DO THE RIGHT THING: STAND UP FOR WORKERS

Submission to the Standing Committee on Finance and Economic Affairs

November 2018

ONTARIO FEDERATION OF LABOUR


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LABOUR

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November 15, 2018

Standing Committee on Finance and Economic Affairs
Ontario Legislature
111 Wellesley St W
Toronto ON M7A 1A2

Dear Committee Members,

The introduction of Bill 47, *Making Ontario Open for Business Act*, erases the collective voice of millions, who have demanded immediate action to modernize Ontario's labour and employment laws. It repeals virtually all of the protections contained in the *Fair Workplaces, Better Jobs Act* (FWBJA), pushing workers and their families further behind by reinstating laws that have created conditions for—and entrenched—precarious employment.

Bill 47 must be withdrawn.

The Ontario Federation of Labour (OFL), on behalf of the 54 affiliated unions and one million workers we represent, will continue to champion the rights of unionized and non-unionized workers.

We will continue to demand better for working people in this province, particularly for workers of colour, female workers, immigrant workers, young workers, and workers with disabilities.

We will stand up for what is decent and what is right. We're calling on our elected representatives to do the same.

We will continue to demand decent jobs rooted in fair working conditions for every Ontario worker and their family.

Through this submission, the OFL has proposed several amendments to Bill 47—namely changes to the *Employment Standards Act* (ESA), the *Labour Relations Act* (LRA), and the *Ontario College of Trades and Apprenticeship Act* (OCTAA)—that will contribute to a legislative framework for decent work in this province.

Together, we must raise the bar for decent work—for workers, for their families, and for the economy—not engage in a race to the bottom.

Sincerely,

Chris Buckley
President

Patty Coates
Secretary-Treasurer

Ahmad Gaied
Executive Vice-President

EMPLOYMENT STANDARDS ACT

Please note that the OFL supports and endorses the recommendations put forth by the Workers' Action Centre and Parkdale Community Legal Services on the changes to the ESA under Bill 47.

MINIMUM WAGE

Increasing the minimum wage is one of the most effective measures that a government has in lifting the lives of vulnerable workers and their families. It establishes a new, higher standard for all wages across the province, including those earned by the millions of Ontarians living near the poverty line.

Not only will an increase in the minimum wage positively affect workers, but it will also positively affect businesses.

The reality is that raising the minimum wage will bolster consumer demand and local economic growth. A $15 minimum wage will increase the purchasing power of low- and middle-income households who are more likely to spend their money in the local economy (e.g., food, health care, education, and housing) than save it.

Under the Ford government, minimum wage workers will be employed full-time and still live in poverty.

The reality is that raising the minimum wage will augment businesses' profit. A $15 minimum wage will increase workers' well being, enhancing their productivity and their investment in the business succeeding. Decent working conditions also allow businesses to achieve a stronger worker retention rate, lowering their training and recruitment costs.[i]

The FWBJA rightly recognized these benefits and implemented a general minimum wage of $14 per hour in 2018—with a scheduled increase to $15 per hour in 2019.

Bill 47 repeals the upcoming $15 minimum wage—a $1 per hour raise—for workers and instead, it freezes their pay for 33 months and ties it to inflation thereafter. This government has taken away a legislated raise for workers next month and pushed it back for years.

It must be understood that eliminating income taxes for minimum wage workers, in lieu of a $1 per hour raise, will leave these individuals significantly worse off. It puts less money in their pocket because low-wage workers already pay relatively low taxes. These workers are better off with higher wages that directly increase their disposable income. Further, this policy undermines the value of what taxes fund for minimum wage workers and everyone else: public services. A tax credit reduces government revenues, contributing to greater public service cuts including to hospitals, schools, and infrastructure.[ii] Everyone is better off with strong and well-funded public services.

Under the Ford government, minimum wage workers will be employed full-time and still live in poverty.

Help is not on the way for workers and their families—that is, unless the government does the right thing.

Withdraw Bill 47 (e.g., maintain the $15 minimum wage slated to begin in 2019), and eliminate exemptions to the minimum wage, including for liquor servers and students.

Currently, there are several workers, including liquor servers and students, who receive a lower minimum wage. For liquor servers, it is argued that the complement of tips supplements their earnings to meet or exceed the general minimum wage. This is predicated on the idea that it is customary for patrons to tip—which is not a mandated practice. Research shows that 20 per cent of liquor servers earn less than the general minimum wage after tips.[iii] It is also important to note that women represent nearly 75 per cent of liquor servers.[iv] This exemption to the minimum wage further reinforces the need for some to tolerate (sexual) harassment or from customers to get tips in an effort to make ends meet. Furthermore, Ontario is currently the only province in the country with a lower minimum wage for students. The Ministry has justified the student minimum wage as a means "to facilitate the employment of younger persons, recognizing their competitive disadvantage in the job market relative to older students who generally have more work experience and may be perceived by employers as more productive."[v] Instead of addressing inequity in the labour market, this exemption further embeds discrimination.

PERSONAL EMERGENCY LEAVE

No one is immune from getting sick, from a personal emergency, or from the death of a loved one. Not a worker. Not a business owner. Not a politician.

To some extent, the FWBJA acknowledged this concept and extended Personal Emergency Leave (PEL)—which could be used for personal illness, injury, and/or medical emergency or for similar urgent matters concerning family, including death—to all workers in Ontario. In other words, it granted access to job-protected leave for the millions of Ontario workers who were ineligible because they were employed by a small business.[vi] Specifically, these workers were entitled to two paid sick days—without a medical note requirement—within the confines of the ten job-protected PEL days.

Under the Ford government, some workers will have no access to paid sick days, paid bereavement leave, or paid personal emergency leave.

Bill 47 reduces the ten days to eight days. It restricts the eight-day allotment by defining how many days can be used for family responsibility (3 days), illness (3 days), and bereavement (2 days).

It removes the right to two paid days, making the entire eight-day leave unpaid. It allows employers to require a medical note for illness.

The proposed leave provisions in Bill 47 limit workers' access to—and the number of days available for—annual entitlements (i.e., personal emergencies, family responsibilities, and illness) by strictly sectioning off time for personal emergencies that occur relatively infrequently (e.g., bereavement). Moreover, these allotments eliminate the kind of flexibility a personal emergency demands. The nature of these issues makes it impossible to determine its exact duration. The leave must provide workers with the flexibility needed to balance work, family illness, and emergencies.

Workers should also not be forced into a position where they must either compromise their own health and the welfare of others or risk losing wages. Taking time off when sick is known to speed up recovery, deter further illness, and reduce overall health care costs.[vii] Workers should also not be forced to provide medical evidence that they are sick. This requirement further compounds the barriers to accessing PEL, including the associated cost of a medical note. Such a requirement also takes time away from others who require medical attention and exposes those in the waiting room, potentially vulnerable patients, to germs. It must be recognized that workers not only require the right to take time off when sick—without a doctor's note—but that leave must also be paid to make it a viable option.

Under the Ford government, some workers will have no access to paid sick days, paid bereavement leave, or paid personal emergency leave.

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Withdraw Bill 47 (i.e., maintain the ten days of PEL without a medical note requirement) and increase paid sick days to seven per year.

EQUAL PAY FOR EQUAL WORK

Workers who are doing similar work should be paid the same. This is a matter of fairness.

Among other factors, a worker's gender, race, colour, ethnic origin, sexual orientation, disability, or employment status should have no place in determining their wage.

The FWBJA introduced this principle of equality for part-time, temporary, seasonal, casual, and temp agency workers, aligning their pay with that of their full-time permanent counterparts—provided that substantially the same kind of work, using the same skill, effort, and responsibility, was being done.

Bill 47 removes this fundamental equality principle from the law, significantly affecting more than one in five workers in Ontario,[viii] including female, Indigenous, racialized,

immigrant, and younger workers as well as workers with disabilities—all of whom are disproportionately represented in insecure work.

For employers, this situation is highly beneficial because they can extract the same kind of work but at a significantly lower price. It is also important to understand that this legislation will perpetuate an increase in precarious employment across the province and contribute to the growing divide between full-time permanent employees and others.

Under the Ford government, some part-time, temporary, seasonal, casual, temp agency workers will be paid less than their counterparts simply because of their employment status.

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Withdraw Bill 47 (i.e., maintain equal pay for equal work standards), provide greater enforcement, and remove loopholes.

For existing equal pay protections to be effective, workers must be aware of the wage structure in their workplace. Although the law allows workers with the right to request a review of their own rate of pay, without access to the overall wage structure, workers cannot ascertain whether they are receiving equal pay for equal work. Instead, employers must have a proactive obligation of pay transparency that requires them to post wage rate information in the workplace and to report this information to the Ministry of Labour. Workers must also be protected from reprisal when requesting and discussing wage rates.

It is also important to note that the inclusion of grounds for differential pay, namely "a system that measures earnings by quantity or quality of production" as well as the ambiguous "other factors," undermines the intent behind equal pay for equal work. Both exceptions to equal pay must be repealed, mirroring the exemption language in the *Pay Equity Act*, which requires an employer to show that differential pay is both objective and does not discriminate based on sex.

SCHEDULING

Many low-wage workers in Ontario receive their schedules with very little notice, have very little—if any—control over when they are scheduled to work, and work fluctuating hours week after week. This uncertainty in scheduling practices contributes to precarious

working conditions and makes it difficult for workers to arrange for childcare, partake in further training and education, make commuting arrangements, and plan other important activities.[ix] It is also important to note that the current imbalance of power, where employers can demand a constant flexibility in schedules from their workers, is such that workers cannot search for or maintain a second job. They are either forced to leave their job, which comes with significant personal financial risk, or to make themselves always available to that employer in the event of additional work.

Under the Ford government, some workers will be forced to be economically dependent on a low-wage, insecure job where scheduling is at the whim of the employer.

Under the FWBJA, workers were scheduled to receive—as of January 1, 2019—the job-protected right to request changes to their work schedule and work location; the right to a minimum of three hours' pay for being on-call, if available to work but not called in or worked less than three hours; the right to refuse requests/demands to work or to be on-call on a day not scheduled to work or to be on-call with less than 96 hours' notice; and the right to three hours' pay in the event of cancellation of a scheduled shift or an on-call shift within 48 hours before the shift was to begin.

Bill 47 repeals the above fairer scheduling protections.

Under the Ford government, some workers will be forced to be economically dependent on a low-wage, insecure job where scheduling is at the whim of the employer.

Help is not on the way for workers and their families—that is, unless the government does the right thing.

Withdraw Bill 47 (i.e., maintain the scheduling rules slated to begin in 2019).

MISCLASSIFICATION

The ESA is meant to establish the minimum employment standards and conditions for workers across the province. Not everyone, however, is protected under the law. The changing nature of work has created a spectrum of different workers—ranging from traditional workers (i.e., those completely protected by the ESA) to so-called independent contractors (i.e., those completely outside of the ESA's protections).

Prior to the FWBJA, employers were able to misclassify workers as independent contractors. In this way, they were able to avoid the direct financial costs of compliance with the ESA (e.g., vacation, public holiday, overtime, termination, and severance pay)

and contributions to basic government programs like the Canada Pension Plan and Employment Insurance. In response, the FWBJA prohibited employers from misclassifying workers but more importantly, it transferred the onus onto the employer to prove that a person is not considered a worker for the purposes of the ESA.

Bill 47 repeals the enforcement mechanism, transferring the burden of proof back to the worker.

Under the Ford government, employers will be more likely to manipulate the system so that workers are left unprotected under the law.

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Withdraw Bill 47 (i.e., maintain the onus on employers to prove that a worker is not considered a worker, for the purposes of the ESA).

LABOUR RELATIONS ACT

WORKPLACE INFORMATION

The reality is that the changing nature of work and government policies have contributed to a growing power imbalance between management and workers. It has also left millions of workers without the power of a union to represent them.

Prior to the FWBJA, workers seeking to bargain collectively faced an increasingly difficult task of identifying and communicating with the members of a potential bargaining unit. Unions were only able to obtain a list of employees, which often had inadequate content, once the certification application was filed. Because unions cannot campaign, nor do they have direct access to workers inside a workplace, they were forced to work based on the limited information they could ascertain from workers. Employers, on the other hand, know how many employees there are, where they work, and their contact information.

Under the Ford government, workers will be denied access to information and encounter significant obstacles to organize collectively.

It must be recognized that genuine democracy can only be predicated on a real dialogue with those affected by, and participating in, the determination of that outcome. No other "democratic" vote process operates without basic voter information. In political elections, for example, all parties have equal access to a voters list—including names, addresses, and phone numbers—well in advance of a vote to ensure that there is sufficient time to engage people in meaningful discourse. Open discussion and debate—unaffected by employer misconduct—contribute to an environment in which employees are free to make an independent choice on whether they want to engage in collective bargaining and, if so, who they wish to represent them.

The FWBJA made significant improvements in this respect by providing unions with earlier access to workplace information. This, however, was conditional on unions being able to demonstrate 20 per cent support from workers in the proposed bargaining unit.

Bill 47 repeals all provisions related to disclosing workplace information—even affecting applications currently before the Ontario Labour Relations Board (OLRB) and those granted under the FWBJA.

Under the Ford government, workers will be denied access to information and encounter significant obstacles to organize collectively.

Help is not on the way for workers and their families—that is, unless the government does the right thing.

Withdraw Bill 47 (e.g., maintain access to workplace information when a union demonstrates that it is engaged in a bona fide organizing drive), and provide greater information.

Without information about job classifications and an employer's organizational structure during an organizing campaign, unions and supportive employees are forced to formulate bargaining unit descriptions based on incomplete information. Further, litigation before the Board at the time of the filing of an application for certification may be reduced by giving unions more information about the workplace earlier in an organizing campaign. Namely, this allows unions to more accurately craft an appropriate bargaining unit description prior to the filing of an application for certification.

CARD-BASED CERTIFICATION

A fundamental element in the collective bargaining process is the manner in which workers are able to express their interest to join a union—in other words, the manner in which a union is certified.

Under the Ford government, vulnerable workers will find it increasingly difficult to access their constitutional right to be represented by a union in collective bargaining.

The current two-step mandatory vote system—which is used in the vast majority of sectors in Ontario—fails to recognize that from the first show of support to when the ballots are cast, the situation can drastically change. With this certification process, employers have a sizeable opportunity to interfere with workers' choices—to engage in threats and intimidation. Although employer opposition and misconduct can be overt (e.g., illegal terminations), in many cases it is subtle but no less effective. Practices include captive audience speeches; small group meetings held by the employer; the distribution of anti-union literature; employer promises of increased wages and benefits; tightening work rules; threats against union supporters; and interrogating workers.[x]

It is also important to mention that the mandatory vote system is unlike any other "democratic" vote. In a political election, for example, voters' financial and economic well-being are not directly controlled by a party nor does one party have the power to break the rules and use illegitimate tactics that cannot be effectively remedied before the election is held.

On the other hand, card-based certification recognizes that when a worker signs a union card, they are expressing their desire to join a union. It is important to note that the Supreme Court of Canada has recognized that "the function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and

how they should pursue those interests."[xi] In fact, union certification success rates in card-based regimes are approximately 20 percentage points higher than under compulsory vote systems.[xii] All Ontario workers—with no exceptions—deserve the same protection of their constitutional right to unionize.

Bill 47 repeals the FWBJA's extension of card-based certification into the building service; home care and community service; and temporary help agency industries—leaving the construction industry as the sole sector left in Ontario to unionize workers through this process.

Under the Ford government, vulnerable workers will find it increasingly difficult to access their constitutional right to be represented by a union in collective bargaining.

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Withdraw Bill 47 (e.g., maintain card-based certification in the building services; home care and community services; and temporary help agencies industry) and extend it to all other sectors.

REMEDIAL CERTIFICATION

The reality is that some employers commit unfair labour practices, coercing or intimidating workers into rejecting the union, during an organizing drive. Prior to the FWBJA, the Board was able to certify a union without a vote when the employer's actions contravened the LRA in such a manner that it became difficult to determine the true wishes of workers. This measure, however, was only adopted if no other recourse was sufficient to counter the effects of the employer's actions and if the union had "adequate membership support." The Board could also consider the results of the previous representation vote. The reality, however, was that the OLRB did not often exercise its discretion to award remedial certification[xiii]—despite the frequent occurrence of unfair labour practices.

Under the Ford government, some workers' constitutional right to join a union will be undermined by the unlawful actions of employers.

The FWBJA rightly recognized that in cases where the LRA is contravened, it is virtually impossible to redress the employer's actions and make a second vote meaningful. As a result, the Act made it easier for the OLRB to invoke remedial certification, disincentivizing employers from engaging in unlawful conduct. Workers should not be subject to—or bear the consequences of—their employer's unlawful actions.

Bill 47 reinstates provisions that allow the Board to order a second representation vote over remedial certification without a vote.

Under the Ford government, some workers' constitutional right to join a union will be undermined by the unlawful actions of employers.

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Withdraw Bill 47 (i.e., maintain the streamlined process for remedial certification).

BARGAINING UNIT STRUCTURE

One of the most critical decisions in the certification process is determining the appropriate bargaining unit. Until the FWBJA, Ontario was one of the few jurisdictions in Canada to not provide its labour board with explicit power to revise, vary, amend, and consolidate bargaining units.[xiv] This limited the ability of the OLRB to create stable collective bargaining relationships and conditions for effective organizing in sectors where unionization has been difficult to achieve.

Under the Ford government, some workers will be denied continued representation by their own union and will find their right to choose their own bargaining agent undermined.

The FWBJA introduced two methods of restructuring bargaining units. The first method allowed the OLRB to consolidate newly certified bargaining units with existing bargaining units—under a single employer and a single bargaining agent. The second method allowed the OLRB to consolidate different bargaining units—under a single employer and different bargaining agents. Restructuring in this case, however, was conditional on receiving agreement from all affected parties.

Bill 47 repeals these provisions and instead empowers the OLRB to change the structure of units within a single employer, where the existing units are "no longer appropriate for collective bargaining." This will permit the OLRB to consolidate, restructure, or reconfigure units; determine which union will be the bargaining agent of resulting units; and amend any provision of an applicable collective agreement.

The involuntary consolidation of different bargaining units, represented by different bargaining agents, will cause significant instability and create less harmonious labour relations in the province. It is important to recognize that positioning unions against each other will fail to

facilitate viable and stable collective bargaining. Further, it must be noted that the legislation does not propose a similar provision that allows for the consolidation of bargaining rights among different employers. More importantly, providing the OLRB with the power to deny workers continued representation by their own union and instead compel them to join another union undermines workers' right to choose their own bargaining agent. In fact, a recent Quebec Court of Appeal opinion points out that the Charter's freedom of association protects the right to join with others and form associations, which in turn includes the right of employees to choose what is in their interest and how they should pursue that interest.[xv] It is both unfair and unjustifiable to treat workers differently where there are different unions in the workplace.

Under the Ford government, some workers will be denied continued representation by their own union and will find their right to choose their own bargaining agent undermined.

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Withdraw Bill 47 (i.e., maintain the ability of workplaces with the same employer and same union at one or more locations to bargain together in cases where the employer and union agree) and combine bargaining units of franchisees of the same franchisor.

The collective bargaining process must evolve to address the fissured workplace. The Special Advisors of the Changing Workplaces Review pointed out: "Collective bargaining cannot be meaningful if it is limited to a single franchisee location. It is likely that no single bargaining unit for a single location of a franchisee has sufficient leverage to improve terms and conditions of employment when, in the same geographic area, there are many other locations selling the exact same product at the same or similar price. The only way to bargain effectively is to be able to bargain collectively with multiple locations involved with that brand in that geographic area."[xvi] For collective bargaining purposes, franchisees of a common franchisor should be treated like a single large employer with multiple locations.

FIRST COLLECTIVE AGREEMENT

In principle, all workers are guaranteed the right to associate for the purposes of collective bargaining. In reality, however, this right remains limited as a result of the barriers to establishing a first collective agreement.

The first collective agreement creates the foundation and sets the precedence of the employer—unionized employee relationship moving forward. Significant delays to obtaining a tangible outcome can render other rights, including the associated right to organize and to participate in collective bargaining, almost meaningless. Employers know that the longer they can delay first contract negotiations, the greater their ability to weaken the resolve of newly organized workers. Inevitably, workers grow frustrated with lengthy delays while their working conditions worsen. This undermines their right to access meaningful collective bargaining.

On the other hand, automatic access to first contract arbitration encourages employers to engage in a meaningful process of collective bargaining. Not only does this mechanism help facilitate navigating through disputed bargaining issues and reaching the first collective bargaining agreement, but it also discourages bad faith bargaining and promotes constructive bargaining relationships.

Bill 47 removes any right to speedy first contact arbitration.

Under the Ford government, workers will find it harder to reach a first collective agreement, which outlines many of the standards and conditions for employment.

Under the Ford government, workers will find it harder to reach a first collective agreement, which outlines many of the standards and conditions for employment.

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Withdraw Bill 47 (i.e., maintain first contract arbitration in cases of remedial certification) and provide automatic access in all other cases.

SUCCESSOR RIGHTS

Ontario employers in the private and public sector are bound by successor rights legislation when a business or a portion thereof is sold. This, however, is not the case for the vast majority of employers who sub-contract services, such as in homecare (e.g., housekeeping and personal support services) and for school bus services. This means unionized contract workers are vulnerable to contract flipping, often losing both their collective agreement and their bargaining rights if the service contract covering their worksite changes hands. This is the case even if the new contract provider hires the *same* employees to perform the *same* work in the *same* location.

Under the Ford government, most unionized workers in contract service industries—with the exception of those in the building services—will have no protections against contract flipping.

The FWBJA introduced successor rights for the building services industry and allowed for regulations to extend successor rights to publicly funded contracted services.

Bill 47 repeals the potential to extend successor rights beyond building services.

Under the Ford government, most unionized workers in contract service industries—with the exception of those in the building services—will have no protections against contract flipping.

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Withdraw Bill 47 (i.e., maintain the regulatory power to extend successor rights to publicly funded contracted services) and broaden successor rights to all contracted services.

RETURN TO WORK

The LRA outlines its intent to protect a worker's right to return to work following a legal strike or lockout. Prior to the FWBJA, this right was restricted to the first six months—after which employers were able to make the case that workers no longer had the right to reinstatement. Combined with the fact that employers can use replacement workers during a legal strike or lockout, the time limit further amplified the power imbalance inherent within the employer-employee relationship during the collective bargaining process. Although every labour dispute is different, workers exercising their constitutional right to strike should be able to do so without fear of job loss once a legal strike or lockout concludes. The FWBJA rightly recognized this right and eliminated the time limitation.

Under the Ford government, workers standing up for better working conditions will only have a limited right to return to work.

Bill 47 reinstates the six-month restriction on the right of employees to return to work.

Under the Ford government, workers standing up for better working conditions will only have a limited right to return to work.

Help is not on the way for workers and their families—that is, unless the government does the right thing.

Withdraw Bill 47 (i.e., maintain the right of workers to return to work—without restriction—following a lawful strike or lockout).

ONTARIO COLLEGE OF TRADES AND APPRENTICESHIP ACT

In 2009, the Ontario College of Trades was created to administer skilled trades apprenticeships. Bill 47 dismantles the College, which plays an important role in establishing training standards and apprenticeship ratios as well as determining whether certification in a trade is compulsory or voluntary. The College is also responsible for maintaining a public registry, which allows the public and employers to identify who is qualified to work as a journeyperson and to discern whether their qualifications are in good standing. This has important implications for public and occupational safety as well as for unfair competition by unqualified operators.

In addition to demolishing the College, Bill 47 takes a one-size-fits-all approach to the ratios governing the journeyperson to apprentice training relationship in workplaces. The legislation proposes a fixed 1:1 ratio across the board. It reduces, for example, the number of journeypersons an employer must retain to supervise and support each apprentice being trained as an ironworker, plumber, sheet metal worker, and carpenter. It is important to note that the current ratios have been set according to industry—in response to the specific on-the-job training requirements for each trade. Based on these requirements, ratios can impact the quality of training provided to the apprentice; the speed or efficiency of the work performed; the health and safety of the apprentice, their trainer, and the workers in the immediate vicinity of the work; and the supply and/or development of workers.

Prior to the College's introduction, there was no consistent process for decision-making, nor a role for skilled workers to provide direct input, on issues related to the trades. The undoing of the College should not be an avenue to return to these practices. It is important to acknowledge that skilled trades workers know best how to make decisions about their own trades. They should therefore be consulted in a meaningful manner prior to the introduction of any new model and have a direct role in any new model regarding decisions that will impact their trade.

ENDNOTES

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Submission to the Standing Committee on Finance and Economic Affairs
November 2018 | Ontario Federation of Labour

The Ontario Federation of Labour (OFL) represents 54 unions and one million workers. It is Canada's largest provincial labour federation.

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