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Submission to the Ministry of Labour

Ontario's Fair Wage Policy

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1. Introduction

Ontario is undergoing an historic process of modernizing our labour laws and policies. The government's Changing Workplaces Review (CWR) has prioritized reforms that will better protect those in precarious work who are made vulnerable by changing business strategies and workplaces. It is in this context that the Ministry of Labour has initiated consultations to update the Ontario Fair Wages Policy.

As the Special Advisors to the CWR note in their final report, contracting and outsourcing, reduces costs and places employers in a position where they are not responsible for the indirect employment they create as they shift liability and cost to others. This creates competition among contractors, causing a downward pressure on workers' compensation while shifting responsibility for working conditions onto third parties. This contributes to increasingly precarious jobs.¹

The Ontario Government spends billions of dollars each year in contracts for goods, services and construction from 51,000 private companies. In recent decades publically funded services that used to be done "in-house" have been privatized, contracted out, delegated to broader public services agencies, and other forms of public-private partnerships. The government has established comprehensive procurement and "supply chain management" to ensure that publically funded goods and services are at the highest quality, in compliance with government policy for the least cost.

Fair wage policies recognize the important role that government can play as a model employer. They prevent governments from using their significant market share and purchasing power to undercut local labour conditions. Fair wage policies enable governments to use their tendering policy to achieve broader policy objectives for economic fairness for workers, health and safety and to positively impact labour market conditions.²

Fair wage policies generally require minimum wage schedules and benefits that must be paid to workers on government contracts. Such policies require a floor for employee compensation in sectors of government contracting to ensure a fair and sustaining wage. By setting a level playing field for employers bidding for government work, especially when such contracts are awarded on a low-bid basis, fair wage policies can help prevent a downward spiral in wages, benefits and working conditions.

¹ Michael Mitchell and John Murray, The Changing Workplaces Review An Agenda for Workplace Rights. Ministry of Labour, May 2017. Online: https://files.ontario.ca/changing_workplace_review_english_summary.pdf

² Josh Mandryk, The Case for a Stronger Fair Wage Policy in Ontario, Canadian Centre for Policy Alternatives, April 2014. Online: https://www.policyalternatives.ca/sites/default/files/uploads/publications/2014/05/Fair_Wage_FINAL.pdf

Contractors that compete on the basis of low wages are less likely to invest in training and health and safety. They are more likely to cut corners on quality thereby increasing long-run costs; more. Such conditions are ripe for companies to misclassify workers as independent contractors to avoid liability as an employer under contract with the government.

2. Consultation Process

We were heartened when the government announced on February 21, 2017 that it would be seeking public input on updates to its Fair Wage Policy to ensure government contract workers continue to receive fair wages and benefits. A “refreshed policy will better reflect Ontario’s evolving workforce” says the Ministry of Labour press release. “An updated Fair Wage Policy will ensure that workers on those government contracts are being treated fairly, and all contractors are on a level playing field” says Minister of Labour Kevin Flynn.

We were hopeful that the government would follow the footsteps of its Changing Workplaces Review and examine how the Fair Wage Policy could better protect workers made vulnerable through government contracting and subcontracting. That would mean starting off the consultation by addressing what scope of government contracting should be covered by the Fair Wage Policy. That has not happened yet.

Instead, we have witnessed a process of invitation-only meetings to discuss narrow questions on the construction and building services that the Fair Wage Policy has historically addressed. The Fair Wage Policy consultation is not publically available on the Ministry of Labour website. It is not on the consultation calendar. It does not meet the principles of the Ministry’s Engagement Framework; a Framework that calls for authentic engagement and inclusivity and balance. On the employee side, beyond the unions that were rightfully invited, there was no representation of non-unionized workers from construction and building services who would be affected by a Fair Wage Policy in these sectors, much less non-unionized workers impacted by government contracting.

We request that the Fair Wage consultation be expanded to initiate a conversation about the scope of coverage of Ontario’s Fair Wage Policy for government contracting out of goods and services. Further, this consultation must seek to encourage “involvement from the full range and diversity of stakeholders affected, remove barriers for those groups that are hardest to reach, and aim for fair and balanced participation.”³

³ Ministry of Labour, Engagement Framework, Principles, Practices and Proficiencies. Online: <https://www.labour.gov.on.ca/english/about/pubs/fw/principles.php>

3. Scope of Fair Wage Policy

Fair wage policies have been with us for a long time. Ontario's first wage policy was enacted in 1936 with the adoption of the *Government Contracts Hours and Wages Act*. Since that time, regulations have set out the minimum wages that are to be paid to workers on government contracts for services in construction and building security and cleaning services. However, the narrow scope of the Fair Wage Policy is clearly out of date. The government is contracting out work in many more sectors than construction and building services.

The scope of the Fair Wage Policy has to be expanded in a number of ways to address changing workplaces and ways in which government contracts work.

Cover all government contracted goods and services

The Fair Wage Policy should be expanded to include all contracts entered into by the government with a company for provision of any goods or services.

When the Fair Wage Policy was established it covered sectors that were, at that time, being contracted out. Times have changed. However, the government failed to update the Fair Wage Policy when it began to contract out other services that had previously been done by government employees.

For example, the current Ontario Fair Wage Policy includes the provision of protection, security or cleaning services in buildings. But there are many other forms of work that are contracted out in building services such as food services, property management and maintenance and parking lot services in which the government contracts with private companies but is not required to comply with the Fair Wage Policy. Such gaps leave workers open to low wages and poor working conditions in serving the government and the public. **It is time to close the gaps and expand the policy to include all contracted out goods and services.**

Having an expansive scope for a Fair Wage Policy is not without precedence. The City of Toronto, the largest municipality in Canada, has long had a Fair Wage Policy that applies to all of the city's contracted-out goods and services.

The City of Toronto Fair Wage Policy is applied to all city of Toronto departments, agencies, boards and commissions.

The Ontario government has dedicated substantial resources to the Ministry of Government and Consumer Services for "supply chain management" in the contracting for goods and services by Ontario's public sector (OPS) and broader public sector (BPS). The government has developed extensive mechanisms to ensure that contracted goods and services meet criteria for operational excellence, strategic client relationships, innovation and growth, and effective public

spending for contracted out work.⁴ What is missing in these criteria is the requirement that all contractors meet Ontario's Fair Wage Policy.

Cover contracts in the broader public service

The scope of the Fair Wage Policy should be expanded to include all broader public service contracts for goods and services. Just as the OPS must comply with comprehensive contracting rules so too must the BPS. The BPS Supply Chain Secretariat covers supply chain management for hospitals, school boards, colleges, universities, Community Care Access Corporations, Children's Aid Society and other publicly funded organizations that receive \$10 million or more in public funds.⁵

Public sector institutions in communities across the province have an important role to play in strengthening local economies by ensuring fair wages and raising the floor in competition for contracted out services.

Include all contractors and their subcontractors

The way in which labour markets function have changed significantly since the province's Fair Wage Policy was brought in to place. The practice of sub-contracting work has increased substantially over recent years. The City of Toronto Fair Wage Policy recognizes this and requires that the policy be complied with by all contractors and subcontractors.⁶ Ontario's Fair Wage Policy must be updated to include a company's contractors and all subcontractors.

The Ontario Fair Wage Policy should adopt the City of Toronto's requirements for contractors and sub-contractors.⁷

- Contractors will be responsible for any violations or non-compliance arising from the engagement of any sub-contractor.
- The contractor and sub-contractor shall comply with fair wage schedules set out under the Fair Wage Policy.

⁴ Ministry of Government and Consumer Services, Supply Chain Ontario, online: <https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/English/forvendors>

⁵ Ministry of Government and Consumer, Broader Public Sector Procurement Directive, online: [https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/Attachments/001-BPS_Procurement_Directive/\\$FILE/BPS_Procurement_Directive.pdf](https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/Attachments/001-BPS_Procurement_Directive/$FILE/BPS_Procurement_Directive.pdf)

⁶ In the procurement process, the company bidding on a contract must submit the name of all subcontractors and information about the subcontractors' use further subcontractors, wage rates, benefits and hours of work.

⁷ See City of Toronto, Fair Wage Policy, Schedule A, Municipal Code, Chapter 67. Online: <https://web.toronto.ca/business-economy/doing-business-with-the-city/understand-the-procurement-process/fair-wage-office-policy/fair-wage-policy/>

- The Contractor is required to submit names of all sub-contracting parties in its application for contracts.
- The contractor and sub-contractor shall,
 - Maintain a list of the names, classification, hourly wage rates and benefits and hours worked per day and amounts paid to each worker.
 - Provide to the Ministry of Labour, when requested, certified copy of all paysheets, lists, records and books relating to the work under contract.

Further, the Fair Wage Policy must be amended to ensure that contracts negotiated through public private partnerships (P3s) and Alternative Financing and Procurement are required to comply with the Fair wage Policy.

What's covered?

Ontario's current Fair Wage Policy applies only to wages. This creates a disincentive to employers who are bidding on government contracts to provide benefits. It also penalizes those employers who do provide benefits. The provincial policy must be updated to ensure that fair wage schedules include total compensation.

The City of Toronto's requirement for the total compensation package should be adopted at the provincial level. Toronto links fair wages to the entire compensation package, including benefits and statutory benefits, rather than simply to straight wages. Toronto's wage schedules include hourly rate, vacation and holiday pay. The City's Fair Wage Office requires contractors to provide information about benefits provided such as company pension plans, extended health care benefits, dental and prescription plans (does not include legislated payroll deductions such as C.P.P., E.H.T., W.S.I.B. or E.I.C). For contractors that do not offer "fringe benefits" to their workers, Toronto's Fair Wage Policy requires that an hourly amount will be added to the hourly wage schedule in lieu of benefits.

Establishment of wage schedules

This is the first review of the Ontario Fair Wage Policy which must clearly address the Canadian Charter of Rights and Freedoms guarantee to the freedom of association and collective bargaining. Historically the City of Toronto Fair Wage Policy has linked fair wage schedules to the entire union wage package, including benefits rather than straight wages. It has done so to meet objectives of its Fair Wage Policy which is to establish "fair wage rates and schedules

[that] are intended to minimize potential conflicts between organized and unorganized labour in the tendering and awarding of City contracts.”⁸

One of the goals of fair wage policies is to level the playing field for companies bidding for government contracts. Given that many government jurisdictions award bids on a low-bid basis, there is a built in disincentive for unionization in companies seeking government contracts.

Ontario’s Fair Wage Policy should minimize potential conflicts or unfair advantage between contractors who are unionized and those who are not. To do this, wage schedules must account for unionized rates in establishing prevailing wages for wage schedules. Fair wage schedules for classifications should be determined by appropriate collective agreements for similar work or similar work for that occupation or sector. In occupations or sectors with lower union densities where comparable classifications cannot be identified, then prevailing wages may be set. Such wage schedules must be set above the living wage.

To ensure that wage schedules are regularly updated, the government should set out in legislation the authority for a Fair Wage Office (or other similar entity that shall be authorized under legislation) to establish wages schedules for common classifications. Wage schedules may be set for 3 years and shall set out annual increases by the rate of inflation in the 3 year period. Authority shall be delegated to update wage schedules every 3 years. Where a fair wage schedule is not established to address new areas of contracting out, the Fair Wage Office should have the delegated authority to examine the collective agreements and prevailing wages rates in the occupation or sector and determine a wage schedule for the goods or services to be contracted.

Employer groups, unions and employee groups should be consulted in the establishment of wage schedules and their updates.

Geographical distinctions should not be maintained in the new Fair Wage Policy. With an increasingly mobile workforce and rising house prices, people may live in one community or area and work in another. Wage schedules should apply across the province.

All wage schedules should be posted on the government website and integrated into procurement practices.

Job quality

While wage levels are central to job quality, as the Changing Workplaces Review concluded, other dimensions are critical in determining the quality of a job. On the heels of the government’s Changing Workplaces Review, the provincial government should ensure that

⁸ City of Toronto Fair Wage Policy, A6. Establishment of rates, Schedule A of the City of Toronto Municipal Code, Chapter 67.

public policy reflects the goals of this important review. That is, the Fair Wage Policy should protect those made vulnerable by changing workplaces under government contracts.

The Fair Wage Policy should be expanded to include business practices that create precariousness for workers. One of the key practices creating lower wages, job and income insecurity and increased risk of workplace injury is the use of temporary help agencies to staff workplaces in provincial contracts.

The Fair Wage Policy should explicitly limit the use of temporary help agencies under government contracts for goods and services. The Special Advisors conclude in the Changing Workplaces Review Final Report, that the triangular relationship between the employee, agency and client, and the temporary nature of employment results in agency employees being among the most vulnerable and precariously employed of all workers.⁹ A modern fair wage policy should work to limit the use of temporary agencies to exceptional circumstances rather than support the growth of this business practice that creates such precarious work and vulnerability of workers.

Without a clear prohibition on staffing models reliant on temporary help agencies, employers will use temporary staffing to evade fair wage policies and erode conditions of work contracted out by government. For example, Canada Fibers Ltd is under contract with the City of Toronto to provide all of the City's curb-side bluebox recycling. This seven year, \$264 million dollar contract provides the company with substantial stability. Yet Canada Fibers provided its employees with substantial instability and minimum wages. Canada Fibers used five temporary help agencies to staff its recycling plant. One of these workers, Angel Reyes, was fired after speaking to media about conditions facing perma-temps at this company. He worked for five years at Canada Fibre through a temp agency, making minimum wage. Toronto's Fair Wage Office investigated Canada Fibers and found that more than 1,600 workers employed through temp agencies had been paid less than the wage schedule required. The company was ordered to pay approximately \$1.33 million in restitution to the workers, including \$200,000 in fines paid to the Fair Wage office.¹⁰

The Ontario Fair Wage Policy should be updated to require that contractors and their sub-contractors shall not utilize temporary help agency employees for more than 20 percent of their staffing complement at any time. Further, workers supplied by temporary help agencies that work at a contractor or subcontractors establishment for more than 90 days shall become directly hired by the contractor/subcontractor.

⁹ Mitchell and Murray (2017) p 198

¹⁰ Sara Mojtehedzadeh, Recycling plant ordered to pay \$1.33 million in fines, back wages. Toronto Star, Tuesday September 26, 2017. Online: <https://www.thestar.com/news/gta/2017/09/25/recycling-plant-ordered-to-pay-133m-in-fines-back-wages.html>

The Fair Wage Policy should explicitly apply to all workers on publically contracted work. That would include dependent and independent contractors.

We have witnessed a huge growth in the practice of employers' misclassifying employees as independent contractors. Businesses do this to avoid the direct financial costs of compliance with the ESA and employer contributions to Employment Insurance, Canadian Pension Plan as well as Workers Safety and Insurance premiums.

The Toronto Fair Wage Office reports that from the period of 2004-16, investigations found that misclassification of employees by contractors and subcontractors contractors are common.¹¹

The *Fair Workplaces, Better Jobs Act* (Bill 148), will, when brought into effect, prohibit employers from misclassifying workers as "not employees" under the *Employment Standards Act*. However, Bill 148 did not amend the definition of employee and so it will still be difficult for workers to prove they are employees. Bill 148 has not clarified that those workers who are in an economically dependent relationship and not independent contractors should be employees under the ESA. As such, workers who should be covered by the provinces Fair Wage Policy may find themselves outside of the scope of this protection. Indeed, Ontario's current Fair Wage Policy presumes an employment relationship and thus does not apply to independent operators. To curb misclassification of employees and employer practices of shifting work to independent contractors, the Fair Wage Policy should explicitly cover all workers, including independent contractors.

4. Administration and Enforcement

A fair wage policy will do little to level the playing field, stop the downward spiral in wages and working conditions in government contracted work, and ensure decent wages and working conditions if it is not enforced.

There has been little, if any, enforcement of Ontario's Fair Wage Policy over the years. Investigations may only be conducted in response to a complaint. There is no clear process of how to file a complaint. There is no process for proactive audits to determine if contractors are complying with the wage policy. Nor has there been any requirement to report to the parliament or publically post enforcement of the Fair Wage Policy and firms in violation of the Fair Wage Policy.

In the absence of any information about contractors' violations under the provincial Fair Wage Policy, reporting from the City of Toronto Fair Wage Office provides an indication of the types of violations taking place.

¹¹ Fair Wage Office - 2016 Annual Report, City of Toronto, September 7, 2017. Online: <http://www.toronto.ca/legdocs/mmis/2017/gm/bgrd/backgroundfile-106800.pdf>

In addition to reviewing all contractors and subcontractors bids for city work to determine eligibility and compliance under the policy, the Fair Wage Office also conducts on-site investigations, interviews workers and company officials, reviews certified company payroll records, issues citations for violations, obtains restitution in back wages for workers, and issues administrative penalties to companies.

Between 2004 and 2016, the Office recovered approximately \$4 million in back wages to almost 4,000 workers. These workers encountered contractor or subcontractor practices such as: underpayment of wages and misclassification of workers, underreporting of hours and the number of workers, cash payments, non-payment of wages, unpaid overtime, banked overtime hours, non-payment of benefits, off-the-clock violations and late payments. The Office also found that contractors failed to submit true and accurate certified payroll records. Among those contractors in violation, some were found to have intentionally failed to pay workers the proper fair wage rate and misclassified workers as “shareholders contractor”.¹²

These violations are just the tip of the iceberg. The Toronto Fair Wage Office is completely understaffed and resourced. This 3-person office is responsible for all contracting in all city of Toronto departments, agencies, boards and commissions.

Most workers, particularly those in non-unionized companies, do not file complaints. Research on Canada and the US document the substantial barriers facing individual workers to filing complaints of employment standards violations.¹³ As such, enforcement cannot rely on individual complaints.

The government rightly asks questions in this consultation about how to ensure compliance, enable workers to enforce their rights under the Fair Wage Policy and consequences on contractors for violating the policy. We provide a brief summary of the components necessary for effective enforcement of the wage policy.

Administration

There must be a dedicated “office” or program under the Ministry of Labour to administer the Fair Wage Policy. This office should have delegated authority, preferably under legislation, to:

- Establish fair wage schedules
- Review all procurement calls to determine applicable fair wage schedules which become a requirement for procurement

¹² Fair Wage Office - 2016 Annual Report, City of Toronto, September 7, 2017. Online: <http://www.toronto.ca/legdocs/mmis/2017/gm/bgrd/backgroundfile-106800.pdf>

¹³ LF Vosko et al, New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada, Paper commissioned by the Law Commission of Ontario. November 2011.

- Verify contractor(s) or sub-contractor(s) eligibility (e.g., previous ESA and Fair Wage Policy violations) and capacity for Fair Wage Policy to be met under bid
- contractors enter into contracts to comply with Fair Wage Policy and wage schedules
- Resolve disputes on applicability of wage schedules

Enforcement

- The enforcement program should be staffed without reducing capacity for employment standards and health and safety enforcement.
- Contractors and their subcontractors shall be required to:
 - At the start of the contracted work, provide all employees with information about the Fair Wage Policy, applicable wage schedules and wage rates and benefits (or pay in lieu of benefits) provided to each employee
 - Maintain a list of the names, classification, applicable wage schedule of all workers, the hourly wage rate, hours worked per day and amount paid
 - Provide certified copy of all pay sheets, lists, records and books relating to the work when requested to do so by the fair wage office/program.
- Ministry of labour administer an accessible individual claims process for restitution when employers do not comply with Fair Wage Policy. Individuals making complaints under this process should be protected from unjust dismissal.
- Proactive inspections are conducted to determine compliance.
- Proactive inspections in response to individual claims, anonymous and third party complaints of non-compliance.
- Targeted proactive inspections to those contractors/subcontractors operating in sectors at high risk for violation.
- Collections of wages owing under the Fair Wage Policy are relatively easy to secure through hold-backs on the contract. However, where violations come to light after a subcontractor or contractor has completed the work on the project, it is much more difficult to recover wages. As such, public sector projects should require a bond or security, particularly for those contractors/subcontractors that are under public contract for short periods of time.
- There must be clear and transparent consequences for violating the Fair Wage Policy that will deter contractors and their subcontractors from doing so. Typically violations of fair wage

policies result in a company being disqualified from obtaining public contracts for a period of time. For effective deterrence, the following measures should be put in place:

- Intentional or egregious non-compliance with the Fair Wage Policy should result in permanent disqualification from bidding on provincial government contracts.
- If a contractor or contractor has been found in violation of the Fair Wage Policy on two occasions within a five year period they should be disqualified from bidding on government contracts.
- There must be full restitution of all workers owed wages under the Fair Wage Policy before a contractor/subcontractor can be part of a bid for contracts
- Penalties must be significant enough to deter non-compliance within the sector and in keeping with the scale of the project or contract.
- The names of contractors and subcontractors found in violation of the Fair Wage Policy should be published on procurement websites and Ministry of Labour website

5. Conclusion

Labour Minister Kevin Flynn stated that he wanted an “updated Fair Wage Policy [that] will ensure that workers on those government contracts are being treated fairly, and all contractors are on a level playing field.” To achieve this goal, the Ontario Fair Wage Policy must be expanded to cover all government contracts. If we are to move from a destructive system of competition for government contracts based on reducing labour costs by cutting workers’ pay and benefits to a positive competition based on raising the skills and productivity of the workforce and ensuring fair wages, then the scope of the Fair Wage Policy must be broadened.

We are seeking an open and transparent consultation process that will enable Ontario to modernize its Fair Wage Policy.