LABOUR ISSUES COORDINATING COMMITTEE

CHANGING WORKPLACES REVIEW

REACTION TO THE INTERIM REPORT

October 11, 2016

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) that are subject to climatic and environmental conditions. It requires a very flexible management approach and is largely a family oriented business. 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 provides low returns. 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. Agriculture produces 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.

GENERAL OVERVIEW OF THE INTERIM REPORT

The report is extensive, detailed, well written and generally provides the perspective of all stakeholders (workers, employers, government). Although it does not prioritize the issues, some issues are further developed than others. There are some aspects of the business workplace that could be more fully developed.

The potential of a new business starting today being in existence in five years is extremely low. The number of small and medium businesses is increasing. Someone who hires their first worker is overwhelmed with the number and complexity of worker protections and related legislation. The number of non-labour Acts and Regulations affecting any single business in any sector is mind-boggling. It is only through industry friendly regulations that a single employer could hope to stay current and in compliance.

There are few topics in business that are as polarizing as labour. Policy options tend to be framed in a pro worker or pro business/employer position. Historically, the Rae government dramatically shifted labour policy based on ideological beliefs which then shifted to the Harris ideology a few years later. Dramatic swings in policy tend not to be sustainable long term legislation. At the end of the debate, employers need workers and workers need employers. Many of the changes in the modern workplace reflect the changes in trade and immigration policies that have altered the economic realities for businesses. The demographics of current society have changed significantly since the origins of the Acts under review. Few if any jurisdiction provide greater protections for its workers than Ontario.

The guiding principles focus on the improvement of security and opportunity for those made vulnerable by the structural economic pressures and changes. The focus is on the individual worker, but could be just as easily applied to the individual business. In many cases the vulnerability of the worker is mirrored by the vulnerability of the business. It is the vulnerability of the business that is driving the changes in the workplace for the worker.

Worker advocates often demand more regulatory structures accompanied by aggressive enforcement. This often leads to fewer employment possibilities in a higher risk economic environment. There is no obvious easy solution, but policies that lead to job growth offer more potential than policies that lead to a retraction in the number of jobs. Is a “bad” job better than “no” job? If society wants a specific standard of living then all of society should contribute. Labour policy should not be done in isolation of other policies. Perhaps labour policy that supports trade and immigration may need to be tied to welfare and other support programs. High labour costs and high energy costs put Ontario businesses in a difficult economic environment. No jurisdiction is an island. Not only must our businesses be competitive, but our governments must be competitive.

REACTION TO SPECIFIC ISSUES—LABOUR RELATIONS ACT

Pages 55 to 63 offer a good history of the agricultural industry’s experiences related to individual and collective rights. It also outlines the rationale for the exemption of the Labour Relations Act. As suggested in the Guidelines it is related to the imbalance of power inherent in the employer worker relationship. The collective interests of farm workers are provided by the Agricultural Employee Protection Act (AEPA). The AEPA duplicate the rights of association found in

Section 2 (d) of the Canadian Charter of Rights and Freedoms. As stated in the Supreme Court of Canada rulings (Dunmore and Fraser) it does not guarantee a specific model. The Wagner model is so confrontational that it leads to more lost time than any other model. Lost time is closely related to lost money for both workers and employers. The Wagner model is so confrontational that the International Labour Organization (ILO) of the United Nations does not use or recommend the Wagner Model. The Interim Report is silent on the ILO and the model they support. The Interim Report is lacking the benefit of other models that do not focus on the principles found in the Wagner model (a duty to bargain, exclusive representation, and dispute resolution mechanisms in and out of collective agreements). Given the long term shortage of workers in agriculture does a more cooperative approach offer greater potential?

The agricultural sector in USA and Canadian jurisdictions that use the Wagner Model sees very little penetration into the industry. The report suggests Collective Agreements cover less than 15% of the private sector workforce. It is unlikely there would be 1% of farm workers covered by the Wagner Model of collective agreements (where allowed). Many agreements are not grass root (farm worker) driven but often top down and tied to food processors that are unionized. The observation alone is significant. The rationale is not obvious, but is probably tied to the industry characteristics that distinguish it from other sectors. Those characteristics include seasonality, relatively young, relatively migrant, relatively small workforce and a relatively older, relatively stationary employer with a strong family orientation. Also, the Wagner Model is highly democratic which suggest minority interests may not be addressed.

When less than 1% of farm workers are covered by collective agreements in jurisdictions that use the Wagner Model, it really begs the question why do worker advocates or government suggest that the Wagner Model is a solution to worker vulnerability. There clearly is a need for alternatives to the Wagner Model. A "worker consultative committee" as defined later in the Interim Report that could work cooperatively with employers holds a lot of potential in agriculture and probably other sectors. Similarly legislation that balances the needs of all stakeholders tends to endure the test of time. The AEPA does provide for a more cooperative approach while complying with the Charter of Rights. <u>The "status quo" option holds the most potential for the farming interests.</u>

The Interim Report comments on the distinction between "agriculture" and "horticulture". When pieces of legislation last as long as the Labour Relations Act, I suspect corporate memory is lost from both government and those impacted by the legislation. There is no consistent definition of farming as you move from one Act to another. The definition of "agriculture" found in the LRA is duplicated in the AEPA. Other Acts like the ESA and specifically Regulation 285 uses and partially defines the term horticulture. I suspect the distinction reflects the consultation that took place for the initial exemption and the timing associated with subsequent exemptions over time. Within the farm industry "horticulture" has a couple of distinctions. First is the difference

between “edible” and “ornamental”. Edible is most commonly fruits and vegetables that can be consumed. Ornamental can be fruits and vegetables that are not consumed; the production of nursery stock (shrubs and trees) used in the landscape industry and the often related sod or lawn production. Second is a distinction between the production and the related services such as a landscape gardener. Tobacco and mushrooms are often shared between the two terms. Scientific definitions often conflict with common use of terms (tomatoes are a fruit but called a vegetable). Agriculture is a broader more inclusive term and suggests that horticulture in its various forms is a subset of agriculture.

Agriculture has little or no experiences with the other aspects of the Labour Relations Act identified in the Interim Report. The farming industry would support anything that improves our competitiveness in the global market. Farming is so short of workers that we have been using Temporary Foreign Workers for over 50 years in the Seasonal Agricultural Workers Program (SAWP). SAWP workers enjoy many benefits that other workers do not. Those benefits are negotiated annually with the host countries. Clearly it is not a “collective agreement” as defined by the LRA. However, it is an agreement that deals with terms and conditions of employment that offers workers and employers a broad range of protections.

REACTION TO SPECIFIC ISSUES—EMPLOYMENT STANDARDS ACT

The Interim Report does a very good job of identifying a broad range of issues and offers some interesting options. Given the 1969 origins, it suggests that corporate memory for government, employers, workers and other stakeholders has gone. The section dealing on administration and enforcement could be the most critical aspect of the review.

The Ontario/Canadian economy has changed because of our Free Trade Agreements, demographics, immigration, technology and so on. Trade is about goods and services only, so our competitors are not obligated to meet our society’s standards. The key driving force behind the grocery business is price. Ontario farmers want to produce the bulk of the food people in Ontario consume. We have the natural resources and the people skills to deliver a broad array of products. Labour standards as well as many others (food safety, environmental, energy) often lead to legislated costs not carried by our developing country competitors. New terms like “dependant contractor” and “fissuring” are an effort to define approaches by businesses searching for ways to remain economically viable. All developed nations are wrestling with the challenges and wanting to avoid the “race to the bottom” philosophy. Efforts to protect vulnerable workers and manage precarious jobs are often seen as an attempt to legislate the so called “bad” jobs out of existence. Unfortunately this approach does not recognize the vulnerable employer in a precarious economy. Creating higher standards that dictate legislated costs makes the employer more vulnerable and the economy more precarious. The often “them against us” mentality does not serve society well. It has a chilling effect on job creation and employer worker relationships. Updating aging legislation is an extremely difficult balancing

act, because to be effective it must also lessen the vulnerability of the employer and the precariousness of the economy. The Advisors recognize this challenge when they indicated that it is not in the public interest to recommend a wholesale elimination of all the exemptions.

It is worth noting the farming has a wide range of exemptions and special rules that have existed since the ESA began. It is also worth noting that most competing jurisdictions have similar exemptions and special rules. Given the extreme shortage of reliable farm workers and the importance of sovereignty of our food supply any adjustments should be evidence based and not broad based ideology or special interest group/political whim. The recommendation to create a process to review long standing exemptions is reasonable. Have the conditions that lead to exemptions and special rules changed over time? Does the necessary balance between business and worker protection and broader society interests dictate keeping the time proven exemptions and special rules?

The growth of unpaid interns is a concern. If the intern does indeed receive hands on skills that will allow progression to a paid position there is value. Unending, unpaid labour with little or no chance of progressing to a paid position has few if any virtues.

Scheduling is a challenging issue, especially in farming. Any direction on scheduling should be evidence based and sector specific. Poor organization and planning skills that trigger scheduling concerns is very different to managing the vagaries of climate, biological production needs, market demands and worker shortages.

Personal Emergency Leaves—10 days/year. The greater than 50 workers clause addresses many concerns from the employer perspective.

- If you have 5 workers and one takes an emergency leave, you have lost 20 percent of your workforce. When you have 50 workers and one takes an emergency leave you have lost 2% of your workforce. The ability to cover the loss of a worker is easier with a larger workforce.
- When is an emergency not an emergency? When does the line between an emergency leave get blurred with vacation or extended weekend. Do workers view the Leave as an automatic additional 10 days off work every year? Distinguishing the rationale between the days would probably limit the personal days off and tie them to the assigned purpose.
- Are the days tied to full time regular employment (8 hours per day, 5 days a week, 50 weeks a year) and then pro-rated for temporary or part-time workers?

Given the seasonal nature of farming, the perishable nature of farm products and the long term shortage of reliable workers an additional legislated 10 days off would have a direct impact on cost/competitiveness. Most employers are as flexible as circumstances permit. Employers that might abuse the circumstances find that the competiveness in the labour market often favours workers as they evaluate their employer options.

Part time, temporary, casual or limited time contract wages compared to full time workers wages doing comparable jobs. The competitiveness within the labour market does impact wages as much as the competitiveness in the market place will permit. When your competition is global as opposed to across the street your ability to maintain specific wages is constantly in a state of flex. Many employers will want to maintain a low base for wages and provide bonus or incentive (pay for performance) when market places provide the opportunity. There is no comfort in a global market and that is seen in all aspects of the business including wages. Farming is a mature industry that is constantly short of workers and operates in a global market. Legislating parody between short term and full term worker's wages will reduce the number of jobs available. You will end up with better wages for those that are working and no wages for those that are not working, which then challenges our welfare systems.

The "Just Cause" section is perplexing. It seems to focus on a specific small group of workers that have more protections than most other workers. How valid a concern is it when your sector has had a worker shortage for well over 50 years and the worker group eluded to has more protections than all other workers in farming? Part of the section refers to Temporary Foreign Workers in Agriculture. Ontario has over 100,000 Temporary Foreign Workers with roughly 20,000 of those in agriculture. There are two paragraphs on page 234 that appear to reflect the rhetoric heard from labour activists.

- Ontario farmers can access Temporary Foreign Workers from 4 programs: i) Seasonal Agricultural Workers Program (SAWP); ii) Agricultural Stream; iii) Low Skill and iv) High Skill. By far the most popular program is the SAWP program with just below 18,000 workers in 2015. SAWP Workers come from Mexico and the Caribbean under an extensive contract that is negotiated each year. SAWP contracts have existed for 50 years. Clearly it is not a "collective agreement" but it does cover a broad range of terms and conditions of employment. It does provide protections for both employers and workers.
- Workers from Viet Nam are mentioned, but they would not be under the SAWP program
- TFWP are administered by three departments of the federal government, i) Employment Workforce Development and Labour, ii) Immigration, Citizenship and Refugees, and iii) Canadian Border Security Agency. The regulation that ties a worker to a specific employer is government policy and any vulnerability caused by the policy must be balanced against other policy issues. Should the creation of jobs take priority over the protection of vulnerable workers? Should the vulnerability of workers always take priority over job creation? Is there a way to accomplish both job creation and worker protection? Ultimately employers must comply with all legislation from all levels of government. Employers should not be used as leverage for ideological disagreements between different levels of government. Labour legislation should not be created in isolation of other policy issues. The federal government demands that Ontario farmers

must hire a Canadian first, if possible, before gaining access to the SAWP program. Is that a reasonable enough request to tie workers to a single employer? Are there other mechanisms to protect workers other than freedom in the labour market? Do the terms and conditions of employment in the SAWP contract provide those protections?

- The SAWP is a premium worker program. It is a premium because the employer not only pays the going wage as determined by the federal government, but must also pay transportation and housing costs, which is not paid to Canadian resident workers. The initial recruitment is by the host country. After the first year there is a "named" program where both the employer and worker can/must request to be paired in the next work cycle. There is a dispute settling structure where either the employer or the worker can go to the workers Consulate, who acts as a mediator. If the working relationship comes to an end (employer dismisses the worker or the worker chooses to quit), the consulate has the ability to transfer (relocate) the worker to another farm in the program.
- All SAWP visas are dated December 15, so workers that complete their contract or are released early ultimately can stay in the Country until December 15. It must be noted that the SAWP contract cannot extend beyond 8 months. It should also be noted that the contract requires the worker to return home upon completion of the contract. The large majority of workers want to return to their homes and family anyway. Ontarian's should not assume Temporary Foreign Workers want to become Canadian/Ontario citizens/residents. They can't randomly work for other employers (federal policy), so they often make the economic decision (where would they live and how would they move around) to return home. Employers do not have the ability to "deport" workers. Employers have had such a worker shortage for so long and the application process is so onerous, you really must question would an employer release a worker on a whim? Where does that replacement worker come from and what must you do to find them? There is no incentive to release workers and lots of incentive to manage workers to be as productive as possible.
- "Threatening workers" seems to make good media headlines. So much of media is about tragedy that reflects a single perspective that is often embellished. Are workers afraid of being sent home? Probably, at first, but once they adjust to the Ontario workplace culture, probably not. A worker's real life experiences is probably from their home country's workplace environment. For example, what is the workplace culture in Mexico? Are they protected by the same or like (ESA) legislation? Are they told to go to the government if an employer abuses their rights? What is the workplace in Mexico really like? An Ontario employer must and does manage a host of cultural issues. Ontario agriculture works with two Universities (Guelph and York) that promote the Hofstede Centre awareness and managing practices of various cultures. There are two huge incentive for employers to have workers adapt to the Ontario workplace culture, i) production efficiency and to a lesser extent, ii) legislative obligation that includes significant reprisal regulations.

- Section X (10) of the SAWP contracts define the obligations around the "early cessation of employment". It requires sufficient reason to prematurely cease the workers employment. Why would the Interim report identify a concern with a specific group of workers, where those workers have more protections than any other Temporary Foreign Worker and most Canadian resident workers? Policy should be evidence based and not on claims by special interest groups.
- The Interim Report includes a worker activist claim of poor health protection with injured workers forced to go home because of their injuries without appropriate care. Where is the evidence? Are there other perspectives? Why does the report not include that SAWP workers are covered 24 hours a day by Workplace Safety Insurance Board and the Ontario Health Insurance Plan the moment they step of the plane. Mexican workers have additional coverage under a Great-West Life Assurance plan negotiated by their government. The protections are in the contract and the worker's consulates are part of the administration of the contract. From the employer perspective, the federal government does an "integrity" audit, which includes compliance of all federal and provincial regulations (including ESA), before the contract is approved.

Temporary Foreign Worker Programs are complex and not all programs are the same. Most farm workers are covered by the SAWP program, so the comments reflect the SAWP program. The comments are about farm workers and not conditions found in other sectors or other programs. The report does not appear to address concerns of other programs in other sectors. This is perplexing as there are roughly 80,000 workers in other sectors that <u>are not</u> covered by the protections found in the SAWP contract. Policy should be evidence based and not on the desires of special interest groups. As a result, the status quo should be maintained for SAWP workers. If requested, comments on the other programs used in farming could be provided.

Temporary Help Agencies and their growth are the result of the Free Trade economy and constant complexity of labour legislation. Farm employers often rely on bookkeepers and accountants to file their business income taxes because of the constant changing and complex regulations. Similarly farm employers are beginning to use THA because of the challenges of finding reliable workers and the constant changing and complex regulations. In the absence of regulations, wages paid will reflect the value of the product produced/marketed. In a global market place the retail price is tied very closely to the least cost provider. Government cannot legislate wealth. The more you regulate to manage vulnerability of workers the greater the cost you put on employment. Employers are then in a position of increasing the proficiency of workers to cover the additional cost or offer fewer jobs. Vulnerable jobs are better than no jobs. If society wants higher worker standards then all of society should contribute to those standards. Or, the society with high regulatory structure should demand all suppliers of the goods and services to meet those standards. The options identified in the Interim Report, do not address the core principles that create the vulnerability identified. Employers need workers and workers need employers. Solutions should not be confrontational but cooperative. Labour policy should

not be made in isolation of trade and immigration policy. As we progress, labour policy should not be made in isolation of our welfare policies. It is counter-productive to address worker vulnerability without addressing employer vulnerability.

Alternate agreements do have a place in the workplace. The approach of "banking hours" offers seasonal workers a pay structure that leads well beyond the work period. Farm workers often find they have extended hours (often related to planting and harvest) during the growing season and few or no hours outside the growing season. Farm workers can often work 2,000 hours a year in a 6-8 month period. If you pay a worker for 40 hours a week and "bank" the additional hours until the off season their pay will extend well into the off season. This reduces the reliance on Employment Insurance (which requires workers to look for full time employment) and allows the experienced worker to return to a seasonal job.

Administration and Enforcement

The Advisors focus much of their attention to the administration of the ESA. The large majority of employers want to work within the laws of all relevant governments. Farms have over 100 pieces of legislation that impact their businesses. The Ministry of Labour administer 4 main Acts each of the four have very different working relationships with the administrative structure.

As an employer group we gravitate to a philosophy of inform, educate, and advise followed by progressively stronger actions to amend the behaviour of the small percentage of employers that are habitual/repeat offenders. Penalties should reflect the seriousness of the infraction. Special interest groups often demand "sledge hammer" justice demanding small infractions receiving onerous penalties with every incident to achieve their goals. Like the legislation, the administration must reflect a balance of all stakeholders to be sustainable.

Government has an obligation to inform its citizens on regulations and how best to comply. 1-800 numbers and websites are tools but do not satisfy the obligation. Most of agriculture occurs in rural Ontario, where access to high speed internet is spotty. Most farm employers are older and probably not as computer literate as their urban counter part.

An approach of working with the industry/employers (cooperative approach) will always do better than a confrontational anti-employer attitude. Often labour activists portray all employers as being abusive and all workers above reproach. In fact most employer worker relations are more cooperative and the most proficient rely on employee engagement as a management approach. Showing balance among stakeholders, providing rationale for regulations, demonstrating easy cost effective ways to comply will gain willing compliance by the large majority of employers. A small staff with good adult training skills working with the specific sectors leaders can identify problem areas (evidence based), engage the industry to find solutions and using traditional trade patterns to inform businesses will accomplish a lot (similar to the

prevention work in H&S). A small group of inspectors/investigators can perform pro-active visits and respond to prioritized infractions. A heavy handed aggressive anti-employer special interest group approach would require a large number of inspectors and put greater demands on our appeal system and courts.

The suggestion of funding labour activist groups to provide training is very antagonistic. Do most workers gravitate to unions and labour activists? When less than 15% of the private workforce functions under collective agreements it also says 85% of workers choose not to associate with unions and labour activists.

The Occupational Health and Safety model does offer some valid means of educating both employers and workers. One key feature is the cooperative attitude or approach found in the Internal Responsibility System. Everyone has rights and responsibilities, so attitude to implementation is significant. Agriculture participates in an OHSA "technical advisory committee". We meet 3-4 times a year with OHSA policy, prevention, enforcement and WSIB at the sector level. The committee addresses jurisdictional issues, risk factors, industry friendly risk management, consistency among various parties, blitzes etc. A similar sector specific approach for 1-5 years holds a lot of promise. A self-audit tool has been effective in a number of other issues (environment and recently in H&S) and has great potential for ESA. Using the H&S Rep or JHSC would have some useful applications but is more limited. It would depend on commodity. It can be difficult to find workers who are interested/prepared to be H&S Reps. A "basic model" option could be fairly effective if done in a cooperative manner. The enhanced model would be difficult to maintain and becomes confrontational.

It seems reasonable that the first enquiry around standards should go to the employer. Farming has a number of exemptions and special rules. Employers are obligated to post the "What you should know" poster that does not outline or acknowledge exemptions and special rules. If the employer response is not satisfactory, then registering a complaint with the Ministry is still an option.

Third party or anonymous complaints offer their own set of concerns around balancing the interests of all stakeholders. Frivolous and vexatious complaints should not go without implications. Complaints need to be evidence based and not just a means to strike out at an employer for some other aspects of the relationship. As a result anonymous complaints should not be acted on. Third party complaints (not anonymous) could be a valid avenue if used in the OHSA IRS style structure.

If there is a cooperative approach using education and prevention like effort, with a focused inspection/investigation followed by a cost and time effective appeal system, great gains could be made over a short period of time.

The OLRB is a very expensive process. Consideration should be given to regional "tribunals" that include a mediation component. Basic complaints can be adjudicated at local level with more sophisticated cases heard by the OLRB.

The concern about the use of the Office of the Worker Advisor is that it is funded by the WSIB. Why should employer WSIB premiums be used to support worker ESA issues? If society wants that type of support, then all of society should pay for it, and not put added financial burden on employers who are trying to compete in a global market. Using the OWA just adds greater vulnerability to employers.

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