July 21st, 2017

Honourable Peter Milczyn,
Chair
Standing Committee on Finance and Economic Affairs
Delivered electronically

RE: Bill 148: Fair Workplaces, Better Jobs Act, 2017

On behalf of an informal coalition listed in 'appendix A' which includes the Ontario Residential Construction Contractors' Association (ORCCA), I am taking the opportunity to offer comments related to *Bill 148: Fair Workplaces, Better Jobs Act, 2017* (the "Bill"). This submission will introduce ORCCA, outline ORCCA's broad concerns with the Bill and the Changing Workplaces Review that preceded the introduction of the Bill, and then provide specific feedback on the Bill's proposed changes to the *Employment Standards Act, 2000* (the "ESA") and the *Ontario Labour Relations Act, 1995* (the "OLRA")

ORCCA

ORCCA is an association of accredited and non-accredited employer bargaining agents with a focus on residential construction issues. This informal association represents residential builders and related trades in Ontario with primary membership in central Ontario (Board Areas 8, 18, 9, 10, 26, and that portion of 12 west of the Trent Severn River).

The Employers represented by this informal coalition provide good, stable employment to their employees, and are predominantly in mature, established bargaining relationships with some of the largest unions in the country.

Broad and Ongoing Concerns (originating from the Changing Workplace Review)

The ESA and OLRA are base pieces of employment legislation, which contain many intricacies. Stability in the legislation has led to the creation of and, for the most part, maintenance of a stable labour relations environment in Ontario, particularly in the construction industry. Parties are able to operate in a predictable environment based on the legislation, past practice, and jurisprudence. The proposed reforms (as outlined below) create unnecessary volatility for stakeholders and practitioners involved, regardless of their intent.

The importance of maintaining a stable labour relations environment has been recognized historically and is evident in past amendments to labour and employment laws. Specifically, past governments have avoided unintended consequences by:

1. Minimizing the number of changes to the ESA and/or OLRA: In the Changing Workplace Review, the authors noted the value attached to labour stability. However, in our view, that value has not been translated into the Bill. The broad strokes and blanket approach to the Changing Workplaces

Review and the Bill impacts all sectors. This would have been avoided if the Bill focused only on core issues and the sectors that are actually impacted by those issues. It is concerning that the construction sector has not been excluded from the broad changes proposed in the Bill, despite it being a distinct and leading sector in Ontario's economy, in part due to the existing stable and predictable environment.

2. Recognizing construction and its subsectors as a unique sector(s): The uniqueness of the construction industry is heavily reflected in labour law, including the current version of the ESA, as well as the OLRA, which embraces the seven sub-sectors of the construction industry. This has created a well understood operating environment for employers, employees, and unions. As outlined in our submission to the interim Changing Workplaces Report (Interim Report), which is attached to this submission, construction is recognized as a sector that relies heavily on specialization and subcontracting. Because construction is performed in an unpredictable environment, schedules and potential pitfalls are by definition unpredictable. Further, the construction of any dwelling (including residential) require a wide variety of skills depending on the type of building being constructed and skills needed. This means the Employer cannot directly employ all workers due to the need for specialized skills and short-term nature of said work. Depending on the residential dwelling, over twenty trades are utilized at one time or another. The proposed legislation does not fully consider the transient nature of construction or the uniqueness of the residential construction industry. This will create unintended consequences.

3. Alternative approach of introducing new labour legislation which builds on the existing base labour legislation: In the past, amendments defined a specific issue and proposed new legislation or parts of legislation without reforming base labour laws. As outlined in our submission to the interim report, examples include *Toronto Transit Commission Labour Disputes Act, 2011* and the *School Boards Collective Bargaining Act, 2014*. In our view, this alternative approach should be given renewed consideration.

4. Identify key stakeholders and hold extensive consultation on the key issues: The Changing Workplaces Review and the Bill tackle an extremely broad number of issues. Because Ontario's labour laws are interconnected, changes in one area can and will produce unanticipated changes in another area. A major focus of the Bill is compliance and this is undermined by the broad focus and blanket approach. Focusing on fewer issues and holding more in-depth consultations with affected employers, unions, and workers will benefit all Ontarians.

ESA Amendments:

In addition to our submission to the interim report, our informal coalition has the following comments related to the ESA:

1. Scheduling Amendments (new VII.1, VII.2)

Construction is a distinct sector of Ontario's economy, and one of the few sectors that is exposed to high levels of uncertainty related to varying on-site conditions, changing weather, and unpredictable issues. As

a result, there is a construction-wide understanding that workers will receive a higher hourly wage (or equivalent piece-work wage) when they are working, but only receive compensation for hours worked. This *quid pro quo* between employer associations, unions, and workers is universally understood and accepted. Unlike other sectors, sick days, 'show up time', and onerous scheduling practices are extremely uncommon, if present at all. The government with its proposed amendments looks to remove this understanding, which threatens to upset the balance of the existing environment, thereby disadvantaging all employers in the construction sector on a go-forward basis.

2. Holiday Pay and Personal Emergency Leaves (subsection 24 and section 50)

As outlined above, construction pays a relatively higher wage for hours worked than other industries in exchange for less generous entitlement in other areas of compensation. Further, construction relies heavily on piecework, subcontracting, and unpredictable working conditions. While the government seeks to simplify the Holiday Pay calculation to increase compliance, this informal coalition is unsure that outcome has been achieved. By creating uncertainty around the definition of an "employee", changing the definition of temporary help agency, and amending the definition of the employer – employee relationship, the new holiday pay entitlement will not be any clearer. This could have the unintended consequence of reducing compliance.

With the introduction of two paid personal emergency leave days, the government is introducing a new benefit to the construction industry. While this may be a good fit for a non-construction workplace, it is new and unchartered ground in the construction industry. It does not reflect the stable labour relations environment in the construction industry, as outlined above and provides a new and unnecessary benefit to union and employees, thereby disadvantaging all employers in the sector.

3. Temporary Help Agencies, Employer – Employee Relationship, Independent Contractors.

As outlined in our submission to the interim report, issues related to temporary help agencies, the employer – employee relationship, and independent contractors are significant for the construction sector. Further, because of the unique nature of construction and reliance on specialized skills, these changes have the greatest potential for unintended consequences. On their face, the proposed amendments seek to increase the number of direct employees and limit the number of independent contractors. These proposals, while admirable for some sectors, ignore the practical realities of construction and our reliance on subcontracting specialized work to independent contractors.

For many years, the OLRA has distinguished between dependent contractors, who are employees for purposes of the OLRA, and independent contractors, who are not. That distinction has worked well to create compromise by deeming persons who are economically dependent on an employer to be employees of that employer, as compared to true independent contractors. Examples of decisions in which the Ontario Labour Relations Board has applied its expert analysis to determine if someone is a dependent or independent contractor include, for example: *P.G. Onisto Construction Inc.*, [2004] O.L.R.B. Rep. 766 and *E.M. Carpentry (1982) Ltd.*, [1989] O.L.R.B. Rep. 829. More recently, the Ontario Labour Relations Board has reviewed whether a general contractor is the true employer of certain individuals,

even if they are nominally employed by a temporary help agency: See, for example, *Rochon Building Corp.*, [2015] O.L.R.D. No. 161.

The Changing Workplaces Review recommended that the dependent/independent contractor distinction be explicitly included in the ESA. However, the Bill does not amend the ESA to include this distinction. Instead, it prohibits employers (and thereby subjects them to penalties) from treating an individual as an independent contractor when they are not. The Bill also gives the employer the burden of proving that an individual is in fact an independent contractor. It is unclear if ESA officers and adjudicators will use the dependent/independent contractor analysis to determine whether or not an individual is an employee for purposes of the ESA.

A change to the universally understood distinction between dependent and independent contractors will raise a number of practical concerns for the construction industry. The construction industry, and particularly the residential building sector, is often transient and seasonal. Many construction entities retain the services of a temporary help agency to provide labour on a limited and short-term basis. Further, deeming a construction entity to be the employer of someone previously understood to be an independent contractor would create great uncertainty. Several of the unintended consequences of such a change in approach are outlined in the attached submission.

The decision not to include the dependent contractor definition in the ESA, despite it being recommended in the Review, coupled with the burden of proof put upon employers, creates great concern that a different standard will be applied. While this may be appropriate in other sectors, it would cause great upheaval in the construction industry, without any corresponding benefit. The harm that the Bill seeks to address simply does not exist in the unionized construction industry, as employers who require individuals on a short-term or limited basis, including those from a temporary help agency, are nonetheless required to ensure that the workers immediately become union members before performing any construction work. These individuals are treated no differently in the employment relationship than any of the employer's other workers. There is no suggestion of any harm in these types of relationships or at least any that would be resolved by changing the approach as to the definition of an employee.

Ontario Labour Relations Act Amendments:

In addition to our submission to the interim report, our informal coalition has the following comments related to the *Ontario Labour Relations Act, 1995* (OLRA)

1. The Ministry of Labour has a role as a neutral third party and the goal of fair and balanced labour relations.

As outlined by the special advisors in the Changing Workplace Review, recent decisions have confirmed the constitutional protection with respect to the freedom of association. This includes the employees' rights to meaningfully associate in the pursuit of collective workplace goals and includes the right to collectively bargain. The amendments address these issues by increasing the rights of Ontarians and Ontario Unions. However, the Bill, in our view, has failed to examine the other side of the proverbial 'unionization' coin. Specifically, amendments should be introduced to enshrine symmetry and balance by

harmonizing the certification process with the decertification process as well as the process to follow for workers who are interested in switching unions. The goal for all parties should be an outcome which reflects the desires of the workforce and, therefore, symmetry is the logical step forward. This would also reduce conflict between unions and employers who would seek to 'cherry pick' the most favourable aspects of each process.

2. Integrity of the Bargaining Unit:

Few issues in labour relations are as sacrosanct as the description of the bargaining unit or 'scope clause'. Once established, it can only be amended through mutual agreement. This pushes the parties together and assists in the creation of mature collective agreements which reflect and support the evolution of labour relations between said employer(s) and union.

The proposed amendments in the Bill include:

- Deeming an individual an employee who is either an independent contractor or employed by another employer (including the newly defined temporary help agency)
- Allowing the OLRB to consolidate bargaining units

These amendments shift the balance of power to heavily favour unions and puts the onus on the OLRB to "pick a winner". Further, the Board as a neutral final arbiter of disputes should not be put in a position to amend bargaining units by selecting a party's preference or preferred 'scope clause'. It undoes the Board's past practice which is based on the application of clear and unvaried rules and practices from which the Board never departs. Settlements between parties without reliance on litigation or hearings before the Board are a sign of successful labour relations, and a concept that the Board, in our opinion, has promoted since its inception. <u>This extensive history must be properly canvassed and discussed through a more thorough consultation</u>.

Yours truly,

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c.c.

Mr. Eric Rennie, Committee Clerk, Standing Committee on Finance and Economic Affairs
Honourable Kevin Flynn, Minister Labour

Appendix A

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Metropolitan Toronto Apartment Builders Association

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Toronto Residential Construction Labour Bureau

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Durham Residential Construction Labour Bureau

Mauro Angeloni
Independent Plumbing & Heating Contractors Association

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Residential Carpentry Contractors Association

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Residential Roofing Contractors Association

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Toronto & District Carpentry Contractors Association

Mauro Angeloni
Residential Siding Contractors Association

Joe De Caria
Masonry Contractors' Association of Toronto

Joe Vaccaro
Ontario Homebuilders' Association

Giovanni Cautillo
Greater Toronto Sewer & Watermain Contractors Association

Patrick McManus
Ontario Sewer & Watermain Contractors Association

Zlatko Maric
Residential Framing Contractors Association

Robert Celsi
Ontario Concrete and Drain Contractors Association

Ross Savatti
Residential Tile Contractors Association

Rob Bradford
Toronto and Area Road Builders Association

Domenic DiBattista
Residential Heating and Ventilation Contractors Association

Carlo D'Ambrosio
Trim Association of Ontario

Grace LoGullo
The Residential Low Rise Forming Contractors Association of Metropolitan Toronto & Vicinity

Dennis Cancian
Ontario Formwork Association

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