

September 24, 2018

Hon. Laurie Scott, M.P.P.
Minister of Labour
14th Floor, 400 University Avenue,
Toronto, Ontario M7A 1T7

Dear Ms. Scott,

I am writing today on behalf of the members of Retail Council of Canada (RCC) regarding amendments made by Bill-148 to the *Employment Standards Act (ESA)* and the *Labour Relations Act (LRA)*. In a nutshell, RCC believes that many of the Bill 148 changes were ill-considered, harmful to business and to employment prospects for Ontarians. While there are elements that we can support in Bill 148, the sheer number of problems with Bill 148's changes fundamentally compromises the *ESA* and *LRA* regimes and we propose that the Bill 148 changes be repealed. If desired, more balanced legislation could be introduced but only after a proper period of consultation and weighing different potential impacts. This note will lay-out RCC's primary concerns and observations with Bill 148 and will also make brief reference to problems arising from Bill-3, which created the *Pay Transparency Act*.

By way of introduction, Retail is our province's largest private-sector employer with over 806,100 Ontarians working in our industry in 2017, generating over \$29 billion in wages and employee benefits. Core retail sales in Ontario (excluding vehicles and gasoline) were \$139.2 billion in 2017.

Retail Council of Canada (RCC) members make more than 70 per cent of core retail sales in our Province. RCC is a not-for-profit industry-funded association that represents small, medium and large retail businesses in every community. As the *Voice of Retail*TM in Canada, we proudly represent more than 16,000 Ontario storefronts in all retail formats, including department, grocery, pharmacy, specialty, discount, independent retailers and online merchants. RCC grocery members also deliver over 95% of the grocery market.

Notwithstanding frequent media speculation about retail's long-term viability, retail had in fact been growing in Ontario for several years in a row, adding 40,900 full-time jobs, \$66 billion in sales, and \$4.6 billion in capital expenditure between 2015 and 2017.

Regrettably, that growth is now jeopardized by developments arising from Bill 148. Since December 2017, 46,100 jobs have been lost in Ontario's retail and wholesale industries (39,100 on a seasonally-adjusted basis)ⁱ

When the *Changing Workplaces Review* was announced in 2015, RCC welcomed the opportunity to review two pieces of legislation that had been in place, substantially unchanged, for more than 15 years. During the hearings conducted by the panel, RCC underscored the need to take a balanced approach: one that would correct problem areas and more effectively target bad actors in the workplace but that would refrain from changes with a negative effect on business and employment. Instead, the previous government introduced sweeping changes which, cumulatively, are having a major impact on the profitability and in some cases, the viability, of Ontario businesses. Moreover, many of these changes were ill-conceived and poorly drafted, which has led to still further changes and remedial programs to address the mistakes made in Bill 148. Among these are the Employment Ontario spending programs introduced to help alleviate the negative impact on youth employment and the last-minute changes announced by the Ministry of Labour in May 2018 to the calculation of public holiday pay. These holiday pay rules have reverted to the pre-Bill 148 rules but will need further revision toward the end of 2019. Similarly, the review of exemptions under the *ESA* for certain specialty roles (among them pharmacists, IT professionals and managers & supervisors) has been stalled since its announcement, leading to uncertainty in the relationships between Ontario businesses and their employees.

Minimum Wage

Bill 148's biggest single cost to businesses is of course the increase in the minimum wage, rising 20.7% on January 1, 2018 with a further rise to \$15/hour legislated for January 1, 2019, bringing the increase to a whopping 29.3% over a 12-month period. RCC was the first province-wide organization to appear on Day 1 of the Bill 148 committee hearings in Thunder Bay. At the time, we underscored our members' concerns not only with the huge increase in costs but also the extreme pace of change, which is far faster than that experienced in any other Canadian or U.S. jurisdiction. Not only does business need competitive labour rates in order to thrive – and this is a particular issue in retail where firms operating in Canada must compete with U.S. online vendors, who typically operate warehouses within lower wage jurisdiction – but business also needs predictability in order to plan and budget properly. An

increase in labour costs of almost 30% over 12 months works directly against these principles of competitiveness and predictability.

Instead, RCC has long advocated the system adopted in Ontario in 2014, following the recommendations of the *Minimum Wage Advisory Panel*, linking annual minimum wage increases to increases in the Consumer Price Inflation Index (CPI). It is only fair that workers' incomes should rise along with price increases. In retail's case the linkage is felt quite directly, as we represent a major share of the CPI "basket" and effectively, our capacity to pay higher wages is directly tied to the prices paid for consumer goods and groceries. CPI-linked adjustments provide the necessary elements of affordability and predictability, while ensuring that workers' incomes keep pace with inflation. CPI linkage also serves to strip out the politics around minimum wage adjustments, which have seen alternating periods of freezes and rapid increases over the last three decades. Unfortunately, the previous government's decision to ditch a policy that it had introduced three years earlier has now front-loaded increases that would cover many years of future price inflation.

RCC applauds your and the new Ontario government's commitment to avert the increase to \$15/hour on January 1, 2019. As the single biggest cost arising from Bill 148, the minimum wage hikes certainly need to be addressed. They are not, however, the only concerns that we have with the changes effected by Bill 148.

Pay Equity

One of the greatest areas of concern lies with the so-called "pay equity" provisions in section 42.1 of the *ESA* that seek to preclude wage distinctions between full-time and part-time employees. While this sounds fine in theory, these provisions have thrown off numerous issues. The first of these is that there are very significant cost implications for retailers. A major employer notes that the costs incurred in bringing all part-time employees up to the level of full-time employees' wages approaches the costs imposed by the above-mentioned changes to the level of Ontario's minimum wage.

The second concern is that the criteria for determining equivalency are ill-defined and in some cases counter-intuitive. While "seniority" is listed as a valid basis for differentiation, the previous government refused to adopt an RCC proposal to clarify that cumulative hours worked by an employee could determine that employee's

seniority. In our view, hours of experience are a far better way of determining seniority than an arbitrary start date. By way of example, a full-time employee and a part-time employee, hired on Jan 1, 2018 but working respectively 40 hours/week versus 4 hours/week won't have the same experience, knowledge and practical seniority after a year of working for the employer.

Speaking more generally, the concept of a single job rate, where tasks are strictly defined and compensated, does not work well in a retail environment. RCC believes that an employee's availability for a greater number of hours of work is itself a virtue that should be recognizable through a differentiated pay scale. In most cases, those extra hours mean availability for a wider number of assignments but even where the role is a fixed one, there can be little doubt that greater availability eases the challenges of scheduling, builds employee familiarity with processes and product offerings and that familiarity in turn promotes better customer relations.

Additional problems arise in collective bargaining environments governed by the *LRA*. For *ESA*-governed workplaces, these pay equity provisions entered into force on April 1, 2018. But in *LRA*-governed workplaces, the start date is at the conclusion of each workplace's current collective agreement. In retail, at least, we have members competing with one another who have significantly different end dates for their current collective agreements. That creates competitive inequities within the sector, as between unionized settings of different employers and as between unionized and non-unionized settings. While we would not seek to advance the interests of one of our members versus another, our proposal to repeal Bill 148 would address this inequity for all retailers in order to avoid creating an unlevel playing field.

Personal Emergency Leaves

Long before Ontario mandated its 10 days of personal emergency leaves through Bill 148, our members had established their own systems and criteria for granting leaves, whether for sick days or other forms of personal emergencies. In many cases, these leaves were paid and exceeded in number the two paid days now stipulated by the *ESA*. These arrangements varied from workplace to workplace but were established by contract or through informal arrangements to meet the particular needs of our employees. Bill 148 sought to standardise these arrangements but has effectively required adaptation of the *ESA* definitions of valid bases for taking PELs, in order that the two paid days and eight other days not become additive to leaves already

provided for by an employer. That meant that all employers have been driven to accept the *ESA's* definitions in preference to those drawn from experience, developed with and well-understood by our employees.

Additionally, our members are seeing significant evidence that the two paid PEL days are being widely treated as “floater” days off, i.e., *de facto* vacation days, which was not their stated purpose. We do not doubt that there are employees taking these days in good faith for personal emergencies. However, our members report a very close correlation between the number of *paid* PEL days available and the number being taken. One employer noted that, as of August 31, 2018 (66% of the way through the year, calendar-wise), 57% of the yearly *paid* PEL eligibility had already been used by employees. It is helpful to contrast this with the extremely limited number of *unpaid* PEL days being taken. One employer notes that *paid* PEL days are being taken in a ratio greater than 7:1 versus unpaid leaves, and in some job categories in a ratio greater than 10:1. We recognize that there may well be less willingness among employees to take *unpaid* days off but we are skeptical that pressing “personal emergencies” coincide so closely with the availability of *paid* leave but generate so few requests for *unpaid* leave.

This is of course against the backdrop Bill 148’s provision of an additional five days’ holiday annually for all employees with more than five years of employment. While RCC supports this extension to three weeks of annual leave, the addition of two “floater” days has effectively added seven new paid days of leave annually for many retail employees, again at significant cost to retail businesses.

Other Concerns and Observations

The public holiday pay entitlements enacted through Bill 148 were poorly conceived and drafted and overrewarded/under-rewarded some employees relative to others. For example, a person who had worked two four-hour shifts in the pay period would receive half the holiday pay entitlement of a person who worked one eight-hour shift. The provisions were also exceedingly difficult to apply fairly in environments in which commission is paid, which is a common form of compensation in retail settings. In consequence, the previous government made a last-minute reversion to the pre-Bill 148 rules in its final week in May 2018. While this helped address the immediate

concerns, the relief only applies until the end of 2019, creating uncertainty for employers and payroll system providers.

The majority of retail settings are non-unionized and hence subject to the *ESA*. That said, we do have a significant unionized workforce, especially in our grocery members, some of whom are among Ontario's biggest private sector employers. Our abiding impression of the *LRA*-related provisions in Bill 148 was of an attempt to place a thumb on the scale. Many of the changes taken in isolation are manageable but the compounding effects of the *LRA* changes are challenging. Taken together, the 20% employee list, first contract arbitration and the ability to combine bargaining units tilt the balance toward organized labour.

As noted earlier, there are aspects of Bill 148 that RCC can support. The increase in annual vacation to three weeks seeks to promote better work-life balance, is already the norm in many other provinces and was, in fact, already offered by many of our members on a national basis. We can also understand the rationale for banning any requirement for medical notes, in that visits to doctors' offices can add to the burden on the health care system. But again, this move has to be viewed against the backdrop of up to 10 PEL days annually, making the process of determining whether leave has been taken appropriately a difficult one. RCC also supports the extension of the "three-hour rule" to shift cancellations on less than 48-hours notice. Employees have the right to be compensated once their time is committed, whether or not their shifts proceed. While each of these changes may be virtuous in themselves, they all add to employer costs and/or compliance challenges, against the backdrop of cost increases imposed by the minimum wage hike and the other changes in Bill 148, most notably pay-equity and paid PELs.

In short then, RCC believes that Bill 148 was far too sweeping in its provisions, imposing a great many additional costs on business within a very short period. Our members also find contradictory provisions within the Bill and a number that were either badly drafted or on which there is remaining uncertainty. Rather than attempting to solve these many problems piece-by-piece, RCC believes that the best course of action would be to repeal Bill 148 and then proceed to address individual problems where necessary, which was the very advice that we provided to the *Changing Workplaces Review Panel* in 2015 and again in 2016.

Pay Transparency Act

Just prior to the last election, the previous government enacted Bill 3, which takes effect beginning on January 1, 2019. The *Pay Transparency Act* will require the inclusion of a compensation rate or range in all publicly-advertised job postings and will preclude interviewers from asking a job candidate about past compensation. In addition, the *Act* will impose an obligation to track and report compensation gaps based on gender and diversity characteristics.

Bill 3 created particular challenges for our members with its salary posting requirement and tracking provisions. Again, the legislation seems informed by the notion of a single job-rate or range, which might be the norm in the public service or in highly-structured unionized workplaces but has little relevance to retail. Retail uses a combination of wages, benefits and in many cases, commission to attract job candidates. We are also a fast-track, meritocratic environment, where today's recruit could be next year's supervisor and a manager within a year or two thereafter. It is not possible to reduce all of this to a single number in a job advertisement and any attempt to do so is unlikely to give candidates a fair basis for comparison.

The (presumably) unintended consequences will include increased frequency of job-hopping, potential friction as between employees within a particular company, and inevitable pressure on competing employers to bid-up their salary numbers in order to attract talent, even at the expense of other offerings like benefits, commissions and opportunities for promotion. Our strongly-held belief is that compensation is rightly a matter for negotiation between an employer and a candidate and should be flexible enough to attract candidates with wide ranges of experience and hence compensation outcomes.

Our members fully support the *Pay Equity Act* and the *Ontario Human Rights Code*. These statutes prohibit discrimination in hiring and pay based on gender and diversity characteristics, so we find the additional requirements of the *Pay Transparency Act* to be both burdensome and intrusive.

Given the breadth of the changes enacted through Bill 148 and via the *Pay Transparency Act*, this note, even at seven pages, touches only lightly on our main concerns. RCC would welcome the opportunity for a detailed discussion of these issues directly with

you and your staff. To that end, please contact me at djbrisebois@retailcouncil.org or by telephone at (416) 467-3757.

Regards,



Diane J. Brisebois
President & CEO

¹ Adjusted: Statistics Canada. Table 14-10-0355-01 Employment by industry, monthly, seasonally adjusted and unadjusted, and trend-cycle

Unadjusted: Statistics Canada. Table 14-10-0022-01 Labour force characteristics by industry, monthly, unadjusted for seasonality