

LABOUR ISSUES COORDINATING COMMITTEE

CHANGING WORKPLACES REVIEW

The Labour Issues Coordinating Committee (LICC) is a coalition of agricultural commodity and farm organizations representing the interests of Ontario farm employers. It was formed in 1991 to develop consensus in the farm employer community on employment and labour-related issues, and to represent their collective positions to government.

Farming is the management of biological processes/living organisms (mainly but not exclusively plants and animals) that are subject to climatic and environmental conditions. It requires a very flexible management approach and almost exclusively are family oriented businesses. Thousands of agriculture products, with only 6 exceptions, compete in a global market. It is a mature industry that requires high levels of capital, is high risk and low return. It has a large number of independent operations (57,000 farmers in Ontario, of which roughly 20,000 employ roughly 85,000 workers) spread throughout rural Ontario producing a wide array of food, ornamental and industrial products. Arguably it is Ontario's largest domestically owned business. Even though it is a highly seasonal industry roughly 60% of the workforce is year round. Some commodities lend themselves to mechanization (corn, wheat, beans, dairy, beef, swine) while others require the gentle touch of the human hand and a discerning mind (mushrooms, greenhouse flowers and vegetables and field fruit and vegetable). It has always been a challenge to find sufficient workers in rural Ontario during the peak of harvest. As a result, horticultural crops have depended on the temporary foreign workers found in the Seasonal Agricultural Worker Program since the mid '60s. In recent years Ontario has seen close to 18,000 SAWP workers and roughly another 2,500 through other temporary foreign worker programs.

Employment Standards Act

Most if not all of our worker protection legislation had their origins rooted in the industrial and manufacturing industries. The nature of work in the manufacturing setting is very different to the nature of work in farming. Since the inception of the Employment Standards Act, agriculture has functioned under a number of exemptions and special rules as do a number of other jurisdictions in both Canada and the United States. This begs the question what circumstances lead to those exemptions and special rules? Perhaps more importantly, have the conditions that lead to the exemptions and special rules changed over time. The exemptions and special rules are tied to:

1. The seasonal nature of farming
2. The highly perishable nature of farm production
3. The historic shortage of workers
4. The importance to society of the sovereignty of our food supply.

Farm workers are divided into 4 job categories (primary production; near farming; harvester (fruit, vegetable, tobacco); landscape gardeners). Each category has a different range of covered, not covered or special rules relative to each of the standards. It is not my intention to debate each standard for each category, but rather provide a range of rationale for the exemptions or special rules:

- The bulk of commercial farming runs from the Bruce Peninsula to the Niagara peninsula to Windsor.
- The frost free period in this area runs roughly from May 15 to October 15.
- Spring work (planting, fertilizer, pest control and pruning) is clearly the most critical time in farming. Every year the climate and related soil and crop conditions offer a very short window of opportunity to start the crop for optimum production. It does not lend itself to a standard 8 hour day. Sometimes the days are 4 hours long, some days are 14 or 16 hour days. The science of agriculture can clearly identify the losses by not hitting the optimum time periods/conditions.
- Frequently farming requires a large number of workers for a relatively short period of time. Given the historic shortage of farm workers (family members as well as hired) paid workers are engaged at critical times.
- Harvest is the second most critical time in farming. Harvest begins when the fruit or vegetable being picked reaches a specific physiological condition which is often dictated by the purchaser of farm products. The fewer the number of buyers means a more uniform delivery of product is required and the timeliness to market can impact pricing. Many factors contribute (heat, moisture, sunlight, and management practices) to the right time to begin harvest, but it is impossible to dictate/define a specific schedule. Similarly the length of harvest does vary due to number climatic or environmental conditions.
- Most of the manufacturing characteristics that lead to the existing employment standards are not present in farming (for example, a standard work day (8 hours) or year (often defined as being 2000 hours). Many farm workers can achieve 2,000 hours of work in a 6-8 month time period and are left with a 4-6 month time period of no or short days of work.

The current exemptions and special rules for each of the four job categories reflect the differences between the farm workplace and the manufacturing workplace. Regulation 285 has survived the test of time, suggesting it has the right balance between the interest of workers and interest of the employer. Both workers and employers can point to some rough justice on any

given job category or standard, but generally speaking the exemptions and special rules do work to the advantage of both the employer and the worker. For example, minimum wage does not apply to the primary production job category. Why, because the cost of living that is a driving force to setting the wage is driven by costs found in urban environments not rural environments. Why is this not abusive to workers? Employers must compete in a local labour market and wage levels often dictate access to workers. It is worth noting that access to reliable workers in rural Ontario for over 50 years is non-existent. Farmers pay a significant premium to access workers through the Seasonal Agricultural Workers Program (one of the 4 Temporary Foreign Workers Program available to farmers).

What has changed in the rural workplaces?

- Free Trade agreements have brought a whole range of farm products from all over the world at amazing low prices. Lowest cost producer from around the world gets the sale regardless of Ontario social standards. Ontario society enjoys the benefit of global market prices. It does not appear that Ontario society is willing to pay for the social standards it espouses and demands of its farmers. It is worth noting that Ontario society is not required to, because of international trade agreements. The result leads to an extremely fragile farm economy. Are we legislating our farmers out of business?
- Provincial governments have focused on the top 9-10 urban centers as the economic engine for the province. As a result the economic activity in rural Ontario has been undervalued and is not well understood.
- A dramatic shift in the rural demographics, including a worker migration from rural to urban workplaces and an aging employer base.
- Traditional employer-employee relationships defined by regulation are no longer economically sustainable, leading to fee for service contracts and an increase in temporary employment agencies. Labour as an input must be extremely strategic.
- Long term worker shortages continues to lead to greater use of temporary foreign worker programs
- Pro-worker focus on legislation (minimum wage and pension plan) put greater financial burdens on employers.

The result is dramatic business consolidation/economic scale of business, increased fragility of financial viability, increased level of performance from workers and fewer workers.

Labour Relations Act

With the exception of a year and a half in the early 90's, agriculture has been exempt from the Labour Relations Act. It should be noted that the penetration of organized labour in agriculture across all jurisdiction in North America is extremely shallow. Ontario's Labour Relations Act, like most other jurisdictions in Canada and the United States uses the Wagner Model, which was

developed during the Second World War in the manufacturing sector. It is perhaps the most confrontational approach to collective bargaining and results in the greatest amount of lost time. Labour Relations is about the balance of power between the direction of employers and the interest of workers. The exemption of agriculture is due to the seasonal nature of highly perishable products leading to a swing in the balance of power in favour of the worker. Following a Supreme Court of Canada ruling in the early '00s, Ontario decided to follow the structure found in the Charter of Rights and Freedoms and a model of collective bargaining championed by the International Labour Organization by creating the Agricultural Employees Protection Act 2002. To my knowledge, no workers have engaged a union to represent their interests.

Q 1: How has work changed for you?

Free Trade coupled with pro-worker legislation has put greater financial burden on employers. As a result, demands for increased worker performance with strategic use of workers (fewer) is common. The use of Temporary Employment Agencies has increased. Attracting and retaining workers have lead many farms into producing a range of crops with a range of harvest dates as a means of keeping a workforce over a longer period of time. The increased use of temporary foreign workers in a broader range of commodities is common.

Q 2: What type of workplace changes do we need to both improve economic security for workers, especially vulnerable workers, and to succeed and prosper in the 21st century?

Improved economic security for workers is directly tied to financial stability and success of employers. Legislation should reflect the important ties between employer and workers. The question should not focus on just vulnerable workers but also vulnerable employers.

If increased economic security for workers is important to Ontario society, then all of Ontario society should fund that goal. Government has the ability to determine where the wealth is and the ability to tax that wealth.

If our businesses are to be competitive in a global market, then our governments must be competitive in their legislation and regulatory approach.

Agriculture is a mature industry that competes in a global market. It is a business with 20,000 small or medium businesses in rural Ontario. Employers who are financially viable will hire more workers. Recent pro-worker legislation has often meant putting greater financial burden on employers which reduces their ability to hire or support workers.

Q 3: As workplaces change, new types of employment relationships emerge, and if the long term decline in union representation continues, are new models of worker representation, including potentially other forms of union representation, needed beyond what is currently provided in the LRA?

Seeking the Right Balance

It has been suggested that there are three key objectives in the employment relationship:

Efficiency: Economic performance (competitiveness, productivity, quality)

Equity: Fair standards regarding outcomes and treatment

Voice: The opportunity for meaningful input into decisions affecting the workplace

It is important to understand why the traditional union representation is declining. This is especially true in the private sector that competes in a global market. Public sectors do have competitors in other jurisdictions, but not within the jurisdiction the same way a private business does.

The current collective bargaining regime is the most confrontational in the world and leads to the most lost time. Outside of Canada and the USA few countries support such a confrontational approach that ultimately adds costs to doing business. Free Trade has an ability to drive out costs that do not carry sufficient benefit.

Agriculture has an alternative model in the Agricultural Employees Protection Act.

Unfortunately there has been little interest in using the model.

Q 4: Are these the key objectives or are there others? How do we balance these objectives or others where they may conflict? What are the goals and values regarding work that should guide reform of employment and labour laws? What should the goals of this review be?

Clearly these are three key objectives. With a federal government pressing free trade and fewer regulations and a provincial government creating more and restrictive regulations it is hard to imagine businesses will be successful and expand.

Pitting the interest of employers against those of the worker creates a difficult workplace. Employers have been forced to change the traditional relationships because of economic pressures. Legislation should find ways to make the relationship more symbiotic and not more competitive. Ultimately there are no “bad” jobs. Rather than driving poor paying jobs out of the jurisdiction by legislative burdens, why not encourage employment by providing support to poorly paid workers.

Ontario has some of the best natural resources in the world to farm, including a high level of skill by farm practitioners. Why drive farm production out of the province by putting legislative burdens in place that our competitors are not obligated to meet. When you buy the cheapest

items in a grocery store, you are supporting the standards of a developing nations or a developed nation with less legislated economic burden.

Q5: In light of the changes in workplaces, how do you feel about the employment standards that are currently in the ESA? Can you recommend any changes to better protect workers? So the particular concerns of part-time, casual and temporary workers need to be addressed, and if so how?

This study has been triggered by the Law Commission of Ontario's look at "vulnerable workers". The report is extremely biased in favour of the new worker. Where is the employer perspective? Also the report is highly critical of the Ministry of Labour's administration of the Act. That criticism does not acknowledge the challenge of balancing the interests of both the employer and the worker. In short, the Employment Standards Act, is similar to most of our competitors and is enforced at a reasonable level.

The ESA is worker protection and not business protection. The move to "fee for service contracts" shifts a number of people who were employees into independent self-employed businessman. The result is twofold, first they are no longer workers and therefore not covered by the ESA and second they become independent business people where there are few if any protections.

Part time, casual and temporary jobs is another reflection of how fragile the business economy has become. It is not an anti-worker action but rather a desperate attempt to remain competitive.

If the concerns of the worker are truly the interest, the best way to support them, regardless of the type of relationship, create an environment where our businesses thrive. If that requires some support for poorly paid workers, then so be it, as long as all of society pays and not just the hard press employer.

Q6: Are changes needed to support businesses in the modern economy? How could the Act be simplified while remaining far and comprehensive? Are there standards in the ESA that you find to complex? If so, what are they and how could they be simplified?

Yes, changes are needed to support businesses in the modern economy. It should probably be a separate but complimentary Act to ESA. The ESA does indeed serve a purpose but every solution should not add to the burden of the employer. Few employers enjoy the benefits outlined in the Act. Few independent business people work 40 hour weeks with time and a half pay for hours above the standard.

The “one size fits all” standard is a concern. Regulation 285 with its exemptions and special rules exist for a reason. Regulation 285 has been in place for many years and has done so because of the balance in interest between employer and worker.

Enforcement of the Act and related costs is a concern. Unrelated third party anonymous complaints are problematic. It can be easy retribution towards an employer for a real or perceived slight by a disgruntled worker.

Q7: Should this leave be revised in any way? Should there be a number of job-protected sick days and personal emergency days for every employee? Are there other types of leaves that are not addressed that should be?

No the leave should not be revised.

The issue is not with the need for personal leave, but with the potential for abuse of leaves. If 10 days are identified in a year, does that get interpreted as an automatic 10 days off at the worker’s discretion? Does it become an additional 10 days of vacation? Given the unpredictability of the farm workplace, employers should be able to ask for validation of the request and an ability to deny requests that are suspect. Are the days spread over the year or allocated at the beginning of the year? Does a worker who has 6 months’ work get 10 days off? Can a worker who has worked 30 days automatically get 10 days off?

10 days off for every worker in the province is a huge amount of lost time. A large employer can more easily manage a worker’s personal day off than a small employer.

Currently, many employers are open to compassionate days off or part days off in slower times of the year and when personal circumstances support the request. The age and stage of life of the worker has a huge impact on the need for personal days off.

Q8: In the context of the changing nature of employment, what do you think about who is and is not covered by the ESA? What specific changes would you like to see? Are there changes to definitions of employees and employers or to existing exclusions and exemptions that should be considered? Are there new exemptions that should be considered?

The nature of employment is changing because of economic necessity, it is not a plot to under mind hired people who work. Most employers in farming work shoulder to shoulder with their hired help. Chances are the employer puts in longer days, do the higher risk jobs, work statutory holidays and so on. To expand the ESA to cover people who do work outside of the current definitions will include most employers and self-employed workers. How would government support self-employed and employers so they can enjoy the benefits under the Act?

The risk of forcing businesses that hire fee for service contracts or self-employed workers is to put financial burden on businesses that probably cannot afford that level of support. Clearly if this is a goal of Ontario society, then all of society should provide the financial support to implement the benefits.

Free Trade has changed the work traditions. Free trade does come with some good opportunities, but it also comes with some financial realities. Can we afford the old standards in the future? Is the traditional way of funding these standards the right way for the future? Do countries servicing our markets have similar standards? What would standards look like in a flat or declining economy? How do we shift the wealth from successful businesses to other members of society?

Q9: Are there specific employment relationships (e.g. those arising from franchising or subcontracting or agencies) that may require special attention in the ESA?

Franchising is extremely rare in farming. Subcontracting and/or agencies are becoming more common as the economy becomes more fragile and the regulatory requirements become more complex. Some professional services (veterinarian) or skilled trades (engine mechanic) have always been hired in. Labour legislation is large and complex, so it can be more cost effective and risk adverse to hire a specific task or group of tasks (recruitment, payroll, orientation and now occasionally management of workers).

Once you move away from the traditional employer worker relationship the lines become much harder to draw when outsourcing a set of skills.

Q10: Do the current enforcement provisions of the Act work well? In your experience, what problems if any, exist with the current system, and what changes, if any, should be made? In your experience, what changes could help increase compliance with the ESA?

The current provisions do work well.

The Law Commission report lacked balance and reflected the interest of worker groups. To read the report you would think all workers are abused, all employers were abusive and the Ministry of Labour was totally incompetent and everyone in society was stealing workers lunch.

Educate, inform, advice followed by progressively stronger penalties for repeat offenders of well balance regulations lead to willing compliance and reasonable enforcement costs. Many Acts have and outreach structure (health and safety organizations) that is separate and independent to enforcement. Does ESA have a comparable support structure? 1 800 numbers and complex websites are only so effective.

Truly understanding the underlying cause for non-compliance is critical to any long term effective enforcement. What has happened to trigger the change in the employer worker relationship? Free trade has forced most primary industries to extremely fine economic margins. Labour is an input cost in much the same way raw materials, water, energy etc. are, so cost benefit decisions apply to all input costs. There have been many mergers and consolidations leading to a consolidation of wealth. Most businesses that operate on large margins in Ontario are not mature industries that rely on manual labour. Most businesses that are very mature industries that do rely on manual labour are extremely fragile. Government cannot legislate wealth. Governments can redistribute wealth. Creating regulations that add costs to doing businesses just drives business out of the province.

Enforcement of any law/regulation often is related to how the different interests (employer, worker, subcontractor, agency etc.) are balanced. Good regulations reflect the interests of all stakeholders and often lead to a willing compliance by all stakeholders. Regulations that are biased in favour towards a specific stakeholder while penalizing other stakeholders often lead to a “catch me if you can” attitude. Regulations that do not balance the interests of all stakeholder tend to have a short life span before they are modified or repealed.

Many regulations use a systematic policing approach (Highway Traffic Act) that use a fine writing deterrent. Is that approach really effective in all regulatory environments? Probably not, when you have multiple worksites spread all over the province.

Q11: In the context of the changing nature of employment , what do you think about who is and is not covered by the LRA? What specific changes would you like to see?

Government tends to be silent on issues that are unclear or do not have strong support. Exemptions are not by happenstance but clear decisive decisions. Why are some groups exempt? Have the circumstances that lead to the exemptions changed?

Is there evidence that workplaces under collective agreements fare better than those that are not. Since Free Trade agreements dominated our economy many of our unionized manufacturing businesses have closed.

The private sector Free Trade economy has seen a steady decline in the interest in the collective bargaining regime found in the LRA. Why? Trade unions appear to be more popular in a booming economy and less popular in flat or declining economies.

Q12: In the context of changing workplaces, are changes required to the manner in which workers choose union representation under the LRA? Are changes needed in the way that

bargaining units are defined, both at the time of certification and afterwards? Are broader bargaining structures required either generally or for certain industries? Are changes needed in regard to protecting bargaining rights?

The LRA is based on a highly confrontational approach (the USA Wagner Act) that leads to a lot of lost time compared to other models of collective bargaining. The International Labour Organization does not recommend the Wagner model and the duty to bargain. Exclusive representation based on a democratic approach really suggests that workers with minority opinions have little input. Perhaps it is time that Ontario provides more flexibility and a less confrontational method to collective bargaining.

The Canadian Charter of Rights and Freedoms provides sufficient protection through the rights of association. It does not define a specific model or regime and allows for options.

Q 13: Are changes required to the LRA with regard to the ground rules for collective bargaining? Are new tools needed in the LRA with respect to industrial disputes or to deal with protracted labour disputes?

In workplaces that are not under a collective agreement you do find many collaborative or cooperative approaches to resolving issues. Given the fragile economy in most industries found under Free Trade, a flexible management approach is often required.

The current tools of grievances within the collective agreement and strikes/lockouts between collective agreements are extremely time consuming, restrictive and cost prohibited.

An open labour market does put pressure on employers to manage in a manner to attract workers. Given the number of Temporary Foreign Workers in Ontario it suggests that workers have a number of options for work. Wage levels may be disappointing, but that is a reflection of the value of the product produced (until you hit the minimum wage level) which is directly tied to global markets.

People or institutions that suggest employers should just double their wages appear to be too far removed from the Free Trade economy to understand why they are moving away from the traditional employer worker relationship.

Q14: In light of the changing workplace and the needs of workers and employers in the modern economy, are changes needed regarding the unfair labour practices set out in the LRA, or to the OLRB's power to provide remedies in response to unfair labour practices?

The unfair labour practices are sufficient. The core problem is a fragile economy so tightening or expanding unfair labour practices do not address the core problem and are likely to aggravate the situation.

Q15: Are there changes that could be made to the LRA that would enable the parties to deal with the challenges of the modern economy?

Move to a more flexible and less confrontational approach. Stability in the market place would remove the need for changes to the LRA.

Q16: Are there any other issues related to this topic that you feel need to be addressed? Are there additional changes, falling within the mandate of the this review, that should be considered?

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