

ONTARIO NURSES' ASSOCIATION

Submission to the Ontario Changing Workplaces Review

**Changing Workplaces Review
Employment Labour and Corporate Policy Branch
Ministry of Labour
400 University Ave., 12th Floor
Toronto**

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SUBMISSION TO THE CHANGING WORKPLACES REVIEW BY THE ONTARIO NURSES' ASSOCIATION

EXECUTIVE SUMMARY

The Ontario Nurses' Association ("ONA") welcomes the opportunity to make submissions regarding the Changing Workplaces Review being undertaken through the Ontario Ministry of Labour. ONA is making a number of recommendations with respect to amendments to the legislation. These recommendations are based on the following principles:

1. Mandating working conditions that enhance dignity and respect for all working people.
2. Encouraging and promoting unionization.
3. Improving the labour relations process.

ONA'S RECOMMENDATIONS

A. Mandate working conditions that enhance dignity and respect for all working people.

1. Improve the minimum wage, overtime, personal leave and sick leave provisions of the *Employment Standards Act*.
2. Improve the enforcement provisions of the *Employment Standards Act*.
3. Put in place provisions that strengthen job security and promote workplace fairness.
4. Address the existing inequity regarding benefits regarding employees working after age 65.

B. Encourage and promote unionization.

1. Reinstate card-based certification.
2. Mandate full information sharing for an organizing drive.
3. Enhance worker protection during an organizing campaign.
4. Mandate reinstatement after a legal strike or lockout.

C. Improve the labour relations process.

1. Give workplace parties the right to first agreement arbitration.
2. Prohibit the use of strike breakers.
3. Mandate continuation of health and welfare benefits during a strike.
4. Enhance the powers of the OLRB to amend bargaining units.
5. Provide a mechanism to ensure that bargaining structures recognize, as the employer, the party who funds and controls the work to ensure that bargaining takes place with the true employer and not with the contractor, agency, or franchisee.

INTRODUCTION

ONA is the union for Registered Nurses as well as Allied Health Professionals in Ontario; it has represented members in the health sector since its formation in 1973.

ONA now represents 60,000 front-line registered nurses (RNs), nurse practitioners (NPs) registered practical nurses (RPNs) and allied health professionals and more than 14,000 nursing student affiliates across Ontario, providing front-line care in hospitals, long-term care facilities, public health, the home and community, clinics and industry.

Many of the workplaces in which ONA has bargaining rights are covered by the provisions of the *Hospital Labour Disputes Arbitration Act* ("HLDAA"). However, a significant number of ONA bargaining relationships are in the right-to-strike sector: in public health, home care providers, community care access centres ("CCACs"), community clinics and industry.

ONA has reviewed and supports the observations made in Section 3 of the Guide to this consultation. To bring the issues into the context in which ONA operates, we would make the following observations regarding changes in the Ontario health care environment.

HEALTH CARE WORK IN CONTEXT

Health care in Ontario is undergoing a sustained period of transformation. As a result, the health care services historically provided in institutional settings are being moved into new locations in the community and elsewhere. This transformation has a number of implications for access to services by our patients and for the transfer of the work of ONA members across sectors.

Today, in Ontario, ONA members face renewed threats from the erosion of RN jobs and replacement with lesser qualified classifications as a result of a fourth consecutive year of frozen base operating funding for our hospitals. Patient services and the provision of this care by our members are being shifted out of hospitals as part of the government's plan to transform the delivery of health care in Ontario.

In the hospital sector, we are witnessing changing scopes of practice and the replacement of workers through skill mix changes, which has resulted in significant layoffs and the elimination of ONA positions, particularly RNs. The substitution of RPNs to do the work of RNs continues to be a primary strategy of hospitals to reduce costs to meet budgetary targets.

However, in the nursing profession, the right provider must be related to the complexity of the patient's care needs and whether the patient has stable and predictable care outcomes. RNs are the right provider for complex and/or unstable patients with unpredictable outcomes. This substitution continues to be a source of dispute between ONA and hospitals as RN work is further eroded leaving the remaining RNs with

excessive patient workloads. The RN share of nursing employment has been falling consistently over time – from 77.4% in 2004 to 70.8% in 2014.

The work of the bargaining unit is being further eroded by a recent increase in the use of agency RNs, a phenomenon which is cyclical in nature. These nurses are being brought into staff particularly critical care units where they are used as a parallel workforce that is excluded from the bargaining unit. This creates morale and quality of care issues as well as undermining the relationship between the employer with the union and its members.

For every patient added to an average RN's workload, patient risk of complications and death rise by 7%. So far this year, Ontario has lost close to 600 RN positions, which means that more than 1 million hours of RN care has been removed from the bedside at hospitals across the province. The result is that Ontario continues to have the second worst ratio of RNs-to-population in all of Canada. Additionally, hospitals are again increasing the use of agency nurses, particularly in acute care units. This use of non-bargaining unit personnel as a parallel workforce undermines the quality of care, the morale of the member and the labour relations of the parties.

The services within hospitals continue to be restructured and redistributed. Hospitals with lower volumes of procedures are instructed to regionalize services to central locations. This results in job loss for ONA members as patient services are moved within and between hospitals.

At the same time, the work of hospital RNs is also being systematically downloaded to community settings as patients' length of stay in hospital are reduced, as chronic and alternate level of care patients are sent home to await placement in a long-term care facility, and as hospital outpatient clinics are transferred to private clinics. Examples of moving services from hospital into private clinics include fertility services, colonoscopies, and cataracts.

For ONA members working in the community and long-term care sectors, the transformation of hospital work has also impacted their workload because of the focus on earlier hospital discharge as well as the complexity of clients and residents now under their care. This has resulted in waiting lists to be managed for home care patients and for patients awaiting a bed in a long-term care home.

Funding for services is also being reformed and bundled to follow the patient from hospital to the community. Hospitals are working in tandem with CCACs to coordinate and integrate services that used to be exclusively delivered by CCACs. This is resulting in the duplication of the ONA job classification of care coordinator that previously was work done solely in CCACs.

For ONA members working in CCACs and in home care providers, the system of managed competition has resulted in fragmented and duplicated services. ONA members identify a massive duplication of services and resources in CCACs and in

home care provider agencies to manage the existing Request for Proposal (RFP) contracting process. One consequence is the duplication of care coordination work in both CCACs and in home care agencies.

One of the key factors that arises in the RFP model for home care delivery is identifying the hand-off or transition of care and who has primary responsibility for the coordination of the patient's care – in the discharge from hospital, in the coordination of home care services in the CCAC, in the coordination of community support services, or in some form of coordination with primary care practitioners. The fragmentation in the home care sector has now led to further duplication of care coordination in new bundled care models.

In the case of long-term care homes, chronic care patients are being downloaded from hospitals without attention to increasing the staffing levels to manage these higher acuity patients. Long-term care homes also rely on contracting staffing from nursing agencies to cover gaps in recruitment. This process is not conducive to continuity of care for our residents. The complexity of care now being required by residents in long-term care homes means RN clinical care can no longer be safely replaced by other classifications as is the current practice in many for-profit nursing homes.

Moving services out of hospitals into community agencies and clinics raise issues regarding the transfer of the nursing workforce and the structure under which collective bargaining will be conducted, both of which have implications for our patients. Moving services out of hospitals is fragmenting care, not integrating care. Moving services out of the framework of the *Public Hospitals Act* is moving services into a regulatory framework of private agencies and clinics that have a mixed record of quality issues for their patients. In addition, there are total compensation inequities between the hospital sector and other sectors such as for-profit nursing homes, home care providers, CCACs and Family Health Teams or Community Health Centres. Compensation issues include maintaining pay equity for predominantly female job classes. Our concern is that the assumption that moving services from a hospital setting to other community-based settings will mean budget savings must be partially based on reducing labour costs.

A. Mandate Working Conditions that Enhance Dignity and Respect for All Working People.

1. Improve the minimum wage, overtime, personal leave and sick leave provisions of the *Employment Standards Act* ("ESA").

ONA has reviewed the report and recommendations made by the Worker's Action Centre (WAC) from their report called *Still Working on the Edge; Building Decent Jobs from the Ground Up*. ONA supports the excellent recommendations made in this report. It does so with one proviso. With respect to hours of work, ONA represents a work force that operates in a 24/7 environment. In negotiating collective agreements for their membership for over 40 years, a great deal of focus has been put on provisions dealing with hours of work and scheduling arrangements that, while providing full coverage for patient care, also place limits on the detrimental impacts of working shift-work and weekends on their membership. As a result, many specific scheduling arrangements have been negotiated that include extended shifts, special schedules and scheduling regulations. ONA would be opposed to any measures which limit its ability to negotiate flexible schedules on behalf of its membership.

2. Improve the enforcement provisions of the ESA.

ONA has reviewed the report and recommendations made by the WAC from their report called *Still Working on the Edge; Building Decent Jobs from the Ground Up*. ONA supports the excellent recommendations made in this report.

3. Put in place provisions that strengthen job security and promote workplace fairness.

ONA has reviewed the report and recommendations made by the WAC from their report called *Still Working on the Edge; Building Decent Jobs from the Ground Up*. ONA supports the excellent recommendations made in this report. In particular, ONA supports the WAC recommendations related to the use of Temporary Agencies which may redress some of the existing problems with the use of nursing agencies.

4. Address the existing inequity regarding benefits regarding employees working after age 65.

It is ONA's position that the time has come to end the ongoing discrimination regarding older workers when it comes to benefits. When the *Ending Mandatory Retirement Statue Law Amendment Act, 2005 – Bill 211* – came into effect on December 12, 2006 the employer's right to require mandatory retirement came to an end. However, it allowed for discrimination in regard to certain workplace benefits at age 65.

While Bill 211 extended the right to equality and employment to older workers, it carved out an exception in the area of benefit plans so that distinctions based on age are still permissible. In particular, Bill 211 maintained the status quo under the ESA, Regulation

286/01 which permits an employer's benefit, pension, superannuation or group insurance plan or fund to make distinctions based on age where those distinctions are made on an actuarial basis. Section 1 of the Regulation under the ESA defines age as "any age 18 or more and less than 65 years".

Section 25(2.3) of the *Human Rights Code* provides that this definition will not constitute a violation of the right to equality in employment even though it is inconsistent with the definition of age in the *Code* itself. The overall effect of these provisions are that employers are not prohibited from providing lesser benefits to employees once they reach age 65.

A helpful analysis of the issues as set out in the paper by Susan Eng called *Accommodating Age in the Workplace - Denying Health Coverage to Older Workers - and Advocates View*. (Appendix 1)

2015 is the 10 year anniversary of the ending of *Ending Mandatory Retirement Statute Law Amendment Act*. Now is the time to complete the process of eliminating discrimination against older workers by an amendment to the provisions in the ESA which are referenced above. Employers should no longer be allowed to compensate older workers with a smaller monetary package by depriving them of benefits to which other employees are entitled. Accordingly, the full slate of benefits should be made available to older workers; in the alternative, they should be provided with payment in lieu of any benefits to which they are not otherwise entitled to ensure they are not doing the same work for a lesser monetary package.

B. Encourage and Promoting Unionization

1. Reinstate card-based certification.

ONA submits that card-based certification should be reinstated in all sectors. It is time for Ontario to return to a system in which a collection of signed cards from a majority of bargaining unit members is the basis for automatic certification. Card check certification reduces the opportunity for the employer intimidation and coercion that exists and is widely utilized in the current, mandatory secret ballot system.

2. Mandate full information sharing for an organizing drive.

Once having established minority support, a union should have the opportunity to provide all employees in the potential bargaining unit with information regarding the union. The open communication approach adopted by the Ontario Labour Relations Board (the "OLRB", "the Board") in *Public Sector Labour Relations Transition Act* ("PSLRTA") cases should be applied to certification proceedings under the *Ontario Labour Relations Act* (the "Act").

During a fixed campaign period, unions, under PSLRTA, are allowed access to bulletin boards in the employer's workplace, a list of names, addresses and phone numbers of employees on the potential voters' list, information meetings at the employer's site/s as well as an information table on the employer's premises during the campaign period. See for example *OPSEU and Grand River, St. Thomas Elgin General Hospital, Rehabilitation Institute of Toronto v. C.U.P.E, Local 1156* and *The Scarborough Hospital v. ONA*.¹

Allowing the union the opportunity to fully communicate during the campaign period would further workplace democracy and would be a step towards levelling the playing field between the union and the employer. It would, in some measure, redress the intimidation, coercion and anti-union communications usually engaged in by employers during an organizing campaign. It would also counter the need for unions to engage in clandestine activities communicate with potential voters. In this age of information sharing, true workplace democracy requires open communication.

3. Enhance worker protection during an organizing campaign.

Employer action whether through discipline or reduction of hours during an organizing campaign inevitably has a severely chilling effect on the ability of employees to freely express their true wishes regarding a union. Redress weeks or months later and/or the right to a further vote is inadequate redress. It is ONA's recommendation that immediate reversion to status quo be ordered upon the filing of an unfair labour practice during an organizing campaign. Penalties for employers who engage in unfair labour practices should also be strengthened.

4. Mandate reinstatement after a legal strike or lockout.

As said by George Adams in his text on labour law,

11.810 ... Because the statutory preservation of the employment relationship during a strike would appear to be of little value without an express right to reinstatement following a strike, most jurisdictions explicitly create such a right...

The current legislation in Ontario contains a provision that requires reinstatement after a legal strike/lockout. However, it is subject to a number of conditions including that the application must be made within six months from the commencement of a strike. It also contains a number of exceptions.

The provisions under Bill 7 were much more protective of the rights of striking employees. Reinstatement at the end of a lockout or lawful strike was mandated. In the

1 *OPSEU v. Grand River Hospital*, [2010] O.L.R.D. No. 2897; *St. Thomas Elgin General Hospital v. OPSEU, Local 152*, 235 C.L.R.B.R. (2d) 187; *The Rehabilitation Institute of Toronto v. Canadian Union of Public Employees, Local 1156*, 2000 CanLII 12710 (ON LRB); *The Scarborough Hospital v. Ontario Nurses' Assn., Local 111*, 2000 CanLII 13588 (ON LRB).

event that there was disputes on the terms and conditions of reinstatement, they were set out in the Act. Striking workers also had the right to displace others who replaced them during the strike. There were also provisions dealing with circumstances where there was insufficient work. It is ONA's submission that these or similar provisions should be re-enacted.

The provisions in other jurisdictions across the country are as follows:

| Jurisdiction | Comment | Statutory provision |
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| Federal | | <p>87.6 At the end of a strike or lockout not prohibited by this Part, the employer must reinstate employees in the bargaining unit who were on strike or locked out, in preference to any person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given and was hired or assigned after that date to perform all or part of the duties of an employee in the unit on strike or locked out.</p> <p>1998, c. 26, s. 37</p> |
| <p>British Columbia</p> <p><i>Labour Relations Code</i>, RSBC 1996, c 244, <http://canlii.ca/t/520vh></p> | | <p>Replacement workers 68 ... (3) An employer must not</p> <p>(a) refuse to employ or continue to employ a person,</p> <p>(b) threaten to dismiss a person or otherwise threaten a person,</p> <p>(c) discriminate against a person in regard to employment or a term or condition of employment, or</p> <p>(d) intimidate or coerce or impose a pecuniary or other penalty on a person,</p> <p>because of the person's refusal to perform any or all of the work of an employee in the bargaining unit that is on strike or locked out.</p> |
| <p>Alberta</p> <p><i>Labour Relations Code</i>, RSA 2000, c L-1, <http://canlii.ca/t/52bwm></p> | | <p>90(1) When a strike or lockout ends</p> <p>(a) as a result of a settlement,</p> <p>(b) on the termination of bargaining rights of the bargaining agent, or</p> <p>(c) on the expiration of 2 years from the date the strike or lockout commenced,</p> <p>any employee affected by the dispute whose employment relationship with the employer has not been otherwise lawfully terminated is entitled, on request, to resume the employee's employment with the employer in preference to any employee hired by the employer as a replacement</p> |

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| | | <p>employee for the employee making the request during the strike or lockout.</p> <p>(2) The request of an employee under subsection (1) must be made in writing</p> <p>(a) within 14 days after the date on which the employee learns that the strike or lockout has ended and in any case within 30 days after the date on which the strike or lockout ended, if the strike or lockout ends in the manner referred to in clause (a) or (b) of that subsection, or</p> <p>(b) forthwith, if the strike or lockout ends in the manner referred to in clause (c) of that subsection.</p> <p>(3) Nothing in subsection (1)</p> <p>(a) prevents the parties to a dispute from agreeing on a mechanism for an orderly return to work within a reasonable period after a strike or lockout is over, or</p> <p>(b) requires an employer to reinstate an employee where</p> <p>(i) the employer no longer has persons engaged in performing work the same or similar to work that the employee performed prior to the employee's cessation of work, or</p> <p>(ii) there has been a suspension or discontinuance for cause of an employer's operations or any part of them, but, if the employer resumes those operations, the employer shall first reinstate those employees who have requested a resumption of employment.</p> <p>(4) An employer shall, on the request of any employee returning to work at the end of a strike or lockout, where there is no collective agreement in place, reinstate the employee in the employee's former employment on any terms that the employer and the employee may agree on, and the employer in offering terms of employment shall not discriminate against the employee because of the employee exercising or having exercised any rights under this Act.</p> <p>1988 cL-1.2 s88</p> |
| <p>Saskatchewan</p> <p><i>Saskatchewan Employment Act</i>, SS 2013, c S-15.1, <http://canlii.ca/t/52bl0></p> | | <p>6-37(1) Following the conclusion of a strike or lockout, if an employer and a union have not reached an agreement for reinstating striking or locked-out employees, the employer shall reinstate striking or locked-out employees in accordance with this section.</p> <p>(2) Subject to subsection (3), an employer shall</p> |

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| | | <p>reinstate each striking or locked-out employee to the position that the employee held when the strike or lockout began.</p> <p>(3) If there is not sufficient work for all striking or locked-out employees after the conclusion of a strike or lockout, the employer shall:</p> <p>(a) reinstate striking or locked-out employees:</p> <p>(i) in accordance with any provisions in the collective agreement respecting recall based on seniority as defined in the collective agreement in force in that bargaining unit; or</p> <p>(ii) if there are no provisions in the collective agreement respecting recall based on seniority, in accordance with each employee's length of service, as determined when the strike or lockout began, in relation to the length of service of other employees in the bargaining unit who were employed when the strike or lockout began; and</p> <p>(b) provide to striking or locked-out employees who are not reinstated notice of layoff or pay instead of notice:</p> <p>(i) in accordance with the collective agreement;</p> <p>(ii) in accordance with a back-to-work protocol agreed to by the employer and the union, notwithstanding Subdivision 12 of Division 2 of Part II; or</p> <p>(iii) if there is no back-to-work protocol or collective agreement in force, in accordance with Subdivision 12 of Division 2 of Part II.</p> <p>(4) Striking or locked-out employees are entitled to displace any persons who were hired to perform the work of striking or locked-out employees during the strike or lockout.</p> <p>(5) An employer is not in contravention of subsection (2) or (3) if:</p> <p>(a) the employer claims that the employee has been terminated for a cause for which the employee might have been discharged; and</p> <p>(b) either:</p> <p>(i) the termination has not been grieved; or</p> <p>(ii) if the termination has been grieved, the grievance process has not resulted in the reinstatement of the employee.</p> <p>(6) Notwithstanding any provision in a collective agreement, the time worked by an employee during a strike or lockout does not constitute accrued service for the purposes of computing seniority unless the employee was working with the consent of the union.</p> |
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| <p>Manitoba</p> <p><i>Labour Relations Act,</i> C.C.S.M. c. L10</p> | <p>Reinstatement after strike or lockout 12(1). Subject to subsection (2), where</p> <p>(a) an employee in a unit of employees of an employer ceases to work because the employees in the unit are locked out by the employer or because the employees in the unit are on a legal strike;</p> <p>(b) a collective agreement is concluded between the employer and the union which was the bargaining agent for the employees in the unit at the time the lockout or strike commenced; and</p> <p>(c) the work performed by the employee at the time the lockout or strike commenced is continued after the lockout or strike is settled;</p> <p>if the employer or any person acting on behalf of the employer refuses to reinstate the employee for the employment he had at the time the lockout or strike commenced</p> <p>(d) in accordance with the provisions of the collective agreement respecting employment of the employees in the unit; or</p> <p>(e) in accordance with any other agreement between the employer and the bargaining agent respecting the reinstatement of the employees in the unit; or</p> <p>(f) where no agreement respecting the reinstatement of the employees in the unit is reached between the employer and the bargaining agent, as work becomes available on the basis of the seniority standing of the employee in relation to the seniority of the other employees in the unit employed at the time the lockout or strike commenced;</p> <p>he commits an unfair labour practice.</p> <p>Defence 12(2). An employer or person acting on behalf of an employer does not commit an unfair labour practice under this section if he or she satisfies the board that the refusal to reinstate the employee was because of conduct of the employee that was related to the strike or lockout and resulted in a conviction for an offence under the <i>Criminal Code</i> (Canada) and, in the opinion of the board, would be just cause for dismissal of the employee even in the context of a strike or lockout.</p> <p>Available work defined 12(3). For purposes of this section, work which becomes available after a lockout or strike is settled includes work which</p> |
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| | | <p>(a) at the time the lockout or strike commenced, was performed by an employee in the unit who ceased to work because of the lockout or strike; and</p> <p>(b) during the lockout or strike, was performed by any other person.</p> <p>Reinstatement where no collective agreement 13(1). Where</p> <p>(a) an employee in a unit of employees of an employer ceases to work because the employees in the unit are locked out by the employer or because the employees in the unit are on a legal strike;</p> <p>(b) the lockout or strike ends without a collective agreement having been concluded between the employer and the union which was the bargaining agent for the employees in the unit at the time the lockout or strike commenced; and</p> <p>(c) the work performed by the employee at the time the lockout or strike commenced is continued after the lockout or strike ends;</p> <p>if the employer, or any person acting on behalf of the employer, refuses to reinstate the employee for the employment which the employee had at the time the lockout or strike commenced</p> <p>(d) in accordance with an agreement between the employer and the bargaining agent respecting the reinstatement of the employees in the unit; or</p> <p>(e) where no agreement respecting the reinstatement of the employees in the unit is reached between the employer and the bargaining agent, as work becomes available on the basis of the seniority standing of the employee in relation to the seniority of the other employees in the unit employed at the time the lockout or strike commenced;</p> <p>the employer, or the person acting on behalf of the employer, commits an unfair labour practice.</p> |
| Quebec | | <p>110.1. At the end of a strike or a lock-out, any employee who has been on strike or has been locked out is entitled to recover his employment by priority over any other person unless the employer has a good and sufficient reason, proof whereof devolves upon him, for not recalling such employee.</p> <p>Any disagreement between the employer and the certified</p> |

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| | | <p>association relating to the non-recall to work of an employee who has been on strike or locked out must be referred to the arbitrator as if it were a grievance, within six months of the date when the employee should have recovered his employment.</p> <p>Sections 47.2 to 47.6 and 100 to 101.10 apply.</p> <p>1977, c. 41, s. 54; 1983, c. 22, s. 90</p> |
| New Brunswick | no comparable provision | |
| Nova Scotia | no comparable provision | |
| Newfoundland / Labrador | no comparable provision | |
| Prince Edward Island <i>Labour Act</i> , RSPEI 1988, c L-1, < http://canlii.ca/t/51vsj > | | <p>9. (3) Where employees go on strike or are locked out in circumstances permitted by section 41, they are entitled, subject to subsection (4), upon the termination of the strike or lockout to return to and be reinstated in their employment without discrimination and subject to the terms and conditions of employment applicable on the termination of the strike or lockout.</p> |

C. Improve the Labour Relations Process

1. Give workplace parties the right to first agreement arbitration.

Reaching a first collective agreement is of critical importance in the realization of the right to organize by workers. All too often, after surmounting the many barriers to achieve certification, employers are able to effectively defeat the rights of workers to join a union through hard bargaining or a failure to bargain in good faith. The current provisions of the Act do not adequately address this issue.

Under Bill 40, either party could make a request to the Minister of Labour for first agreement arbitration if no collective agreement had been reached in the 30-day period after there was a right to strike/lockout. This right to first agreement arbitration was repealed by the Harris government.

Parties must now apply to the Board for first agreement arbitration. The Board is mandated to order first agreement arbitration only if it concludes that the process of collective bargaining had been unsuccessful because of:

- a. the refusal of the employer to recognize the bargaining authority of the trade union;
- b. the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- c. the failure of the respondent to make a reasonable or expeditious effect to conclude a collective agreement; or
- d. any other reason the Board considers relevant.

To make such an application often requires lengthy, fiercely fought, and expensive litigation which undermines the successful organizing campaign.

A review of provisions in other jurisdictions across the country provides alternatives to the current Act. In Manitoba, a party may apply to the Minister to submit a first agreement dispute arbitration if conciliation is not successful. Under the federal legislation, the Minister can direct the board so consider whether it is advisable that first agreement arbitration be ordered. Legislation in Newfoundland/Labrador allows the parties to apply to the board to determine whether it is advisable to have first agreement arbitration.

ONA submits that the Act be amended to make first agreement arbitration available either as a right on the prerequisites found in Bill 40.

2. Prohibit the use of strike breakers.

Under Bill 40, there were a number of provisions that facilitated the democratic right of unions to strike and of employers to lockout in the face of unsuccessful negotiations. These provisions included,

- (a) prohibition on the right of bargaining unit employees during a strike/lockout;
- (b) limits on the use of newly hired employees;
- (c) limits of others at strike locations;
- (d) prohibitions re replacement worker.

Bill 7 also had a no reprisals provision prohibiting an employer from taking workplace action against any individual because of their refusal to perform strike work. The details of these provisions are discussed in the attached paper entitled, *The Sky Has Not Fallen: Replacement Worker Law Under Bill 40* by Mary Cornish in April of 1994. (Appendix 2)

The Harris government repealed these provisions. ONA submits that similar provisions should be re-enacted.

In his book, George Adams says the following with respect to strike/lockout replacement:

5(ii) — STRIKE AND LOCKOUT REPLACEMENTS, Adams Cdn. Lab. L 10.5(ii) [Footnotes incorporated into text, or omitted.]

10.640 Where legislatures have been unimpressed with the results of this [non-interventionist] philosophy, they have tended to enact specific legislation specifying certain outcomes or limitations. For example, in Nova Scotia [N.S., *Trade Union Act*, s. 102], New Brunswick [N.B., *Industrial Relations Act*, s. 50(2)], Prince Edward Island [P.E.I., *Labour Act*, s. 60], Newfoundland and Labrador [Nfld. & Lab., *Labour Relations Act*, s. 68], and Ontario [Ont., *Labour Relations Act*, 1995, s. 140(2)], legislation prohibits the supplying or hiring of replacement employees by employers represented by an accredited employers' organization. The federal statute prohibits the use of replacement workers "for the demonstrated purpose of undermining a trade union's representational capacity rather than the pursuit of legitimate bargaining objectives" [*Canada Labour Code*, s. 94(2.1)]. British Columbia and Quebec (and formerly Ontario) have gone one major step further and prohibited the hiring of replacement labour generally [B.C., *Labour Relations Code*, ss. 6(3)(e), 68, 72, 73; Que., *Labour Code*, s. 109.1. From 1992 to 1995 Ontario also prohibited the hiring of replacement workers: *Labour Relations Act*, R.S.O. 1990, c. L.2, ss. 73.1, 73.2 (en. 1992, c. 21, s. 32; Rep. 1995, c. 1, Sch. A, s. 1(2)).] The Quebec Labour Code in essence provides:

1. Prohibited replacement workers include: those persons hired as replacements between the start of the negotiation stage and the end of the strike or lockout; replacements employed by another employer or contractor; members of the affected bargaining unit; workers employed by the employer at another establishment; and employees at the affected establishment who fall outside the bargaining unit.

2. Members of the affected bargaining unit can continue to work to the extent agreed upon by the parties and, in some cases, with the further approval of the Conseil des services essentiels as ordered by the conseil or the government in the case of essential public services.

3. Members of the affected unit may not work in any of the employer's other establishments.

British Columbia, in summary, provides that:

1. Prohibited replacements include anyone, paid or not: who is hired or engaged after the earlier of when notice to bargain is

given or bargaining begins; who ordinarily works at another of the employer's places of operations; who is transferred to the affected location after the earlier of when notice to bargain was given or bargaining commenced; or who is employed, engaged or supplied to the employer by another person.

2. Persons who work at the location affected by the strike may act as replacements but only when they individually agree to do so. There can be no reprisals by the employer for a refusal to agree.

3. The Minister may direct the board to designate essential services which must be provided during a strike or lockout when he or she considers that the dispute poses a threat to the health, safety or welfare of the residents of the province. This discretion may come on the Minister's own initiative or on the recommendation of the board after conducting an investigation at the request of a party or on its own motion.

6 — STATUS OF STRIKING EMPLOYEES, Adams Cdn. Lab. L 11.6 [Footnotes omitted]

11.810 Quebec and British Columbia actually preclude the hiring of strike replacements [*Quebec Labour Code*, s. 109; *BC Labour Relations Code*, s. 68]. The federal statute also precludes hiring strike replacements but only where it is for the purpose of undermining a trade union's representational capacity [*Canada Labour Code*, s. 94(2.1)]. Manitoba and Ontario prevent the hiring of a "professional strike breaker" [Man., *Labour Relations Act*, s. 14; Ont., *Labour Relations Act, 1995*, s. 78.].

6 — STATUS OF STRIKING EMPLOYEES, Adams Cdn. Lab. L 11.6, [Footnotes incorporated into text]

11.830 Outside of British Columbia and Quebec, it is generally recognized that struck employers have the right to hire replacements and an Ontario decision held that an employer legally locking out its employees has the right to hire "temporary" replacements. Where there are unfair employer labour practices, however, different considerations may arise. Again, Manitoba and Ontario prohibit the hiring of "professional strike breakers".

3. Mandate continuation of health and welfare benefits during a strike.

Currently there is no provision under the Act with respect to the continuation of benefits during a legal strike or lockout. Bill 7 required employers to continue benefits during a legal strike or lockout in circumstances where the union paid the costs of doing so. Section 81 also prohibited the threat of cancellation or denial of benefits as a means to interfere with legal strike/lockouts. ONA recommends that these or similar provisions be re-enacted.

As can be seen from the following chart, the current provisions of the Act are out of step with many other jurisdictions across Canada.

| Jurisdiction | Comments | Statutory provision |
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| Federal <i>Canada Labour Code</i> , RSC 1985, c L-2, http://canlii.ca/t/52qwj | NB: Pension rights or benefits | 94.(3) No employer or person acting on behalf of an employer shall (d) deny to any employee any pension rights or benefits to which the employee would be entitled but for (i) the cessation of work by the employee as the result of a lockout or strike that is not prohibited by this Part, or (ii) the dismissal of the employee contrary to this Part |
| British Columbia <i>Labour Relations Code</i> , RSBC 1996, c 244, http://canlii.ca/t/520vh | | Continuation of benefits 62 (1) If employees are lawfully on strike or lawfully locked out, their health and welfare benefits, other than pension benefits or contributions, normally provided directly or indirectly by the employer to the employees must be continued if the trade union tenders payment to the employer or to any person who was before the strike or lockout obligated to receive the payment (a) in an amount sufficient to continue the employees' entitlement to the benefits, and (b) on or before the regular due date of that payment. (2) If subsection (1) is complied with (a) the employer or other person referred to in that subsection must accept the payment tendered by the trade union, and (b) a person must not deny to an employee a benefit described in that subsection, including coverage under an insurance plan, for which the employee would otherwise be eligible, because the employee is participating in a lawful strike or is lawfully locked out. (3) A trade union and an employer may agree in writing to specifically exclude the operation of this section. |
| Alberta | | Insurance and pension rights |

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| <p>Labour Relations Code, RSA 2000, c L-1, <http://canlii.ca/t/52bwm></p> | | <p>155(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall deny to any employee any pension rights or benefits or insurance rights or benefits to which the employee would be entitled but for</p> <p style="padding-left: 40px;">(a) the cessation of work by the employee as the result of a lockout or strike that is permitted by this Act, or</p> <p style="padding-left: 40px;">(b) the dismissal of the employee contrary to this Act.</p> <p>(2) While an insurance scheme remains in force, no employer or person acting on behalf of an employer shall, without lawful excuse,</p> <p style="padding-left: 40px;">(a) deny or threaten to deny to an employee any benefit under the insurance scheme,</p> <p style="padding-left: 40px;">(b) cancel or threaten to cancel the insurance scheme,</p> <p style="padding-left: 40px;">(c) refuse to accept any of the premiums tendered by a bargaining agent on behalf of all the employees enrolled in the insurance scheme who are represented by the bargaining agent, or</p> <p style="padding-left: 40px;">(d) fail to remit to the insurer any of the premiums tendered by a bargaining agent, in the circumstances referred to in subsection (3).</p> <p>(3) Subsection (2) applies where</p> <p style="padding-left: 40px;">(a) the employee in a unit of employees of the employer ceases to work because the employees in the unit are locked out by the employer or because the employees in the unit are on a lawful strike, and</p> <p style="padding-left: 40px;">(b) the trade union that was the bargaining agent for the employees in the unit at the time the lockout or strike commenced tenders, or attempts to tender, to the employer, for the duration of the lockout or strike, the premiums in respect of all the employees covered by the insurance scheme who are represented by the bargaining agent.</p> |
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| | | <p>(4) In this section,</p> <p>(a) “insurance scheme” means a medical, dental, disability, life or other insurance scheme normally maintained by the employer on behalf of the employees in the unit;</p> <p>(b) “premiums” includes all amounts payable by the employees and the employer in consideration for a contract of insurance.</p> <p>1988 cL-1.2 s153</p> |
| <p>Saskatchewan</p> <p><i>Saskatchewan Employment Act</i>, ss. 6-36, 6-62(1)(m)</p> | <p>NB: Any benefit, subject to the union making payments to the employer</p> | <p>Benefits during strike or lockout</p> <p>6-36 (1) In this section, “benefit plan” means a medical, dental, disability or life insurance plan or other similar plan.</p> <p>(2) During a strike or lockout, the union representing striking or locked-out employees in a bargaining unit may tender payments to the employer, or to a person who was, before the strike or lockout, obliged to receive the payment:</p> <p>(a) in amounts sufficient to continue the employees’ membership in a benefit plan; and</p> <p>(b) on or before the regular due dates of those payments.</p> <p>(3) The employer or other person mentioned in subsection (2) shall accept any payment tendered by the union in accordance with subsection (2).</p> <p>(4) No person shall cancel or threaten to cancel an employee’s membership in a benefit plan if the union tenders payment in accordance with subsection (2).</p> <p>(5) On the request of the union, the employer shall provide the union with any information required to enable the union to make the payments mentioned in subsection (2).</p> <p>6-62 (1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:</p> <p>(m) unless a union has not tendered payment as authorized by section 6-36, to deny or threaten to deny</p> |

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| | | <p>to any employee any benefit plan, as defined in section 6-36, that the employee enjoyed before the cessation of work or the exercise of any rights conferred by this Part:</p> <p>(i) by reason of the employee ceasing to work as the result of a lockout or while taking part in a stoppage of work due to a labour-management dispute if that lockout or stoppage of work has been:</p> <p>(A) imposed by the employer; or</p> <p>(B) called in accordance with this Part by the union representing the employee; or</p> <p>(ii) by reason of the employee exercising any of those rights[.]</p> |
| <p>Manitoba</p> <p><i>Labour Relations Act,</i> CCSM c L10</p> | <p>NB: only pension rights/benefits</p> | <p>17. Every employer and every person acting on behalf of an employer</p> <p>(a) who denies or threatens to deny an employee</p> <p>(i) because the employee ceases to work as the result of a strike or lockout not prohibited under this Act, or</p> <p>(ii) because the employee ceases to work as the result of a dismissal contrary to this Act, or</p> <p>(iii) because the employee exercises any right conferred upon him under this Act or any other Act of the Legislature or of Parliament,</p> <p>any pension rights or benefits to which the employee is entitled or would have been entitled except for the cessation of work or the exercise of the right;</p> <p>...</p> <p>commits an unfair labour practice.</p> <p>S.M. 1992, c. 43, s. 4.</p> |
| <p>Quebec</p> <p><i>Labour Code,</i> CQLR c C-27,</p> | <p>None explicitly, but see articles 14-15, which might relate to</p> | <p>14. No employer nor any person acting for an employer or an employers' association may refuse to employ any person because that person exercises a right arising from this Code, or endeavour by</p> |

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| <p><http://canlii.ca/t/52bwh></p> | <p>benefits available if reprisal action is taken during a legal strike.</p> | <p>intimidation, discrimination or reprisals, threat of dismissal or other threat, or by the imposition of a sanction or by any other means, to compel an employee to refrain from or to cease exercising a right arising from this Code.</p> <p>This section shall not have the effect of preventing an employer from suspending, dismissing or transferring an employee for a good and sufficient reason, proof whereof shall devolve upon the said employer.</p> <p>R. S. 1964, c. 141, s. 13; 1983, c. 22, s. 2.</p> <p>15. Where an employer or a person acting for an employer or an employers' association dismisses, suspends or transfers an employee, practises discrimination or takes reprisals against him or imposes any other sanction upon him because the employee exercises a right arising from this Code, the Commission may</p> <p>(a) order the employer or a person acting for an employer or an employers' association to reinstate such employee in his employment, within eight days of the service of the decision, with all his rights and privileges, and to pay him as an indemnity the equivalent of the salary and other benefits of which he was deprived due to dismissal, suspension or transfer.</p> <p>That indemnity is due in respect of the whole period comprised between the time of dismissal, suspension or transfer and that of the carrying out of the order, or the default of the employee to resume his employment after having been duly recalled by his employer.</p> <p>If the employee has worked elsewhere during the above mentioned period, the salary which he so earned shall be deducted from such indemnity;</p> <p>(b) order the employer or the person acting for an employer or an employers' association to cancel the sanction or to cease practising discrimination or taking reprisals against the employee and to pay him as an indemnity the equivalent of the salary and other benefits of which he was deprived due to the sanction, discrimination or reprisals.</p> <p>R. S. 1964, c. 141, s. 14; 1969, c. 47, s. 7; 1977, c. 41, s. 1, s. 7; 1983, c. 22, s. 3; 2001, c. 26, s. 6.</p> |
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| New Brunswick | no comparable provision | |
| Nova Scotia <i>Trade Union Act, RSNS</i> 1989, c 475, http://canlii.ca/t/5273q | | 53. (3) No employer and no person acting on behalf of an employer shall (d) deny to any employee any pension rights or accrued benefits to which the employee would be entitled but for (i) the cessation of work by the employee as the result of a lockout or strike that is not prohibited by this Act, or (ii) the dismissal of the employee contrary to this Act |
| Newfoundland / Labrador <i>Labour Relations Act,</i> RSNL 1990, c L-1, < http://canlii.ca/t/52cqq > | | 24. (2) An employer and a person acting on behalf of an employer shall not deny pension rights or benefits to which he or she would otherwise be entitled to an employee by reason only of his or her stopping work (a) as the result of a lockout, whether or not that lockout is prohibited under this Act; (b) while taking part in a legal strike as a result of an industrial dispute after all steps provided or contemplated by law have been taken through collective bargaining and conciliation to settle the dispute; or (c) by reason only of dismissal contrary to this Act. |
| Prince Edward Island | no comparable provision | |

4. Enhance the powers of the OLRB to amend bargaining units.

Section 7 of Bill 40 gave the Board the power to combine bargaining units where representation rights were held by the same bargaining agent with the same employer; that section was repealed by the Harris government. ONA supports the re-establishment of the Board's power to combine bargaining unit and takes the position that the Board's power to vary existing bargaining units should be further expanded.

The purpose of Section 7 was to facilitate viable and stable collective bargaining through the creation of broader bargaining units. The thinking behind this provision was that broader bargaining units reduce the problems associated with fragmented bargaining and provide more efficiency, convenience, lateral mobility, common employment conditions and industrial stability. The vast majority of applications under Section 7 were brought by trade unions. This allowed trade unions to create broader and more diverse bargaining units, expanding units incrementally and organizing groups who were otherwise untenable as individual bargaining units. This power should be reinstated.

ONA further submits that the OLRB should be given the power to vary bargaining unit descriptions in original certificates granted by the Board and/or as amended by the parties through collective bargaining. Given the Board's jurisprudence which prohibits the use of strike or lockout to press changes to the recognition clause of a collective agreement (or arbitration under HLDAA) and the lack of explicit Board power to do so, there is no effective way to adjust historical bargaining structures that are no longer reflective of current reality.

A review of the legislation in other Canadian jurisdictions provides options to consider in an amendment to the Act.

British Columbia

Sections 41 and 142 of the British Columbia ("B.C.") *Labour Relations Code* provides the B.C. Board with the power to vary, consolidate or merge bargaining units. Under Section 142 the B.C. Board has used its power to vary a certificate to "sweep in" a new group of employees with whom the union enjoys majority support, relying on a rebuttable presumption against multiple bargaining units.

New Brunswick

In New Brunswick the *Industrial Relations Act* sets out an explicit procedure for applying to vary, consolidate or merge bargaining units:

22(1)Where a trade union is certified under this Act, an application may be made to the Board at any time to amend the certification (a) to change the name of the trade union or employer where the name of the trade union or employer has been changed, (b) to include specific additional classifications of employees in the unit, (c) to exclude specific classifications of employees from the unit, or (d) to combine previous certification orders into one order.

22(2)Where two or more trade unions are certified under this Act an application may be made to the Board at any time for the merging of their certificates into one consolidated certificate.

22(3)Before disposing of an application under this section, the Board may make or cause to be made such examination of

records or other inquiries, including the holding of hearings, as it deems necessary, or take or supervise the taking of such votes as it deems expedient to direct, and the Board may prescribe the nature of the evidence to be furnished to the Board. 22(4) In disposing of an application under this section, the Board shall declare which collective agreements, if any, shall continue in force and to what extent they shall continue in force and which collective agreements, if any, shall terminate.

Federal

Section 18.1 of the *Canada Labour Code* sets out a procedure for bargaining unit reviews by that board.

Alberta

The Alberta board exercises continuing authority over bargaining units created by certificates issued under the *Alberta Labour Relations Code*, and has used its general authority to revoke or vary an order to consolidate or restructure existing bargaining units.² Section 45 of the *Alberta Labour Relations Code* also provides for consolidation or alteration of bargaining units, respectively,

41(1) One or more certified bargaining agents may apply to the Board for the consolidation of certificates of one or more bargaining agents into a consolidated certificate.

41(2) When the Board, after any inquiry it considers necessary, is satisfied that the certificates of the bargaining agents should be consolidated, the Board shall issue a consolidated certificate (a) naming the trade union or trade unions as the certified bargaining agent or agents, (b) naming the employer in respect of which the trade union or trade unions are certified as bargaining agent or agents, and (c) describing the unit in respect of which the trade union or trade unions are certified as bargaining agent or agents.

41(3) When a consolidated certificate is issued, the Board may declare which collective agreements, if any, shall continue in force and which collective agreements, if any, shall terminate

45. The Board may, on the application of any trade union or employer affected, modify the description of a bargaining unit contained in any certificate if it is satisfied that

(a) the former certificate no longer appropriately describes the circumstances of collective bargaining between the parties,

2 *Calgary School District No. 19 and C.B.E.S.A., Re, 2013 Carswell Alta 707 (Alta. L.R.B.)*

(b) the modification is not such as may call into question the union's majority support within the bargaining unit, and

(c) it is otherwise appropriate to make the modification.

Saskatchewan

Section 6-104(2)(f) of the *Saskatchewan Employment Act* provides the board with the power to make an order rescinding or amending a certificate.³

Prince Edward Island

Section 4(1) of the PEI *Labour Act* provides that the board can reconsider *inter alia* any of its decisions or orders and s. 18 of the *Labour Act* indicates that the board can apply to amend a certification order to change the name of the union or employer, include or exclude additional classifications of employees in the unit, or combine previous certification orders into one order.⁴

Quebec

In Quebec the Commission des normes du travail has taken the view that a certification order has ongoing effect enforceable and redefinable by the issuing agency.⁵

Nova Scotia

In Nova Scotia, applications to vary certification orders are given statutory authorization in s. 28 of the *Trade Union Act*.

28 (1) Where a trade union is certified under this Act, an application may be made to the Board to amend the certification to

(a) change the name of the union or employer where the name of the union or employer has been changed;

(b) include specific additional classifications of employees in the unit;

(c) exclude specific classifications of employees from the unit; or

(d) combine previous certification orders into one order.

Manitoba

3 *Saskatchewan Employment Act*, SS 2013, c. S-15.1, ss. 6-104(2)(f), (g), (h), 6-108(3).

4 *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 5S. 4(1) and s. 18.

5 Adams, *Canadian Labour Law*, 7.790.

Similar to Ontario, in Manitoba there is no specific statutory authorization providing for a process whereby a party can apply to vary, consolidate, or fragment a bargaining unit or certification order. However, Section 142(5)(d) of the *Labour Relations Act of Manitoba* provides the board with the power to determine whether "an employee or group of employees is or are included in a unit for which a bargaining agent has been certified".

Clearly, the *Ontario Labour Relations Act* provides its Board with less remedial jurisdiction than that of many other provinces. In Ontario, given the significant changes in the health sector, not only in the agencies through which health care is provided, but also the changes in skills, duties and responsibilities of employees, it is timely for an increase in the powers of the Board to review, and amend, where appropriate, bargaining unit structures.

ONA recommends that the powers of the Board under Section 7 be restored and that the Board be given expanded powers to review and amend bargaining units.

5. Provide a mechanism to ensure that bargaining structures reflect who funds and controls the work to ensure that bargaining takes place with the true employer and not with the contractor, agency, or franchisee.

The Consultation paper, Question 12, asked whether sectoral or broader bargaining structures are required generally or for certain industries. In ONA's submission, the Act should be amended to provide a broader or sectoral mechanism to reflect who funds and controls the work to ensure that bargaining takes place with the true employer.

If the goal of the Act is to provide employees with a democratic voice in their work, then it is necessary to bring balance to the unequal power relations between the employee and the employer. The current definitions and jurisprudence dealing with "the employer" and "a related employer" simply do not reflect the organization of many private and public sectors.

For example, in the health care system, the publicly-funded CCACs distribute work through a competitive bidding process between providers of "nursing services" for home care and care in ambulatory care clinics. As a result, the provision of nursing services is contracted out to for-profit companies, particularly in the ambulatory care sector, and not-for-profit organizations. These companies and organizations often then rely upon temporary agency nurses.

The organization of nursing services in the home care and ambulatory care is a hollow pyramid. The work is controlled by the CCAC, but the CCAC have fragmented the provision of nursing services to a network of "nursing service providers" who are subcontracted to provide either home-care or ambulatory clinic services. The formal employment relationship of the nurses is with a private company, a not-for-profit organization, or a temporary agency.

In fact, the organization of work in the home-care sector is more akin to the construction industry with a network of contractors and subcontractors.

In ONA's submission, the current approach to certification creates a barrier to meaningful collective bargaining with the true employer which ultimately directs the flow and distribution of nursing services. The current bargaining unit structure, based upon a single employer and single "workplace" means that ONA may be required to organize and negotiate with a small private company which is relied upon by the CCAC. Such a private company may rely upon temporary agency nurses to provide care. Often, the right to bargain to impasse leads to a loss of work to another agency.

Similar work organization structures, based upon tiers of sub-contracted out work emerged in the 1980's in the private sector allegedly to save labour costs and produce on a "just-in-time" production schedule. The impact in the private sector is well documented to be one of lower wages and benefits and poorer working conditions.

ONA's position is that such a model of work organization has no place in Ontario's health care. However, the Act needs to be amended to ensure that nurses have an effective voice with their true employer.

ONA reserves the right to make further submissions.

All of which is respectfully submitted by the Ontario Nurses' Association.

APPENDICES

Appendix 1 - Susan Eng. *Accommodating Age in the Workplace - Denying Health Coverage to Older Workers - and Advocates View*. March 24, 2015.

Appendix 2 - Mary Cornish. *The Sky Has Not Fallen: Replacement Worker Law Under Bill 40*. April 1994.