

SUBMISSION TO THE EMPLOYMENT STANDARDS REVIEW

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The Manitoba Chambers of Commerce

‘Where Entrepreneurial Spirit Meets Community Values’

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INTRODUCTION:

The Manitoba Chambers of Commerce is the umbrella organization for Manitoba's Chamber movement. With a membership comprised of 76 local chambers and 300 direct corporate members, in total we represent over 10,000 businesses from across Manitoba.

Our membership is not confined to any specific region within Manitoba. Nor do we represent only one size of business. In fact, the Manitoba Chambers represents the entire spectrum of business, from sole proprietorships to some of the largest companies in Manitoba. Nor do we represent only one particular sector of the economy. To cite but a few examples, our membership includes representatives within services, manufacturing, transportation, mining, agriculture, and technology.

The Manitoba Chambers of Commerce is pleased to have this opportunity to present its views in relation to Manitoba's Employment Standards Act. The rules that govern the workplace are obviously of extreme importance to the business community and, in turn, the workers it employs, the customers it serves, and the government it finances. Accordingly, the Manitoba Chambers has taken an active interest in the Employment Standards Review: it held a Roundtable on this topic, was the first to orally present to this committee, helped construct a submission provided by the Manitoba Employer Council and is providing this written submission.

The Vision of the Manitoba Chambers is as follows:

- Policy development that brings together businesses of all sizes, from all sectors, and communities across Manitoba;
- Non-partisan public debates of integrity, that criticize government where necessary, praise government where warranted, and disdain personal attacks and exaggeration;
- A Business community that demonstrates high ethical standards in all it does;
- Businesses dedicated to the vitality of their communities, the prosperity of their employees and the sustainability of the environment;
- A province that understands the nature and value of entrepreneurship and promotes the competitive enterprise system;
- A provincial government with sound, long-term economic strategies that are focused without ignoring opportunity, flexibility and diversity;
- Government policies and spending that are efficient and effective, delivering the programs that Manitobans need and helping the disadvantaged; and

- A Manitoba that promotes the progress of all its citizens toward individual freedom, dignity and prosperity, and opposes any form of negative discrimination or needless control.

This submission will be in three parts:

- It will echo the Chambers' concerns about the consultation process the Manitoba Government has set up regarding this issue (in particular, our concern about a lack of research or resources directed to this review, and its timing in relation to the federal review);
- It will call for a broader agenda against which this review (and its conclusions) should be judged; and
- It will reiterate the recommendations of the submission from the Manitoba Employers Council (MEC)¹.

CONCERNS ABOUT THE CONSULTATION PROCESS:

In its oral submission on December 1, 2005 the Chambers expressed concern that there doesn't appear to be the business/labour panel that is normally created for this type of review of labour legislation. We have since been informed that the Labour-Management Review Committee (LMRC) will be discussing the Chair's findings and impressions, but why wouldn't the LMRC be involved from the beginning? Secondly, although the first of four public meetings began on December 1, a discussion paper was only distributed on November 18 and written comments must be in by January 16, 2006.

Compare this to the federal process which began in October 2004. The discussion paper was distributed several months in advance of consultations, a four-day consultation with 39 academics was held and numerous public consultations were undertaken that are still underway.

The federal process is headed by a Harry Arthurs, (a world renowned legal scholar and labour law expert), who is advised by three "expert advisers" and a "stakeholder panel" representing labour and management. In addition, the federal commission has engaged 23 research projects in order to better understand the issues relating to employment standards.

And this brings us to another concern, the timing of Manitoba's review. Why couldn't it wait until the federal process was completed? Certainly the issues are compatible. The news release announcing the provincial review talks about "increasing flexibility", "reflecting the realities of the modern economy" and "the rise of non-traditional employment" -- you will find those words in the federal discussion documents.

The Government of Manitoba has given itself almost no time to consider the implications

¹ The Manitoba Chambers is a proud member of the MEC and helped write the MEC's submission. For more information in this regard, see www.mbchamber.mb.ca.

of the federal review. Manitoba's throne speech said the provincial reforms will be introduced by the end of the current session, which is set to end June 13, 2006. Professor Arthurs is hoping to have his recommendations submitted that same month and the federal government will formally respond some time thereafter.

Our provincial government has been in power for five years. Why is this review important now as opposed to last year, and if could wait until now why can't it wait until the federal process is finished?

Even if the government was smart enough to hold its reforms until it saw what the federal government is doing, why can't Manitobans have the benefit of the federal research and reforms before we are asked for our views? Professor Arthurs describes his work as a "state-of-the-art review of the literature" involving "extensive research projects designed to gather and analyze new data". Much of the research being undertaken by the federal process (e.g. "What is the relationship between labour standards, productivity and competitiveness?" and "The function of labour standards in relation to other social and economic worker protection platforms") would be highly relevant to the province's inquiry.

In his "Interim Report of the Federal Labour Standards Review" Professor Arthurs wrote:

“... it is important to obtain the best possible information about the actual operation and impact of Part III [of the Federal Labour Code] as it presently exists, about how comparable legislation works in other Canadian jurisdictions and in comparable foreign countries, and about the likely effects of changes, so far as these can be predicted. It must be carefully researched.”²

Yet the Manitoba Government appears to have done little if any research in this regard. No numbers have been provided to reveal trends as to job growth, the evolution of work in Manitoba (part-time, self-employment, size of business, wages, benefits etc.) and how those trends relate to other provinces.

The government seeks input on unpaid leaves and work-life balance but offers no analysis of the effects and utilization of its provisions for maternal, parental and compassionate care leave. Are they being utilized? To what degree? Are they being utilized by vulnerable workers, or are they simply being utilized by those workers who would have had such 'benefits' anyway? What is the effect on the business, and on the employer when he/she returns (do they return, does job loss typically follow soon thereafter)?

Consider this comment from the Government of Manitoba's discussion guide:

² October, 2005 at p. 6.

“While prosecution may be undertaken, it is expensive and rarely pursued, and seldom results in meaningful fines.”³

This is a rather bold and extensive indictment (coming from government no less) of an important part of Manitoba’s employment standards legislation. Yet, no proof or analysis is offered – why is prosecution rarely pursued, why is it so expensive, should expense matter when governments are seeking to enforce the law, and why does the process ‘seldom result in meaningful fines’ (were the accused parties innocent so fines weren’t imposed at all in many cases, how did the government decide the fines that were handed down were not meaningful etc)?

As another example, the discussion paper often refers to legislation in other provinces, but there is no analysis as to the effects that legislation is having in those jurisdictions and how (if at all) our economy and labour dynamics may change the applicability of such legislation.

The government needs to provide more research on these issues. Given the government’s current abdication in this regard, the Chambers will certainly do what it can to track key data – including Statistics Canada pending revision provincial employment data for the last 30 years or so and the ongoing review of the Federal Labour Code.

THE CREATIVE CAPITAL AGENDA

After reviewing the submissions received by the federal Labour Code review and conducting our own research, we found a considerable degree of consensus among labour and management. Too often this consensus is lost in the heated debates regarding our disagreements. The areas of agreement are substantial:

“Many years of research have established that, surprisingly, little real conflict exists between the goals of the overwhelming majority of workers and those of their employers.”⁴

The Manitoba Chambers is proposing an agenda of nine elements that builds on that consensus. We are suggesting an all-encompassing vision against which all government policies, all Budgets, all Speeches from the Throne, and all employment standards amendments should be judged. Individually, each element represents areas of agreement between labour and management. Taken together, they constitute a plan that bridges the goals of economic growth and individual well-being.⁵

³ P. 7.

⁴ David Sirota, Louis Mischkind and Irwin Meltzer, The Enthusiastic Employee, (Wharton School Publishing, New Jersey, 2005) p. xxiii.

⁵ For more information in relation to the Creative Capital Agenda see the MCC’s Labour Code Review Submission at www.mbchamber.mb.ca.

A New Agenda:

a) Changing Our Mindset:

Adopt a ‘creative capital agenda’ – one that judges all policies against the basic standard of whether they are empowering each individual to obtain employment that fully taps into their creative potential.

b) Money Matters:

Engage in effective tax relief for low-income tax payers.

c) Developing Skills/Recognizing Skills:

None of the items we propose for the skills strategy are new (lifelong learning; the importance of skills acquisition, from the most basic to the most sophisticated; skills recognition, etc). Indeed, great strides have been accomplished in relation to many of them. The key call for change is twofold:

- that these strategies receive an even greater focus from government, business, labour and the public as part of a creative capital agenda; and
- as such, every single initiative be evaluated against the standard of whether the skills of the individual involved have been enhanced in a way that leads to engaging and financially rewarding employment.

d) Create an Environment in Which Business Can Thrive:

If the goal of the creative capital agenda is to provide people with jobs that are well-paying, meaningful and tap into their talents, then we need an environment that enables businesses to create/maintain those jobs.

e) Celebrate Business Success Stories:

Collectively we must do a better job of sharing business success stories in a way that both inspires and instructs.

f) Celebrate Government Success Stories:

The same applies to sharing government success stories. If a program enhances the creative capital agenda it is our duty to trumpet it.

g) Enhance Knowledge of the Law:

The first step to an effective regulatory system is knowledge as to its existence.

h) Enforce the Law:

Laws that are not enforced serve no purpose other than to permit victimization of workers and to penalize law-abiding employers.

i) Government, Labour and Business Must Work Together

The most important aspect of the creative agenda is that government, business and labour agree to work on it together.

SPECIFIC RESPONSES TO THE ISSUES RAISED BY THE EMPLOYMENT STANDARDS REVIEW

One challenge facing policy makers in relation to labour standards is the incredibly wide range of personal circumstances that occur within the workforce.

On October 11, 2005 the Manitoba Chambers held a roundtable on the federal Labour Code review and Manitoba's Employment Standards Review. The event attracted over 60 attendees from a wide array of businesses of various sizes (small, medium, large) and a wide array of sectors. The variety of circumstances relayed during the event was astonishing. Some businesses indicated they provided wages and benefits well above the legislated standards. Some met the standards and feared their viability should those standards change. Some could not get workers to move from part-time to increased hours/full-time as those workers did not want the additional expense of contributing towards benefits or reducing their work-life balance.

Some had employees who accessed benefits through other part-time jobs or through their spouse. Almost all wanted the flexibility to work out their arrangements with their workforce.

The need for flexibility in order to keep up with an accelerating pace of change runs through many of the submissions this Commission has received from the business community. Certainly, one does not need to look far to find support for this view. Thomas Friedman warns that we are entering a phase that will see the digitization, virtualization, and automation of virtually everything and "The gains in productivity will be staggering for those countries, companies, and individuals who can absorb the new technological tools."⁶ Adaptability will be crucial as a faster rate of innovation will push the pace of the 'churn' of economic opportunities and jobs.⁷

Many jobs will ride the wave of innovation, cresting to greater specialization and therefore higher value. But there is no denying that other jobs will be crushed by it,

⁶ The World is Flat: A Brief History of the Twenty-First Century, (New York: Farrar, Straus and Giroux, 2005), p.45.

⁷ Ibid., p. 239.

becoming permanently replaced by technology, while some (largely manual or commoditized labour), will receive relatively low value in the market.

Those who oppose ‘regulatory interference/reform’ (increasing the minimum wage, extending work benefits etc.), do so on the grounds that it leads to market rigidities. Market rigidities, in turn, limit the effective and efficient utilization of labour and that leads to less productivity, less jobs and lower standards of living. While market rigidities should always be avoided, they are absolutely toxic given the evolution of the global and knowledge economies.

This is, quite literally, a textbook argument endorsed by the likes of the International Monetary Fund, the Organization for Economic and Cooperative Development and the European Commission (to cite but a few examples).

Even many of those that champion legislative reform warn that it can lead to job loss. Consider the following from “Unemployment and Labor Market Institutions: The Failure of the Empirical Case for Deregulation”:

- “If these components of the social protection system are too strong, or poorly designed, or poorly matched with one another, it is not hard to imagine that they could have substantial negative effects on employment opportunities.”⁸

Accordingly, we echo the comments of the submission of the Manitoba Employers Council (MEC):

“In considering the Code and possible amendments it is important to keep in mind that all legislation is a blunt instrument and has the potential to be counter-productive.” and

“Legislative change which is ill advised or too inflexible can kill jobs rather create them, frustrate employee preferences rather than advance them, and discourage investment rather than attract it.”

We also wish to take this opportunity to reiterate the specific recommendations of the MEC:⁹

A. REFLECTING THE REALITIES OF THE MODERN ECONOMY:
FLEXIBILITY, PROTECTION, COVERAGE AND COMPLIANCE

1. Hours Of Work And Overtime

⁸ Ibid., p. 3.

⁹ For further explanation or rationale for these recommendations, please see the MEC’s December 12, 2005 submission, also available at www.mbchamber.mb.ca.

(a) Hourly Workers:

The legislation should be amended so as to empower the Director of Employment Standards to issue variances. In the event any stakeholder disagrees with the decision of the director, an appeal would lie within thirty (30) days to the Manitoba Labour Board.

A variance once issued should remain in effect until an application was made to amend or cancel it. The sole criterion for acceptance would be support by a majority of the employees affected as indicated in a written petition or a sign-up sheet.

Further the averaging period should be extended to six months to allow for seasonal variations.

(b) Salaried Employees:

The legislation should permit the following type of clause in an employment agreement:

"Your salary is fashioned to compensate you for all hours worked including hours in excess of eight (8) in a day and forty (40) in a week so long as you earn minimum wage for the first forty (40) hours per week and time and a half minimum wage thereafter, unless otherwise agreed."

(c) Incentive-Based Workers:

There should be no change in this area.

More education needs to be given to employers about general holiday pay and vacation pay including incentives where applicable.

(d) Managers:

The definition of "Employer" should be revised to return "Manager" in the definition. We suggest that the term "Supervisor" similarly be defined since that word is used in the regulations.

"Manager" should also be defined in the Code and that the definition be the exact wording which appears in the *Labour Relations Act*.

A need would then arise to consider what provisions of the Code, if any, would still apply to a manager who otherwise would be excluded from the operation of the Code in its entirety. For example, managers should be entitled to maternity and parental leave, compassionate care leave, as well as the equal pay provisions. Otherwise, the terms and conditions of employment of a manager be left to the parties to fashion.

2. Exclusions From The Code: Agricultural Workers
There should be no change in the legislation until thorough consultation has been held with stakeholders.
 3. Promoting Compliance
There is no need to change current enforcement tools. We do however support an approach to improve education of employers and employees. Specific ways to achieve greater knowledge and understanding should be fashioned in consultation between stakeholders.
- C. REFLECTING THE CHANGING FACE OF TODAY'S LABOUR FORCE AND THE DEMANDS ON TODAY'S FAMILIES

4. Termination Notice
We support amendments to the Code which provide notice on a graduated scale. However, this should be done with care and amendments should be focused on notice of termination (which could be given either as working notice or pay in lieu of notice). It should also be stipulated that mitigation is an element to be considered in the context of entitlement to notice for both the individual and group termination provisions.

It should remain possible for employers and employees to agree to alternate arrangements. However, such arrangements would be subject to approval by the Director of Employment Standards.

Employees should remain obligated to provide notice of resignation on a basis which is equivalent to notice of termination. The current right to collect a financial penalty from an employee who leaves without giving proper notice should be continued. As well as the right to hold back vacation pay, the employer should be entitled to hold back statutory in order to satisfy the monetary value of a claim against an employee who leaves without giving proper notice.

In the context of termination an exception to the obligation of either the employer or the employee to give notice should include circumstances where just cause to terminate (or resign) exists. The test of just cause should be the same as applies at common law.

Finally, the obligation of directors to pay employees amounts representing pay in lieu of notice should be removed from the legislation, both in the context of individual and group terminations.

5. Statutory Holiday Pay For Part-Time Workers

It is reasonable for individuals who are employed on a regular part-time basis to receive statutory holiday pay on a pro rata basis. However, casual employees by the very nature of their engagement should not be entitled to statutory holiday pay unless they are employed on a basis which brings them within the 15 in 30 days standard.

The way to achieve payment for regular part-time employees is simply to pay a percentage of their wages representing the number of statutory holidays. The same definition of "wages" as is used for vacation allowance should be applied in order to achieve consistency and ease of administration.

The requirement for a regular part-time employee to be actively employed for 15 of the last 30 calendar days should be retained as a prerequisite.

6. Wage Deductions

Currently in Manitoba the provisions of the Code and policy applied by the Employment Standards Branch requires specific authorization for a wage deduction. This provides adequate protection and no changes should be made except for failure to give notice of resignation.

7. Employment Of Children

There should be no change in this area although the Director of Employment Standards may wish to consider preparing a checklist which could be promulgated and amended from time to time in order to ensure that all relevant factors are considered.

8. Unpaid Leaves And Work-Life Balance

No additional change is necessary.