

HAND-HARVESTERS OF FRASER VALLEY BERRY CROPS

New Era Protection of Vulnerable Employees

A report prepared for
the B.C. Federation of
Labour by Graeme
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TABLE OF CONTENTS

<u>OVERVIEW</u>	<u>PAGE NO</u>
1. THOMPSON'S REPORT – IMPROVING PROTECTION FOR HAND-HARVESTERS	4
2. ENFORCEMENT – AGRICULTURE COMPLIANCE TEAM	8
3. RESISTANCE TO ENFORCEMENT	12
4. NEW ERA ENFORCEMENT	16
4.1 Memorandum of Agreement	
4.2 New Era Employer Requirements	
4.3 New Era Entitlements	
5. MEMORANDUM OF UNDERSTANDING – ONE YEAR LATER	23
6. WHAT WENT WRONG	26
6.1 Political solutions not Based on Reality	
6.2 The Failure of Direct Deposit – an Undertaking Breached	
6.3 Informed but Powerless Workforce	
7. HOW DO HAND-HARVESTERS DIFFER FROM OTHER WORKERS	31
7.1 Lower Employment Standards	
7.2 Calculation of Crop Piece Rate Minimum Wage	
7.3 No Entitlement to Hourly Minimum Wage	
7.4 Semi-Monthly Payment of Wages	
7.5 Other abuses	
7.6 Child Hand-Harvesters	
7.7 Scales	
7.8 Picking Card	
7.9 Sanitation	
7.10 Living Conditions	
7.11 Vehicle Safety	
7.12 Passing on Cost of Doing Business	
7.14 Under-Reporting of Hand-Harvesters	
7.15 Unlicensed Farm Labour Contractors	
7.16 Backwards Accounting	
8. IMPORTING NEW ERA HAND-HARVESTERS	38
9. ANALYSIS	40
9.1 No Future for Low Wage – No Wage Harvesters	
9.2 Unconscionable Subsidy	
9.3 Time for a change?	
10. RECOMMENDATIONS	43
11. APPENDIX “A”	45
12. APPENDIX “B”	45
13. APPENDIX “C”	47
14. COMPONENTS OF THE PROGRAM	48

HAND-HARVESTERS OF FRASER VALLEY BERRY CROPS

NEW ERA PROTECTION OF VULNERABLE EMPLOYEES

OVERVIEW

In the matter of employment standards for hand-harvesters of Fraser Valley Berry Crops, there are four key players: Growers or Farmers; Farm Labour Contractors; government, usually in the form of the Employment Standards Branch (the “Branch”) of the Ministry of Skills Development and Labour and hand-harvesters, also known as pickers.

For the purposes of this paper, hand-harvesters means persons employed by growers or Farm Labour Contractors to pick piece rate (berry) crops in the Fraser Valley and are ostensibly to be paid the government established “Minimum Wage for Piece Work Crops.”

Hand-harvesters of Fraser Valley berry crops are largely drawn from the Lower Mainland’s Indo-Canadian community. They tend to be middle-aged and older, to have resided in Canada under five years, and to have limited ability to read or speak English. Many are in Canada under the auspices of the family reunification program. While some reside on the farms where they work, most reside in suburban homes and are transported to their workplaces by their employers, the Farm Labour Contractors. Farm Labour Contractors are also from the Indo-Canadian community. Informed observation suggests that 98 percent of hand-harvesters and virtually all Farm Labour Contractors are Indo-Canadian.

Farm Labour Contractors, according to the **Employment Standards Act**, (the ‘Act’), means “an employer whose

employees work, for, or under, the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product". Farm Labour Contractors have made themselves integral to the harvest of Fraser Valley berry crops. They provide a critical service to growers and hand-harvesters. For growers, they provide the service of recruiting, delivering and supervising hand-harvesters when and where they are needed. They take on the responsibility of recording work performed and paying the hand-harvesters. For hand-harvesters, they find employment, provide transportation to, from, and between workplaces and create a continuity of employment necessary for Employment Insurance applications.

The **Act** requires Farm Labour Contractors to be licensed. Among other requirements, applicants must successfully complete a written examination (with a passing mark of 80 percent) on the requirements of the **Act** and its regulations. Farm Labour Contractors must deposit a bond with the Branch to provide it with a readily accessible source from which to recover unpaid wages. Instead of hand-harvesters waiting for the Branch to garnish accounts receivable, to seize and sell assets, the Branch is able to pay them as soon as the appeal period expires or an appeal is resolved.

Although employment standards were extended to hand-harvesters in the 1970's, this account starts in 1993, when employment standards entitlements, including those for hand-harvesters, were revisited as part of the Thompson Royal Commission. Branch efforts to enforce those provisions of the **Act** pertaining to hand-harvesters were likewise revisited, resulting in revamped enforcement in 1997.

THOMPSON'S REPORT – IMPROVING PROTECTION FOR HAND-HARVESTERS

Mark Thompson, a lawyer and a professor of the Faculty of Commerce at the University of British Columbia, was appointed Royal Commissioner by Moe Sihota, then Minister of Labour and Consumer Services. Thompson's mandate included reviewing BC employment standards and recommending improvements. His inquiry was the most

extensive and exhaustive examination of employment standards in British Columbia in a generation.

Thompson and the Advisory Committee held public hearings throughout British Columbia; they received over 600 briefs. He submitted his report, Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia, in 1994, to Dan Miller, the Minister responsible for Labour. What Thompson found in the agricultural sector and what he recommended led to the subsequent improvement in employment standards and in enforcement in the mid-1990s.

Thompson found that, “the current situation is exploitative of workers and leads to violations of this **Act** and other statutes”. Exploitation took many forms, but the most common abuses included:

- Workers being paid less than the minimum fruit and berry crop piece rate wages;
- Workers not being paid any wages; and
- Workers being paid in the form of bogus Records of Employment.

From an enforcement and wage recovery perspective, Thompson found that:

The piece rate records were almost impossible to verify – “the use of tickets or chits by workers, Contractors and growers makes it impossible for the authorities to decide if a particular worker worked in a given location on a specified date”, and;

- Some Farm Labour Contractors were in business for a short period of time and also were asset-less or judgement proof.

Thompson’s findings confirmed what the Branch had found. Investigations in the 1980’s found that:

- About 80 percent of hand-harvesters advised that they were compelled to return wages paid to their employers after each payday;
- Wages were calculated at the end of the season by multiplying the employer's record of pounds picked by a piece rate lower than that set by government;
- Hand-harvesters paid both employee and employer contributions to Canada Pension Plan and Employment Insurance;
- Some wages were held back until the start of the following season as an inducement for the hand-harvester to return to that employer for the next crop harvest;
- Almost all employers' payroll records showed only hours worked, even though wages are calculated on a piece rate basis;
- Hand-harvesters who resided at their workplace worked 7 days a week but their payroll records showed only 5 days;
- Hand-harvesters worked 10 hours a day, 7 days a week but their payroll records show only 8 hours a day, 5 days a week;
- Hand-harvesters paid a transportation fee, sometimes in an amount equal to vacation pay;
- Older hand-harvesters were paired, often husband and wife, and treated as one employee, and;
- Wages paid in the form of bogus Records of Employment (ROE).

Essentially, hand-harvesters were not paid what they were lawfully entitled to be paid. Instead, for the most part, they were paid in the form of bogus ROEs — bogus in the sense that the wages paid and the weeks worked reflected the conditions necessary for the hand-harvester to obtain

benefits for the off-season. The ROE's did not reflect the actual wages paid or the weeks worked. In effect, contributors to Employment Insurance paid the hand-harvesters' wages.

Thompson concluded that the situation could be remedied by implementing the following recommendations:

- Eliminating the farmworkers' exemption from minimum wage;
- Calculating wage rates on the lesser of the period of employment, or two weeks for seasonal farmworkers hired directly by producers;
- Exempting farmworkers from normal overtime, in consideration of which they would not work more than 10 hours in a day or 60 hours in a week;
- Requiring Farm Labour Contractors to record the number of hours worked each day and to provide their grower clients with payroll records pertaining to the harvesting of their crops;
- Making growers, while Farm Labour Contractors remained the employer of hand-harvesters, liable for unpaid wages owed to hand-harvesters who worked on their farms;
- Expanding the subject matter of the Branch's Farm Labour Contractor examination to include other statutes and regulations pertaining to employment, such as Workers' Compensation Board's health and safety regulations; and
- Enhancing cooperation among representatives of the Branch, other provincial government agencies and the RCMP to improve the system of inspecting Farm Labour Contractors' vehicles.

ENFORCEMENT – AGRICULTURE COMPLIANCE TEAM

Following Thompson's report, the Branch's Regional Manager then responsible for the agricultural sector approached Growers' Associations to discuss accusations of abuse of hand-harvesters. Representatives of the Growers' Associations reacted indignantly, claiming the accusations were unfounded. They demanded proof, noting that there were few complaints. No complaints, they contended, meant no abuse. Certain growers' representatives challenged the Branch to prove the accusations, inspect the sector to confirm that there was no abuse and check for compliance. To test their claims, the Regional Manager revitalized enforcement. Thus, it was the growers who actually invited revamped enforcement.

The Director's enforcement of minimum standards on behalf of hand-harvesters was extraordinary. Unlike other sectors, it was not complaint driven. Unlike other sectors, the Director put together a joint project team. Investigative personnel from the Branch and Human Resources Development Canada (HRDC) came together to investigate compliance of producers and Farm Labour Contractors with their respective statutes. This joint project team, known as the Agriculture Compliance Team (ACT) began its investigations in May 1997. Canada Custom and Revenue Agency (CCRA) investigators joined ACT in 1998.

The Branch's role was critical to ACT. Unlike HRDC, which can only conduct educational talks at workplaces – and only when invited by employers, the Branch has considerable statutory authority to inspect workplaces.

ACT was a sizeable enforcement team. The Branch provided two delegates full-time and three co-op students. HRDC had a team leader with five full-time investigators supported by two administrative support staff. CCRA assigned three rulings officers, two trust examiners and two administrative support staff.

To obtain payroll records, the Branch and HRDC would each prepare a demand for production of payroll records based on their own statutory authority. Both demands would be

served on the grower or Farm Labour Contractors at the same time (if served by post, mailed in the same envelope). A set of payroll records delivered to the Branch would satisfy both demands. The Branch would examine the payroll records for its purposes. When the Branch had completed its examination, the payroll records would be turned over to HRDC. CCRA would obtain the payroll records from HRDC. Each agency conducted its own investigation independently.

Government supported ACT. When it became apparent that growers could frustrate the Branch's access to fields, government reacted swiftly by issuing a regulation empowering the Branch to go into the fields. By regulation, in 1998, government decreed that, "2) No person may restrict or attempt to restrict the director from making an entry under section 85 (1) (a) of the **Act**" (B.C. Reg. 269/98).

ACT was remarkably successful, especially given the lack of success of earlier enforcement attempts. Its success was derived from consolidating the investigating personnel of three agencies and employing Punjabi speaking investigators – a move that dramatically increased trust between hand-harvesters and investigators. That trust increased opportunities to get information about contraventions and made it easier to provide hand-harvesters with information on entitlements.

According to the BC Public Service, the success of ACT was:

... a direct result of the multi-jurisdiction review of the Farm Labour Contractors sector and the utilization of staff members who are able to communicate directly with the predominantly Indo-Canadian work force. A trust has been developed between the farmworkers and the team members resulting in a significant increase in information and wage complaints received from farmworkers.

The results were worth the effort. During the 1999 harvest, the Branch:

- Identified 82 Farm Labour Contractors who were either without a license or had more employees than their license permitted;
- Suspended or cancelled 78 Farm Labour Contractors licenses; and
- Issued 855 Determinations that found employers in contravention of significant entitlements.

[Determinations are the Branch's formal finding of a contravention of the ACT or its Regulations combined with an order to pay and to comply]:

- Collected \$107,200 in penalties;
- Received more applications for Farm Labour Contractors (meaning few Farm Labour Contractors were operating outside of the **Employment Standards Act**);
- Received a greater number of employee wage security bonds (meaning more hand-harvesters had their wages protected); and
- Recovered thousands of dollars in unpaid wages.

The greater knowledge of and trust in the Branch probably contributed to the increase in complaints made by hand-harvesters, from four in 1996 to 48 in 1999.

ACT was also a success for the other agencies. In return for its investment in the program, HRDC:

- Established the existence of extensive abuse through fraudulent Records of Employment within the Employment Insurance benefit program – abuses long suspected but until then unproven;
- Realized 'indirect savings' of \$2.5 million; and
- Realized 'direct savings' of over \$1.0 million.

For its part in the program, CCRA recouped \$3.3 million from employers in non-remitted EI premiums and CPP contributions.

From May 1997 to November 2001 ACT achieved the following enforcement results for the Branch.

Farm Labour Contractors without a license or with more employees than licensed:

1997	1998	1999	2000	2001
32	33	14	10	23

Farm Labour Contractors receiving a Determination:

78 of 87	90 of 93	77 of 97	76 of 111	56 of 105
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Child employment permits issued:

5	47	89	(group) 36	139
			(individual) 35	43

Determinations issued for children working without permit:

19	16	11	9	5
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Wage complaints made:

21	22	50	42	52
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Wages recovered:

\$47,303	\$30,256	\$65,042	\$77,135	\$117,754
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For the Branch, ACT reduced Farm Labour Contractors non-compliance from 100 percent in 1997 to 34 percent in 2001. For HRDC, ACT prevented about \$5 million in Employment Insurance fraud. For CCRA, ACT recovered over \$4 million in unpaid taxes and remittances of Employment Insurance premiums and Canada Pension Plan contributions.

The innovative and successful collaboration of government agencies was recognized publicly at the time. ACT won a 'Gold 2000 Public Service Award for Teamwork', and its manager received a Public Service Gold Medal for his role in creating a multi-agency, joint provincial-federal taskforce to better regulate fruit and berry crop hand-harvesting. BC's Public Service Commission concluded that, "ACT has had tremendous success in documenting the extent of abuse and put corrective measures into place to protect this very vulnerable work force".

RESISTANCE TO ENFORCEMENT

ACT's success is even more remarkable in light of the interference and resistance mounted against its expanded enforcement activities. The intrusion of Colleen Beaumier, MP Brampton-Mississauga into the enforcement campaign in May 1998 was one of the more blatant examples of political interference in the enforcement campaign. Beaumier, a friend and guest of Mel Purewal, the Fraser Valley's prominent blueberry Farmer, arrived uninvited and unannounced at a public meeting. There she accused ACT of intimidating hand-harvesters and expressed her displeasure with the information-sharing agreement between the Branch and federal agencies - the cornerstone of ACT's effectiveness. While she described her visit as 'fact-finding', from all appearances it was overt political interference.

One approach growers and Farm Labour Contractors used to frustrate enforcement was to deny ACT access to hand-harvesters in the fields. Although the Branch had statutory authority to enter any workplace, initially there was no meaningful consequence when an employer or someone acting on behalf of an employer denied the Branch entry to the hand-harvesters' workplaces. This deficiency was cured when the government created an administrative penalty for obstructing the Branch's access to hand-harvesters. In 1998, a regulation was issued that prohibited anyone from restricting or attempting to restrict the Branch from entering the fields. Challenges to this prohibition failed. No grower or Farm Labour Contractor could get between ACT and the hand-harvesters without incurring an administrative penalty.

ACT could interview hand-harvesters at the time and place of its choice.

Perhaps as important as creating a penalty for denying the Branch access to workers at their workplaces was the message that government signaled to growers and Farm Labour Contractors. By promptly and effectively addressing the challenge of denied access, government assertively expressed its support of the Branch's enforcement initiative. The regulation's language is clear and precise, a product of skilled and thoughtful regulators. Its message is starkly stated – get out of the Branch's way.

Another approach used by employers to limit ACT's effectiveness was to litigate enforcement to a standstill. Some growers and Farm Labour Contractors raised a 'war chest' to fund appeals of Determinations issued by the Branch against them. Their strategy was to so engage ACT in defending its past investigations before the Employment Standards Tribunal (the "Tribunal"); it could not undertake any new investigations. Tony Bhullar, a lawyer, and later a Liberal MLA, was hired to file and argue appeals. Bhullar's self-professed mission was to so preoccupy ACT in preparing submissions in response to appeals and in attending Tribunal hearings that ACT could not get out of its offices.

From 1997 to 2001, the Branch issued 1,136 determinations against Farm Labour Contractors. Of these, 143 were appealed to the Tribunal. Of these 143, the Tribunal confirmed 135, varied 2, and cancelled 2 (four were before the Tribunal at the time this report was produced). The Tribunal dismissed the preponderance of appeals. The enforcement activity was undisturbed. The appeal-them-to-inactivity campaign was woefully unsuccessful.

Discussion of enforcement would be incomplete without an account of the personal attacks made by Farm Labour Contractors and by grower representatives against the Branch's manager responsible for ACT and its enhanced and effective enforcement. The Branch's manager was the target of punishing and persistent personal attacks.

The BC Raspberry Growers' Association and the Raspberry Industry Development Council were quick to attack the Branch's manager. A letter to the Editor of *Fruit and Vegetable Magazine* signed by the Chair of the Development Council and the President of the Association on BC Raspberry Growers' Association letterhead claimed:

The impression [the Branch's manager] gives of Farm Labour Contractors (FLCs) in British Columbia is pathetically slanted to support his own biased views as to the necessity of existence for his enforcement team. It is certainly surprising that a provincial employee would make such inflammatory remarks as a representative of the Ministry of Skills Development and Labour in a public forum and without offering authentication.

[The Branch's manager] is spreading his doctrine of massive, unsolvable problems, hoping to enshrine his position in the face of looming changes in regulation that may ultimately result in the lack of need for this enforcement.

And, in a letter to the Minister of Skills Development and Labour, the same pair wrote:

We cannot continue to tolerate the uncontrolled actions of an employment standards enforcement officer, tarnishing our entire industry by spreading biased information and openly working to disrupt and eliminate a farm contracting system that is depended upon by over a thousand farms throughout British Columbia for their livelihood.

What the Branch's manager said was that some hand-harvesters are paid wages in the form of a ROE, and some are paid less than the minimum wage. He said that 'workers remain quiet because they're afraid they'll lose their work or their entire extended family will lose their jobs'. His conclusion that 'there's good value in Farm Labour Contractors' seems to have been overlooked.

These attacks came from berry growers that rely on hand-harvesters to pick about a fifth of their crop; the rest are

machine harvested. Their heightened concern about the availability and cost of hand-harvesters seems out of proportion given their reliance on mechanization.

The BC Raspberry Growers' Association and the Raspberry Industry Development Council were not alone in attacking the Branch's manager and seeking his removal. Some ethnic media outlets portrayed the Branch's manager as a government employee out of control. The problem, as it was presented, was government involvement, and the problem with government involvement was that it was effective - effective in no small part because of the vigour with which the Branch's manager applied his investigative and organizational skills and abilities to the enforcement campaign. Get rid of the Branch manager, and with the removal of the person seen to be energizing the enforcement campaign, the campaign would collapse.

In addition to the organized campaigns to run the Branch out of the fields were the whisper campaigns to link wage disruption with Branch enforcement in hand-harvesters' minds. The Branch, not growers or Farm Labour Contractors, was responsible for causing hand-harvesters to miss work, resulting in lost wages. The Branch, hand-harvesters were told, was making it difficult for Farm Labour Contractors to employ them. There were threats directed against ACT personnel; suggestions that their continued investigating activities would jeopardize their prospects of continued government employment. The 'race card' was played; Anglo-Canadian males brutalizing Indo-Canadian females – overlooking that many members of the Branch's ACT contingent were Indo-Canadians.

The Minister's response to the Raspberry Growers and Development Council, while supportive of the Branch manager, was not helpful. Due to unspecified administrative delays, a response letter, drafted in July 2002, was not sent until March 2003. In the meantime, the Branch's manager had booked off work on medical leave. He remained

on medical leave until his premature retirement in June 2004. The sheriff had been run out of town.

NEW ERA ENFORCEMENT

John van Dongen, Minister of Agriculture, Food and Fisheries, starkly stated his views on employment standards and hand-harvesters at the October 24, 2001 'Open Cabinet':

First of all, we want less government. That will result in a more competitive industry. That is an area that we intend to work closely on with some of the other ministries, such as Graham's Ministry, Labour. A good example there is the kind of very complex employment standards and regulations we have that are choking industries like the raspberry industry.

In an undated memo produced in January, 2002 van Dongen and Graham Bruce, Minister of Skills Development and Labour, jointly agreed that:

In response to concerns expressed by Farmers and Farm Labour Contractors about disruptions to the harvest during peak picking periods, Employment Standards compliance staff were directed to reduce their presence in the fields during that period.

Enforcement activity by the Employment Standards Branch will continue throughout the winter and spring months. While full efforts will be made to minimize or eliminate disruption of work during the critical period of harvest, enforcement measures will proceed.

In terms of protecting hand-harvesters, this agreement was actually an improvement on an earlier suggestion. Earlier it had been suggested that the Branch give growers and Farm Labour Contractors hours or days notice of its intent to visit a field; advance notice would mean the Branch's visit would be less disruptive to the harvest. It would give growers and Farm Labour Contractors time to prepare for the visit. It would allow employers time to remove from the workplace children working without a permit and the number of hand-harvesters who would put the employer over the permitted

number. It would have the same negative impact on the Branch's ability to properly investigate and effectively enforce the ACT as such advance notice in criminal investigations would render meaningless a police raid or execution of a search warrant.

Work, hence offences take place during harvest. The Branch found the most effective means to investigate compliance of Farm Labour Contractors is to interview seasonal hand-harvesters in the field, at their workplace – to go to the workers during work at their workplace. During a workplace inspection, the Branch would readily obtain information about non-payment of wages and easily determine if the number of persons employed complied with the Farm Labour Contractor's bond limit and if the motor vehicle which took the hand-harvesters to, and from, their workplaces was certified to be roadworthy. That approach was effective. The announcement made by van Dongen and Bruce ended that effectiveness because only limited enforcement measures can take place outside the peak season.

Van Dongen had delivered. Farmers and Farm Labour Contractors could get on with their business as they saw fit without the involvement and interference of the Branch. Van Dongen was not alone in easing off enforcement in the summer of 2001. The Director of Employment Standards at the time kept Branch enforcement personnel out of the berry fields in the summer of 2001. Bruce did not instruct them to get out into the berry fields, and so appears to have condoned keeping them office-bound. Collectively, van Dongen, Bruce and the Director put out of action that extraordinary approach to enforcement – the Agriculture Compliance Team.

ACT still exists, but in name only. No longer do investigators from HRDC and CCRA join those from the Branch to do field inspections. Despite the brief flurry of field inspections following a vehicle crash in which a hand-harvester was killed, Branch personnel spend most of their time in their offices. Their office has moved from Abbotsford, in the heart of berry growing country, to Whalley in Surrey.

The Branch is not totally inactive. Certain Farm Labour Contractors have failed to honour their undertaking to pay wages by way of direct deposit. This past fall, ACT issued about three dozen Determinations for failure to pay by direct deposit. The one true benefit hand-harvesters gained through the memorandum of understanding discussed below meet with less than universal voluntary compliance.

Memorandum of Understanding 2003

Apparently, not satisfied with his previous efforts to effectively eliminate enforcement, van Dongen pushed on. In May 2003 he brokered a Memorandum of Understanding between the Ministry of Skills Development and Labour and its Employment Standards Branch and BC Agriculture Council (BCAC) and BCAC member organizations. It was a 'partnership'; the goals of which were to:

- Produce a framework for a partnership between the Branch, Ministry of Skills Development and Labour and the Agriculture sector;
- Increase education, understanding and compliance in regard to the **Act** with a focus on core requirements under the **Act**;
- Provide a more proactive, efficient and mutually satisfactory means of dealing with employment legislation issues and complaints while protecting the most vulnerable of employees; and,
- Assist in creating opportunities for youth employment in Agriculture.

This memorandum of understanding gave Bruce and the Branch written assurance that the BCAC and its member organizations would comply with the **Act**. Those organizations undertook to comply with the **Act** in that, "they will not support or condone the utilization of unlicensed Farm Labour Contractors". Bruce also received written assurance that, "the largest employers of hand harvest labour in BC, the blueberry, raspberry, strawberry, field vegetable and tree fruit associations have not and will not condone any core

violations, including the non-payment of wages owed to farmworkers and hand harvesters by growers, Farm Labour Contractors, processors or fresh packers.” The Council and its member organizations also promised to support Branch enforcement activities during the 2003/04 seasons.

These assurances of compliance with the **Act** and of support for its enforcement are not legally necessary. Ignorance of the law is no defense. It is difficult to appreciate what the Branch gained from these assurances. Employers are compelled to comply with the **Act**, regardless of their views of its propriety.

As for supporting Branch enforcement activities, these are the same organizations that requested the Branch give prior notice of when and where it intended to conduct a workplace inspection.

Of greater importance than the BCAC’s assurance to comply with the **Act** and support its enforcement was the Ministry’s expectation, expressed at the same time, that Farm Labour Contractors pay wages by direct deposit. The Minister’s expectation would be converted to a regulation later. Many farm worker advocates believe direct deposit of wages is necessary to end abuses, in particular, clawbacking of wage payments, made possible when wages are paid by cash or cheque. Direct deposit ends the abusive practice of issuing a receipt or a cheque in the correct amount but, if any payment is made, paying cash or converting the cheque to cash in a lesser amount. The sector’s response to this initiative will be discussed later.

New Era Employer Requirements

The amount of bond that had to be deposited was one area where the New Era relaxed statutory requirements of Farm Labour Contractors. The amount of the bond is directly related to the number of hand-harvesters. Its amount is calculated by multiplying the number of employees specified in the license application times the minimum hourly wage (\$8.00) times a multiplier. A multiplier of 80, for example, means that a Farm Labour Contractor has given the Branch

access to 80 hours wages at \$8.00, (\$640.00), for each employee.

At one time the multiplier was 120. In April 1999, it was reduced to 80. Bruce further reduced the multiplier. In 2003, by regulation, the multiplier was reduced for Farm Labour Contractors who had not been found to have contravened the **Act** for specified periods of time. The reductions are significant and initiated after a short period of time. After a year without a finding of a contravention, the multiplier is reduced to 60, after two years to 40 and for three or more years to 20.

In order to qualify for the reduced multiplier, the records for that employer only have to show that the Branch has not issued any Determinations for the qualifying period. The Branch does not issue Determinations against those Farm Labour Contractors who, when found to be in contravention, resolve the matter informally. Instead of having to post a bond worth \$640 for each employee, a Farm Labour Contractor against whom a Determination has not been issued in a three year period has to post only \$160 for each employee - a reduction of \$480.00. Instead of having the equivalent of a week's wages available per employee, the Branch now has about two day's wages.

A multiplier of 20 - \$160.00 for each employee - does not provide financial resources to pay wages owed should the Farm Labour Contractor become insolvent.

New Era Entitlements

While announcing this "new partnership agreement that helps protect farmworkers", Bruce mentioned that the very same workers would the next day lose their entitlement to hours of work, overtime and statutory holiday pay. He also announced a new crop piece rate minimum wage for hand-harvesters.

What Bruce failed to mention was that the new crop piece rate minimum wage was 3.72 percent lower than its predecessor, issued for the 2001 harvest. For example, the 2001 minimum wage for strawberries was \$0.326 a pound,

raspberries, \$0.338 and blueberries, \$0.376. The 2003 minimum wage for strawberries was \$0.314, \$0.012 less; raspberries and blueberries, \$0.326, \$0.014 less.

From 1995 to 2003, hand-harvesters' crop piece rate minimum wage, with the exception of those who pick daffodils, included statutory holiday pay and vacation pay. Statutory holiday pay has a value of 3.6 percent. Vacation pay has a value of 4 percent. When the government eliminated hand-harvesters' entitlement to statutory holiday pay, the amount of statutory holiday pay, 3.6 percent, and the pro-rated vacation pay of 4.0 percent formerly earned on those days, was eliminated from the hand-harvesters' crop piece rate minimum wage.

The inclusion of statutory holiday pay and vacation pay in a wage rate is abnormal and unique to hand-harvesters. Had any other group of employees lost entitlement to statutory holiday pay, their wage rates would have remained the same because statutory holiday pay is calculated in addition to their wage rate. Hand-harvesters, however, because their wage rates include statutory holiday pay, had their wage rates reduced. As it is, hand-harvesters' crop piece rate minimum wages are 4 percent less than they appear to be because they still include vacation pay.

Furthermore, they were no longer entitled to their overtime provisions, which were already significantly less than for other workers. Prior to the changes, hand-harvesters got time and a half after working 120 hours in a two-week period. Other workers get time and a half after working 40 hours in a one-week period. Overtime does not apply to hand-harvesters now, no matter how many hours they work.

In this Memorandum, the following points were presented by the Ministers as 'improvements' gained by hand-harvesters:

- An officer of the Employment Standards Branch liaising with the Council and its member associations;
- The largest employers of hand-harvesters in BC agreeing that they would not condone any core violations, including the non-payment of wages owed;

- The Council and its member organizations supporting the Branch's enforcement activities;
- Delivering a minimum of five annual joint education sessions for growers, Farm Labour Contractors and farmworkers;
- The Ministry and the Council and its member organizations developing educational materials to be used in seminars, industry newsletters and targeted mailouts;
- The Council and its member associations promoting use of the materials and attendance at seminars;
- The 'Partner' web sites describing the partnership, its goals and progress towards meeting the goals;
- The Branch committing to visit every berry field once during the harvest; and
- The 'government' requiring their wages to be paid by direct deposit.

Under the Memorandum, hand-harvesters lost the following:

- Statutory holiday pay, resulting in crop piece rate minimum wage reduction of 3.72 percent; and
- Overtime pay.

It is impossible to imagine on what basis Bruce can now proclaim that "this agreement will help protect vulnerable workers". In consideration of direct deposit of wages, hand-harvesters absorbed a considerable drop in wages and lost any compensation for working in excess of 120 hours bi-weekly.

The irony is that direct deposit does not prevent employers from recovering wages paid to hand-harvesters. In the real world out in the berry fields, if a hand-harvester wants to work again or get a ROE to obtain off-season benefits, or

both, they are vulnerable to pressure to repay wages, regardless how those wages were paid.

It is unknown if hand-harvesters were consulted in the discussions concluding with the signing of this Memorandum. It is unknown, for example, how many, if any, hand-harvesters appreciate what they lost when statutory holiday pay was given up in return for the development and promotion of educational materials by the Council.

Questionable exchange of benefits aside, the Memorandum of Understanding is based on the faulty assumption that education produces compliance. Enforcement, not education, produces compliance. From the beginning, Farm Labour Contractors have had to sit and pass an examination, which tests and certifies their knowledge of the **Act** and the Employment Standards Regulations. If education was sufficient to secure compliance, then over a decade of educating and testing Farm Labour Contractors should have uncovered no abuse in the industry. The lesson learned from ACT's enhanced enforcement campaign is that Farm Labour Contractors and growers are motivated to voluntary compliance when it is more likely they will be caught and fined if they don't comply.

MEMORANDUM OF UNDERSTANDING – ONE YEAR LATER

In February 2004, the Director of Employment Standards (the 'Director'), provided the following information about the 'outcomes' of the Memorandum of Understanding.

An Industrial Relations Officer was now in charge of Agricultural Compliance. In addition to responsibility for Farm Labour Contractors and their employees, that Officer also maintained a full investigative and adjudicative caseload.

Although asked, the Director has yet to report on any assistance the Council and its member organizations provided to the Branch during the 2003 harvest - assistance these organizations undertook to supply.

There were seven (7) education sessions. On June 13th the Officer met with strawberry producers in Abbotsford, on the 19th with producers in Abbotsford and Delta, on the 25th with producers in Penticton and Kelowna and on the 27th with raspberry producers in Abbotsford. In the autumn, in Abbotsford, he met with blueberry producers on October 29th and with raspberry and strawberry producers on November 12th. He made a presentation to the BC Agricultural Council on December 8th.

Although asked, the Director has yet to reveal how many producers attended the Branch's education sessions. The information provided by the Branch could only confirm that at one session there were 15 attendees and at another, 70. It appears that the Branch and the Council have yet to deliver any of the promised annual joint education sessions for growers, Farm Labour Contractors and farmworkers.

As of April 2004, the Branch and the Council had yet to produce the promised educational materials.

In 2003, the Branch conducted 59 site visits – far from the Minister's stated undertaking to visit every field. These few site visits found an astonishing 69 percent of Farm Labour Contractors in contravention of 'core issues'. Thirty-six percent of producers were found in non-compliance with core issues. Core issues include entitlements to payment of wages, minimum wage, payment of wages on a semi-monthly basis and fraudulent payroll records (two employees on one picking card).

Of the 1,777 hand harvesters interviewed during these site visits and the 52 who filed complaints in 2003, 134 reported failure to receive minimum wage, 182 failures to be paid at least twice a month or at all, 19 not paid vacation pay and 157 victims of payroll record fraud. The 1,777 employees represent about a third of the number of employees 'bonded' by the 110 registered Farm Labour Contractors for 2003. These site visits also found 21 instances of non-compliance with daily log requirements, 16 instances of failure to provide proper vehicle registration, 18 instances of failure to post piece rate notice and four children employed without the requisite child employment permits. At these site visits, the

Branch encountered 7 unlicensed Farm Labour Contractors.

It is apparent that the Branch did not visit every field. The Director did not explain why the Branch did not deliver on the Minister's undertaking. From casual observation, 59 sites, assuming a site is a field, is a very small percentage of Fraser Valley berry fields.

As of April, 2003 the Director had issued 7 Determinations against Farm Labour Contractors for being unlicensed (\$5,500 in administrative penalties); 13 for failure to keep or to produce records, 31 for failure to pay by direct deposit and one for non-payment of wages; a total of 52 Determinations.

This is in stark contrast with the outcomes of the 1999 enforcement campaign conducted by ACT. During that campaign, ACT issued 855 Determinations and collected \$107,200 in penalties.

Even though two thirds of Farm Labour Contractors and one-third of Producers were found to be in non-compliance with 'core-issues' in just 59 visits, the Director did not increase Branch resources assigned to Farm Labour or undertake any extraordinary investigative or educational activities.

The Director did have resources available to engage in proactive investigations. Although the Campbell cuts reduced the number of Full Time Equivalents (FTE – the unit BC government uses to measure personnel allocation) was reduced from about 150 to about 120 because of the 'Campbell Cuts', only about twenty of those were investigative personnel. So, while their numbers were reduced by about a quarter, the new complaint process resulted in more than a 50 percent drop in complaints between 2002 and 2004. The drop was in no small part due to the fact that employees are now expected to face employers on their own, using a self-help kit designed by the Branch, before filing a formal complaint. This left two-thirds of the Branch investigators available to deal with half the caseload.

The Branch also switched from an investigative model to mediation and adjudication for program delivery. Mediation and adjudication is less time consuming than investigation.

The Branch issued fewer than half the number of Determinations in 2003/2004 than it did in 2001/2002, dropping from 1,600 to just 787. The Branch office responsible for hand-harvesters went from a caseload backlog of about two months in 2001/2002 to none in 2003/2004. The caseload in the Fraser Valley's Whalley office dropped so dramatically that it was able to 'loan' an Officer to the Lower Mainland office. This occurred despite the fact that one of the purposes of the **Act** is to ensure workers receive basic standards of compensation. Non-compliance was clearly up, yet the Branch visited just 59 sites.

WHAT WENT WRONG

Political Solutions not Based on Reality

Hand-harvesters face another barrier to obtaining basic standards of employment - the Minister seems to be out of touch with the reality of their workplaces. The following exchange between the Minister and a member of the press last July (after a farm labourer was killed in a vehicle crash on her way to work) indicates his disconnect:

Bruce: ... But in respect to the work that we're attempting to do to improve life on the farm, so to speak, there's been a number of initiatives that both the Ministry of Agriculture and the Ministry of Labour have been working with, with the agricultural community and specifically Farm Labour Contractors.

Reporter: And what is that work, what are you doing?

Bruce: Well, first of all, we have had all of the agricultural communities - [rather] sectors sign off on a Memorandum of Understanding of what needs to be done in the agriculture community.

In respect to Farm Labour Contractors, they are required to be bonded.

[Farm Labour Contractors have been required to be bonded since the early 1980's – not a NEW ERA initiative.]

We've also moved very aggressively in respect to making sure that people receive full payment for their wages, which you might think is odd, but in fact, has been occurring for a number of years in which farm labour employees, farm labourers are not getting paid. We've done that by initiating a process of direct deposits so all Farm Labour Contractors have to have direct deposits with employees.

[Failure of Farm Labour Contractors' voluntary compliance with direct deposit discussed next. Bruce failed to mention that ACT had all but been wound down and consequently enforcement all but eliminated.]

We've also increased the fines so that, where it is, that they do not adhere to the rules and regulations, they find themselves faced with severe penalties.

[The 52 Determinations issued generated \$28,000 in penalties, about \$500 a Determination. Being charged \$500 for failure to be licensed, for example, is not exactly a severe penalty. Penalties of these small amounts are minor costs of doing business, not incentives to bring business practices into compliance. Penalties in excess of \$100,000, as in 1999, would be an incentive to either correct business practices or elect a government comfortable with employee exploitation.]

And then combined with that we've done a very aggressive program with some of our industrial relations officers with the farm labourers themselves, making sure that people with English as a second language are fully aware and understanding of what their rights are as employees. This is going to be a

little bit longer in getting everybody fully apprised of what their rights and responsibilities are but we're working through with them in the field and directly through a number of forums that are held beginning each year.

[Educating hand-harvesters has been a long on-going activity predating the current government, with many more hand-harvesters contacted in past harvests than during the 2003 harvest. 'We're working through with them in the field' does not ring true when only 59 sites were visited, only 1,777 employees interviewed. Knowing one's rights is one thing; getting them, especially with the Branch's 'self-help' program, is another. Vulnerable employees, such as hand-harvesters, need assistance in getting what is lawfully theirs.]

Penalties without subsequent re-investigations are ineffectual. Only with subsequent re-investigation is a non-compliant employer moved up the penalty ladder to the \$10,000 rung. Only with re-investigation is a non-compliant employer pushed to a point where contravention becomes an unacceptable cost of doing business. A chance encounter of a Farm Labour Contractor with the Branch does not bring the full economic weight of penalties to bear.

According to its 2003 report:

The Ministry is committed to protecting vulnerable employees, including garment workers and agricultural workers. As these groups have historically been the most disadvantaged and the least able to advance their own interests, the ministry's challenge is in trying to involve the sectors in achieving employer compliance with employment standards.

It is impossible to see how the Minister has honoured this commitment and met the challenge. The Memorandum of Understanding and the reduction in entitlements has neither protected agricultural workers nor achieved employer compliance.

The Failure of Direct Deposit – An Undertaking Breached

All that the Minister asked of Farm Labour Contractors was that they pay their employees by direct deposit. Farm Labour Contractors have not complied. One measure of their non-compliance is the number of Determinations issued for non-compliance with this requirement – 31. Another is that the Minister persuaded an anti-government regulation Cabinet to issue a regulation requiring Farm Labour Contractors to pay wages by direct deposit. A government committed to reducing regulations by a third, a government that requires Ministers to give up two regulations in order to get one, went ahead and issued a regulation requiring employers in the farm sector to pay wages by direct deposit.

The regulation mandating direct deposit is as follows:

Exclusion from payment options for Farm Labour Contractors;

40.2 (1) In respect of the payment of wages to farm workers, Farm Labour Contractors are excluded from section 20 of the **Act**;

(2) A Farm Labour Contractor must pay all wages to farm workers employed by the Farm Labour Contractor;

(a) in Canadian dollars, and

(b) by deposit to the credit of the farmworker's account in a savings institution.

This regulation may not achieve its objective. There are two problems; one minor, the other, major. Payment should be made in Canadian 'currency' not 'dollars'. More importantly, 'by deposit' should be 'by direct deposit'. *Black's Law Dictionary* distinguishes between 'deposit' and 'direct deposit'; they are distinctly different activities. The Branch may yet discover that it has not been given the tool it needs to compel compliance with the direct deposit payment

requirements. It did not get the swift and timely support the previous government provided ACT when growers tried to keep the Branch out of the fields.

Informed but Powerless Workforce

Again, education is no substitute for enforcement. No amount of knowledge will lead to action without motivation. And in an environment of intimidation and threats, even the most informed workers are robbed of the choice to act.

Despite what government believes, hand-harvesters are well informed about their rights. From May 1997 to November 2001, ACT handed out over 5,500 fact sheets describing hand-harvesters' statutory entitlements. These fact sheets were written in English, Punjabi, as well as French, for the fruit tree hand-harvesters in the Okanagan. ACT educated over 1,300 hand-harvesters in formal classroom-like instruction environments at the Progressive Intercultural Community Services Society (PICS) and at Abbotsford Community Services. ACT also educated HRDC personnel, who in turn, passed on information to hand-harvesters who they interviewed for benefits. Given the 'ripple effect', it can be reasonably assumed that many hand-harvesters are aware of their statutory entitlements. Few, if any, economic sectors have a workforce as informed about statutory employment standards as does the berry sector. The Branch has made and continues to make extraordinary efforts to inform hand-harvesters of their statutory entitlements.

Despite these efforts, hand-harvesters tell Branch personnel that past abuses are still present. Hand-harvesters are well aware of their statutory entitlements but, because they are subjected to manipulation and control, they can do little, if anything, to obtain them.

HOW HAND-HARVESTERS DIFFER FROM OTHER WORKERS

Lower Employment Standards

On top of these losses and reductions, hand-harvesters continue to be entitled to lower minimum standards, to lesser basic standards than other employees. The most vulnerable are afforded the least protection. Below is the inventory of how piece rate paid berry and fruit hand-harvesters are short-changed.

Calculation of Crop Piece Rate Minimum Wage

When the berry and fruit hand-harvester piece rates were introduced, the Branch hired an economist to establish what an average hand-harvester could pick in an hour. That result was related to the hourly minimum wage, from which was computed the crop piece rate. In theory, an average hand-harvester picking an average crop at the average pace would earn the equivalent of the hourly minimum wage on the basis of the crop piece rate paid for each half-bin, bin or pound. In reality, it means a hand-harvester has to pick just over 23 pounds an hour of blueberries or raspberries and about 26.5 pounds a hour, every hour, to make the currently minimum wage of \$8.00 an hour.

The problem with the crop piece rate minimum wage rates is that they are predicated on 'average'. No allowance is made for poor crops. No consideration is given to harvesting at the end of the crop, when pickers are more gleaners than harvesters. Fatigue is not factored in, nor is weather. The distance between where the hand-harvester is picking and the weighing station is not factored in. In other words, time spent recording what they have picked works against hand-harvesters. For reasons beyond the hand-harvester's control, the hand-harvester may be physically unable to pick at a rate that approximates the hourly minimum wage.

In 1997, it was determined that an experienced and quick hand-harvester picking a blueberry crop at its height can earn about \$40 a day, however, by the end of the crop, might only earn about \$12 a day. Minimum wage was \$7.00

an hour. A retail employee paid minimum wage earned, in an 8-hour day, \$56. This past harvest season, in order to earn the minimum wage of \$8.00 an hour for an eight hour day, a hand-harvester had to pick about 184 pounds of strawberries (23 pounds/hour), or about 212 pounds of blueberries or raspberries (26.5 pounds/hour).

The inability of a hand-harvester to pick at a rate that approximates the hourly minimum wage would not be devastating to the hand-harvester if they were entitled to the hourly minimum wage.

No Entitlement to Hourly Minimum Wage

Hand-harvesters are not entitled to the hourly minimum wage, currently, \$8.00 an hour. Other employees paid on a piece rate or other incentive-based wages are entitled to the hourly minimum wage. A telemarketer paid \$4.00 for each subscription sold, a form of piece rate, is entitled to the hourly minimum wage; they must be paid at least \$8.00 an hour regardless of the number of subscriptions sold during her or his shift. A sales person paid on a straight commission basis is entitled to \$8.00 an hour for each hour worked. Even when a commissioned sales person sells nothing in a pay-period, that sales person has earned minimum wage for each hour worked. Not so for hand-harvesters.

Hand-harvesters are entitled to the crop piece rate minimum wage regardless of the time-spent picking. If a hand-harvester works eight hours and picks one pound of raspberries, for example, earns only \$0.326. A piece rate telemarketer, however, who worked eight hours and sells one subscription, earns \$64.00.

The other sectors that rely on incentive-based wage rates to induce employees to work to their fullest potential must pay at least the hourly minimum wage. Commissioned salespersons paid in whole or in part by commission are entitled to the hourly minimum wage. They are also entitled to overtime at the hourly minimum wage when their commission earnings are less than the hourly minimum

wage at the applicable overtime rates (see: ESR section 37.14). The government provides the safety net of hourly minimum wage to all employees paid on a piece rate basis except those who are employed as hand-harvesters. The unproductive piece rate worker is not unique to the farm sector. Other sectors find ways to deal with those workers who do not earn by selling goods and services what they are paid in hourly minimum wage.

Semi-Monthly Payment of Wages

Almost all employees within provincial jurisdiction are entitled to semi-monthly payment of wages. Wages earned in a pay period, which cannot be longer than 16 consecutive days, must be paid in full within 8 days of the end of the pay period. Not so for hand-harvesters. Piece rate hand-harvesters may be paid 80 percent of total estimated wages owing at the middle of each month. All remaining wages must be paid within eight days of the end of the month.

Other Abuses

ACT observed other abuses of hand-harvesters, some that were outside of the jurisdiction of the agencies participating in ACT. These abuses include the following:

Child Hand-Harvesters

From time to time, during field inspections, the Branch encountered children under the age of 12 working as hand-harvesters. This practice contravenes the statutory control of the employment of children provisions. The pretext for their presence often was, because of a lack of childcare, the child or children accompanied their mother into the field, where she cared for them while she worked. This pretext did not explain why the children had buckets of their own and were picking alongside their mothers.

Without field inspections, the Director does not know if Farm Labour Contractors are complying with the provisions pertaining to the employment of children.

Scales

After filling picking buckets or pails, hand-harvesters walk to weigh stations. At the weigh stations, they transfer berries from picking buckets or pails into flats. Berries are weighted in flats.

ACT rarely found scales used to measure poundage picked to be of the lawful type. Fewer still were certified to be accurately calibrated. All too often, inappropriate scales were used. Bathroom scales were commonly found as the device to measure poundage picked. Hand-harvesters were denied fair measure because of their employer's use of inaccurate and inappropriate scales.

Besides using inaccurate and inappropriate scales, the manner of weighing has an adverse effect on hand-harvesters. Weighing is often done in such a way that the hand-harvester cannot question or verify the employer's announcement that the pail is under-weight or acceptable. There is no opportunity for a second opinion and no way to monitor the process of weighing the produce closely. There is no scrutineer.

Weighing is done by the party whose interest is in paying the least amount for berries harvested – the grower or the grower's surrogate, the Farm Labour Contractor. The picking pail is never overweight. Unlike buying produce at a retail outlet, where the process of weighing the produce is clearly visible to both the buyer and the seller, hand-harvesters usually have no visual or physical access to the scale.

ACT did not have authority to address weighing scale issues.

Picking Card

Picking cards record the weight of berries picked. Here again, hand-harvesters are vulnerable. At the weigh scale, hand-harvesters turn in their picking card to the supervisor weighing the flats. All too often, the amount recorded is not

accurate. Hand-harvesters have to accept the amount as recorded.

Without field inspections, the Director does not know if Farm Labour Contractors are complying with the provisions pertaining recording work performed.

Sanitation

While some Farm Labour Contractors and growers provide field toilets, usually in the form of portable toilets, many do not. Working from dawn to dusk necessitates hand-harvesters to relieve themselves in the field. That patch of field that was an outdoor latrine becomes a workplace, later in the day or in the harvest. Branch personnel sometimes saw hand-harvesters relieve themselves where they were working.

Besides the general lack of toilets, there are fewer hand-washing facilities. Hand-harvesters have no employer provided means to wash the dirt and berry juice off their hands or to wash their hands after relieving themselves. It is inconceivable that employees who work in offices or stores would tolerate workplaces without toilets or wash basins. For hand-harvesters, however, it is the norm.

Branch personnel saw very few hand-harvesters wearing hand protection. Generally, berries are picked by hand-harvesters without cotton or latex gloves.

A sector whose product essentially goes untouched from hand-harvester to consumer would want to assure its consumers that the product was picked in the most sanitary way possible. Product picked by unclean hands does not lend itself to a positive public image. Given the requirements for food handlers in restaurants and other food service businesses to work with clean hands, it is remarkable that growers and Farm Labour Contractors do not universally provide toilets and hand washing facilities. Farm Labour Contractors in the USA provide both toilets and hand washing facilities in the fields.

Doug Powell, scientific director of the Food Safety Network at Ontario's Guelph University, says food-borne illnesses afflict up to one in four Canadians annually and are due to micro-organisms lurking in beef and poultry as well as fresh fruits and vegetables. Controlling these outbreaks, he says, largely comes down to improving sanitation practices at every stage along the food chain.

ACT did not have authority to address these issues.

Living Conditions

Some growers provide their farmworkers with on-site residences. While some of these on-site residences are modern, with contemporary plumbing and heating, others are not. They lack indoor toilets, central heating and other contemporary necessities.

There is no restriction on the amount growers can charge hand-harvesters for rent or for room and board.

ACT did not have authority to address these issues.

Vehicle Safety

Farm Labour Contractors are required by Employment Standards Regulations to ensure that each vehicle they use for transporting employees has affixed to it an unexpired inspection certificate in accordance with section 25.02 of the **Motor Vehicle Act** regulations. They are also required to file with the Director an up-to-date list of the registration numbers and license numbers of each vehicle used for transporting employees, and, if they own the vehicle, copies of the inspection certificate and other records that must be maintained under section 25 of the **Motor Vehicle Act** regulations.

Without field inspections, the Director does not know if Farm Labour Contractors are complying with the regulations pertaining to vehicles.

The requirement to affix an unexpired inspection certificate to the vehicle is no substitute for a vehicle inspection conducted by a government enforcement agency.

Roadside hand-harvester vehicle inspections were discontinued in the early 1990's. It was discontinued in part because hand-harvesters often lost a day's wages when the vehicle they were riding in failed inspection. It is unclear as to why hand-harvester vehicles cannot be inspected in the field while the hand-harvesters are picking.

The Compliance and Consumer Services Branch of the Ministry of Public Safety and Solicitor General has the responsibility of ensuring commercial vehicle safety. Its Commercial Vehicle Safety and Enforcement Division has a mandate to conduct random roadside checks of all commercial vehicles. The 15-passenger vans commonly used by Farm Labour Contractors are commercial vehicles, and are therefore subject to random roadside inspections. Although requested, the Assistant Deputy Minister did not provide any information on the number of random roadside checks of vehicles transporting hand-harvesters to, from and between fields or whether that transportation activity was the subject of a focused campaign during 2003.

Passing on Cost of Doing Business

ACT encountered hand-harvesters who had to pay their Farm Labour Contractors a fee for providing them with a ride to and from their workplaces. This fee contravenes Section 21 of the **Act**. Hand-harvesters are under the direction and control of their employers during their trips to, from and between their workplaces. Group travel to the worksite is conducted for the benefit of the employer in that it ensures the workforce, who frequently lacks their own transportation, arrive in a timely manner for work. In return for the benefit of moving employees at the same time, employers cannot pass on the associated cost.

Under-Reporting of Hand-Harvesters

The Branch acknowledges the number of hand-harvesters to be under-reported. It is in the Farm Labour Contractor's interests to under-register the number of employees.

Without field inspections, the Branch cannot establish if Farm Labour Contractors have posted a bond in the appropriate amount.

Unlicensed Farm Labour Contractors

Farm Labour Contractors can avoid the costs associated with obtaining a license by non-compliance with the **Act's** licensing requirements. No license fee paid, no bond posted.

Without field inspections, the Branch cannot discover unlicensed Farm Labour Contractors.

Backwards Accounting

Some Farm Labour Contractors start at the desired result and create records to support it. For example, although the hand-harvester worked 12 hours, the Farm Labour Contractor recorded only 7 hours because that produced the desired amount of wages to be paid.

Without field inspections, the Branch cannot easily verify records.

IMPORTING NEW ERA HAND-HARVESTERS

In July 2004, Jonathan Woodward, a Staff Reporter for *The Province*, reported that 7 producers had applied through the federal government's Seasonal Agricultural Workers Program for Mexican harvesters. Crops were going unharvested for lack of enough harvesters. Millions of dollars of fruit and berries was rotting in the fields. According to the Ministry of Agriculture a lack of hand-harvesters led to \$16 million worth of fruit and vegetables going unharvested in 2002. Mike Wallis, Executive Director of the Raspberry Growers Council, blamed changing demographics for the decline in the number of persons willing to work as hand-harvesters. Older Indo-Canadian workers - the mainstay of the labour force are retiring, he said, while younger immigrants are going to more professional jobs. He claimed that there weren't enough

Canadians who wanted to do the work and concluded that Mexicans are needed to fill the void.

Industry claims that the exit or retirement of hand-harvesters must be addressed by importing workers is not supported by information collected by the Branch. The number of employees bonded by Farm Labour Contractors is virtually the same in 2003 (5915) as it was in 1999 (6000), only 857 fewer than in 2000, 396 fewer than in 2001 and 527 fewer than in 2002. There has not been a significant decline in the number of bonded employees in the past five years. The number of bonded employees in 2003 is over 2,000 more than in 1997. From this perspective, it is difficult to appreciate why this year the shortage of hand-harvesters is so great that Mexicans are needed.

Judging by a comment made by raspberry representatives in their letter to a sectoral magazine, it would appear raspberry growers would welcome migrant workers. They noted that, "at this time, British Columbia producers are not able to take advantage of a foreign labour program, established with the help of the Federal government in eight other provinces." Rather than pay better wages and improve working conditions, the raspberry growers appear to prefer their crops being harvested by foreign labourers.

The concern of raspberry growers for readily available hand-harvesters is perplexing because most of the raspberry crop is harvested mechanically.

There have been attempts to get Canadian youth involved in hand-harvesting. Most recently, 'Co-op' students were sent into Fraser Valley secondary schools to extol the virtues of hand-harvesting as a summer job. There seems to have been few takers. Hand-harvesting does not compete with the assurance of a minimum wage. Furthermore, the heat of the fields in a Fraser Valley summer lacks the comfort of an air-conditioned fast-food outlet.

Organic blueberry farmer Chris Croener, according to reporter Woodward, had no problem finding workers. He provides incentives, including a bonus for working the

season. Croener observed that, “If people can’t find pickers, I would ask first how they’re treating their pickers.”

It has been observed that the family reunification program is no longer bringing as many people to Canada as it once did. The family reunification program is the chief source of hand-harvesters. There is not a present crisis, certainly not one to the extent claimed, however, in time, with the present hand-harvesters aging and not being replaced by younger Indo-Canadians or people newly-arrived from India, there will be a severe shortage of hand-harvesters.

ANALYSIS

No Future for Low Wage-No Wage Harvesters

Government is pandering to berry growers and to Farm Labour Contractors. It pandered to them when it lowered the already low employment standards for hand-harvesters. It pandered to them when it reduced enforcement. These actions will not do growers any long-term good.

Good wages and working conditions attract employees. Hand-harvesters’ present poor wages and unpleasant or sub-standard working conditions do not attract people to the industry. People become hand-harvesters out of desperation, often while searching for something better and often while acquiring the English language skills to obtain better employment. Youth will not choose the discomfort of hand-harvesting in the heat of a Fraser Valley summer over the comfort of working in an air-conditioned restaurant, store or office. Youth will not choose the uncertainty of hand-harvester wages over the certainty of wages from employers in other sectors.

The consequence of crops being harvested by the cheapest means is the continued exploitation of harvesters. Continued exploitation deters people from becoming hand-harvesters and drives them to other employment opportunities.

If growers want their crops harvested, they will have to increase wages and improve working conditions. Low

wages and poor working conditions for hand-harvesters make it a sunset employment occupation. Continued dependence on importing workers willing to tolerate such conditions until better employment is available provides only short-term relief and perpetuates an abusive employment environment. Policy that relies on continued immigration to address worker shortages for the industry is unlikely, in the long-term, to enjoy public support.

Unconscionable Subsidy

Currently, growers receive a subsidy in the form of low wages and of wages paid in the form of ROE. The low wage subsidy is paid for by hand-harvesters and the bogus ROE is a cost borne by contributors to Employment Insurance.

It may be that the growers need a subsidy to ensure the viability of the industry. Recent studies have found that even as the price paid by consumers of fruits and berries has increased in the past few years, the farm gate price has decreased. Consumers are paying more but growers are getting less.

If a subsidy is needed, it ought not to be paid by hand-harvesters or by contributors to Employment Insurance. A subsidy, if needed to ensure an adequate supply of local resident workers, must be provided honestly.

An honest subsidy would be one that makes it economically possible for growers to adhere to all employment standards, including the normal minimum wage and to provide acceptable sanitary and safe workplaces. An honest subsidy would end exploitation of harvesters. It would allow, at the same time, for growers to get a fair return on their crops and for Farm Labour Contractors to get a reasonable price for the services they provide growers and hand-harvesters. Perhaps government should pay the difference between what growers can afford to pay to have their crops harvested and what harvesters should be paid for the beneficial work they perform.

It may be that growers and Farm Labour Contractors are taking advantage of a vulnerable workforce, elderly Indo-

Canadians, to pass on costs of doing business and improve their profits.

An inquiry into the economics of Fraser Valley berry crops would be a logical first step to establish whether the industry is operating under such tight margins that they needed a subsidy to survive or whether they are taking advantage of a vulnerable work force to boost their profits.

Time For a Change?

Another possibility is that the globalization of food supply has struck a blow to Fraser Valley berry growers - one from which they cannot rebound without support. The transportation of fresh berries, fruit and produce is no longer limited to crossing the continent; the ability to transport these products across the globe has put increased pressure on local producers worldwide. A recent Oxfam report found that the fresh fruit and produce market is dominated by large distribution companies which act as "gatekeepers" between developing countries and lucrative western markets. Retailers in Canada and the United States now hold "internet auctions" for suppliers to submit the lowest bids for contracts and place "same-day" orders for fresh produce to be packaged and shipped within 24 hours. If globalization increases and transportation costs remain low, it may be cheaper to fly berries from South America to Vancouver than to truck Fraser Valley products into the city.

Under this scenario, without subsidization, berry growers in the Fraser Valley may be faced with the same challenge as fruit growers in the Okanagan. Fruit growers either had to convert their orchards to vineyards or replant them in the new high-density format. Berry growers may have to diversify their crops, pursue value-added applications for their commodities or farms or replant their berries to permit mechanical harvest.

RECOMMENDATIONS

That the Government of British Columbia:

- Reactivate the Employment Standards Branch's Agricultural Compliance Team (ACT) by:
 - Restoring funding and staffing for ACT,
 - Renewing ACT's alliances with Employment Insurance Commission, Workers' Compensation Board, RCMP and other government agencies whose mandates impact hand-harvesters, and
 - Reinstating meaningful field and vehicle inspections.
- Abolish the government created minimum wage rate for crops and extend the general hourly minimum wage to all hand-harvesters, including foreign workers.
- Conduct an economic inquiry into the viability of Fraser Valley berry farming that would:
 - Examine growers' claims regarding lack of hand-harvesters and insufficient revenue to comply with the ACT;
 - Identify challenges confronting the industry, and
 - Provide recommendations to resolve problems identified.
- Review and improve the knowledge examination for Farm Labour Contractors and expand it to include all statutes and regulations pertaining to hand-harvesters.
- Ensure that flats are weighed by the appropriate type of scales, properly calibrated and inspected by the appropriate regulatory authority.
- Create a standard 'picking card' and make it readily available to the industry.

- Restore bonding requirements to a multiplier of 120.
- Ensure that vehicles used to transport hand-harvesters are safe and roadworthy by reinstating frequent, focussed inspection campaigns.
- Ensure hand-harvesters have access to toilets and hand washing basins, thereby providing comfort to hand-harvesters and improving the cleanliness of the crop for its consumers.
- Establish a limit on the amount an employer can charge an employee for lodging, comparable to those limits for domestic workers and for tree planters.
- Establish requisite lodging conditions for those farm workers who reside in employer-provided accommodation; such as access to indoor plumbing, hot and cold running water, and electrical supply.

APPENDIX "A"

2003 Crop Piece Rate Minimum Wage

The minimum wage for farmworkers who are employed on a piece work basis and hand-harvest the following crops is as follows (rates include vacation pay of four percent of earnings):

Apples	\$ 15.60/ bin (27.1 cu. ft.)
Apricots	\$ 17.94/ 1/2 bin (13.7 cu. ft.)
Beans	\$ 0.214/ pound
Blueberries	\$ 0.362/ pound
Brussels sprouts	\$ 0.149/ pound
Cherries	\$ 0.205/ pound
Grapes	\$ 16.58/ 1/2 bin (13.7 cu. ft.)
Mushrooms	\$ 0.215/ pound
Peaches	\$ 16.58/ 1/2 bin (12.6 cu. ft.)
Pears	\$ 17.56/ bin (27.1 cu. ft.)
Peas	\$ 0.267/ pound
Prune plums	\$ 17.56/ 1/2 bin (13.7 cu. ft.)
Raspberries	\$ 0.326/ pound
Strawberries	\$ 0.314/ pound
Daffodils**	\$0.125/ bunch (10 stems)

****Note: the rate for daffodils does not include vacation pay.**

APPENDIX "B"

2001 Crop Piece Rate Minimum Wage

The minimum wage for farmworkers who are employed on a piece work basis and hand-harvest the following crops (rates include 3.6 percent statutory holiday pay and 4 percent vacation pay):

(a) raspberries	\$.338 per pound;
(b) strawberries	\$.326 per pound;
(c) blueberries	\$.376 per pound;
(d) cherries	\$.213 per pound;
(e) apples	\$16.18 per bin (27.1 cu. ft.);
(f) pears	\$18.22 per bin (27.1 cu. ft.);
(g) apricots	\$18.61 per 1/2 bin (13.7 cu. ft.);

(h) peaches	\$17.20 per 1/2 bin (13.7 cu. ft.);
(i) prune plums	\$18.22 per 1/2 bin (13.7 cu. ft.);
(j) grapes	\$17.20 per 1/2 bin (12.6 cu. ft.);
(k) brussels sprouts	\$0.154 per pound;
(l) beans	\$0.222 per pound;
(m) peas	\$0.277 per pound;
(n) mushrooms	\$0.223 per pound.

(1.1) The minimum wage for farmworkers who are employed on a piece work basis and hand-harvest the following crops is, for gross volume or weight picked, as follows:

(a) daffodils..... \$.125 a bunch (10 stems)

APPENDIX “C”

MEMORANDUM OF UNDERSTANDING

BETWEEN: MINISTRY OF SKILLS DEVELOPMENT AND
LABOUR

THE EMPLOYMENT STANDARDS BRANCH (THE
BRANCH)

AND

BC AGRICULTURE COUNCIL

AND BCAC MEMBER ORGANIZATIONS

INTRODUCTION

This Memorandum is designed to create a framework for a partnership approach to addressing awareness and education of employer and employee rights and responsibilities under the **Employment Standards Act and Regulations** and to build on initiatives already undertaken by many associations.

The goals of this partnership are:

- Produce a framework for a partnership between the Employment Standards Branch, Ministry of Skills Development and Labour and the Agriculture sector.
- Increase education, understanding and compliance in regard to the **Employment Standards Act (ESA)** with a focus on core requirements under the **ESA**.
- Provide a more proactive, efficient and mutually satisfactory means of dealing with employment legislation issues and complaints while protecting the most vulnerable of employees.
- To assist in creating opportunities for youth employment in Agriculture.

COMPONENTS OF THE PROGRAM

- Improving compliance in the hand-harvesting sector with a particular focus on the berry industry. Every berry site will be visited at least once during the 2003/04 season.
- The BC Agriculture Council and its member organizations agree that they will not support or condone the utilization of unlicensed Farm Labour Contractors including the exclusive use of licensed Farm Labour Contractors.
- An Officer of the Employment Standards Branch would be assigned to liaise with the council and its member associations with initial priority on education with the hand-harvest sector. These liaisons would include visiting producer operations to further both the goals of the Memorandum of Understanding and industry compliance with the legislation.
- As the largest employers of hand harvest Labour in BC, the blueberry, raspberry, strawberry, field-vegetable and tree fruit associations have not and will not condone any core violations, including the non-payment of wages owed to farmworkers and hand harvesters by growers, Farm Labour Contractors, processors or fresh packers.
- The Council and its member organizations will support the Ministry of Skills Development and Labour, Employment Standards Branch enforcement activities during the 2003/04 seasons as part of the Council's commitment to protect vulnerable workers.
- A minimum of 5 jointly delivered education sessions would be held annually directed at industry participants including producers, contract labour services and employees.
- The partners will develop educational materials to be used in a number of venues - seminars, industry newsletters, targetted mailouts. Information sessions can take place in various locations, including on farms.

- The Council and its member associations would promote use of the materials and attendance at seminars.
- Partner web sites to include a description of the partnership, its goals and progress towards meeting the goals.
- The Council will seek to provide a resource to support the partnership through the Skills Development and Labour component of the Agri-Food Futures Fund.
- The signatories will link to the Agriculture Labour Partnership Committee for input, advice and recommendations in regard to trends, potential priorities and activities of the partnership.

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September 20, 2004