation for purposes of collective bargaining beyond the level of the

workplace, would represent a significant departure from the present enterprise-based industrial relations system (with the exception of the construction sector), the Ontario Federation of Labour retables its proposal that a carefully designed, comprehensive and participative task force be struck by the Government of Ontario to develop options and proposals concerning the scope, mechanics and costs of broader-based bargaining.

Respectfully submitted,

ONTARIO FEDERATION OF LABOUR

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ENDNOTES

1. K. Sugeno, Unions as Social Institutions in Democratic Market Economies, (1994) 133 International Labor Review 511, at p. 519.

2. Gilbert, Douglas, *Occupational Health and Safety in Canada and the United States*, American Bar Association, 1998, pp. 33 and 38 and studies cited therein. The presence of a union is a central means by which JHSCs are made to work well: Ibid, p. 34; Reilly et al., "Unions, Safety Committees and Workplace Injuries", *British Journal of Industrial Relations*, 33: 2 June 1995. Strong and capable union representation on such a committee causes management to give priority to the recommendations of the committee, which in turn ensures that the committee causes improvements in workplace health and safety.

3. Karen Bentham, "Employer Resistance to Union Certification," (2002), *Relations Industrielles/Industrial Relations*, 57-1, p.159.

4. Ron Lebi and Elizabeth Mitchell, *The Decline in Trade Union Certification in Ontario: The Case for Restoring Remedial Certification*, [10 C.L.E.L.J.] 473 at p.475 conclude that in the year 2001-2002 there was a drop of 42% in applications received and a drop of 49% in membership as compared to 1994-1995. Further the success rate for certification applications declined from 71% in 1994-95 to 48% in 2002-2003.

5. Sara Slinn, "The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis" (2003), *Canadian Labour and Employment Law Journal, Vol.10,* p. 367-397.

6. Stan Lanyon and Bob Edwards, *The Right to Organize*, 1991.

7. Andrew Sims, Rodrigue Blouin and Paula Knopf, *Seeking a Balance, Review of Part I of the Canada Labour Code, 1995*. Report for the Federal Minister of Labour, p.62.

8. Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law*, (1980) Toronto: Carswell, p. 44.

9. *Response to the Ministry of Labour Consultation Paper on Contract Tendering in the Contract Service Sector*, (August 14, 1990), Ontario Federation of Labour.

Response to the Ministry of Labour's Proposed Amendments to the Employment Standards Act and the Ontario Labour Relations Act Concerning Employees of Service Contracts, (March 1991), Ontario Federation of Labour.

Further Response to the Ministry of Labour's Proposed Amendments to the Ontario Labour Relations Act and the Employment Standards Act on Contract Tendering, (March 25, 1991), Ontario Federation of Labour.

10. In distinction to Ontario the Government of British Columbia did undertake a study of broader-based bargaining. See John Baigent, Vince Ready, and Tom Roper, *A Report to the Honourable Moe Sihoa, Minister of Labour. Recommendations for Labour Law Reform,* September, 1992, page 30. (Note: Tom Roper dissented from the broader-based bargaining section of the report.)

11. John O'Grady, *Discussion Paper on the Terms of Reference, Composition, Timetable and Research Plan for a Provincial Task Force on Sectoral Wage-Setting and Broader-Based Bargaining*, May 6, 1991.