

# The Seasonal Agricultural Workers Program: Looking at Mexican Participation Through a Magnifying Glass

---

**Irma Fabiola Cruz-Lopez**

Thesis submitted to the Faculty of Graduate and Post-Doctoral Studies in partial  
fulfilment of the requirements for the degree of Doctor of Laws (Ph. D.)

**Faculty of Law  
University of Ottawa**

©Irma Fabiola Cruz-Lopez, Ottawa, Canada, 2013

## **Abstract**

Mexican migrant workers have been coming to Canada since 1974 to work in agriculture as participants of the Seasonal Agricultural Workers Program (SAWP). Presently, Mexicans constitute the majority of SAWP workers. As well, Ontario is the main receiver of these workers followed by British Columbia and Quebec. Accordingly, the scope of this thesis mainly encompasses Mexican workers in Ontario. However, the thesis also includes Mexican SAWP workers in Quebec and British Columbia.

This thesis reveals two main issues: (1) that all SAWP workers, particularly Mexican workers, lack key legal rights and protections relating to labour relations, employment, health and safety standards at the structural level of the SAWP; and at the federal, provincial, and international levels. (2) Even when they have rights under legislation relating to the above-mentioned subject matters, Mexicans, especially, lack the capacity to access them. Thus, they become ‘unfree labourers’ who are placed in a perpetual state of disadvantage, vulnerable to abuse and exploitation once in Canada.

To describe the issues above, the thesis is divided into five chapters addressing the following:

Chapter 1 presents the historical context behind the SAWP as well as the Mexican workers’ circumstances that attract them to participate in the Program.

Chapter 2 examines the applicable constitutional and federal framework for SAWP workers. In addition, it highlights key federal exclusions placed on them, which originate in the federal immigration and employment insurance legislation.

Chapter 3 concludes that Ontario does not protect its agricultural workers from unfair treatment and exploitation in the workplace; rather, it perpetuates such practices. This reality is intensified for SAWP Mexican workers. Particularly, chapter 3 analyses a constitutional challenge to the Ontario legislation excluding agricultural worker from its labour relations regime; said challenge is based on ss. 2(d) and 15(1) of the Canadian Charter of Rights and Freedoms.

Chapter 4 maintains that similarly to workers in Ontario, SAWP workers in Quebec and British Columbia also face extreme disadvantages due in great part to the lack of or limited legal protections.

Finally, chapter 5 asserts that due to its implementation in the Canadian framework, international law is inadequate to protect domestic and SAWP workers’ rights. While each chapter identifies tangible drawbacks or anomalies, which affect SAWP workers negatively, the thesis also provides recommendations to alleviate said weaknesses.

## Table of Contents

Acknowledgements.....	viii
Introduction.....	1
Chapter 1- SAWP’s Context and Structure .....	6
I.    Historical Context of Migrant Farm Workers.....	6
A.    During World War II .....	7
B.    Post-World War II .....	9
1.    “Unfree Immigrant Labour” .....	9
2.    “Free Immigrant Labour” .....	17
3.    “Unfree Migrant Labour” .....	20
C.    The Mexican Context .....	26
1.    Deregulation of Agriculture in Mexico.....	26
2.    Need to Migrate .....	32
II.   Profile of SAWP Participants .....	34
A.    Geographical Origin and Destination.....	34
B.    Socioeconomic Status.....	35
C.    “The Migrant Syndrome” .....	37
III.  What is the SAWP?.....	42
A.    What are the policies behind the SAWP?.....	43
B.    How Does the SAWP Work? .....	45
C.    What Are the Benefits for Canada and Mexico? .....	47
D.    Structure of the SAWP .....	51
1.    Memorandum of Understanding (MOU).....	51
2.    The Operational Guidelines .....	57
3.    Employment Agreement .....	62
IV.   Conclusion.....	69
Chapter 2- Federal Framework .....	70
I.    Constitutional Context in Relation to the SAWP .....	71
A.    Division of Powers Generally.....	71
B.    Labour and Employment .....	73
C.    Jurisdiction relating to SAWP Workers’ Employment and Labour Relations.....	76
D.    Agriculture.....	79
E.    Federal Government’s Mandate and Role in Agriculture .....	84
F.    Immigration .....	87

II.	Key Federal Exclusions Affecting SAWP Workers .....	91
A.	Immigration and Refugee Protection Act (IRPA) .....	91
1.	Temporary Workers .....	92
a.	Live-in Caregiver Program .....	98
b.	Low Skill Pilot Project .....	100
c.	SAWP workers and Low Skill Pilot Project Agricultural Workers .....	102
B.	The Employment Insurance Act (EIA).....	105
1.	Contextual Background .....	105
2.	Application of the EIA to SAWP Workers.....	108
3.	Charter Challenge of EIA Exclusion as Applicable to SAWP Workers ..	111
a.	Case Analysis .....	112
b.	Disposition of the Case .....	115
4.	Author’s Observations and Suggestions regarding EIA’s Exclusion of SAWP Workers.....	117
III.	Conclusion.....	119
	Chapter 3- SAWP Workers in Ontario .....	122
I.	Application of Provincial Legislation to Workers under the SAWP- Ontario ...	126
A.	Occupational Health and Safety Act(OHSA).....	128
1.	Joint Health and Safety Committee .....	131
2.	Health and Safety Representative .....	138
3.	Right to Refuse or to Stop Work where Health or Safety in Danger.....	140
B.	Employment Standards Act (ESA).....	142
C.	The Labour Relations Act (LRA) and the Agricultural Employees Protection Act (AEPA).....	148
II.	Charter Challenge of Ontario Legislation.....	154
A.	Background.....	154
B.	<i>Dunmore</i> .....	158
1.	Judicial History .....	160
2.	The issues before the Supreme Court of Canada .....	162
3.	Section 2(d) Freedom of Association Analysis .....	163
4.	Underinclusive Government Action/ Positive Government Obligation ...	165
5.	Section 1 Analysis.....	166
6.	Remedies.....	167
7.	Dissent.....	168

C.	<i>Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia(BC Health Services)</i> .....	169
1.	Background.....	170
2.	Judicial History.....	170
a.	British Columbia Supreme Court.....	171
b.	British Columbia Court of Appeal.....	172
3.	Issue before the Supreme Court of Canada.....	172
4.	The Overturn of the “labour trilogy”.....	173
5.	Scope of freedom of association.....	174
6.	“Substantial interference”.....	175
7.	Underinclusion.....	176
8.	Applicability outside the collective bargaining context.....	177
9.	Section 1 Analysis.....	178
10.	Section 15 Analysis.....	179
11.	Dissenting Opinion.....	179
D.	<i>Fraser v. Ontario (Attorney General)(Fraser II)</i> .....	180
1.	The context and the claim.....	180
2.	Judicial History.....	182
3.	Analysis of the Ontario Court of Appeal.....	182
4.	s. 1 Analysis.....	184
5.	s. 15 Analysis.....	185
6.	Remedies.....	185
E.	<i>Ontario (Attorney General) v. Fraser (Fraser III)</i> .....	186
1.	Majority’s Analysis of s. 2(d).....	187
2.	Majority’s Analysis of s. 15.....	192
3.	Concurring Opinions.....	193
4.	Dissenting Opinion.....	193
5.	<i>Fraser III’s</i> Impact on Mexican SAWP Workers.....	196
a.	“Meaningful process”.....	198
b.	“to Bargain in Good faith”.....	200
III.	Conclusion.....	202
Chapter 4-	SAWP Workers in Quebec and British Columbia.....	204
I.	Quebec.....	206
A.	An Act Respecting Occupational Health and Safety (OHS).....	211

1.	Rights for Workers.....	211
2.	Health and Safety Committees.....	215
3.	Safety Representatives .....	217
B.	An Act respecting Labour Standards (LS) .....	218
1.	Wages.....	219
2.	Duration of the Regular Workweek.....	220
3.	Weekly Rest Periods.....	223
4.	The Right to Refuse to Work .....	224
5.	Annual Leave with Pay.....	224
C.	Labour Code (LC) .....	226
D.	<i>Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 c. Johanne L'Écuyer &amp; Pierre Locas (Travailleurs et travailleuses)</i> ...	227
1.	The Issues.....	229
a.	Freedom of Association.....	229
b.	s. 15 Equality Rights.....	231
c.	Union Accreditation.....	232
2.	New Developments and Observations .....	233
a.	Commentary on the <i>Commission's</i> Decision.....	233
b.	Arguments of the Attorney General of Quebec.....	238
II.	British Columbia.....	243
A.	Background.....	243
1.	Health and Safety for Agricultural Workers.....	247
a.	The Legislation.....	247
b.	Research Findings.....	249
2.	Employment Standards Act (ESA) .....	254
a.	Hours of Work and Overtime .....	255
b.	Statutory Holidays .....	256
3.	Labour Relations Code (LRC).....	257
a.	Floralia Agreement .....	258
b.	Sidhu & Sons Nursery Agreement .....	262
B.	Observations-Limitations .....	268
III.	Conclusion.....	269
	Chapter 5- Application of International Law to SAWP Workers in Canada.....	271
I.	Background on Canada's Domestic Implementation of International Law.....	274

A.	Customary International Law .....	276
B.	Treaties .....	284
1.	Who is Responsible for What? .....	285
2.	Complaint Against the Government of Canada Before the ILO.....	290
a.	The Government’s Response.....	291
b.	The Committee’s Conclusions and Recommendations.....	292
II.	Author’s Proposed Recommendations.....	295
A.	The Presumption of Conformity.....	295
B.	Conformity in <i>Charter</i> Cases .....	301
III.	Conclusion.....	307
Conclusion	.....	309
Bibliography	.....	312
I.	Constitution.....	312
II.	Federal Legislation.....	312
III.	Provincial Legislation .....	313
IV.	Jurisprudence.....	314
V.	Agreements .....	320
VI.	International Instruments.....	321
VII.	Secondary Materials: Monographs.....	322
VIII.	Secondary Materials: Other than Monographs.....	324
Appendix I – Memorandum of Understanding.....		337
Appendix II – SAWP Employment Agreement.....		340
Appendix III – SAWP Employment Agreement (British Columbia).....		348
Appendix IV – HRSDC Deck.....		355
Appendix V – CIC Statistics on SAWP Works by Province from 2000-2009.....		375
Appendix VI – Number of Temporary Foreign Workers in Agriculture (excluding SAWP).....		377
Appendix VII – Number of Temporary Foreign Worker Positions under the SAWP....		404
Appendix VIII – Employment Contract for Temporary Foreign Workers (Non-SAWP)		407
Appendix IX – Pay Sheet for Mexican SAWP Workers .....		412
Appendix X – Floralia Agreement.....		414
Appendix XI – Sidhu & Sons Agreement.....		436
Appendix XII – Mexican Seasonal Agricultural Workers Direction.....		454

Appendix XIII – SAWP Employment Agreement for Commonwealth Caribbean Seasonal Agricultural Workers .....	456
Appendix XIV – SAWP Employment Agreement for Commonwealth Caribbean Seasonal Agricultural Workers (British Columbia).....	464
Appendix XV – Interview Guide.....	471

**Table of Figures**

Table 1: Summary on the various types of immigration and migrant labour .....	25
Table 2: Distribution of SAWP Mexican Workers in Canada.....	34
Table 3: Parental Benefit Claims .....	116
Table 4: CIC Statistics .....	122
Table 5: Distribution of Ontario Census Farms by Major Product Type, 2006 .....	134
Table 6: Vacancies Filled by Crop.....	135
Table 7: Summary of Benefits .....	144

# Acknowledgements

I am truly grateful to my supervisor, Professor André Braën for his guidance, feedback, extreme patience and understanding. His constructive comments were a guiding light in the course of this work. I also thank the members of the thesis defence committee, Dr. France Houle, Dr. Ives LeBouthillier, Dr. Charles-Maxime Panaccio and Dr. Denise Spitzer, for their valuable comments and suggestions.

As the old saying dictates, “it takes a village to raise a child”, I can certainly attest that it took a community to help me write this thesis. I would like to express my deepest gratitude to my work colleagues: Edward A. McNabb for reviewing early stages of chapters 1 and 2 and for his continuous encouragement and advise; Francois Chasse for reviewing the early stage of chapter 4 and to the rest of my colleagues at the Department of Justice Canada, Legal Aid Directorate for being so supportive and patient with me while undertaking this long journey. I am especially grateful to my director, Bonny Wong-Fortin for her never-ending understanding, patience and flexibility, which allowed me to complete this work.

As for my family, I thank them for all their love and encouragement. I thank my parents who raised me with unconditional love and supported me in all my pursuits. I thank my siblings for their support, love, encouragement and generosity. I also thank my beloved daughter Andrea for her understanding and unconditional love. She is the light in my life. And most especially, I thank my loving, supportive, encouraging, and patient husband Michael for his faithful support during this journey. Thank you.

*I dedicate this thesis to my beloved father,  
Dr. Facundo Cruz Terán. He was a generous man  
true to his ideals; he always treated and cared for the  
sick and vulnerable. He was brilliant at practicing  
medicine; I admired him deeply.*

# Introduction

Mexican migrant workers have been coming to Canada since 1974 to work in agriculture as participants of the Seasonal Agricultural Workers Program (SAWP). The SAWP originated as a means to alleviate labour shortages in Ontario. It first brought Caribbean workers in 1964. Mexicans were incorporated into the Program ten years later (1974). Presently, Mexicans constitute the majority of SAWP workers. As well, Ontario is the main receiver of these workers followed by British Columbia and Quebec. Accordingly, the scope of this thesis mainly encompasses Mexican workers in Ontario. However, the thesis also includes Mexican SAWP workers in Quebec and British Columbia.

This thesis reveals two key issues: (1) that all SAWP workers, particularly Mexican workers, lack key legal rights and protections relating to labour relations, employment and health and safety standards at the structural level of the SAWP; and at the federal, provincial, and international levels. (2) Even when they have rights under legislation relating to the above-mentioned subject matters, Mexicans, especially, lack the capacity to access them. Thus, they become ‘unfree labourers’ who are placed in a perpetual state of disadvantage, vulnerable to abuse and exploitation once in Canada. By ‘unfree labourers’ the author means unable to freely circulate in the Canadian labour market because they are trapped to work with only one employer.

The author notes that while she found diverse and considerable literature by sociologists and other social scientists on the SAWP and its participants, she, on the other hand, found limited legal literature on the subject. This posed additional challenges for her. However, it is precisely because there are scarce legal works on this subject that this

## Introduction

thesis contributes to the advancement of knowledge as a “ground-breaking” exploratory and descriptive work, which provides with an overview of migrant workers disadvantaged legal position in Canada. As well, it suggests some potential avenues to remedy such disadvantaged position.

The two key issues (findings) of the thesis, as outlined above, are based on the examination of numerous primary and secondary sources. For instance, the author examined legislation (federal and provincial); jurisprudence (domestic and international); international costumes and instruments; as well as books, periodicals, articles, reports, studies, statistics and internet resources. In addition, the author relied on studies conducted by medical scholars and social scientists, particularly, sociology scholars.

Finally, the author contacted Canadian government officials, Mexican embassy officials, Mexican consular officials, as well as union representatives in order to gather information (see appendix XV- Interview Guide). The mode of contact was done via telephone, electronic mail and through face-to-face interviews. The author requested these interviews or conversations by explaining that she was conducting her doctoral research regarding SAWP and its participants and she would appreciate any first-hand information on the subject. Thus, the purpose of contacting these officials and representatives was to gather general information regarding the SAWP, its management, as well as to follow up on the author’s own questions, which were raised during her research.

In order to describe the specific problems encountered by SAWP workers, this thesis is divided into five chapters; each with its own footnotes starting at 1 for ease of reference. Chapter 1 presents the historical context behind the SAWP. It also explores

## Introduction

the Mexican workers' circumstances that attract them to participate in the Program. Finally, chapter 1 highlights relevant features of the Program's structure.

Chapter 2 examines the applicable constitutional and federal framework for SAWP workers. Particularly, it examines how "immigration" and "employment" pursuant to the *Constitution Act, 1867* apply to these workers. As well, chapter 2 highlights federal exclusions placed on them. These exclusions are found in the federal immigration and employment insurance legislation. By exclusion the author means an exclusion from a right, benefit or protection afforded by precedent or legislation.

Chapter 3 outlines key Ontario legislation in the areas of labour relations, employment, health and safety standards applicable to all agricultural workers.

It captures Ontario's legal reality; namely that the current Ontario legal framework, as applicable to all agricultural workers in that province, does not provide protection from unfair treatment and exploitation in the workplace; rather, it perpetuates such practices. Chapter 3 further argues that said legal reality is intensified for SAWP Mexican workers.

Chapter 4 also examines labour relations, employment and health and safety standards legislation applicable to SAWP workers in Quebec and British Columbia. It concludes that similarly to workers in Ontario, SAWP workers in Quebec and British Columbia also face extreme disadvantages due in great part to the lack of or limited legal protections, especially when compared to agricultural workers in general.

Finally, chapter 5 asserts that the implementation of international law within the Canadian context hinders the grant of essential labour and human rights, as stipulated in well-established treaties or conventions, for all agricultural workers and particularly

## Introduction

SAWP workers. Therefore, such implementation makes international law inadequate to protect domestic and SAWP workers' rights to organize and collectively bargain.

While each chapter identifies tangible drawbacks or anomalies, which affect SAWP workers negatively, the author also provides recommendations to alleviate said weaknesses. She does not advocate for the abolition of the Program, instead she recommends the incorporation of protective measures targeting SAWP workers in particular. As well the author does not propose that all SAWP employers abuse and exploit workers. Rather, the thesis argues that the structure of the Program; the lack of provincial and federal rights and protections; the current implementation of international law in Canada; as well as Mexican workers' lack of education, inability to communicate in English or French, lack of financial resources, political capital, isolation, and the need to keep their jobs, create an environment where some employers can, and in many instances, have abused and exploited their workers.

Although this thesis explores key areas applicable to SAWP workers, it has its limitations. It does not include all federal and provincial legislation applicable to SAWP workers. Furthermore, it does not include all applicable international law. Instead, the author chose essential pieces of legislation from the various jurisdictions and key international law instruments to illustrate that even at that "macro" level of analysis one will conclude that SAWP workers lack basic legal rights and protections and as such are extremely vulnerable to abuse and exploitation and in fact, many have been abused and exploited.

As well, the contextual scope of this thesis mainly targets Mexican male workers under the SAWP; it does not include female Mexican SAWP workers and all Caribbean

## Introduction

SAWP workers. However, most of the issues identified for the principal target group apply to the other groups, unless identified by the author.

Another limitation is the lack of the employer's perspective. This was difficult to capture since the author was unsuccessful at finding employers willing to tell their side of the story. The difficulty was exacerbated by the unwillingness or inability of FARMS, the agency representing and aiding them in hiring SAWP workers, to provide the author with a list of participating employers. For these reasons, the author has extracted from various authors their findings regarding the employer's perspective.

The limitations identified above create opportunity for additional research. It should be noted that this thesis is a starting point and as such it aims to spark interest in further research. As well, it aims to be a point of reference to stimulate debate and discussion. Last but not least, it should be underscored that this thesis is written to serve as an advocating voice for all Mexican SAWP workers in particular. It hopes to shed light on the dark reality faced by many of them; and it aspires to inform the legal community and exhort its members to promote and advocate that all SAWP workers, particularly Mexicans, deserve to have access and benefit from the law and policies of the participating provinces, Canada and the international community.

# Chapter 1- SAWP's Context and Structure

The aim of this chapter is to illustrate the historical context surrounding farm workers in Canada. In particular, this chapter explores the Mexican migrant workers' historical and current circumstances that attract them to work in Ontario and other participating provinces every year under the Seasonal Agricultural Workers Program (SWAP). Finally, this chapter will highlight relevant features in the SAWP's structure, particularly, its Memorandum of Understanding (MOU), Operational Guidelines and Employment Agreement.

## I. Historical Context of Migrant Farm Workers

In order to better grasp and understand the SAWP's legal framework, it is imperative to examine how it all started. As one dives into history, two themes emerge in particular: (1) the need to have "reliable"<sup>1</sup> workers in the fields. Having mobility and immigration status restrictions is what makes them "reliable". (2) As well, for the Ontario (and other provinces) farming industry to succeed there needs to be a constant supply of seasonal workers.

---

<sup>1</sup> By reliable, the author means workers unable to freely circulate in the labour market and unfree to refuse work when required. See Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada*, (Montreal & Kingston: McGill-Queen's University Press, 2002) at 140 [Basok]. Simply stated, farm owners need "unfree" labourers. "Unfree" labourers are reliable because they are not free to leave farm work to work anywhere else in Canada; if they do, they are subject to deportation. See also Adrian A. Smith, "Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers" (2005) 20 No. 2 Can JL & Soc'y 95 .

## A. During World War II

Farming is integral to Canada's development. Throughout Canada's history, the agricultural industry has faced two problems: how to recruit adequate workers for the harvest season and how to retain them throughout the whole season.<sup>2</sup> Since the 1940's Canada started to encounter a decline in agricultural employment. Until the 1940's farming was essentially a family business.<sup>3</sup> Nevertheless, the commercialization and consolidation in farming lead to a significant increase in the proportion of hired workers versus the self-employed farm operators and unpaid members of their families. The farm consolidation trend in agriculture was related to certain pressures faced by family farms. These pressures were the much faster rising cost to produce agricultural commodities in relation to the price farmers could charge for their produce.<sup>4</sup> This disparity created a devastating "cost-price squeeze" for many farmers. Consequently, many of them were forced to abandon farming and move to the cities in search of industrial jobs.<sup>5</sup> For instance, in 1941, 28 per cent of the Canadian labour force was allocated in the agricultural sector. In contrast, this number dropped to 7.6 per cent by 1966.<sup>6</sup>

The supply of seasonal labour was particularly low during World War I and World War II. To alleviate this shortage, there were various public and private labour

---

<sup>2</sup> See Veena Verma, "The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program under Unionization", (December 2003), online: The North-South Institute < <http://www.nsi-ins.ca> > [Verma].

<sup>3</sup> *Ibid* at 5.

<sup>4</sup> See Basok, *supra* note 1 at 26.

<sup>5</sup> *Ibid*.

<sup>6</sup> See Verma, *supra* note 2 at 5.

recruitment initiatives.<sup>7</sup> For instance, young men from urban centres were recruited for agricultural work by government representatives. Particularly, the Farm Service Force established in Ontario in 1941, recruited children, youths, and adult day-by-day workers for farm labour.<sup>8</sup> Moreover, the federal government supplied German prisoners of war, Japanese-Canadian internees, and conscientious objectors, predominantly Doukhobors and Mennonites, to the agricultural industry.<sup>9</sup> Also, in 1943, the Dominion Provincial Farm Programme was established to recruit Canadian workers nationally.<sup>10</sup> After World War II, labour shortages persisted, as a result, there were some initiatives taken to recruit among children, women, urban workers, and aboriginal people. Sociology professor Vic Satzewich argues, in his book titled *Racism and the Incorporation of Foreign Labour*<sup>11</sup>, that in spite of all the efforts to maintain a constant labour supply in agriculture, the “agricultural capital lacked sufficient internal reserves of labour and therefore became dependent upon the mobilization of various forms of foreign labour.”<sup>12</sup>

---

<sup>7</sup> *Ibid* at 5-6.

<sup>8</sup> See Basok, *supra* note 1 at 28.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid*.

<sup>11</sup> Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945*, (London and New York: Routledge, 1991) [Satzewich].

<sup>12</sup> *Ibid* at 84. The author relies primarily on the work of Professor Satzewich to outline the historical background of migrant workers in Canada. However, other authors have also focused their work on the subject. See D. Avery, *Reluctant Hosts: Canada's Response to Immigrant Workers, 1896-1994*, (Toronto: McClelland & Stewart, 1995); N. Kelly & Trebilcock, J., *The Making of the Mosaic: A History of Canadian Immigration Policy*, (Toronto: University of Toronto Press, 2000); V. Knowles, *Strangers at our Gates: Canadian Immigration and Immigration Policy, 1540-2006*, (Toronto: Dundurn Press, 2007); N. Sharma, *Home Economics: Nationalism and the Making of Migrant Workers in Canada*, (Toronto: University of Toronto Press, 2006).

## **B. Post-World War II**

Canada pursued different methods to incorporate foreign workers into agricultural labour after World War II. Specifically, different groups of foreign workers were incorporated as “unfree immigrant labour”, “free immigrant labour”, and “unfree migrant labour”.<sup>13</sup>

### **1. “Unfree Immigrant Labour”**

The term “unfree immigrant labour” refers to individuals who were granted a status of “immigrant” by the Canadian government. They were seen as potential future settlers and citizens, even though at first they faced political and legal restrictions over their ability to circulate in the Canadian labour market.<sup>14</sup> There were two main groups of foreign-born workers incorporated to farm labour as “unfree immigrant labour”: Polish war veterans and Displaced Persons from Eastern Europe.<sup>15</sup>

Polish war veterans were one of the first groups allowed into Canada after World War II who were initially intended to fill farm labour positions in Canada; particularly, they were destined to farm labour positions in Ontario's fruit and vegetable industry.<sup>16</sup> According to professor Satzewich, there were 4,527 Polish veterans recruited to Canada in 1946 and 1947. They were members of the 2<sup>nd</sup> Polish Corps who fought as part of the British 8<sup>th</sup> Army in the Mediterranean.<sup>17</sup> They refused returning to Poland after the end

---

<sup>13</sup> *Ibid* at 84-121. The author will define these terms throughout the section. These terms have been extracted from professor Satzewich's work.

<sup>14</sup> *Ibid* at 85-86.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid* at 86.

<sup>17</sup> *Ibid*.

## Chapter 1- SAWP's Context and Structure

of the war because they were against communism. The British government accepted the vast majority of these soldiers and their dependents as permanent settlers. While Great Britain accepted most of the 130,000 veterans and dependents, it was not prepared to take them all. Instead, Great Britain encouraged Canada, Australia, New Zealand and various South American countries to accept some of these veterans as permanent residents.<sup>18</sup>

Canada accepted Great Britain's request, partly because there were pressures coming from Ontario farmers to find replacements for the German prisoners of war. However, Canada and Britain did not want this to become public knowledge. In a confidential telegram to the Department of External Affairs, the High Commission for Canada in Great Britain wrote:

The United Kingdom recognized that our present willingness to take Polish veterans is linked with our loss of prisoner of war labour, but urge that this relationship be not unduly stressed in any publicity given these arrangements because of the adverse effect it would have on Polish morale.<sup>19</sup>

In July of 1946, Canada formally approved the entry of the 4,000 Polish veterans to work on Canadian farms.<sup>20</sup> These veterans were initially granted the right of temporary entry into Canada. The right of temporary entrance was granted to those who signed a labour contract, which stipulated that they would remain for two years in the agricultural employment where they were originally placed by the Department of Labour. Upon the fulfilment of this requirement, and after three additional years of residence, they could apply for Canadian citizenship.<sup>21</sup> The contract also stated that they were to

---

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* at 86-87.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* at 87.

## Chapter 1- SAWP's Context and Structure

receive a monthly minimum wage plus board.<sup>22</sup> Furthermore, the contract specified that they were to 'enjoy living and working conditions prevailing in the locality where they were employed'. The number of hours of work they were to execute was left unspecified in the contract; however, officials from the Department of Labour informally expected that they should work about sixty hours per week. If these foreign workers did not fulfil their contracts, they were subject to the denial of permanent admission to Canada and faced deportation. They were not able to resign, change jobs or be fired without the consent of the Department of Labour. Married men who were recruited had to leave their wives and children in Europe until they fulfil their contractual obligations.<sup>23</sup> However, the contract was later modified. It allowed the worker, after completing one-year employment with the same farmer, to make his own arrangements for farm labour employment during his second year of the contract.<sup>24</sup> Professor Satzewich underscores that although, these workers had restrictions to circulate in the Canadian labour market, "there was a certain degree of 'free' choice in the determination of to whom they sold their labour power."<sup>25</sup>

The veteran's wages were generally lower than those received by Canadians performing the same work. For instance, in 1947 veterans in southern Ontario were earning an average wage of \$53.00 per month.<sup>26</sup> However, this amount was lower than

---

<sup>22</sup> *Ibid.* The minimum wage was \$45 per month; also, housing, meals, and sometimes laundry services were provided by the farmers.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid* at 88.

## Chapter 1- SAWP's Context and Structure

the average wage for farm labour in Ontario at the time; it was about \$70.00 per month, including board.<sup>27</sup> Not surprisingly, the main complaint of the veterans regarding their working conditions was that the wages were too low for the long hours and types of work they had to undertake. Despite poor wages and difficult working conditions, the vast majority of veterans fulfilled the terms of their contracts.<sup>28</sup>

After the fulfilment of their contracts, they qualified for permanent residence status and could freely circulate in the labour market. Attempts of the Department of Labour to encourage them to remain employed in agriculture were ineffectual. A small number eventually settled on their farms but most left agricultural labour to find better paying jobs in the city. These jobs were found mainly in manufacturing or mining.<sup>29</sup>

Just as the Polish war veterans, the Displaced Persons were the second group of foreign-born people who were initially placed as “unfree immigrant labour” in the south-western Ontario fruit and vegetable industry. These people were primarily of eastern European origin that, like the Polish war veterans, had refused to return to the Soviet bloc at the end of the war as they were against communism. There were 165,697 Displaced Persons admitted to Canada between 1947 and 1954.<sup>30</sup> Some were admitted as sponsored relatives of eastern European immigrants already settled in Canada.<sup>31</sup> Displaced

---

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* at 89.

<sup>29</sup> *Ibid* at 92.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.* “They were admitted on the condition that a close relative undertake the responsibility for their welfare if they became unemployed during the first five years in Canada.”

## Chapter 1- SAWP's Context and Structure

Persons admitted as sponsored relatives were free immigrants since, once in Canada, they were allowed to circulate freely in the Canadian labour market.<sup>32</sup>

However, a large number of Displaced Persons initially came as contract workers. These workers were expected to eventually settle permanently “as wage labourers or as petty agricultural commodity producers”.<sup>33</sup> Although they were formally immigrants, they were initially “unfree immigrants” because their ability to freely circulate in the labour market was subject to legal restrictions for a period of time after having arrived in Canada.<sup>34</sup>

The Department of Labour covered the costs of transportation for these workers. Once working in Canada, the transportation costs were recovered through monthly deductions from their pay. The labour contract stipulated the minimum wage; the different deductions made by the employer, and the type of accommodation that was to be provided, as well as medical and social insurance coverage.<sup>35</sup> Particularly, the labour contract stated that workers had to remain in the employment to which they were initially placed for a period of one year after their arrival. If they failed to remain in said employment, and if they circulated in the labour market, then they were subject to deportation and/or prosecution under provincial civil law for breach of contract.<sup>36</sup> From

---

<sup>32</sup> *Ibid* at 93.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

the 165,697 Displaced Persons admitted to Canada between 1947 and 1954, Ontario received about 7,016 through the labour contract arrangement.<sup>37</sup>

While Displaced Persons had a contract to work for at least one year in Canadian farms, farmers only needed workers for their seasonal labour demands. But as was the case with Polish veterans, farmers were encouraged to assume the overhead costs for these workers during slow season as they were assured of at least a certain amount of help during harvest time.<sup>38</sup> Although, farmers were encouraged to pay for these workers during the low season, many who were familiar with these workers' contributions on farm production in Ontario recognized and praised their successful results. For example, the Ontario representative of the Dominion Provincial Farm Labour Committee stated:

The service rendered by DPs [Displaced Persons] to Ontario farmers has been and still is, very considerable, and it is hard to conceive what the situation would have been without their presence- and indeed many of them have proved to be excellent workers who have received high recommendation from their farmer employers.<sup>39</sup>

Although the Displaced Persons performed well and contributed to the agricultural sector, there were two problems associated with the use of these foreign workers in the agricultural industry. First, a certain proportion left their farm labour

---

<sup>37</sup> *Ibid* at 93-94. There were three types of agricultural labour contracts: those involving single male workers; married couples with less than three children and sugar beet contracts for large families. In Ontario, the minimum wage for single male Displaced Persons was \$45.00 per month with board. Married couples with less than three children were paid \$74.00 monthly. The minimum wage paid to a single male Displaced Person was lower than the average wage for farm labour, which was approximately \$70.00 per month. This implies that similarly to Polish Veterans, Displaced Persons provided cheap and unfree labour to Canadian farmers.

<sup>38</sup> *Ibid* at 94.

<sup>39</sup> As cited by Satzewich in *Ibid*.

positions before the expiry of their contract. Second, few continued in farm labour employment after the expiry of their contracts.<sup>40</sup>

To illustrate the first problem above, in 1948 some 1,596 Displaced Persons were placed under contract in Ontario farms. By November of 1948, 42, or 2.6 per cent of the total, were reported to have abandoned their work without official approval.<sup>41</sup> Although this was a small number, some farmers and state officials wanted to deport some of the Displaced Persons to discourage the others from doing the same<sup>42</sup>.

Both the Polish veterans and Displaced Persons were subject to political and ideological intimidation to remain in the initial positions in which they were placed. In his work, Professor Satzewich uses the following quote to illustrate this point in an eloquent manner:

It is a grand opportunity for those unfortunate people who are now in Displaced Person Camps to come to free Canada and without financial burdens . . . In making application [to come to Canada] the applicants, both men and women of their own free will and accord, sign an application and give their undertaking to the Minister of Labour that they will remain in the employment for which they were selected to a period of one year . . . Credit must be given . . . to the vast majority of newcomers who are working . . . for employers to whom they have been assigned . . . There are, however, cases where the workers . . . refuse to carry out the terms of the undertaking given on the application forms. There are cases too where a good deal of reluctance and unsatisfactory service is evident and there are still others where men and women deliberately leave their positions. You will appreciate that it is very necessary for these people who are taking their first step towards becoming Canadian citizens to carry out the undertaking made . . . The future of this movement depends on the success of those immigrants already in Canada in becoming assimilated and it would be unfortunate if the general public were led to believe, through the actions of a few, that the programme as a whole was not satisfactory. . . <sup>43</sup>

---

<sup>40</sup> *Ibid.* See also Basok, *supra* note 1 at 28-29.

<sup>41</sup> *Ibid.* at 95.

<sup>42</sup> See Satzewich, *ibid.*

<sup>43</sup> *Ibid.* The statement above was a letter by Minister of Labour, Arthur MacNamara, sent in 1949 to various foreign language newspapers in Canada.

The statement underscores various points of interests. However the most contradicting for the author emanates from the idea that Canada is a “free” country, or is a country with free institutions. One of the elements in this freedom was the notion that one had the ability to circulate in the labour market. Yet, the actual contract that these workers had to undertake contradicted the idea of freedom as it created a class of unfree wage labour.<sup>44</sup> While apparently there were no Displaced Persons actually deported for freely circulating in the labour market, the RCMP was used to track down and return the offenders to their original employment. The threat of deportation blatantly contradicted the Minister's sympathy for these ‘unfortunate’ people. That threat further increased their sense of marginalization given that they already had a vulnerable status in Canada.<sup>45</sup>

The second ‘problem’ with Displaced Persons was that they did not remain in farm labour employment after the expiry of their contracts. Displaced Persons who fulfilled the terms of the contract were issued a ‘certificate of merit’ by the Department of Labour. It certified that they completed their contracts and therefore all state restrictions over their circulation in the labour market were lifted. In sum, just as with the recruitment of Polish veterans, the recruitment of Displaced Persons did not create a permanent farm labour force that Ontario farmers could use when demand required it and discard when they were no longer needed.<sup>46</sup>

---

<sup>44</sup> *Ibid* at 96.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* at 98.

## 2. "Free Immigrant Labour"

Foreign-born workers were also incorporated into the Ontario fruit and vegetable industry as free immigrant labour. These workers were seen as "permanent settlers, future citizens and members of the imagined community"<sup>47</sup>. There were no restrictions imposed on their length of stay and ability to remain in Canada. In other words, once in Canada, they could circulate freely in the labour market. However, they were admitted on the basis of their stated intention to fill positions in industries with need of workers, such as the agricultural sector.<sup>48</sup>

In 1947, Canada and the Netherlands signed a bilateral agreement where Canada was to recruit and screen Dutch farmers and their families for emigration to Canada.<sup>49</sup> Those chosen by the Netherlands for emigration were defined by Canada as permanent residents. They qualified for citizenship after five years of residence. Moreover, once in Canada, they were free to circulate in the labour market. In other words, they could take any position offered to them by any employer. A farmer in Canada nominated every worker. In addition, the Department of Citizenship and Immigration investigated the settlement conditions before the farmer's application was approved. Consideration was also given to the immigrant's preference in the location where he wanted to settle.<sup>50</sup>

Most of the Dutch immigrants who were initially allocated into farm labour in Canada had owned their own farms in The Netherlands. However, after their arrival,

---

<sup>47</sup> *Ibid.* See also Verma, *supra* note 2 at 7.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* at 99. Approximately 19,300 workers and their dependents came to Canada under this arrangement between 1947 and 1951.

similarly to some of the Polish veterans and Displaced Persons from Eastern Europe, some of the Dutch immigrants left farm labour and found more profitable employment in other sectors of the Canadian labour market<sup>51</sup>. Thus, many farmers objected and criticized the Canadian government. They wanted the government to restrict their ability to circulate in the labour market for at least one year. However, the Canadian authorities did not comply.<sup>52</sup>

A second group of free immigrant workers for Ontario farmers came recruited under the Assisted Passages Loan scheme. It was designed to assist in the recruitment of immigrant labour from Europe.<sup>53</sup> Initially, the scheme provided loans to European immigrants who wanted to work in Canada; the loan covered the costs of transportation from Europe to Canada; however, their dependents were required to pay their own way and were encouraged to remain in Europe until the breadwinner found steady work, repaid his loan and found suitable accommodation for his family.<sup>54</sup> However, in spite of this loan program, Canada faced increasing difficulty in recruiting heads of households who were willing to leave their families for several years in order to come to Canada. Consequently, Canada was forced to provide transportation loans to the worker's dependents as well.<sup>55</sup>

Until the mid-1960's, these loans were offered only to Europeans who were perceived as 'suitable, desirable and acceptable' and who would be unable to pay their

---

<sup>51</sup> *Ibid.* See also Verma, *supra* note 2 at 7.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* at 100. This scheme began in February 1951.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid* at 101.

trip to Canada.<sup>56</sup> Ethnic Germans living in the Eastern Zone that escaped to the west was the group, which was apparently the target of recruitment under the Assisted Passages scheme.<sup>57</sup>

Assisted Passage immigrants were initially recruited to work as woods workers, domestic workers, construction workers, miners, factory and farm workers in southwestern Ontario's fruit and vegetable farms.<sup>58</sup> Those who were given an assisted passage loan were required to repay it within two years of arriving in Canada. They paid in installments. For instance, employers deducted a fixed amount from the worker's monthly pay cheque, which was then remitted to the Canadian government. Those who were given a loan were expected to remain in the employment to which they were initially placed until the loan was repaid, or for at least a period of one year.<sup>59</sup>

At least during their first year in Canada, Assisted Passage immigrants were unable to circulate in the labour market. They could not leave their jobs, nor could they be fired without the formal approval of the Canadian government.

In this light it is possible to see the loan system as a subtle form of debt bondage whereby an attempt was made to ensure that those permanent settlers admitted to the country would remain for at least one year in the employment for which they were initially recruited.<sup>60</sup>

---

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.* Later, other western and southern Europeans were granted assisted passage loans. From 1951 to 1955, a total of 32,600 people took advantage of the loan scheme.

<sup>58</sup> *Ibid.* Between 1951 and 1955, there were about 4,700 or 14.4 per cent of the total Assisted Passage immigrants placed in Ontario farms.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

Nevertheless, Assisted Passage loans did not keep workers in certain positions for a full year. In spite of the requirement to stay with the same employer for one year, a large portion of these immigrants left farm labour before they repaid their loans and before the end of the one year requirement. These workers seem to have been more likely to leave their farm jobs before the expiry of their contract than Polish veterans and Displaced Persons from Eastern Europe. For example, in 1953 there were approximately 2,050 German farm workers who arrived under the Assisted Passage scheme to work in Ontario farms. By the end of that year, however, 639 or 31.2 per cent of those workers left their farm employment. In Alberta, this figure was 60 per cent and New Brunswick and Saskatchewan had similar high numbers.<sup>61</sup>

Farmers and other employers pressured Canadian officials to deport Assisted Passage immigrants who did not comply with their contracts. However, Canadian officials did not force them to remain in their original employment; nor threaten them with deportation.<sup>62</sup> This reflects a sharp distinction in treatment between the “free immigrant” and “unfree immigrant classes”.

### **3. “Unfree Migrant Labour”**

The third mode of foreign labour incorporation in the Ontario fruit and vegetable industry after World War II has been the unfree migrant labour. Those under this category were granted the right of temporary entry, were not defined as potential future citizens and members of the imagined community, and faced political and legal

---

<sup>61</sup>*Ibid* at 102.

<sup>62</sup>*Ibid*.

## Chapter 1- SAWP's Context and Structure

restrictions over their ability to circulate in the Canadian labour market.<sup>63</sup> This section will discuss one main group of workers who fall in this category, namely Mexican workers under the Seasonal Agricultural Workers Program (SAWP).<sup>64</sup> For purposes of this section, the author will describe the context surrounding the beginnings of the SAWP. In later sections of this chapter, the author will illustrate in greater depth why this program makes its participants “unfree migrant” workers.

Because of the poor retention of workers derived from the two categories discussed earlier, “unfree immigrant labour” and “free immigrant labour”, which were the government’s immigration initiatives to relieve Ontario farmers’ urgent need for workers, the agricultural industry lobbied the federal government to bring migrant workers from the Caribbean on a seasonal basis.<sup>65</sup> The agricultural industry wanted workers with strict restrictions on mobility during the critical harvest time. Simply stated, it wanted workers who would be available whenever the crop was ready to be picked, including the evening, weekends, or holidays.<sup>66</sup>

The initial response from the federal government was to resist the industry’s petition. Instead, the government wanted to attract domestic workers by improving working conditions.<sup>67</sup> It seems the government was uncomfortable with the idea of bringing Caribbean workers to Canada. As Veena Verma points out, such discomfort

---

<sup>63</sup> *Ibid* at 107. See also Verma, *supra* note 2 at 7-12.

<sup>64</sup> The other groups were composed of Caribbean workers and American tobacco workers from the Southern United States.

<sup>65</sup> See Basok, *supra* note 1 at 29-32. See also Verma, *supra* note 2 at 8-11.

<sup>66</sup> See Verma, *supra* note 2 at 11. See also Satzewich, *supra* note 11 at 110-116.

<sup>67</sup> See Basok, *supra* note 1 at 29-30.

## Chapter 1- SAWP's Context and Structure

was based on racist attitudes. For example, the government was weary of the impact these foreign workers would have on the racial demographic of Canada. As Assistant Deputy Minister of Immigration eloquently put it:

[I]t should be mentioned here that one of the policy factors was a concern over the long range wisdom of a substantial increase in the Negro immigration to Canada. The racial problems of Britain and the United States undoubtedly influenced this concern which of course still exists today.<sup>68</sup>

Another concern, which the government raised, was whether the workers could adapt to Canadian Society.<sup>69</sup>

Although resistant in the beginning, the government finally relented to the farmers' pressure. Accordingly, in 1964 Canada agreed to the entry of 264 Jamaican workers, on a seasonal contractual basis in the south-western Ontario fruit and vegetable industry.<sup>70</sup> This marked the beginning of the Seasonal Agricultural Workers Program (SAWP). It has gradually expanded to include other countries of the Caribbean. Mexico came into the Program in 1974.<sup>71</sup>

Instead of improving working conditions, as it first intended, the federal government crafted policy to justify the importation of Caribbean and Mexican workers as "suitable" for this work. Sociology Professor Satzewich and labour law author Verma argue that the meaning of "suitable" connotes a racist attitude toward these workers. By "suitable" the real quality envisioned in these workers is the incapacity to freely circulate in the labour market, to be deportable if they leave their farm jobs in Canada and take

---

<sup>68</sup> As quoted by Verma, *supra* note 2 at 8.

<sup>69</sup> *Ibid* at 7.

<sup>70</sup> *Ibid* at 8-10. See also Satzewich, *supra* note 11 at 110.

<sup>71</sup> See Basok, *supra* note 1 at 33.

## Chapter 1- SAWP's Context and Structure

jobs in other industries, and to be unable to ever qualify for citizenship; in other words they are not members of the “imagined” Canadian society.<sup>72</sup> Furthermore, it encompasses the notion that only these people can perform the “dirty work” than no other Canadian wants to undertake. As such, there is a tone of inferiority attached to these workers as compared to Canadian workers. As Member of Parliament H.D. Danforth thoroughly stated in 1973:

Mr. Chairman, many people do not like to work in agriculture. They do not like the monotony, the conditions and the fact that you work sometimes in heat and sometimes in cold. That is all right; they do not like it and they should not be forced to work at all. . . How [then] do they [farm owners] obtain labour? Many of them have encouraged offshore labour over the years which comes from three sources, the Caribbean, Portugal, and Mexico. We need this labour . . . and these people are used to working in the heat. They are used to working in agriculture, and they are satisfied with the pay scale. . .<sup>73</sup>

Accordingly, the Canadian government crafted the SAWP as a mechanism to employ “unfree”, temporary workers, with no chance for Canadian citizenship to address the following objectives: the agricultural industry’s need for “reliable” workers and the government’s concerns regarding the impact of non-white foreign seasonal workers on Canadian demographics as well as their inability to integrate into Canadian society. The

---

<sup>72</sup> See Verma *supra* note 2 at 8-9. See also Satzewich, *supra* note 11 at 112-116. Critical Race Theory would be helpful in further contextualizing SAWP workers’ reality. This theory “is committed to advocating for justice for people who find themselves occupying positions on the margin—for those who hold ‘minority’ status. It directs attention to the ways in which structural arrangements inhibit and disadvantage some more than others in our society. It spotlights the form and function of dispossession, disenfranchisement, and discrimination across a range of social institutions. . .” A.J. Trevino et al., “What’s so critical about critical race theory?”, *Contemporary Justice Review*, Vol 11, No 1 (March 2008), at p. 8. While an analysis using Critical Race Theory is beyond the scope of this thesis; it should nevertheless be acknowledged to be a helpful lens to further analyze and contextualize the status of SAWP workers in Canada. For further reading on this subject see Kevin R. Johnson, “The Intersection of Race and Class in U.S. Immigration Law and Enforcement”, *Law and Contemporary Problems*, Vol 72:1 Fall 2009; Margaret E. Montoya, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 *DENV U L REV* 467 (2001); Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 *Hastings LJ* 255 (2005).

<sup>73</sup> Hansard, 20 July 1973: 5836, as quoted by Verma, *supra* note 2 at 9. Although Portugal also supplied workers to Canada, it did not form part of the SAWP.

## Chapter 1- SAWP's Context and Structure

SAWP was also an efficacious way to bring workers into jobs Canadians do not want. In reality, given its experience with history, the Canadian government has crafted an efficacious way to satisfy the agricultural industry's need for 'reliable' farm labour by creating unfree migrant workers who will always have to work in farm jobs, cannot change jobs (circulate freely in the labour market), and are deportable if they do not comply with their contractual obligations. The following table illustrates this point as compared to other types of incorporated labour.

**Table 1: Summary on the various types of immigration and migrant labour**

Mode of Incorporation	Groups	Characteristics	Results
<b>"Unfree Immigrant Labour"</b>	Polish Veterans, Displaced Person from Eastern Europe	Initial mobility restrictions; must comply with contractual obligations to work with a particular employer in agriculture for a given period of time. Once completed the contract, these immigrants can settle permanently and become Canadian citizens. All mobility and immigration restrictions are lifted.	Did not continue with agricultural employment once their contracts were completed. Pursued better paying jobs in other sectors.
<b>"Free Immigrant Labour"</b>	Dutch citizens, Europeans under the Assisted Passage Loan Scheme	Limited mobility restrictions upon arrival; no threat of deportability even when agreed to work with a particular employer. Perceived as Canadian settlers and future citizens.	Did not continue with agricultural employment once they settled in Canada. Pursued better paying jobs in other sectors.
<b>"Unfree Migrant Labour"</b>	Caribbean and Mexican workers under the SAWP	Complete mobility and immigration restrictions; can only work in agriculture with a given employer and for a particular amount of time; they are deportable given their temporary status; cannot apply for permanent residence and thus can never become citizens; if they do not comply with the rules of the Program, they are subject to deportation and to be banned from the Program.	A reliable supply of workers who do not leave their farm work and are willing to work upon the employer's requests.

## C. The Mexican Context

In order to have a clearer view into why Mexicans seek employment in Canada every year under the SAWP, it is imperative to have a basic understanding of the context regarding Mexico's circumstances or reality. As such this section will briefly explore two main issues: deregulation of agriculture in Mexico and the need to migrate for Mexicans.

### 1. Deregulation of Agriculture in Mexico

The process of land concentration in the hands of large corporations is historically entrenched in Mexico. While the Mexican Revolution of 1910<sup>74</sup> decelerated the process to a certain degree since much of its aim attempted to redistribute land to the peasantry, Mexico's development strategies in the twentieth century reversed the achievements of the Revolution and aggravated the problems of massive rural unemployment, underemployment, and poverty.<sup>75</sup> For instance, the policy of import-substituting industrialization<sup>76</sup>, pursued between 1946 and 1966, played an essential role in the destruction of the country's subsistence agriculture, particularly in the production of rice,

---

<sup>74</sup> An agrarian reform followed the 1910 Mexican Revolution redistributing land to the peasant classes. See generally Moisés Ochoa Campos, *La Revolución Mexicana: Sus Causas Sociales*, Tomo II, online: Instituto Nacional de Estudios Históricos de la Revolución Mexicana: México, 1967 at 9-14 <[http://www.bicentenario.gob.mx/bdb/bdbpdf/LaRevolucionMexicanaSusCausasSociales\\_Tomo-II/LaRevolucionMexicanaSusCausasSociales\\_Tomo-II-Cap01.pdf](http://www.bicentenario.gob.mx/bdb/bdbpdf/LaRevolucionMexicanaSusCausasSociales_Tomo-II/LaRevolucionMexicanaSusCausasSociales_Tomo-II-Cap01.pdf)>.

<sup>75</sup> See Basok, *supra* note 1 at 93.

<sup>76</sup> Import substitution industrialization or "Import-substituting Industrialization" (called **ISI**) is a [trade and economic policy](#) that advocates replacing imports with domestic production. It is based on the premise that a [country](#) should attempt to reduce its foreign dependency through the local production of industrialized products. See generally Albert O. Hirschman, "The Political Economy of Import-Substituting Industrialization in Latin America", *The Quarterly Journal of Economics*, vol. 82, No. 1 (Feb., 1968) at 1-32.

## Chapter 1- SAWP's Context and Structure

beans, maize, and wheat.<sup>77</sup> Thus, this policy emphasized industrial development and the provision of cheap food for the industrial working class. During the implementation of this policy, government assistance was placed predominantly in commercial agriculture and large estates. However, this was not the case for peasant farms; they were overlooked by this policy. In other words, the government subsidized credit, research, mechanization, marketing facilities, and the distribution of implements for large private firms. However, private peasant farms received nothing. This policy aided in the creation of monopolies where large firms would specialise only in certain products while peasant farms were negatively impacted as they did not have the means to compete with the industrial firms receiving all the subsidies from the Mexican government. This resulted in Mexico's heavy dependency on imports of basic grains from the United States as well as a decline in the economic status of the majority of farmers who raised corn and beans.<sup>78</sup> It seems ironic that the policy which aimed to keep Mexico independent from foreign production achieved the exact opposite.

From 1970 to 1982 Presidents Luis Echeverria Alvarez and Jose Lopez Portillo attempted to counterbalance the above mentioned policy with policies aimed to help small or peasant farmers. These new policies included price support, subsidized credit, discount prices for agricultural inputs, crop insurance, storage and marketing assistance, education and health services. Also, new technologies were provided for peasants depending on rain-fed agriculture. At the same time, President Echeverria Alvarez

---

<sup>77</sup> See Basok, *supra* note 1 at 93.

<sup>78</sup> *Ibid.*

introduced some changes to strengthen the *ejido* (rural community) system and redistributed more land to *ejidos*.<sup>79</sup>

President Jose Lopez Portillo also endeavoured to promote self-sufficiency in food. Accordingly, his government introduced in 1980, *el Sistema Mexicano de Alimentacion* (the Mexican Food System (SAM)). Its goal was to support arid land and tropical agriculture in order to increase production of basic foods. SAM's objective was to attain self-sufficiency in the production of corn and beans by assisting and investing in small farms located in rain-fed districts.<sup>80</sup> Other important policies during Lopez Portillo's term included the granting of credit by the National Rural Credit Bank (Banrural) and a government guarantee to share the risk of crop failure with the farmers.<sup>81</sup>

The debt crisis of 1982 ended these helpful policies for small farms.<sup>82</sup> Newly in office, President Miguel de la Madrid Hurtado abandoned the SAM policy and adopted 'structural adjustment policies', also known as 'neo-liberal policies'. Mexico began its economic restructuring in the late 1980's, following mandates imposed by the International Monetary Fund (IMF) and the World Bank to deregulate its agricultural sector. Consequently, Mexico cut its public investment in agriculture, dismantling key programs such as credit, subsidized farm inputs, price supports, food reserves, state marketing boards and extension services.

---

<sup>79</sup> *Ibid* at 94.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid*.

<sup>82</sup> For an overview of this crisis see David M. Gould, "Mexico's Crisis: Looking Back to Assess the Future", online: *Economic Review*, (Federal Reserve Bank of Dallas: Second Quarter 1995) <<https://www.dallasfed.org/research/er/1995/er9502a.pdf>> [Gould].

## Chapter 1- SAWP's Context and Structure

These policies included the following measures: rising interest rates to limit consumer spending and discourage the flight of capital; reducing government spending by removing subsidies on food, fuel and public transportation and cutting social spending on health, housing and education; devaluing the currency exports and discourage imports; removing price controls; and privatizing state companies.<sup>83</sup>

These policies drove subsistence farmers out of business. Furthermore, credit to agricultural farmers and the budget for agriculture were cut off. Finally, many research institutes and technical assistance programs were terminated.<sup>84</sup>

The culmination of these neo-liberal policies began with Mexico's entrance into the *General Agreement on Tariffs and Trade*<sup>85</sup> (GATT) in 1986, the amending the land reform provision of the *Constitution* in 1992, and the signing on to the *North American Free Trade Agreement* (NAFTA) in 1994.<sup>86</sup> Its advocates promised that agricultural and trade deregulation would expand employment and exports while reducing Mexican migration to the United States.<sup>87</sup> In its enthusiasm to increase trade with the U.S., Mexico approved NAFTA in 1994. This resulted in the immediate removal of tariffs on yellow corn. Tariffs for other products like sugar, white corn and beans were phased out

---

<sup>83</sup> Basok, *supra* note 1 at 94. See also Gould, *supra* note 82 at 5-9; and Antonieta Barrón, "Migraciones internas e internacionales. Mercados primarios, condiciones de trabajo secundarias. Jornaleros a San Quintin, Baja California, México y a Niagara on the Lake, Ontario, Canadá", (1998), online: *Asociación de Estudios Latinoamericanos (LASA)* < <http://lasa.international.pitt.edu/LASA98/Barron.pdf>>.

<sup>84</sup> See Basok, *supra* note 1 at 94.

<sup>85</sup> The General Agreement on Tariffs and Trade (GATT 1947), online: *World Trade Organization* <[http://www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf)>. See also General Agreement on Tariffs and Trade 1994, online: *World Trade Organization* <[http://www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf)>.

<sup>86</sup> See R. Dennis Olson, "Lessons from NAFTA: Food and Agriculture" (December 2, 2008), online: *Institute for Agriculture and Trade Policy* < [http://www.iatp.org/files/451\\_2\\_104576.pdf](http://www.iatp.org/files/451_2_104576.pdf)> [Olson].

<sup>87</sup> *Ibid.*

## Chapter 1- SAWP's Context and Structure

gradually over the next 14 years.<sup>88</sup> Cutting domestic agricultural support, combined with the opening of Mexico's borders to deregulate trade, has allowed agribusiness cartels<sup>89</sup> to dump agricultural commodities at below the cost of production into Mexico. This has displaced Mexican farmers from their own markets. Since Mexico dismantled its publicly owned food reserve earlier, transnational agribusiness cartels were able to profit by displacing domestic Mexican production with cheaper, below-cost corn imported from the United States.<sup>90</sup> The outcome was that by 2006, Mexico had lost over two million agricultural jobs, including as many as 1.7 million small farmers who were forced out of their lands into urban areas, or into the United States.<sup>91</sup>

For example, U.S. based Cargill and Mexican-based (but partly U.S.-owned) corn giant *Maseca* (both transnational agribusiness) exercise unprecedented market control over key agricultural sectors, which include yellow and white corn and beans.<sup>92</sup> Therefore, whenever prices rise for these commodities in the Mexican market, Cargill can stop buying in that market and turn to its imported reserves. Doing so enables Cargill to

---

<sup>88</sup> *Ibid.* Most significantly, NAFTA was accompanied by a multinational takeover of Mexican grain commercialization and massive imports from the United States, leading to a further real price decline. See also Leigh Binford, "From Fields of Power to Fields of Sweat: the Dual Process of Constructing Temporary Migrant Labour in Mexico and Canada", *Third World Quarterly*, Vol. 30, No. 3, (2009) at 506 [Binford].

<sup>89</sup> By "cartels" the author means a group of [companies](#) or [countries](#) which collectively attempt to [affect market](#) prices by [controlling production](#) and [marketing](#). See Definition of "Cartel", InvestorWord.Com, online <<http://www.investorwords.com/745/cartel.html>>; See also Definition of "Cartel" by the Cambridge Advanced Learner's Dictionary & Thesaurus, online <<http://dictionary.cambridge.org/dictionary/british/cartel>>. It defines cartel as "a group of similar independent companies who join together to control prices and limit competition".

<sup>90</sup> See Olson, *supra* note 86.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

undercut producer prices for Mexican farmers and push them out of their own market; this leaves them with few choices: migrating to the cities or north of the border.<sup>93</sup>

Advocates for agricultural trade deregulation argue that such lower prices benefit consumer, particularly poor people. However, while prices paid to Mexican farmers fell 43 per cent between 1994 and 2000, prices for tortillas-the most important staple food for Mexicans nearly tripled, rising 571 per cent during the same period.<sup>94</sup> By January 2007, *tortilla* prices had tripled again. The bottom line is that multinational agribusiness cartels do not pass on the savings from low crop prices to consumers. Instead, they keep the difference, which is reflected in their growing profit levels. For example, Cargill's net income escalated from \$597 million in fiscal year 1999 to \$3.48 billion by the third quarter of fiscal year 2011.<sup>95</sup>

The overall effect of neo-liberal policies has been the consolidation of a shift from 'food self-sufficiency', in which Mexico produced grains and other basic foods, to 'food security', where government relies on international markets to supply those foods that are cheaply obtained elsewhere or, better said, are sold more cheaply because producers receive massive state subsidies.<sup>96</sup> This has resulted in extreme negative impacts for Mexicans generally and peasant farmers particularly. For example, between 2000 and 2005 Mexico lost 1.5 million jobs in the countryside and the number of workers competing for casual agricultural day labour jobs in Mexico's north and west increased

---

<sup>93</sup> *Ibid.* See generally Binford, *supra* note 88 at 503-517.

<sup>94</sup> See Olson, *supra* note 86.

<sup>95</sup> See Lisa Clemens, "Cargill reports third-quarter fiscal 2011 earnings", online: Cargill <<http://www.cargill.com/news-center/news-releases/2011/NA3043120.jsp>>.

<sup>96</sup> See Binford, *supra* note 88 at 506.

exponentially.<sup>97</sup> In this social and economic context one can understand how legal, international contract employment, at wages higher than in Mexico, might allure poor, uneducated, landless, and desperate people.

## 2. Need to Migrate

Mexican migration to the north is not a new occurrence. It dates back to the last century.<sup>98</sup> Also the motives for migration are not new. In a nutshell, Mexicans go north for economic reasons; or simply stated, they seek more stable and better paying jobs.<sup>99</sup> As discussed, above, the neo-liberal policies deregulating agriculture in Mexico have played an important role in stimulating migration to the United States and Canada. Moreover, one of the most significant effects of these policies has been the growth of underemployment. For instance, it is estimated that Mexico's underemployment in 2010 was at 25 per cent.<sup>100</sup>

Another problem created by the neo-liberal policies was the substantial decrease in average as well as minimum wages. Sociology Professor Tanya Basok illustrates this fact as follows:

[O]n average, in 1996 real wages represented only 60 percent of their value in 1980, and the real minimum wage in 1996 was only 27 percent of the value in 1980.<sup>101</sup>

---

<sup>97</sup> *Ibid.*

<sup>98</sup> See Basok, *supra* note 1 at 93.

<sup>99</sup> *Ibid* at 91.

<sup>100</sup> According to the CIA World Fact Book, Mexico's underemployment in 2010 was 25per cent. See CIA World Fact Book, "Mexico", online: CIA < <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html>>. Further, the total labour force in 2010 was 46.99 million; the labour force by occupation was distributed as follows: agriculture 13.7per cent; industry 23.4per cent and services 62.9per cent. Therefore, Mexican farm labour force encompasses around 6.4 million people.

<sup>101</sup> Basok, *surpa* note 1 at 95.

## Chapter 1- SAWP's Context and Structure

In other words and for the sake of illustration, if a farmer earned \$100 pesos in 1980, in 1996 he would then earn the equivalent of \$60 pesos. In the event that the same farmer earned the minimum wage, he would then earn the equivalent of \$27 pesos in 1996. It is no surprise then that Mexicans want to migrate north since they do not have land to farm, or do not have the means to compete with multinational agribusiness; they work long hours in other farms or in other industries making extremely low wages at best and extremely low minimum wages on average. For example, the minimum wage for the fiscal year 2011 is of \$59.82 pesos per day<sup>102</sup>, equivalent to approximately \$4.87 Canadian dollars per day. On the other hand, if they see a legal means to earn more money working in Canadian farms as opposed to risking their lives working illegally in the United States<sup>103</sup>, then it is very likely that many are going to sign up. As it will be discussed later, the SAWP is best conceived as a means to alleviate poverty and not as a development program. Its Mexican participants enroll because they need to earn a living to cover the most basic needs of their families.

---

<sup>102</sup> See “*Salarios mínimos 2011*”, online: Servicio de Administración Tributaria <[http://www.sat.gob.mx/sitio\\_internet/asistencia\\_contribuyente/informacion\\_frecuente/salarios\\_minimos/default.asp](http://www.sat.gob.mx/sitio_internet/asistencia_contribuyente/informacion_frecuente/salarios_minimos/default.asp)>.

<sup>103</sup> See “*Migrantes mexicanos fallecidos en la frontera sur de EUA en su intent por internarse sin documentos*”, online: Secretaría de Relaciones Exteriores (SRE) [http://www.sre.gob.mx/movil\\_sre/images/stories/dgpme/estadisticas/Cons\\_ycausas\\_2004\\_2011\\_26ago.pdf](http://www.sre.gob.mx/movil_sre/images/stories/dgpme/estadisticas/Cons_ycausas_2004_2011_26ago.pdf) >. This report concludes that 2896 Mexicans died attempting to cross the US border without documents between 2004 and 2011. As well, the report states that the principal causes of death were dehydration, drowning, car accidents, health complications, hypothermia and others. See also Nancy Perez Garcia, “*Cruces en la Frontera: Migración Indocumentada y Muertes en la Frontera México-Estados Unidos*”, online: SRE <http://portal.sre.gob.mx/pcdh/libreria/libro5/nancy%20perez.pdf>> at pp. 157-166. For additional information on Mexican undocumented migrants see Michael Hofer, Nancy Rytina & Bryan C. Baker, “*Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*”, online: U.S. Department of Homeland Security [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf)>.

## II. Profile of SAWP Participants

This section (II) will further elaborate on the SAWP's context by focusing on its actual Mexican participants. Where do they come from and where do they go in Canada? What is their background? Why do they keep returning to Canada?

### A. Geographical Origin and Destination

The number of Mexican agricultural workers under the SAWP has grown each year since it was open to Mexicans in 1974. For instance, in that year there were 203 workers participating; by 2000 the number was 9,235; and by 2009 it was 15,727. These numbers are illustrated by the table below provided by the Department of Citizenship and Immigration Canada.

**Table 2: Distribution of SAWP Mexican Workers in Canada**

**Canada - Foreign workers in the Seasonal agricultural worker program (Mexican) by Province from 2000-2009**

Province	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Prince Edward Island	0	0	0	0	0	0	--	7	--	--
Nova Scotia	0	0	0	0	--	--	--	--	--	8
New Brunswick	0	0	0	6	0	0	0	13	6	8
Quebec	1,528	2,019	2,396	2,466	2,661	2,693	2,703	2,463	2,654	2,557
<b>Ontario</b>	<b>7,489</b>	<b>8,208</b>	<b>8,128</b>	<b>7,779</b>	<b>7,839</b>	<b>8,127</b>	<b>8,329</b>	<b>9,064</b>	<b>9,618</b>	<b>9,030</b>
Manitoba	25	39	50	12	--	--	14	31	28	28
Saskatchewan	0	0	0	8	5	31	43	55	50	67
Alberta	188	190	214	248	258	433	527	687	796	988
British Columbia	5	0	--	41	66	556	1,313	1,991	2,883	2,628
Province not stated	0	0	--	6	8	22	53	--	237	--
<b>Grand Total</b>	<b>9,235</b>	<b>10,456</b>	<b>10,799</b>	<b>10,566</b>	<b>10,842</b>	<b>11,877</b>	<b>12,987</b>	<b>14,416</b>	<b>16,278</b>	<b>15,727</b>

Note: Due to privacy considerations, some cells in this table have been suppressed and replaced with the notation "--". As a result, components may not sum to the total indicated. In general we have suppressed cells containing less than five cases except in circumstances where, in our judgment, we are not releasing personal information on an identifiable individual.

Source: Citizenship & Immigration Canada, RDM, Facts and Figures 2009

Data request tracking number: RE.10.0643.

This apparent constant growth in number of participants illustrates two premises: Canada needs a constant supply of agricultural workers and Mexico has incrementally provided part of that supply every year since it entered the SWAP in 1974.

Most SAWP participants come from central Mexico. For instance, in 2010, there were 15,809 Mexican workers under the SAWP in Canada. At least 7,795 or about 50 per cent of those workers came from State of Mexico (2,858), Guanajuato (988), Puebla (1,067), Tlaxcala (1,877), and Veracruz (1,005).<sup>104</sup> Most of these workers go to Ontario.<sup>105</sup> In fact, Ontario receives 90 per cent of Caribbean and Mexican workers combined under SAWP.<sup>106</sup> As Table 2 above illustrates, about 57 per cent of the total number of Mexican workers worked in Ontario in 2009. Quebec received approximately 16 per cent in 2009; and British Columbia received 16.1 per cent in the same year.

## **B. Socioeconomic Status**

According to the SAWP rules and requirements, which will be discussed later in this chapter, participants under the Program must have the following profile:

1. Must be a Mexican citizen;
2. Must be an agricultural worker or have experience working in agriculture;
3. Must know the process for the planting and harvesting of cereals, vegetables, flowers, fruits (strawberries in particular), and tobacco;
4. Must be preferably between 22 and 45 years of age;

---

<sup>104</sup> See “*Resumen de los Servicios de Vinculación Laboral*”, online: Secretaria del Trabajo y Prevencion Social (Mexican Secretariat of Labour and Social Welfare) <[http://www.stps.gob.mx/CGSNE/resultados\\_programas\\_listado\\_stps.htm](http://www.stps.gob.mx/CGSNE/resultados_programas_listado_stps.htm)>. The information is only available in Spanish.

<sup>105</sup> See Table 2 above. About 57 per cent of the total Mexican workers went to Ontario in 2009.

<sup>106</sup> See Tanya Basok, “Canada's Temporary Migration Program: A Model Despite Flaws”, online: Migration Information Source <<http://www.migrationinformation.org/Feature/display.cfm?ID=650>> [Basok 2].

## Chapter 1- SAWP's Context and Structure

5. Must be preferably married or in a common law union;
6. Must have a minimum of 3<sup>rd</sup> grade education and a maximum of a 10<sup>th</sup> grade education; and
7. Preferably should reside in a rural zone.<sup>107</sup>

This required profile tends to yield workers who are mainly landless peasants working in agriculture or other related fields and reside in the central rural regions of Mexico.

Moreover, most of those workers are poorly educated and do not speak English or French. Finally, they are the breadwinners of their households. Consequently, most of them have more than one dependent to support. However, their families do not accompany them to Canada. They have to stay in Mexico.

As previously mentioned, these workers are the perfect fit to a program that integrates its workers as “unfree migrant labour”. That is because they are extremely vulnerable given their background of poverty, marginalization, illiteracy, unemployment, and in immediate need to feed their families. Who would not accept a contract to legally work in Canada for more than the Mexican minimum wage, which at the time of the drafting of this thesis was of \$59.82 pesos per day (about \$ 4.87 CAD per day).

---

<sup>107</sup> See “PROGRAMA DE TRABAJADORES AGRÍCOLAS TEMPORALES MÉXICO-CANADÁ”, online: Secretaria del Trabajo y Previsión Social <[http://www.stps.gob.mx/CGSNE/coord\\_empleo\\_stps.htm](http://www.stps.gob.mx/CGSNE/coord_empleo_stps.htm)>. The information is only available in Spanish. This profile is meant to mainly attract male workers. In fact, most Mexican SAWP workers are male. However, there are female workers under the Program which are mainly single mothers who relied more heavily on their SAWP income. An average of 2.49 per cent of SAWP workers were women in 2010. Just as their male counterparts, they endure precarious working and living conditions on the farms and face gender-specific challenges. For further analysis of their unique vulnerabilities See Evelyn Encalada Grez, “Vulnerabilities of female migrant farm workers from Latin America and the Caribbean in Canada” (April 2011), online: The Canadian Foundation for the Americas (FOCAL) <[http://oppenheimer.mcgill.ca/IMG/pdf/Labour\\_Mobility\\_Encalada\\_Vulnerabilities\\_of\\_female\\_migrant\\_fm\\_workers\\_from\\_Latin\\_America\\_and\\_the\\_Caribbean\\_in\\_Canada\\_April\\_2011\\_e.pdf](http://oppenheimer.mcgill.ca/IMG/pdf/Labour_Mobility_Encalada_Vulnerabilities_of_female_migrant_fm_workers_from_Latin_America_and_the_Caribbean_in_Canada_April_2011_e.pdf)>. As well, see Kerry Preibisch & Evelyn Encalada, “Migrant Women Farm Workers in Canada” (July 2008), online: University of Guelph <[http://www.rwmc.uoguelph.ca/cms/documents/182/Migrant\\_Worker\\_Fact\\_Sheet.pdf](http://www.rwmc.uoguelph.ca/cms/documents/182/Migrant_Worker_Fact_Sheet.pdf)>; Ofelia Becerril Quintana, “A New Era of Seasonal Mexican Migration to Canada”, online: The Canadian Foundation for the Americas (FOCAL) <<http://www.focal.ca/publications/focalpoint/467-june-2011-ofelia-becerril-quintana-en>>; and “Program Details: Statement of Policy”, online: FARMS, <<http://www.farmsontario.ca/program.php?divname=StatementOfPolicy>>.

### C. "The Migrant Syndrome"

The SAWP is best envisioned as a poverty alleviation program.<sup>108</sup> As one poses the question why do Mexican workers keep coming back every year in spite of earning low wages<sup>109</sup>; having to endure harsh, long hours of work and isolation from their families and Canadian society; and being trapped to work in one particular farm, with the risk of deportation in the event that he takes a better paying job in Canada or displeases his employer? It is because SAWP participants become locked into a cycle of transmigration also known as "the migrant syndrome".<sup>110</sup>

Although Mexican workers under the SAWP earn more than what they would earn in Mexico performing farm work, it is, however, difficult to accumulate a substantial amount of capital. SAWP participants with many contract labour trips to Canada tend to be older. Accordingly, their families have grown as a result of having additional children, which means additional food, clothing, and health care costs. At the same time, younger children, those already present when their fathers entered the SAWP, have reached school age. As they attend school, additional expenses accumulate.<sup>111</sup> On average, Mexican workers send home about \$CAN 1,000 or more per month.<sup>112</sup> For example, if a worker has an 8-month contract, he is likely to send home approximately

---

<sup>108</sup> See Leigh Binford, "The Seasonal Agricultural Workers Program and Mexican Development" (September 2006), online: The Canadian Foundation for the Americas (FOCAL) <[http://www.focal.ca/pdf/migration\\_Binford\\_seasonal%20agricultural%20workers%20program%20Mexican%20development\\_August%202006\\_FPP-06-07.pdf](http://www.focal.ca/pdf/migration_Binford_seasonal%20agricultural%20workers%20program%20Mexican%20development_August%202006_FPP-06-07.pdf)> [Binford 2].

<sup>109</sup> By Canadian standards

<sup>110</sup> See Binford 2, *supra* note 108 at 7. See also Basok, *supra* note 1 at 129-138.

<sup>111</sup> Basok, *supra* note 1 at 129-131.

<sup>112</sup> See Binford 2, *supra* note 108 at 4.

\$CAN 8,000, or an equivalent of about 4 or 5 years of salary earned if he worked in Mexico.<sup>113</sup>

Usually, in the first year, earnings are used to maintain the workers' households and pay off the debts that may have been incurred in order to join the SAWP. It is often not until the second year that they start investing their remittances. They mainly spend the money earned on building or repairing a house. They also used their earnings to pay for their children's education, while very few use their earnings to buy land or a small business.<sup>114</sup> In many cases their households' standards of living improve. This results in many migrants, as well as their families, treating as necessities the goods and services that a few years earlier were probably seen as middle class luxury items.<sup>115</sup>

For instance, participants with more than five trips to Canada own cars or trucks; over 15 per cent have satellite dish and almost 40 per cent have a private telephone line.<sup>116</sup> Once integrated as everyday necessities, telephones, satellite or cable television service and vehicles raise the cost of the household budget to levels that can only be sustained by returning to Canada the following season in order to earn comparatively higher salaries in Ontario farms. Accordingly, while the standard of living for Mexican SAWP workers do improve, the maintenance of this life-style depends on sustained earnings from Canada.<sup>117</sup> For fear of losing their chance to return to Canada, Mexican

---

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid* at 4-9.

<sup>115</sup> *Ibid* at 7.

<sup>116</sup> *Ibid.*

<sup>117</sup> Basok, *supra* note 1 at 130.

workers comply with their employers' expectations and are available for work whenever they are needed.<sup>118</sup>

Even those who have not been able to purchase luxury items or desired services use SAWP's earnings to improve their diet, clothing and shelter. They purchase furniture, appliances and electronic goods, which were unattainable before entering the SAWP. However, a better diet means higher food costs; appliances mean higher electricity bills and occasional repair or replacement costs as well. Not surprisingly, about 74.5 per cent of Mexican workers in Canada with six or more trips spent 'a lot' of their Canada-earned income on 'family maintenance' compared to 48.7 per cent with fewer than six trips.<sup>119</sup>

On the other hand, less than 30 per cent of current and former SAWP participants had made investments of any type.<sup>120</sup> It is worth mentioning that 44 per cent of SAWP participants with six or more trips to Canada are landowners, compared to 20 per cent of those with fewer than six trips.<sup>121</sup> Land ownership is a source of status in rural communities. It also provides some off-season employment for SAWP participants as well as employment for some members of their households while SAWP participants are in Canada.<sup>122</sup> The products of small-scale agriculture or stock raising can be consumed by the household or sold to supplement the Canada-earned income. Nevertheless, the

---

<sup>118</sup> *Ibid.*

<sup>119</sup> Binford 2, *supra* note 108 at 7.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid* at 8.

<sup>122</sup> *Ibid.*

## Chapter 1- SAWP's Context and Structure

dismal state of Mexican agriculture due to low cost imports, rising producer prices and government abandonment of small producers, does not offer a viable alternative to Canadian labour migration.<sup>123</sup>

A similar problem exists with small scale enterprises established by about 10 per cent of SAWP participants. Commercial activity financed with money earned in Canada is usually restricted to small corner stores (*tienditas*) selling food (tacos, fruit drinks, popsicles), clothing and other items. The market for all these goods is limited by the overall poverty and low purchasing power of those communities. Therefore, the small, usually household based businesses that some SAWP participants have established tend to complement and not substitute contract labour in Canada.<sup>124</sup>

Moreover, research indicates that migrants from urban and semi-urban areas are more likely to invest than their rural counterparts. The irony is that most SAWP participants do not originate from such areas. As previously stated, most of them come from rural zones in central Mexico. In fact, the Mexican Ministry of Labour and Social Welfare's objective is to assist those who need it the most and thus most participants are not business owners or landowners<sup>125</sup>. Instead, they come from communities with a shortage of arable land for sale and a poor potential for investment in small businesses. Finally, most have low levels of education; without it, they are likely to encounter difficulties managing small businesses.<sup>126</sup>

---

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> Interview with Mr. Hernan de Jesus Ruiz Bravo, counselor from the Embassy of Mexico in Canada, interview date: March 27, 2008. [Interview with Embassy Agent]

<sup>126</sup> Basok, *supra* note 1 at 136-138.

## Chapter 1- SAWP's Context and Structure

In short, the SAWP is a poverty alleviation, not a development program. Its participants keep returning to Canada every year because they have placed themselves in a vicious cycle where by working in Canadian farms, they are able to provide a better standard of living for their families but must return every year in order to maintain it.

### III. What is the SAWP?

The Seasonal Agricultural Workers Program (SAWP) was established in 1966 between Canada and Jamaica. Under this Program, Canada temporarily employed Jamaican agricultural workers to harvest tobacco in Southern Ontario.<sup>127</sup> The government of Canada authorized the SAWP because there was an inadequate supply of “reliable” agricultural workers from within the Canadian labour pool.<sup>128</sup> Over the last 40 years, the need for “reliable” labour in agriculture has multiplied to the point where offshore labour has become a necessity. Consequently the SAWP has expanded to include workers from Mexico, Trinidad & Tobago, Barbados, and the Organization of Eastern Caribbean States<sup>129</sup>. Likewise, there are more provinces participating in the Program, besides Ontario, they include Nova Scotia, New Brunswick, Prince Edward Island, Quebec, Manitoba, Alberta and British Columbia.<sup>130</sup> The scope of the author’s research primarily encompasses Mexican workers under the SAWP working in Ontario since, as Table 2 above illustrates, more than 50per cent of the total number of Mexicans have worked in Ontario in the past decade. As well, the majority of both Mexican and Caribbean workers (90per cent) work in that province.<sup>131</sup>

---

<sup>127</sup> See “Agriculture Programs and Services: Overview”, online: Service Canada <<http://www.servicecanada.gc.ca/eng/on/epb/agri/overview.shtml>>.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> See Table 2 above.

<sup>131</sup> See Basok 2, *supra* note 106.

### **A. What are the policies behind the SAWP?**

The Government of Canada has identified its SAWP policies as follows:

(1) to provide a supplementary source of reliable<sup>132</sup> and qualified seasonal labour in order to improve Canada's prosperity by ensuring that crops are planted and harvested in a timely fashion; (2) to help maintain the livelihoods of Canadian and permanent resident workers in the agricultural industry as well as in other industries that directly or indirectly participate in and benefit from the agricultural industry; and (3) to ensure that Canadians and permanent residents are always considered for employment first.<sup>133</sup>

At first glance, the policies seem altruistic; attempting to benefit Canadian society as a whole. However, the fact that the Canadian government intends to hire Canadian and permanent residents first is not reflected in Canada's actions since it has done very little to change the working conditions in the agricultural sector.<sup>134</sup> Furthermore, the Ontario government has also reiterated its unwillingness to improve working conditions for agricultural workers in that province; in fact, it has successfully appealed an Ontario Court of Appeal's decision granting all agricultural workers the right to collectively bargain and unionize under that jurisdiction's labour relations legislation.<sup>135</sup>

---

<sup>132</sup> By reliable the author means workers that will not walk out the job in the middle of the harvest and who are available to work at any time, be it day, night, Mondays, Sundays, or during holidays. The most important reason why Mexican workers are always available to work is because they are afraid of being expelled from the Program by the Mexican Ministry of Labour. See Basok, *supra* note 1 at 117, 120-125.

<sup>133</sup> See "Caribbean and Mexican Seasonal Agricultural Workers Program: Policy", online: Service Canada <<http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>. See also "Agriculture Programs and Services: Overview", *supra* note 127.

<sup>134</sup> See Verma, *supra* note 2 at 27.

<sup>135</sup> See *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3. Its in-depth discussion will be presented in chapter 3.

## Chapter 1- SAWP's Context and Structure

As previously discussed, the Canadian government chose to bring seasonal workers from the Caribbean and Mexico instead of improving the working conditions in agriculture to attract domestic workers. It seems disingenuous to say that the government is giving priority to hiring Canadians and permanent residents when it has not made those jobs more attractive for them. Instead, those jobs continue to pay low wages, to be dangerous, to require hard physical labour, and to be temporary.<sup>136</sup>

Accordingly, the author submits that these are not reliable, permanent and attractive jobs for anyone in Canada. Moreover, as it will be discussed later, agricultural work is not fully covered by the provincial, federal and international legislation aim to protect worker's rights. Even when some of these legal sources provide coverage, they are deficient since the individual's that should be protected cannot access such protections adequately.

Finally, these policies reflect the objective of hiring seasonal workers from Mexico and the Caribbean because they are "reliable", which really means, they will not abandon the work before its completion. If they do, they will be repatriated immediately and probably blacklisted from the Program. They cannot afford this "luxury" as they must work to support their families in Mexico. As such, they will work for low wages, long hours, and under precarious conditions. For many of these workers, having such job is better than having no job at all.

---

<sup>136</sup> The majority of these jobs pay minimum wage, exposed workers to extreme work hazards such as exposure to chemicals and pesticides, and requires them to work more than 12hours shifts during the peak season. These will be elaborated in chapters 3 and 4.

## B. How Does the SAWP Work?

Human Resources and Skills Development Canada manages and sets general policies for the Program.<sup>137</sup> It works closely with the Foreign Agricultural Resource Management Services (FARMS)<sup>138</sup> in Ontario. Employers submit requests for foreign agricultural workers to FARMS.<sup>139</sup> These requests, once approved by HRSDC, are forwarded to recruitment agencies in Mexico. It is then Mexico's responsibility to recruit workers in order to satisfy the requests.<sup>140</sup> As stipulated in the Employment Agreement, which will be discussed later, the employer pays for the worker's airfare and ground transportation, visa fees, and administrative fees paid to FARMS.<sup>141</sup> However, the worker must pay the employer costs for air travel and the work permit.<sup>142</sup> Workers who earn the approval of their employers are classified as "named".<sup>143</sup> "Named" workers are asked to return for the next season with the same employer. However, if they do not get "named" by the employer, they may be

---

<sup>137</sup> See "Agriculture Programs and Services: Overview", *supra* note 127.

<sup>138</sup> FARMS is a non-profit, federally incorporated in 1987 to facilitate and coordinate the processing of requests for foreign seasonal agricultural workers. Authorized by Human Resources and Skills Development Canada, FARMS performs an administrative role to the Caribbean and Mexican Seasonal Agricultural Workers Program. It is a private sector run organization, governed by a Board of Directors, appointed from those commodity groups participating in the Program. See F.A.R.M.S., online, <<http://farmsontario.ca>>.

<sup>139</sup> See "Agriculture Programs and Services: Overview", *supra* note 127.

<sup>140</sup> *Ibid.*

<sup>141</sup> See Appendix II, *AGREEMENT FOR THE EMPLOYMENT IN CANADA OF SEASONAL AGRICULTURAL WORKERS FROM MEXICO – 2011* at Clause VII (1-3) [Employment Agreement].

<sup>142</sup> See Appendix II, Employment Agreement, Clause VII (3).

<sup>143</sup> See "2007 ADMINISTRATIVE AND PROCESSING PROCEDURES", online: Service Canada, <<http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>. See also Veena Verma, "The Regulatory and Policy Framework of the Caribbean Seasonal Agricultural Workers Program" (April 2007), online: The North-South Institute <[http://www.nsi-ins.ca/english/pdf/Regulatory\\_Policy\\_Verma.pdf](http://www.nsi-ins.ca/english/pdf/Regulatory_Policy_Verma.pdf)> at 9-10 [Verma 2].

## Chapter 1- SAWP's Context and Structure

relocated to other farms or risk not being chosen again for the Program.<sup>144</sup> Likewise, the employer has the right to terminate and repatriate any of his workers for non-compliance, refusal to work, or any other sufficient reason.<sup>145</sup>

On the other hand, the worker has no right to appeal a decision to terminate or to challenge if the employer fails to “name” him.<sup>146</sup> This lack of protection creates acute vulnerability for the workers since arguably they could be sent back immediately in the event that they decided to object to the employer’s decisions regarding treatment, working conditions or who gets “named”. As some authors have argued, such regime allows the employer to send back sick or injured workers. “It is a convenient method for farmers to avoid worker compensation claims and temporary staffing issues associated with employee illness.<sup>147</sup>”

At the end of the season, employers make the necessary arrangements to transport their workers to the nearby airport for departure to Mexico. Once arrived in Mexico, workers report to the recruitment agency with evaluation forms from their employers. A negative evaluation can result in suspension from the program.<sup>148</sup> However, the worker does not have an opportunity to appeal such

---

<sup>144</sup> See Verna 2, *supra* note 143.

<sup>145</sup> See Appendix II, Employment Agreement, Clause X (1).

<sup>146</sup> Neither the Employment Agreement nor the Operational Guidelines provide for an appeal or redress mechanisms.

<sup>147</sup> “The Status of Migrant Farm Workers in Canada 2006-2007”, online: the United Food and Commercial Workers Union (UFCW) <<http://www.ufcw.ca/Theme/UFCW/files/PDF2007/StatusReportEN2007.pdf>> at 9.

<sup>148</sup> *Ibid.* See also Basok, *supra* note 1 at 99; and “Participating Countries: Mexico”, online: FARMS <<http://www.farmsontario.ca/countries.php?divname=Mexico>>. “As of January 2010 the Ministry of Labour has made the worker evaluation available on-line. The evaluation form can be found at <https://simolint.stps.gob.mx> and should be completed as part of the requirement process. Each employer

evaluation.<sup>149</sup> He or she is powerless to defend or justify a negative evaluation. From the Mexican worker's point of view, there seems to be a constant variable, which is having no ability to appeal or bargain at any level of the Program's decision-making processes. The author argues that this is one of the core reasons why the SAWP can provide "reliable workers", who will keep quiet and do as they are told, no questions asked.

### **C. What Are the Benefits for Canada and Mexico?**

The answer to the above posed question is at least two-fold. On the Canadian perspective, it attempts to alleviate the apparent shortages of "reliable" agricultural labour.<sup>150</sup> On the other hand, for the Mexican perspective, it attempts to alleviate poverty.<sup>151</sup> Therefore, this bilateral arrangement has benefited Canada with "reliable" workers and Mexico with millions of dollars in remittances and relief to its high unemployment and underemployment levels.<sup>152</sup> For example, Mexico's unemployment rate in 2010 was 5.6 per cent, higher than the previous year. As for its underemployment rate, it estimated to be about 25per cent<sup>153</sup>. Hence, Mexico benefits mainly in two ways: it receives remittances from the workers while at the same time,

---

has been assigned a username and pass code necessary to fill out the form. The evaluation has two sections: a General and an Extended Assessment (the Extended assessment is optional. The General assessment is indispensable for the requirement process). The Ministry of Labour has put together a User's Manual to assist you in completing the evaluation."

<sup>149</sup> *Ibid.*

<sup>150</sup> See generally "Agricultural Programs and Services: Overview", *supra* note 127.

<sup>151</sup> See Binford 2, *supra* note 108. See also Interview with Embassy Agent, *supra* note 125.

<sup>152</sup> According to the CIA's The World Factbook, Mexico's unemployment rate in 2010 was 5.6per cent and its underemployment rate 25per cent. See CIA World Factbook, *supra* note 100.

<sup>153</sup> *Ibid.*

## Chapter 1- SAWP's Context and Structure

alleviates its unemployment and underemployment by sending thousands of Mexicans to work in Canada. In fact, the Ministry of the Exterior (Secretaria de Relaciones Exteriores) acknowledged that remittances sent by workers outside Mexico, including seasonal workers in Canada reached more than 15,000 million U.S. dollars in 2004.<sup>154</sup>

Canada's main benefit is the receipt of dependable and reliable agricultural workers.<sup>155</sup> This constant supply of reliable workers allows Canada to sustain and create new jobs in agriculture. According to Sociology Professor, Tanya Basok, "each farm worker in horticulture supported 2.6 jobs in the supply and processing sectors in 1995. If the 9,876 SAWP jobs in the Ontario industry were not filled, 25,678 jobs in other sectors would have been lost."<sup>156</sup> Moreover, SAWP workers facilitate Canadian farmers' ability to compete in the global market; Canada's agriculture is worth \$90 billion per year. For instance, in 2004, Ontario alone exported more than \$7.4 billion of food or food products to the United States and \$51 million of food or food products to Mexico.<sup>157</sup>

---

<sup>154</sup> See *Actualidad Economica en America del Norte*, Boletín Periodístico Semanal del 13 al 19 de noviembre de 2004, Año V, No. 43, online: Secretaria de Relaciones Exteriores <[http://www.sre.gob.mx/laredo/images/pre\\_bol\\_eco\\_2004\\_43.htm](http://www.sre.gob.mx/laredo/images/pre_bol_eco_2004_43.htm)>. The information is only available in Spanish. See also "The Status of Migrant Farm Workers in Canada 2006-2007", *supra* note 147 at p. 6; and Binford 2, *supra* note 108; Basok, *supra* note 1; Interview with Embassy Agent, *supra* note 125; and Interview via telephone with the Mexican Consulate in Leamington, Ontario on 12 July 2010 [Interview with the Mexican Consulate].

<sup>155</sup> See "Seasonal Agricultural Workers Program", online: Foreign Affairs and International Trade Canada <<http://www.canadainternational.gc.ca/mexico-mexique/work-travail/sawp-ptag.aspx?lang=en>>.

<sup>156</sup> Basok 2, *supra* note 106.

<sup>157</sup> See Heather Gibb, "Farmworkers from Afar" (2006), online: The North-South Institute <[http://www.nsi-ins.ca/english/pdf/Farmworkers\\_Eng.pdf](http://www.nsi-ins.ca/english/pdf/Farmworkers_Eng.pdf)>, at 6.

## Chapter 1- SAWP's Context and Structure

In addition to serving as a constant supply of reliable agricultural labour force, helping to sustain and create new jobs, and facilitating competition in the global market, Mexican workers also contribute to Canada by working and living there. For example, they shop and bank in the farming communities where they are placed. As Dr. K. Preibisch states:

Many of the sales generated by migrant workers stay in rural communities; the limited mobility of migrant workers constitutes them as a captive market. A recent study estimated migrant workers spend \$82 million in rural communities on goods and services to meet their daily consumption needs but also on purchases they take home.<sup>158</sup>

Furthermore, these workers spend their money in restaurants, bars, long distance telephone cards, mobile phone fees, and wire transfer services. They buy at the second hand stores<sup>159</sup> and are obliged to purchase their plane tickets form only one designated travel agency in Canada called CanAg Travel Services Ltd.<sup>160</sup> Finally, as will be discussed later, they pay taxes and contribute to the Employment Insurance and Canada Pension Plan.<sup>161</sup>

In light of the above, it is no surprise that Mexico and Canada have labeled the Program a success. In fact, the Mexican Ministry of Labour and Social Welfare has labeled this Program as “[a]n international successful linking program between supply

---

<sup>158</sup> K. Preibisch, “*Canada’s Seasonal Agricultural Workers Program as a Model of Best Practices in Migrant Worker Participation in the Benefits of Economic Globalization Project: Social Relations Practices between Seasonal Agricultural Workers, their Employers, and the Residents of Rural Ontario*”, online: The North-South Institute <[http://www.nsi-ins.ca/english/pdf/exec\\_sum\\_preibisch.pdf](http://www.nsi-ins.ca/english/pdf/exec_sum_preibisch.pdf)> [Preibisch].

<sup>159</sup> *Ibid.*

<sup>160</sup> See “*CanAg Travel Services*”, online: FARMS <<http://www.farmsontario.ca/canag.php>>.

<sup>161</sup> See “*Seasonal Agricultural Workers Program*”, online: Human Resources and Skills Development Canada (HRSDC) <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tfw/sawp\\_tfw.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml)>. See also Appendix II, Employment Agreement, Clause IV.

and demand of labor force. An experience model of a seasonal agricultural program between two countries. . .”<sup>162</sup> Likewise, the Agricultural section of the Mexican Embassy in Canada has stated that “the program [SAWP] has been a success. . . [that] Mexican Agricultural workers arriving in Canada, have the same rights and obligations than Canadians in the same activity. . .”<sup>163</sup> In similar fashion, Canada reflects its satisfaction with the Program asserting that “[t]he Seasonal Agricultural Workers Program. . . is a successful labour mobility program between Canada and Mexico. . .”<sup>164</sup> “In Ontario this Program has responded to a critical shortage of available workers suitable for seasonal agricultural work.”<sup>165</sup>

Notwithstanding such praises, what about the workers? Do they benefit from the SAWP? The simplistic answer is yes, they benefit since they have jobs that allow them to earn a livelihood to support their families in Mexico. However, the author argues that having a job is not enough to conclude that these workers are benefited. As the following chapters will illustrate, the existing legal framework, as applied to farm workers generally and Mexican SAWP workers particularly, fails to fully protect them from abuse and exploitation while working in Canadian farms. Instead the Program's structural as well as legal frameworks make them “unfree labourers” who are “reliable” because they can be expected to work immediately upon command of their employers

---

<sup>162</sup> “Seasonal Agricultural Workers Program (SAWP): Mexico-Canada (1974-2006)”, Secretaría del Trabajo y Previsión Social, on file with the author. The internet link is no longer available.

<sup>163</sup> “Mexican Seasonal Agricultural Workers Program”, online: Consejería Agroalimentaria de México en Canadá <<http://www.nasda.org/Accord/Mx-CanProgTrabAgr.pdf>>.

<sup>164</sup> “Seasonal Agricultural Workers Program”, online: Foreign Affairs and International Trade Canada <<http://www.canadainternational.gc.ca/mexico-mexique/work-travail/sawp-ptag.aspx?lang=en>>.

<sup>165</sup> “Agriculture Programs and Services: Overview”, *supra* note 127.

and it is unlikely they will complain about it. Stated differently, they are not given the same protections, as other workers in Canada. The Program places them in a vulnerable position that can make them targets of abuse and exploitation. This is certainly no benefit.

#### **D. Structure of the SAWP**

The SAWP is based on three instruments, which prescribe the recruitment, selection, and documentation procedures for its participants. They are a Memorandum of Understanding (MOU) between Canada and Mexico; Operational Guidelines; and Employment Agreement.

##### **1. Memorandum of Understanding<sup>166</sup> (MOU)**

The Memorandum of Understanding (MOU) establishes the SAWP. The Minister of Human Resources and Skills Development (HRSD) is Canada's representative and its signatory. Likewise, the Secretary of External Relations (*Secretario de Relaciones Exteriores*) is the Mexican representative and signatory.<sup>167</sup>

The MOU does not constitute an international treaty pursuant to the *Vienna Convention on the Law of Treaties*<sup>168</sup>. Rather, it is an “intergovernmental administrative agreement”<sup>169</sup>. Consequently, it is not legally binding since it is not a treaty as defined

---

<sup>166</sup> See Appendix I, *Memorandum of Understanding Between the Government of the United Mexican States and the Government of Canada Concerning the Mexican Seasonal Agricultural Workers Program* [MOU]. This is an updated version signed in 1995. The copy was provided upon written request on 12 December 2007 by Mr. Hernán de Jesús Ruiz Bravo, counselor from the Embassy of Mexico in Canada.

<sup>167</sup> *Ibid.*

<sup>168</sup> 23 May 1969, 1155 UNTS 331.

<sup>169</sup> See Appendix I, MOU, Clause 2(c).

by international law. In fact, Canada and Mexico have explicitly acknowledged that there is no intent to characterize the MOU as a binding treaty.<sup>170</sup> However, the parties agree to amend the MOU, at any time, with the approval of both parties.<sup>171</sup> Furthermore, the MOU diminishes its enforceability by creating ambiguity regarding the legal consequences should a party breach any of its provisions. For instance, it only states that “any differences with regard to the interpretation or application of this Memorandum of Understanding or its attachments will be resolved through consultation between both parties.”<sup>172</sup> As well, the MOU’s language regarding what both parties have agreed to follow seem to be weak. For instance it states: “Canada and Mexico have agreed that **the guiding principles underlying** the Program will be. . .”<sup>173</sup>

Although both parties clearly state that the MOU does not constitute an international treaty, there have been instances where a court would find an MOU to have legal authority regardless of the parties’ stipulated intentions within the instrument. Thus, it appears that what a document is called is not determinative in assessing its legal nature and effect. A case in point is *Budisukma Puncak Sendirian Berhad v. Canada*<sup>174</sup>. One of the central questions of this case was whether a MOU that clearly stipulated its

---

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid* at Clause 2(a).

<sup>172</sup> *Ibid* at Clause 2(c).

<sup>173</sup> See Appendix I, MOU.

<sup>174</sup> 2004 FC 501. However, it is important to note that courts have used the actual intent of the MOU to determine its legal effect. See *Mitsui & Co. (Point Aconi) Ltd. v. Jones Powers Co.*, 2000 NSCA 95, at paras 60-93. In this case, the Nova Scotia Court of Appeal held that a MOU between two private companies dealing with the resolution of a construction dispute was legally enforceable. Although this case concerned private entities and not foreign governments, it does show that the form of any agreement is not determinative of its legal character.

non-binding legal effect was the authority for Canadian port authorities to detain a foreign vessel carrying the flag of one of the MOU's member states. The federal court answered in the affirmative: the MOU was the authority for the following reasons:

- It proved to be an effective enforcement mechanism<sup>175</sup>; and
- It proved to yield a high degree of cooperation and expectation in enforcing its objectives<sup>176</sup>.

The MOU in this case, clearly imposed and directed the member states how various international instruments would apply. For example, it enlisted 10 international instruments as the basis for compliance. As well, the MOU directed the Authorities (parties) to carry out obligations in relation to “Inspection Procedures”, “Rectification” and “Detention; furthermore, it also attached regulations from an international instrument as a ‘relevant instrument’ to follow.<sup>177</sup> Furthermore, the MOU used what could be understood as non-discretionary language to direct its members to various commitments. For instance, it used wording such as

Each authority that has accepted the Memorandum **will give effect** to the provisions of the present Memorandum. . . Each authority **will establish** and **maintain** an effective system of port State control with a view to ensure that,

---

<sup>175</sup> *Ibid* at para 87. “. . . [I]t is possible to view the MOU as the ‘enforcement’ mechanism. While the preamble to the MOU specifically states that it ‘is not a legally binding document and is not intended to impose any legal obligations on any of the Authorities’, nevertheless, it has proved to be an effective enforcement tool.”

<sup>176</sup> *Ibid* at para 90. “It appears that the Authorities to the MOU have experienced a high degree of cooperation in enforcing Port State Control Measures. Thus, because the signatory states to the MOU agree to apply the standards and expectations expressed in the agreement, and, as a result, not by enforceable contract but by the honour of the agreement, a detention would be authorized by the MOU and respected by a flag state whose ship has been detained.”

<sup>177</sup> *Ibid* at paras 70-71.

## Chapter 1- SAWP's Context and Structure

without discrimination, foreign merchant ships calling at a port of its Authority, or anchored off such a port comply with the standards laid down in the relevant instruments as defined in section 2.<sup>178</sup>

While the federal court did not specifically say that the MOU was an international treaty and thus was legally enforceable and binding in international law, it nevertheless concluded that the MOU was the legal authority for the detention of a foreign vessel.<sup>179</sup> Following on this precedent, would the MOU establishing the SAWP be considered as a legal authority to enforce any of the MOU's objectives? The author submits that the MOU could be seen to be a legal authority. Following the case in point above, the SAWP's MOU could be seen to be an effective enforcement mechanism, which yields a high degree of cooperation and expectation in enforcing its objectives.<sup>180</sup>

The aim of the MOU is the desire to ensure that the Program continues to be of benefit to both parties and facilitates the movement of Mexican Seasonal Agricultural Workers into Canada “where Canada determines that such workers are needed to satisfy the requirements of the Canadian agricultural labour market.”<sup>181</sup> The MOU further establishes that Canada and Mexico have agreed to the following:

- a. the operation of the program will be administered according to the Operational Guidelines (which will be discussed later). Those Guidelines will be subject to annual review by both parties and

---

<sup>178</sup> *Ibid* at para70.

<sup>179</sup> *Ibid* at para 94.

<sup>180</sup> The author takes this position with caution as further precedent, as well as legal commentary must be explored in detail. This is certainly a topic which merits its own in depth research and analysis.

<sup>181</sup> See Appendix I, MOU.

## Chapter 1- SAWP's Context and Structure

amended as necessary in order to reflect changes essential for the successful administration of the Program;<sup>182</sup>

- b. workers are to be employed at a premium cost to the employers and will receive adequate accommodation and treatment equal to that receive by Canadian workers performing the same type of agricultural work, in accordance with Canadian laws;<sup>183</sup>
- c. the workers are to be employed in the Canadian agricultural sector only during periods where Canadian workers are unavailable;<sup>184</sup> and
- d. each worker and employer will sign an Employment Agreement, outlining the conditions of employment under the Program. Said Agreement will be subject to annual review by both parties and amended after consultation with employer groups in Canada to reflect changes required for the successful administration of the Program.<sup>185</sup>

In other words, the MOU provides the parties with the avenues to follow in order to attain the agreed goal, which is the continuation of the SAWP and swift movement of Mexican Seasonal Agricultural Workers into Canada. As well, Mexico and Canada have exercised (and continue to do so) a “high degree of cooperation”; they have also followed the MOU’s provisions to the full extent possible all the time; finally, they have placed high “expectations” that each party will abide by the MOU. This was confirmed

---

<sup>182</sup> *Ibid* at Clause 1(a).

<sup>183</sup> *Ibid* at Clause 1(b).

<sup>184</sup> *Ibid* at Clause 1 (c).

<sup>185</sup> *Ibid* at Clause 1(d).

when the author interviewed Mexican and Canadian officials. In fact, Canadian officials would consider the MOU to be much more than a non-binding set of aspirations.<sup>186</sup> They all seemed to agree that Canada and Mexico fully rely on the MOU and its corresponding operational guidelines as well as the Employment Agreement to carry out the SAWP successfully.<sup>187</sup>

Whether or not the MOU is a legal authority or legally binding, its guiding principles itemized above are the foundation of the SAWP. Accordingly, the core elements necessary for the success of the Program are the adherence to the Operational Guidelines; equal treatment for the workers as well as adequate accommodation while in Canada; the use of these workers only when Canadian workers are not available and requiring the workers to sign an Employment Agreement. Only the parties, Mexico and Canada, have the right to review and, in the event of desiring changes, those changes must be subject to consultation only with the Canadian employers.<sup>188</sup> The workers, being parties to the Employment Agreement because they have signed it, have absolutely no right to bargain for amending, changing or expressing their concerns in regards to the terms of employment as stipulated in the Employment Agreement. A member of the Mexican Embassy in Canada explained that because these workers are seasonal, they technically are not employed during the negotiations and reviews of the

---

<sup>186</sup> See Interview with Embassy Agent, *supra* note 125 ; See also Interview with France Asselin (Manager) and Darlene V. Goodwin (Policy Advisor) from HRSDC/Temporary Foreign Workers Program, Skills and Employment Branch, dated 11 August 2010.

<sup>187</sup> *Ibid.*

<sup>188</sup> See Appendix I, MOU, Clause 1.

Employment Agreement; therefore, they cannot be part of any bargaining.<sup>189</sup> In short, the core elements of the MOU necessary for the success of the Program have the effect of completely excluding the actual workers.

## 2. The Operational Guidelines

As the MOU stipulates, the SAWP is administered under the Operational Guidelines. They instruct on how the Program is to be administered; they define the role of the state and non-state actors, including their designated duties and responsibilities. Finally, they provide processes for the recruitment of workers, which is closely regulated by the parties. They allow the state parties to closely monitor and regulate the recruitment of foreign workers.<sup>190</sup> The aim of this regulated method of recruitment is to ensure that workers are tracked at every step in the process, and not subject to abuses at the hands of employers or independent labour contractors. Canada will not process workers under the SAWP through private contractors or other private means.<sup>191</sup>

A tangible example on how the recruitment process is regulated also involves regulating the means of transportation used by the SAWP workers to get to Canada. As such, the regulation prescribes that the employer and the Mexican Government Agent in Canada are responsible for selecting and providing the most economical method of air

---

<sup>189</sup> See Interview with Embassy Agent, *supra* note 125.

<sup>190</sup> See “Caribbean and Mexican Seasonal Agricultural Workers Program: Operating Guidelines”, online: Service Canada < <http://www.servicecanada.gc.ca/eng/on/epb/agri/operations.shtml> >. See also “Statement of Policy”, online: FARMS < <http://www.farmsontario.ca/program.php?divname=StatementOfPolicy> >.

<sup>191</sup> See “Policy Statement Regarding Access to and the Termination of Assistance to an Employer under the Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Program”, online: Service Canada < <http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml> >.

## Chapter 1- SAWP's Context and Structure

transportation to and from Canada<sup>192</sup>. The actual travel agency, in-charged of managing the workers' flights and itineraries, has been approved as the only travel agency assigned by the state parties.<sup>193</sup> As stipulated in the MOU, the Operational Guidelines are subject to annual review by both parties and can be amended as needed in order to reflect changes, which are required for successfully administering the Program.<sup>194</sup>

Canada's duties and responsibilities in the administration of the SAWP include the following:

a. to establish directions pursuant to Canada's immigration laws to limit and monitor the admission of Mexican and Caribbean workers seeking entry to work under the SAWP to persons selected by the sending country who:

- are at least 18 years of age;
- are nationals of the sending countries;
- satisfy immigration laws, and
- are parties to an Employment Agreement;<sup>195</sup>

---

<sup>192</sup> See "Agriculture Programs and Services: Overview", *supra* note 127. See also Appendix II, Employment Agreement, Clause VII.

<sup>193</sup> See "Agriculture Programs and Services: Overview", *supra* note 127; see also "Caribbean and Mexican Seasonal Agricultural Workers Program: Operational Guidelines, 2006 Administrative and Processing Procedures", online: Service Canada <<http://www.servicecanada.gc.ca/eng/on/epb/agri/operations.shtml>>; "Administrative and Processing: Processing Procedures", online: FARMS <<http://www.farmsontario.ca/program.php?divname=AdministrativeAndProcessing>>. The name of the agency is CAN-AG Travel Services Ltd.

<sup>194</sup> See Appendix I, MOU, Clause 1(a).

<sup>195</sup> See Appendix XII, *Mexican Seasonal Agricultural Workers Direction June 17, 1974*, Clause 2. [MSAW-Direction]; See also "Seasonal Agricultural Workers Program", online: Human Resources and Skills Development Canada (HRSDC) <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tfw/sawp\\_tfw.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml)>.

## Chapter 1- SAWP's Context and Structure

- b. provide adequate notice to the sending countries regarding the number of workers required by Canadian employers with the aim of facilitating the documentation process and enabling their arrival on the required dates;<sup>196</sup>
- c. review applications, and other worker documentation material related to admissibility, as well as, issue letters of introduction authorizing the issuance of work visas, and to advise Mexico and the Caribbean states when all documentation is complete. The Canadian consular offices in Mexico and the Caribbean carry out the review and issuance of work visas;<sup>197</sup>
- d. designate for the purpose of assisting in the administration of the SAWP, the Foreign Agricultural Resource Management Service (F.A.R.M.S.), and in Quebec, the Fondation des Entreprises en Recrutement de Main d'oeuvre Agricole Étrangère (FERME), to transmit employment orders accepted by a local Service Canada Centre (SCC).<sup>198</sup> F.A.R.M.S. and FERME are the administrative arms of the SAWP. They are grower organizations funded

---

<sup>196</sup> See generally “Policy Statement Regarding Access to and the Termination of Assistance to an Employer under the Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Program”, online: Service Canada < <http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>.

<sup>197</sup> See generally “Caribbean and Mexican Seasonal Agricultural Workers Program: Policy”, online: Service Canada < <http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>. See also “Seasonal Agricultural Workers Program”, *supra* note 195; “Agriculture Programs and Services: Overview”, *supra* note 127.

<sup>198</sup> See “Agriculture Programs and Services: Overview” *supra* note 127; see also “Caribbean and Mexican Seasonal Agricultural Workers Program: Policy”, *supra* note 197.

exclusively through user fees collected from participating employers at the time their applications are approved for processing.<sup>199</sup>

Mexico's main duties and responsibilities are:

- a. upon receipt of the number of workers needed by Canadian employers, Mexico and the Caribbean States shall complete the recruitment, selection and documentation of the workers and notify the Canadian authorities of the number of workers, their names, and the dates of arrival in Canada;<sup>200</sup>
- b. select only persons who can perform agricultural and horticultural work and who meet Canadian health requirements. Workers' medical evaluations are to be arranged before arriving in Canada in accordance to the medical processing guidelines as prescribed by Citizenship and Immigration Canada;<sup>201</sup>
- c. maintain a pool of labour with individuals suitably qualified and ready to depart for Canada in the event that Canadian employers request additional workers;<sup>202</sup>

---

<sup>199</sup> See Foreign Agricultural Resource Management Services (FARMS), online, <<http://www.farmsontario.ca/>>. See also *Fondation des Entreprises en Recrutement de Main-d'oeuvre agricole Étrangère* (FERME), online: <<http://www.fermequebec.com/102-Qui-est-FERME.html>>.

<sup>200</sup> See "Agricultural Programs and Services: Overview", supra note 127.

<sup>201</sup> See "Temporary Foreign Workers Program", online: Human Resources and Skills Development Canada (HRSDC) <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/sawp.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml)>; "How to Hire a Temporary Foreign Workers", online: Citizenship and Immigration Canada (CIC) <<http://www.cic.gc.ca/English/resources/publications/tfw-guide.asp>>.

<sup>202</sup> See "Seasonal Agricultural Workers Program (SAWP) Mexico-Canada (1974-2006), *Secretaría del Trabajo y Previsión Social* (Mexican Ministry of Labour and Social Welfare), on file with the author. The internet site provided as a link has been changed. The author has not been able to locate the new link.

## Chapter 1- SAWP's Context and Structure

- d. provide that it will maintain a pool of at least 300 workers. This pool of workers allows for the immediate availability of workers in cases of harvest-related emergencies or to replace workers as needed; and
- e. appoint one or more Government Agents in Canada to ensure the expedient and swift functioning of the Program for the benefit of the employers and workers, and to perform the duties required of that Agent under the Employment Agreement.<sup>203</sup> It is important to underscore that the role of the Government Agent is dual in nature. In other words, the Agent does not only represent the workers while they are in Canada, but also he/she ensures that the employer's interests are met.<sup>204</sup> This, however, defeats or neutralizes the Agent's capacity to represent the workers who are his/her countrymen/woman. Rather, it is perplexing that a foreign State, Mexico in this case, has to ensure that Canadian employer's interests are fulfilled within the SAWP; as Veena Verma points out, this should be the role of the Canadian Government.<sup>205</sup>

---

<sup>203</sup> *Ibid.*

<sup>204</sup> See Basok, *supra* note 1 at 108-115; See also Verma, *supra* note 2 at 23; Preibisch, *supra* note 158 at 6; Appendix II, Employment Agreement. “**WHEREAS** the Government of Canada and the Government of the United Mexican States agree that an agent for the Government of the United Mexican States known as the “**GOVERNMENT AGENT**” shall be stationed in Canada to assist in the administration of the program.

<sup>205</sup> Verma, *supra* note 2 at 23.

### 3. Employment Agreement<sup>206</sup>

The Memorandum of Understanding requires the workers and employers participating in the SAWP to sign an Employment Agreement.<sup>207</sup> While the Operational Guidelines lay out the duties and obligations of the state parties regarding the administration of the Program, the Employment Agreement lays out the duties and obligations of the worker and employer as it pertains to the conditions of employment. Also, as the MOU stipulates, the Agreement is subject to annual review by both state parties. However, amendments to the Agreement may be made only after consultation with employer groups in Canada to reflect the changes required for successfully administering the Program.<sup>208</sup> Yet, the Mexican workers who are the other party to the Agreement are not consulted on this matter. They are completely ignored or left out of the decision-making process regarding their own working rights and obligations. They have no bargaining power even at this initial stage of the Program.

On the surface, the Agreement provides coverage of some key minimum rights. It contains provisions stipulating that the employer must provide adequate and free lodging to the worker, subject to municipal and safety standards.<sup>209</sup> The Employer must also provide meals, either free or at a low cost through wage deductions and provide a

---

<sup>206</sup> See Appendix II, Employment Agreement.

<sup>207</sup> See Appendix I, MOU, Clause 1(d).

<sup>208</sup> *Ibid.*

<sup>209</sup> See Appendix II, Employment Agreement, Clause II (1).

minimum of thirty minutes for meal breaks.<sup>210</sup> Furthermore, the employer must pay the worker at his place of employment weekly wages at a rate equal to:

- i) the minimum wage for WORKERS provided by law in the province in which the WORKER is employed;
- ii) the rate determined annually by HUMAN RESOURCES and SOCIAL DEVELOPMENT CANADA to be the prevailing wage rate for the type of agricultural work being carried out by the WORKER in the province in which the work will be done; or
- iii) the rate being paid by the EMPLOYER to his Canadian workers performing the same type of agricultural work; whichever is the greatest, provided:
  - iv) that the average minimum work week shall be 40 hours;
  - v) that, if circumstances prevent fulfilment of Clause III (iv) above, the average weekly income paid to the WORKER over the period of employment is as set out in Clause III (iv) above at the hourly minimum rate;
  - vi) that where, for any reason whatsoever, no actual work is possible, the WORKER, shall receive an advance with a receipt signed by the WORKER to cover personal expenses, the EMPLOYER shall

---

<sup>210</sup> *Ibid* at Clauses II (2) and IV (2).

## Chapter 1- SAWP's Context and Structure

be entitled to deduct said advance from the WORKER'S pay prior to the departure of the WORKER.<sup>211</sup>

The Agreement also specifies that the normal workday is of eight hours<sup>212</sup>, and that for every six consecutive days of work, the worker must have a day off for rest.<sup>213</sup>

Notwithstanding the apparent coverage of basic employment protections, there are critical deficiencies with the Agreement. Although the Mexican Agreement specifies the length of the average workday and required day of rest each week, it nonetheless contains qualifiers, which diminish said standards. For example, Clause I (2) of the Agreement clearly describes that the “worker may agree to extend his/her hours when THE URGENCY OF THE SITUATION requires it”. The Agreement further stipulates “the urgent working day should not be more than 12 hours daily”.<sup>214</sup>

As for the protection relating to the worker's entitled day of rest per every 6 consecutive days of work, it has also been neutralized by the following stipulation within Clause I (3) of the Agreement. It reads: “For each six consecutive days of work, the worker will be entitled to one day of rest, but where the urgency to finish farm work cannot be delayed the employer may request the worker's consent to postpone that day until a mutually agreeable date.”<sup>215</sup> In a nutshell Section I of the Agreement clearly

---

<sup>211</sup> *Ibid* at Clause III (1-3).

<sup>212</sup> *Ibid* at Clause I (2).

<sup>213</sup> *Ibid* at Clause I (3).

<sup>214</sup> *Ibid* at Clause I (2).

<sup>215</sup> *Ibid* at Clause I (3).

allows the employer to ask for more hours of work per day and withhold the day off. Particularly in peak season, this practice of asking workers to withhold the day off has been identified as the rule and not the exception.<sup>216</sup> Although evidence suggests that the employers view the Program as advantageous precisely because the workers work overtime, there are however, no provisions in the Agreement dealing with overtime pay arrangements. In fact, as will be explained in chapters 3 and 4, agricultural workers are not entitled to overtime pay under Ontario's, Quebec's and British Columbia's legislations.

In addition, the Agreement requires the workers to work and live at the place of employment or at such other place as approved by the employer and the Government Agent.<sup>217</sup> Likewise, the worker cannot work for any other employer without the approval of Human Resources and Skills Development Canada, the Government Agent and the employer.<sup>218</sup> These provisions seriously diminish the workers' bargaining power and mobility rights. For instance, it would be frightening to criticize or object to one's employment conditions when one's employer is also one's landlord, means of transportation and working visa grantor<sup>219</sup>. Accordingly, they become "unfree labourers" as they cannot circulate in the labour market and do not have the negotiating capacity to change potential precarious or disadvantageous circumstances. Such restrictions seem unfair and unconscionable especially because, these workers, in

---

<sup>216</sup> See generally, Basok, *supra* note 1.

<sup>217</sup> See Appendix II, Employment Agreement, Clause IX (1).

<sup>218</sup> *Ibid* at Clause IX (5).

<sup>219</sup> Although the employer does not issue the working visa *per se*, it is he who must request for the worker so that he/she can apply for a working visa. In other words, there is no visa without an employer.

addition of fulfilling a desperate labour shortage in Canadian farms, contribute to the Canada Pension Plan, pay income tax, and Employment Insurance.<sup>220</sup>

It is relevant to note that the Agreement does not address unionization or the right to collective bargain. This position of vulnerability is exacerbated by language, cultural, and geographical barriers as many of these workers live on remote farms. As such, few have access to legal authorities or social services that would possibly assist them in the event they had complaints regarding working conditions. Also, because they are not Canadian citizens, Mexican workers do not have access to the political processes to advocate on their behalf.

The Employment Agreement does not stipulate how it is to be enforced. Hence, in theory, it can be enforced in the same manner as any other employment contract in Canadian courts. As of the writing of this thesis, the author did not find precedent or case law where either the employer or employee has sought enforcement or damages for breach of the Agreement. This should not be a surprise since workers are only in Canada temporarily. Consequently, it would be difficult to access legal representation for a case that might take years to resolve in the courts. Also, these workers do not have the financial means to bring about such endeavour. As previously identified, many of them come from poor, rural communities in central Mexico. Adding to their overall vulnerable position, they are desperate to find a source of income, as they are the breadwinners for their families. Thus, it is not strange or surprising that they cannot or would not bring breach of contract claims in Canadian courts. Finally, many of them do

---

<sup>220</sup> See "Seasonal Agricultural Workers Program", online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tf/sawp\\_tf/shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tf/sawp_tf/shtml)>.

not speak English or French and are extremely isolated once they arrive in Canada.<sup>221</sup> They usually live in the farms where they work; these farms are usually not located in urban areas or in the middle of towns.<sup>222</sup> These factors are a great impediment for them to contact the relevant authorities or lawyers to launch their complaints. However, even if they could overcome said impediments and launch a legal complaint against their employer for breach of the Agreement, they would be putting their families' livelihoods at risk as they would be jeopardizing the only employment they have.<sup>223</sup>

Filing a complaint with their Government Agent can be perceived as ineffective and in some cases counterproductive. The Agent does not often have the support staff to go out to the farms and thoroughly investigate claims.<sup>224</sup> Although FARMS is responsible for providing staff support, it is funded by the farmers, as such the availability of staff support is subject to the farming community's willingness to supervise its own practices as they pertain to migrant workers.<sup>225</sup> This greatly compromises the ability of the Agent to make impartial findings in his investigation. It also creates a conflict of interest since the party, which receives the complaint (Government Agent) is supported by the employer's agency in-charged of administering the SAWP.

---

<sup>221</sup> See Preibisch, *supra* note 158.

<sup>222</sup> *Ibid* at 3-5.

<sup>223</sup> See generally Basok, *supra* note 1 at 110-128.

<sup>224</sup> Interview with agents from the Mexican Consulate in Leamington, Ontario (12 July 2010), via telephone.

<sup>225</sup> See FARMS, online:< <http://www.farmsontario.ca/>>.

## Chapter 1- SAWP's Context and Structure

Another disincentive for a worker to launch a complaint is the threat of premature repatriation. Grounds for termination mainly encompass breach of contract, which can include non-compliance, refusal to work, or any other sufficient reason.<sup>226</sup> The Agreement does not give any guidelines or defines any of these grounds for dismissal. It only requires the employer to consult with the Government Agent before making the decision to dismiss a worker.<sup>227</sup> In short, the Agreement does not provide for any due process when deciding whether a worker should be dismissed from the Program. Consequently, it leaves broad discretion to the employer as to how to apply those grounds. Once a worker is terminated, he is repatriated before the end of his work-term; in many instances at his own expense.<sup>228</sup> Finally, many workers are discouraged from complaining because of the possibility of being “blacklisted” from the Program by an angry employer or Government Agent.<sup>229</sup> As earlier noted, many of them cannot afford to risk losing their place in the Program as they come from poor, rural areas in Mexico where unemployment and underemployment are high. They need to return to Canada because they are the only means of financial support for their families. Consequently, they rather “work seventy hour a week, seven days a week,

---

<sup>226</sup> See Appendix II, Employment Agreement, Clause X (1).

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid* at Clause X (2). For instance, in Ontario alone, there were 541 SAWP workers (Mexican and Caribbean) prematurely repatriated in 2011; 493 in 2010; 547 in 2009; 634 in 2008; 653 in 2007; 572 in 2006; 688 in 2005 and 678 in 2004. This information was provided upon written request by Henry Neufeld, Business Expertise Manager, Foreign Worker Program, Labour Market & Social Development Programs Branch, Service Canada, via electronic mail: [henry.neufeld@servicecanada.gc.ca](mailto:henry.neufeld@servicecanada.gc.ca), on 23 August 2012. Although the author requested statistics on all participating jurisdictions, Mr. Neufeld only provided for statistics relating to Ontario as stated above.

<sup>229</sup> See Basok, *supra* note 1 at 120-125; Verma 2, *supra* note 143 at 10.

hiding an injury from an employer, or putting up with substandard living conditions” than return to Mexico where there are dismal work opportunities.<sup>230</sup>

#### **IV. Conclusion**

This chapter attempted to illustrate the historical background surrounding farm workers in Canada. It particularly discussed the three forms of foreign labour incorporation in Canada, namely, “unfree immigrant labour”, “free immigrant labour” and “unfree migrant labour”. The first two could not maintain a constant supply of reliable workers as most of workers under such method of incorporation left farm work as soon as their contracts expired or before and moved to other industries in the cities without the fear of being deported. Accordingly, the third method of incorporation has resulted as the most “successful” in providing a constant agricultural labour force, which will not leave the work as they cannot circulate in the labour market and are subject to deportation in the event that they work somewhere else. This is the case of SAWP workers.

As well, this chapter canvassed Mexican worker's historical and current circumstances that attract them to work in Canada every year under the SAWP. Specifically, it underscored the vulnerabilities inherent in Mexican workers due to their socioeconomic status, as well as their educational and non-immigrant status in Canada. Finally, it attempted to highlight relevant features in the SAWP's structure, particularly, the MOU, Operational Guidelines and Employment Agreement.

---

<sup>230</sup> See Wai Suen, Rachel Li, “You Sure Know Who to Pick’Em: Human Rights and Migrant Farm Workers in Canada” (2000) 15 Geo Immigr LJ 1999 at 203.

## Chapter 2- Federal Framework

SAWP workers come to Canada under a federal program and are given authority to work through the issuance of a work permit granted by the federal government's Department of Citizenship and Immigration Canada (CIC). Furthermore, these workers come to work exclusively in agriculture. In fact, they come to assist Canada's agricultural industry by filling its labour shortage. Without their help, the Canadian agricultural sector would lose its capacity to produce and stay competitive. Further, as explained in chapter 1, it was the agricultural employers who lobbied the federal government to allow offshore workers to come and fill in the labour shortage in that industry. In light of the above, it is appropriate to state that the SAWP intersects with agriculture, immigration and employment. While this chapter is not intended to be an exhaustive presentation on constitutional law, however, it aims to examine the three mentioned subject-matters in context with the *Constitution Act, 1867*<sup>1</sup>. As well, it will explore the federal legal framework that encompasses the SAWP. Particularly, it will underscore how key applicable federal legislation excludes SAWP workers from accessing some of its fundamental benefits. These exclusions mainly derive from the *Immigration and Refugee Protection Act*<sup>2</sup> (IRPA), and the *Employment Insurance Act*<sup>3</sup> (EIA).

---

<sup>1</sup> *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [the *Constitution Act, 1867*].

<sup>2</sup> *Immigration and Refugee Protection Act*, SC 2001 c 27[IRPA].

<sup>3</sup> *Employment Insurance Act*, SC 1996, c 23 [EIA].

## I. Constitutional Context in Relation to the SAWP

### A. Division of Powers Generally

The division of legislative power between the federal and the provincial governments is primarily found in sections 91 and 92 of the *Constitution Act, 1867*. This division is based on the concept that every possible subject matter falls under either exclusive federal or exclusive provincial jurisdiction.<sup>4</sup> Sections 91 and 92 assign particular enumerated heads of power to Parliament and the provincial legislatures.<sup>5</sup> In general, each order or level of government is granted exclusive powers with the implication that the other order or level of government is excluded from enacting legislation relating to those powers.<sup>6</sup>

Furthermore, sections 91 and 92 use a distinctive terminology, which grants legislative authority in relation to “matters” coming within “classes of subjects”.<sup>7</sup> Thus, in order to ascertain whether a particular legislation falls within section 91 or 92, the first step is to identify its “matter” (pith and substance). The second step is to assign the matter to one of the “classes of subjects” (heads of legislative powers).<sup>8</sup> Hogg explains that “a law that purports to apply to a matter outside the jurisdiction of the enacting legislative body may be attacked in three different ways”<sup>9</sup>, by challenging

---

<sup>4</sup> See *Attorney General for Canada v. Attorney General for Ontario*, [1937] 1 DLR 673 at 684 (JCPC) [*Labour Convention Case*].

<sup>5</sup> See the *Constitution Act, 1867*, *supra* note 1, ss 91-92. For a detailed discussion regarding distribution of power see Peter W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed, vol 1, (Toronto: Carswell, 2009), loose leaf copy.

<sup>6</sup> *Ibid.*

<sup>7</sup> Hogg, *supra* note 5, at p 15-6.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* at p 15-28.

## Chapter 2- Federal Framework

- the validity of the law;
- the applicability of the law, or
- the operability of the law.<sup>10</sup>

For instance, it could be argued that a law is invalid because its pith and substance (matter) falls within a class of subjects that is outside the jurisdiction of the enacting legislative body.<sup>11</sup> Challenging the applicability of the law, it can be argued that while a law intends to apply to a matter outside the jurisdiction of the enacting body, it, however is valid in most of its applications, but it should be interpreted as not applicable to the matter that is outside the jurisdiction of the enacting body. Thus, the law is not to be invalid, rather it is inapplicable to the extra-jurisdictional matter.<sup>12</sup>

Finally, Hogg states that another way of attacking a law that applies to a matter outside the jurisdiction of the enacting body is to argue that such law is inoperative through the doctrine of paramountcy.<sup>13</sup> This doctrine provides that where there are inconsistent federal and provincial laws, it is the federal law that prevails; thus rendering the provincial law inoperative to the extent of the inconsistency.<sup>14</sup> This argument has been used in instances where both levels of government have concurrent jurisdiction to legislate in matters of old-age pension and supplementary benefits<sup>15</sup>, as well as over

---

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Constitution Act, 1867, supra note 1, s 94A.*

agriculture and immigration.<sup>16</sup>

## **B. Labour and Employment**

While the *Act* is explicit in various subject matters, it, however, does not expressly list labour and employment. Thus, the development of the present division of powers in these areas between the two levels of government has been the product of judicial interpretation.<sup>17</sup> The general rule is that all aspects of labour and employment law fall under the exclusive jurisdiction of the provinces over “property and civil rights”, local works and undertakings, and all matters of a merely local or private nature in the province.<sup>18</sup> In other words, section 92 (13) of the *Constitution Act, 1867* grants the provinces jurisdiction over “property and civil rights”, as such, labour laws are seen as regulating the civil right of freedom of contract and thus fall within the provincial jurisdiction.<sup>19</sup> Accordingly, provincial legislatures generally have exclusive jurisdiction over labour relations and employment.

On the other hand, the federal government retains the power to regulate employment in works and undertakings or businesses within the exclusive legislative authority of Parliament. Most of these involve interprovincial or international

---

<sup>16</sup> *Ibid* at s 95. This will be examined further in the chapter.

<sup>17</sup> See *Attorney General for Canada v. Attorney General for Ontario*, [1937] 1 DLR 684 (JCPC) [*Employment and Social Insurance Act, 1935 Reference*].

<sup>18</sup> See *Labour Convention Case*, *supra* note 4 at 681; *Employment and Social Insurance Act, 1935 Reference*, *supra* note 17 at 686; See generally Joseph E. Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, 4<sup>th</sup> ed., Volume 1, (Cowansville, Quebec: Les Éditions Yvon Blais Inc., 1989) at 285 [Magnet]; See also *Constitution Act, 1867*, *supra* note 1, s 92 (13).

<sup>19</sup> See *Employment and Social Insurance Act, 1935 Reference*, *supra* note 17 at 686.

## Chapter 2- Federal Framework

transportation and communications, as well as banking.<sup>20</sup> Furthermore, provincial jurisdiction over labour relations and employment is the rule and federal jurisdiction is the exception.<sup>21</sup>

These constitutional principles were examined by the Supreme Court of Canada in *Northern Telecom v. Communications Workers*<sup>22</sup>, where the Court stated:

‘In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise. . .’<sup>23</sup>

As well, in *Construction Montcalm Inc. v. Minimum Wage Commission*<sup>24</sup>, the Supreme Court of Canada held the following principles:

- Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule<sup>25</sup>;
- however, by way of exception, Parliament may assert exclusive jurisdiction

---

<sup>20</sup> *Ibid.* See also *R. v. Grand Falls Milling Co. Ltd.*, 2005 NBPC 14 (available on CanLII) at 4; *Léo Beaugard & fils (Canada) Ltée v. Commission des normes du travail* [2000] RJQ 1075 (Que CA); and “The International Comparative Legal Guide to Employment & Labour Law 2011: A Practical Cross-Border Insight into Employment and Labour Law”, online: Global Legal Group <<http://www.iclg.co.uk/khadmin/Publications/pdf/4392.pdf>>.

<sup>21</sup> See *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45, [2010] 2 SCR 696. In this case the entire Court reaffirmed the principle that provincial jurisdiction over labour relations is the norm and federal authority is exceptional. See also *Northern Telecom v. Communications Workers*, [1980] 1 SCR 115; and *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 SCR 754.

<sup>22</sup> [1980] 1 SCR 115.

<sup>23</sup> *Ibid* at 132.

<sup>24</sup> [1979] 1 SCR 754.

<sup>25</sup> *Ibid* at 768.

## Chapter 2- Federal Framework

over these matters if it is demonstrated that such jurisdiction is an integral part of its primary competence over some other single federal subject<sup>26</sup>;

- primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over the same matters is an integral element of such federal competence<sup>27</sup>;
- the question whether an undertaking, service or business is a federal one depends on the nature of its operation<sup>28</sup>; and,
- to determine the nature of the operation, it is imperative to look at the normal or habitual activities of the business, without regard for exceptional or casual factors.<sup>29</sup>

Therefore, when assessing whether particular employees are governed by federal or provincial legislation, one must look at whether the industry concerned is an integral part of a matter under federal jurisdiction.<sup>30</sup>

---

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* at 769.

<sup>29</sup> *Ibid.* This summary was mentioned in *Northern Telecom v. Communications Workers*, *supra* note 22 at 131-132. It was also mentioned by the Manitoba Labour Relations Board in *Mayfair Farms (Portage) Ltd. (Re)* [2007] MLRB No 6 at para 17.

<sup>30</sup> *Ibid* at 768. See also Jeffrey Sack, Michael C. Mitchell & Sandy Price, *Ontario Labour Relations Law and Practice*, 3rd ed., (Markham: Lexis-Nexis, 1997, loose leaf) at 2.18.

### **C. Jurisdiction relating to SAWP Workers' Employment and Labour Relations**

According to clause XI (3) of the Employment Agreement, SAWP workers are bound by provincial legislation in matters of employment and labour relations.<sup>31</sup>

Although there seems to be scarce precedent confirming this, two labour tribunals, one in Manitoba and the other in British Columbia have endorsed this view. For example, the Manitoba Labour Board unequivocally held that it has jurisdiction to hear and receive an application from Mexican SAWP workers for union certification pursuant to Manitoba's Labour Relations legislation.<sup>32</sup> As well, the Board held that workers under the SAWP are "employees" within the meaning of that provinces labour relations legislation.<sup>33</sup>

More explicitly, one of the central issues in this case was whether the Manitoba Labour Board had jurisdiction to deal with an application for certification pursuant to Manitoba's labour relations legislation or whether it ought to be brought at the federal level.<sup>34</sup> Adhering to the constitutional principles discussed in *Construction Montcalm Inc. v. Minimum Wage Commission*<sup>35</sup>, the Board concluded that it had constitutional jurisdiction to receive and determine the SAWP workers' application as jurisdiction over labour relations generally falls within provincial legislation.<sup>36</sup> The fact that these workers were foreigners, working through a federal program where there was federal

---

<sup>31</sup> See Appendix II, *Employment Agreement*, Clause XI (3).

<sup>32</sup> See *Mayfair Farms (Portage) Ltd. (Re)* [2007] MLBD No 6, 139 CLRBR (2d) 1 (Manitoba Labour Board) (Lexis).

<sup>33</sup> *Ibid* at paras 27-51.

<sup>34</sup> *Ibid* at para 10.

<sup>35</sup> See *Construction Montcalm Inc. v. Minimum Wage Commission*, *supra* note 24.

<sup>36</sup> See *Mayfair Farms (Portage) Ltd. (Re)*, *supra* note 32 at paras 12-26.

## Chapter 2- Federal Framework

involvement through HRDC, Service Canada, and CIC, did not change the fact that their employment fell within provincial jurisdiction.<sup>37</sup> That is because “. . .involvement in a federal program does not thereby result in the employment automatically falling under federal jurisdiction”<sup>38</sup> However, the Board did not provide guidance as to when and how much “federal involvement” would trigger federal jurisdiction over labour relations.

The Manitoba Labour Board has not been the only labour relations adjudicator holding that SAWP workers’ labour relations fall within provincial jurisdiction. The British Columbia Labour Relations Board also found that its *Labour Relations Code*<sup>39</sup> also applied to SAWP workers.<sup>40</sup> In that case, both domestic and SAWP workers successfully obtained union certification pursuant to the British labour relations legislation. However, the employer applied to cancel the union’s certification as relating to SAWP workers because, according to the employer, the labour relations legislation was inoperative or inapplicable to SAWP workers due to the constitutional doctrines of federal paramountcy and interjurisdictional immunity.<sup>41</sup> One of the employer’s submissions was to treat the SAWP along with its corresponding documents (MOU, Employment Agreement, and Operational Guidelines) as federal law. Accordingly, the

---

<sup>37</sup> *Ibid* at para 25.

<sup>38</sup> *Ibid*.

<sup>39</sup> RSBC 1996, c 244.

<sup>40</sup> See *Greenway Farms Ltd. (Re)*, [2009] BCLRBD No 135, 170 CLRBRC (2d) 208 (British Columbia Labour Relations Board) (Lexis).

<sup>41</sup> *Ibid* at para 2. For in-depth discussion of the constitutional doctrines of federal paramountcy and interjurisdictional immunity see Hogg, *supra* note 5, pp 15-8 to 15-38.4. For instance he defines interjurisdictional immunity as “if provincial law would affect the ‘basic, minimum and unassailable’ core of the federal subject, then the interjurisdictional immunity doctrine stipulated that the provincial law must be restricted in its applications (read down) to exclude the federal subject”, at p 15-38.2. See also *Ordon Estate v. Grail*, [1998] 3 SCR 437.

provincial *Labour Relations Code* would be in conflict with a federal law (SAWP).

Thus, the constitutional doctrines mentioned would be triggered making the provincial legislation inoperative or inapplicable.<sup>42</sup>

The British Columbia Board did not agree. Instead, it went on to declare that

assuming for the purpose of this analysis that the SAWP documents constitute ‘legislation’, the fact that the federal government has “legislated” with respect to terms and conditions of employment of SAWP workers does not lead to a presumption that in doing so it intended to ‘rule out’ or exclude the application of provincial legislation in respect of that subject. ‘Very clear statutory language’ is required to reach a conclusion that the federal government intended to ‘occupy the field’ with respect to that subject. Absent such language, if the SAWP documents can be properly interpreted so as not to interfere with provincial legislation (in this case the Code), that interpretation is to be preferred over another possible interpretation that would give rise to a conflict.<sup>43</sup>

Thus, the British Columbia Board held that the SAWP is not a “federal law” for purposes of the doctrine of federal paramountcy. The Board went on to add that even if the SAWP was “federal law”, the doctrine would still not apply since the application of the provincial labour relation legislation to SAWP workers did not conflict with or frustrate the purposes of the SAWP such as to render the provincial legislation inapplicable to SAWP workers.<sup>44</sup>

Regarding the doctrine of interjurisdictional immunity, the Board concluded that the terms and conditions of employment of SAWP workers were not a matter falling within a ‘core area’ of federal legislative power. And even if that was not the case, the B.C. Board found that applying the *Code* to SAWP workers did not impair that ‘core area’ of federal jurisdiction. Thus, allowing SAWP workers the same access to the

---

<sup>42</sup> *Ibid* at para 99.

<sup>43</sup> *Ibid* at para 110.

<sup>44</sup> *Ibid* at paras 99-148.

provincial legislation which, benefit domestic farm workers is consistent with Canada's commitment in the MOU that SAWP workers are to receive "equal treatment" to domestic farm workers while in Canada, and would not impair any area of federal legislative competence.<sup>45</sup> Finally, the Board denied the employer's application to cancel the union's certification as applicable to SAWP workers.<sup>46</sup>

#### **D. Agriculture**

At Confederation, cooperative action by both levels of government in immigration and agriculture was needed to arrange for the admission and settlement of immigrants.<sup>47</sup> Section 95 of the *Constitution Act, 1867* explicitly confers on the Parliament of Canada and the provincial legislatures concurrent<sup>48</sup> powers over "agriculture" and "immigration", with the qualification that any provincial law shall have effect "as long and as far only as it is not repugnant to a federal law"<sup>49</sup>. This means that a provincial law relating to agriculture or immigration that expressly contradicts a federal law will be inoperative to

---

<sup>45</sup> *Ibid* at paras 149-165.

<sup>46</sup> *Ibid* at para 171.

<sup>47</sup> Hogg, *supra* note 5, at 26-1.

<sup>48</sup> "Concurrency" refers to the allocation of responsibility for a subject matter of legislation to both the federal and provincial levels of government. See "Concurrency", online: Centre for Constitutional Studies, <<http://www.law.ualberta.ca/centres/ccs/keywords/?id=18>>.

<sup>49</sup> See *Constitution Act, 1867*, *supra* note 1 at s. 95.

"In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada." The author briefly synthesizes the jurisprudence interpreting whether something falls within the concurrent power of agriculture. This may be of guidance and a starting point when assessing if the SAWP may be a federal law pursuant to the concurrent power of agriculture as stipulated in s. 95.

## Chapter 2- Federal Framework

the extent of the contradiction.<sup>50</sup> The Supreme Court of Canada has held that there must be an actual conflict between federal and provincial laws before paramountcy is triggered, and then the provincial law will be held to be inoperative only to the extent of the conflict or operational incompatibility or operational inconsistency.<sup>51</sup> However, a provincial law that merely supplements or duplicates a federal law will continue to operate.<sup>52</sup> Furthermore, paramountcy also arises in situations where compliance with the provincial law would frustrate the purpose of a federal law.<sup>53</sup>

In matters relating to “agriculture” paramountcy would be triggered if there is an actual conflict with a federal law. However, an assessment of which matters are considered to be “Laws in relation to Agriculture” becomes the central question in determining the constitutional validity of agricultural legislation.<sup>54</sup> Viscount Simon explained in *Saskatchewan (Attorney General) v. Canada (Attorney General)*<sup>55</sup> that there is a distinction between legislation ‘in relation to’ agriculture and legislation which may

---

<sup>50</sup> See *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161; See also Magnet, *supra* note 18 at 288-289.

<sup>51</sup> *Ibid.* See also *Smith v. the Queen*, [1960] SCR 776 ; *Construction Montcalm Inc. v. Minimum Wage Commission*, *supra* note 17; *Ross v. Registrar of Motor Vehicles*, [1975] 1 SCR 5; *Robinson v. Countrywide Factors Ltd.*, [1978] 1 SCR 753.

<sup>52</sup> See *O’Grady v. Sparling*, [1960] SCR 804; *Stephens v. the Queen*, [1960] SCR 823; *Smith v. the Queen*, *supra* note 44. See also Magnet, *supra* note 18 at 290-291.

<sup>53</sup> See *Bank of Montreal v. Hall*, [1990] 1 SCR 121; *M & D Farm Ltd., v. Manitoba Agricultural Credit Corp.*, [1999] 2 SCR 961; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 SCR 113; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536; and *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3.

<sup>54</sup> For further reference see *British Columbia (Milk Board) v. Bari Cheese Ltd.*, [1991] BCJ No 2444 (BCCA) (Lexis); *British Columbia (Milk Board) v. Clearview Dairy Farm Inc.*, [1987] BCJ No 324 (BCCA) (Lexis); *R. v. Bradford Fertilizer Co.*, [1971] OJ No 1763 (Ont CA) (Lexis); *Reference Re Farm Security Act 1944 (Saskatchewan) S. 6*, [1947] SCR 394; *Reference Re Validity of Section 5(a) of the Dairy Industry Act (Importation of Margarine)*, [1948] SCR 1, affd [1951] AC 179 (JCPC); *R. v. Davenport*, [1928] 23 Alta LR 525, [1928] AJ No 1 (Alta CA) (Lexis); *R. v. Dominion Stores Ltd.*, [1980] 1 SCR 844; and *R. v. Neuman*, 1998 ABCA 261, [1998] AJ No 881 (Alta CA) (Lexis).

<sup>55</sup> [1949] 2 DLR 145, [1948] JCJ No 1 (JCPC) (Lexis).

## Chapter 2- Federal Framework

affect agriculture. A matter which affects something is not necessarily “in relation to” it as that expression is used in sections 91, 92, and 95 of the *Constitution Act, 1867*.<sup>56</sup>

Therefore, it is ‘the true nature and character of the legislation’, not its possible effects such as ultimate economic results that matters.<sup>57</sup>

The shared federal and provincial power over enacting “laws in relation to agriculture” minimally implicates laws, which regulate aspects of farm organization and the financing of farm assets. In fact, Canadian courts have generally limited the application of the “agricultural power” to activities relating directly to on-farm agricultural activities<sup>58</sup> or to the regulation of agricultural inputs<sup>59</sup>.

For example, the Manitoba Court of Appeal included the following within the “agricultural power” pursuant to s. 95 of the *Constitution Act, 1867*:

. . . No doubt, the term “Agriculture” must be given as wide a meaning as the word will naturally convey. It would, no doubt, cover practical husbandry and tillage, the growing of crops, the planting and care of fruit trees, the rearing of domestic animals, the sciences applied to or bearing upon these subjects and perhaps the disposition of the products by the producer; but I do not think it would apply to these products when they have left his hands and become articles of ordinary merchandise.<sup>60</sup>

The line of cases found regarding the concurrent powers in respect to “agriculture” clearly state that the term refers to the actual growing of crops or tending of animals, or

---

<sup>56</sup> *Ibid* at para 3.

<sup>57</sup> *Ibid*.

<sup>58</sup> See *R. v. Eastern Terminal Elevator Co.*, [1925] SCR 434; *R. v. Manitoba Grain Co.*, 32 Man R 52, (1922) 66 DLR (Man CA).

<sup>59</sup> See *R. v. Bradfoard Fertilizer Co.*, [1972] 1 OR 229, [1971] O.J. No. 1763 (Ont CA) (Lexis); *Brooks v. Moore*, 13 BCR 91, [1907] B.C.J. No. 18 (BCSC) (Lexis); and *R. v. Neuman*, 1998 ABCA 261, 62 Alta LR (3d) 79 (Alta CA).

<sup>60</sup> See *R. v. Manitoba Grain Co.*, 66 DLR 406, [1922] MJ No 4 at para 45 (Man CA) (Lexis).

## Chapter 2- Federal Framework

activities “inside the farm gate”.<sup>61</sup> As soon as the produced commodity is regarded, or treated by legislation as a marketable good, its regulation becomes a matter falling either on property and civil rights or trade and commerce.<sup>62</sup> In other words, as soon as a produce or product such as milk enters the stream of commerce, it is likely that it stops belonging to the ambit of agriculture within the meaning of section 95.

Moreover, in *Canada v. Eastern Terminal Elevator Co*<sup>63</sup>, the Supreme Court of Canada held that an amendment to the *Canada Grain Act* regulating the trade in grain was *ultra vires* the federal Parliament and could not be supported under section 95 of the *Constitution Act, 1867*. The Court noted that

. . . the subject-matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the grounds that it is a trade in natural products. What we have here is trade legislation and not a law for the encouragement or support of agriculture, however wide the meaning may be given to the latter term.<sup>64</sup>

Likewise, cases dealing with marketing legislation in the dairy industry have been justified to fall within “property and civil rights” or in “matters of purely local concern” thus belonging to provincial competence instead of the federal power of trade and commerce.<sup>65</sup>

Accordingly, all activities that exhibit the characteristics of agriculture, namely,

---

<sup>61</sup> *Ibid.*

<sup>62</sup> See *Reference Re Validity of Section 5(a) of the Dairy Industry Act (Importation of Margarine)*, [1948] SCR 1, *affd* [1951] AC 179 (JCPC); See also *Dominion Stores Ltd. v. R.*, [1980] 1 SCR 844; *Re Agricultural Products Marketing Act*, [1978] 2 SCR 1198.

<sup>63</sup> [1925] SCR 434. This case has been overruled on other points but not on the one regarding section 95.

<sup>64</sup> *Ibid* at 11. Opinion by Justice Mignault.

<sup>65</sup> *Ibid.* See also *Reference re: Agricultural Products Marketing Act, 1970*, [1978] 2 SCR 1198; and *British Columbia (Milk Marketing Board) v. Bari Cheese Ltd.*, 42 ACWS (3d) 202, [1993] BCJ No. 1748 at para 141 (BCSC) (Lexis).

## Chapter 2- Federal Framework

practical husbandry and tillage, the growing of crops, the planting and care of fruit trees, the rearing of domestic animals, the science applied to or bearing upon these subjects, encouragement or support of agriculture, and possibly the disposition of the products by the producer, may be regulated by either a provincial legislature or Parliament under the “agriculture power”. Nonetheless, the effect of section 95 is to give paramountcy to Parliament to override or pre-empt a provincial law “in relation to agriculture” by enacting a law that would negate the effect of a provincial law relating to some aspect of agriculture.

As well, courts have ruled in favour of the federal Parliament in cases where it legislates to promote breed improvement, raising of livestock, improve the quality of the livestock and to protect persons who raise and purchase animals by establishing animal pedigree associations that are authorize to register and identify animals.<sup>66</sup>

Finally, courts have also explained that where there is no conflict, laws enacted by both levels of government in relation to agriculture can coexist. For instance, in matters of animal health, the Saskatchewan’s court of Queen’s Bench ruled that because agriculture is a concurrent field of jurisdiction between the federal government and provincial governments, the power to legislate with respect to sick animals is therefore shared between the two levels of government, each playing its own role, which is complementary to that of the other. As such these two roles can coexist.<sup>67</sup>

---

<sup>66</sup> See *R. v. Newman*, 1998 ABCA 261, [1998] AJ No 881 (Alta CA) (Lexis). See also *R. v. Davenport*, 23 Alta LR 525, [1928] 2 D.L.R. 852 (Alta App Div) (Lexis).

<sup>67</sup> See *Holland et al. v. Saskatchewan*, 2004 SKQB 478, (2004) 258 Sask R 243 (QB).

## **E. Federal Government's Mandate and Role in Agriculture**

Sections 4 and 5 of the *Department of Agriculture and Agri-Food Act*<sup>68</sup>, grants the Department of Agriculture and Agri-Food with the following authority regarding agriculture:

**4.** The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) agriculture;

(b) products derived from agriculture; and

(c) research related to agriculture and products derived from agriculture including the operation of experimental farm stations.

Other powers or duties of the Minister

**5.** The Governor in Council may assign any other power or duty to the Minister.<sup>69</sup>

As well, the federal government, through the Department of Agriculture and Agri-Food further defines its mandate regarding agriculture as follows:

Agriculture and Agri-Food Canada provides information, research and technology, and policies and programs to achieve an environmentally sustainable agriculture, agri-food and agri-based products sector, a competitive agriculture, agri-food and agri-based products sector that proactively manages risk, and an innovative agriculture, agri-food and agri-based products sector.<sup>70</sup>

Particularly, the federal government “helps ensure [that] agriculture, agri-food and agri-

---

<sup>68</sup> RSC 1985, c A-9.

<sup>69</sup> *Ibid* at ss 4-5.

<sup>70</sup> “Mandate”, online: Agriculture and Agri-Food Canada <<http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1173965157543&lang=eng>>.

## Chapter 2- Federal Framework

based products industries can compete in domestic and international markets, deriving economic returns to the sector and the Canadian economy as a whole”<sup>71</sup>.

Furthermore, the agricultural industry in Canada is pervasively regulated by federal law.<sup>72</sup> In fact, agriculture is the only industry where the special needs of the industry are promoted separately from the general economic policies of the government.<sup>73</sup> This is the case because the production and distribution of food is of fundamental importance. Thus, a practical reason for government regulation has been to ensure a reliable supply of good quality food.<sup>74</sup> The federal role in Canada has evolved into one of protection for farmers and farming operations by providing price and income support. Farm operators also receive direct benefits from programs such as crop insurance, farm finance and credit, irrigation, flood and drought assistance, grain marketing and supply management.<sup>75</sup> Such protection and support has been well established in the federal government’s policy of “Growing Forward: Toward a New Agriculture Policy Framework”.<sup>76</sup> Its objectives are

- focusing on building a competitive and innovative sector;
- being proactive in managing risks; and,

---

<sup>71</sup> *Ibid.*

<sup>72</sup> See for instance [Agricultural and Rural Development Act \(ARDA\)](#), RSC 1985, c A-3; [Agricultural Marketing Programs Act](#), SC 1997, c 20; [Agricultural Products Cooperative Marketing Act](#), RSC 1985, c A-5; [Agricultural Products Marketing Act](#), RSC 1985, c A-6; [Agriculture and Agri-Food Administrative Monetary Penalties Act](#), SC 1995, c 40; [Farm Credit Canada Act](#), SC 1993, c 14; [Farm Debt Mediation Act](#), SC 1997, c 21; [Farm Income Protection Act](#), SC 1991, c 22; and [Farm Products Agencies Act](#), RSC 1985, c F-4.

<sup>73</sup> See Donald E. Buckingham & Ken Norman, eds., *Law Agriculture and the Farm Crisis*, (Saskatoon, Saskatchewan : Purich Publishing, 1992) at 14 [Buckingham & Norman].

<sup>74</sup> *Ibid.*

<sup>75</sup> See “Growing Forward: Toward a New Agriculture Policy Framework”, online: Agriculture and Agri-Food Canada < <http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1200339470715&lang=eng>>.

<sup>76</sup> *Ibid.*

## Chapter 2- Federal Framework

- ensuring the sector contributes to society's priorities.<sup>77</sup>

In order to achieve its objectives, the federal government has introduced programs such as *AgriInvest*, which is a savings account for producers that provides flexible coverage for small income declines<sup>78</sup>; *AgriStability*, which provides income support when a producer experiences large income losses<sup>79</sup>; *AgriRecovery*, which is a disaster relief framework that allows governments to provide rapid assistance to fill gaps not covered by existing government programs<sup>80</sup>; and *AgriInsurance*, which includes production insurance and other insurance products.<sup>81</sup>

In addition to protecting farmers and their operations through the programs above, the federal role has evolved into one of consumer protection.<sup>82</sup> For instance, many federal programs insure the existence of marketing standards, inspections, animal and plant health, agricultural research, food and safety and quality standards and container standards. Some of these matters are also regulated by the provinces.<sup>83</sup>

---

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> Most legislation enacted with respect to agricultural production matters has come at the initiative of the federal government to assist agricultural producers to produce high-quality agricultural products that will be safe, abundant and attractive in the marketplace. Some of these initiatives are contained in the following federal legislation: *Health of Animals Act*, SC 1990, c 21; *Animal Pedigree Act*, RSC 1985, c 8 (4<sup>th</sup> Supp); *Plant Protection Act*, SC 1990, c 22; *Seeds Act*, RSC 1985, c S-8; *Fertilizer Act*, RSC 1985, c F-10; *Pest Control Products Act*, SC 2002, c 28.

<sup>83</sup> See Buckingham & Norman, *supra* note 73 at 14.

## F. Immigration

During Confederation, Canada was a predominantly agricultural economy and immigrants would mainly settle on farms. Immigration Acts passed in 1869 (*Act respecting Immigration and Immigrants*, SC 1869, c 10), 1886 (*Immigration Act*, RSC 1886, c.65), and 1906 (*Immigration Act*, RSC 1906, c 93, s 26) had as common objective to bring farmers and female domestic servants. As former Assistant Deputy Minister of the Department of Immigration and Colonization, W.D. Scott wrote:

The act was framed with the objective of providing the immigration officials with the necessary machinery to carry out the government's policy of inducing the immigration of farmers and of female domestic servants from approved countries

. . . .<sup>84</sup>

The federal Parliament has exclusive jurisdiction over “aliens and naturalization”<sup>85</sup>.

However, immigration is one of the few areas of explicitly concurrent jurisdiction (along with agriculture and old age pension) in the *Constitution Act, 1867*. Therefore, jurisdiction over immigration matters is shared by the federal and provincial governments, subject to federal paramountcy in the event of any conflict between federal and provincial laws in the area.<sup>86</sup>

---

<sup>84</sup> Bruce Hodgins & Robert Page, eds., *Canadian History since Confederation*, (Georgetown, Ontario: Irwin-Dorsey Limited, 1979) at 421.

<sup>85</sup> See *Constitution Act, 1867*, *supra* note 1, s 91(25).

“ It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

25. Naturalization and Aliens.”

<sup>86</sup> *Ibid* at s 95.

## Chapter 2- Federal Framework

Generally, when provincial legislation in pith and substance affects aliens and naturalized citizens, it is *ultra vires* the province.<sup>87</sup> Furthermore, when provincial legislation in the area of immigration to the province conflicts with federal legislation, the latter will render the former inoperative where repugnancy is demonstrated.<sup>88</sup> Although these are general rules, the federal government has actively negotiated agreements with the provinces so that they can select some of the immigrants who will settle within their territories through different avenues such as the provincial nominee program.<sup>89</sup>

One of the most extensive agreements is the *Canada-Quebec Accord*.<sup>90</sup> Under this *Accord*, Quebec has sole responsibility for selecting all independent immigrants, temporary residents, and refugees abroad who want to settle in that province through its own separate selection criteria.<sup>91</sup> Other types of federal-provincial agreements relate to financial assistance, where the federal government provides settlement funds to the provinces that assist immigrants settle within their territories. That is the case with the

---

<sup>87</sup> See *Union Colliery Co. of British Columbia v. Bryden*. [1899] AC 580, [1899] JCY No 2 (JCPC) (Lexis).

<sup>88</sup> See *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113. See also *British Columbia v. Singh*, [1908] 13 BCR 477, [1908] BCJ No 33 (BCSC) (Lexis).

<sup>89</sup> Most provinces in Canada have an agreement with the Government of Canada that allows them to nominate immigrants who wish to settle in that province. The participating provinces and territories are Alberta, Manitoba, Newfoundland and Labrador, Ontario, Saskatchewan, British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, Yukon and Northwest Territories. Provincial nomination is a fast-tracked option to attain permanent residence in Canada. Generally, each province or territory have their own unique provincial nomination program, except Quebec, which has a different selection system. Eligible candidates under these program must usually be skilled labourers, semi-skilled workers, international graduates, family members of Canadian or permanent residents living within the province or territory, and farmers (by farmers, it is meant farm owners not farm labourers). For detailed information on each jurisdiction's requirements and eligibility criteria see "Provincial Nominees: Who can apply", online: Citizenship and Immigration Canada (CIC) <<http://www.cic.gc.ca/english/immigrate/provincial/apply-who.asp>>.

<sup>90</sup> See *Canada-Quebec Accord*, signed in 1991, online: *Ministère des Relations avec les citoyens et de l'Immigration* <[http://www.micc.gouv.qc.ca/publications/pdf/Accord\\_canada\\_quebec\\_immigration\\_anglais.pdf](http://www.micc.gouv.qc.ca/publications/pdf/Accord_canada_quebec_immigration_anglais.pdf)>.

<sup>91</sup> *Ibid.*

## Chapter 2- Federal Framework

*Canada-Ontario Immigration Agreement*.<sup>92</sup> Through the agreement, the federal government will provide funding over five years to help newcomers successfully integrate into Ontario communities. The agreement outlines how the governments of Canada and Ontario will work together in the

- [Settlement and Language Training Services](#)<sup>93</sup>
- [Partnership with Municipalities](#)<sup>94</sup>
- [Provincial Nominee Program](#)<sup>95</sup>
- [Temporary Foreign Workers Agreement](#)<sup>96</sup>
- [Ontario Immigration Web Portal](#)<sup>97</sup>
- [Related Links](#)<sup>98</sup>

Although Canada and some provinces have signed agreements regarding the management of immigration<sup>99</sup>, Canada, however, continues to be responsible for setting national

---

<sup>92</sup> See *The Canada-Ontario Immigration Agreement*, online: CIC <<http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/ont-2005-agree.asp>>. For a list and text of all existing Canada-Provincial-Territorial Agreements on Immigration see “Federal-Provincial/Territorial Agreements”, online: CIC <<http://www.cic.gc.ca/english/department/laws-policy/agreements/index.asp>>.

<sup>93</sup> *Ibid* at ss 6.4 and 6.5.

<sup>94</sup> *Ibid* at s 7.3.

<sup>95</sup> *Ibid* at s 5.3.3 and Annex C.

<sup>96</sup> *Ibid* at s 5.3.

<sup>97</sup> *Ibid* at Annex B.

<sup>98</sup> See “Integration and Settlement in Ontario”, online: CIC <<http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/can-ont-index.asp>>.

<sup>99</sup> Currently, Manitoba, Ontario, Saskatchewan, Prince Edward Island, Alberta, British Columbia, New Brunswick, Nova Scotia, Newfoundland and Labrador have some form of provincial nominee programs.

## Chapter 2- Federal Framework

standards and goals; defining immigrant classes; establishing immigration levels in Canada; managing entry to Canada and enforcement activities.<sup>100</sup>

Since section 91(25) confers the federal Parliament exclusive jurisdiction over aliens and naturalization, it has enacted the *Citizenship Act*.<sup>101</sup> However, in the area of immigration, the federal government has assumed legislative responsibility through the *Immigration and Refugee Protection Act*.<sup>102</sup> The *Act* controls admission to and removal from Canada. As well, adjudication with respect to immigration and refugee matters is handled by an independent federal tribunal called the Immigration and Refugee Board (IRB).<sup>103</sup> Finally, the Canada Border Service Agency (CBSA) is responsible for managing and securing Canada's borders.<sup>104</sup> In short, the CBSA detains people for immigration reasons and removes people inadmissible to Canada.<sup>105</sup>

---

<sup>100</sup> See "Who We Are", online: CIC <<http://www.cic.gc.ca/english/department/mission.asp>>. See also Legal Aid Research Series, "Representation for Immigration and Refugee Claimants: Final Study" (2002), online: Department of Justice Canada <[http://publications.gc.ca/collections/collection\\_2011/jus/J3-10-16-eng.pdf](http://publications.gc.ca/collections/collection_2011/jus/J3-10-16-eng.pdf)> at 14.

<sup>101</sup> RSC, 1985, c C-29. Generally, the *Act* establishes who is a Canadian citizen, who may become one, how to apply for citizenship, and who may lose Canadian citizenship.

<sup>102</sup> IRPA, *supra* note 2.

<sup>103</sup> See "About the Board", online: Immigration and Refugee Board of Canada (IRB) <<http://www.irb-cisr.gc.ca/Eng/brdcom/abau/Pages/Index.aspx>>. Applications for judicial review from decisions made by the Board are heard by the Federal Court. Provincial courts have concurrent jurisdiction in these matters, however, since there is a comprehensive scheme for review in the Federal Court, provincial courts ought generally to defer to federal courts. See *Reza v. Canada*, [1994] 2 SCR 394; and *Suresh v. Canada*, [1998] 38 OR (3d) 267 (Ont Ct Gen Div), affd [1999] 42 OR (3d) 797 (Ont Div Ct).

<sup>104</sup> See Sandra Elgersma, "Temporary Foreign Workers" (7 September 2007), Library of Parliament, Political and Social Affairs Division, PRB 07-11E at 2 [Elgersma]. "CBSA was created in 2003 to assumed responsibility for the intelligence, interdiction, and enforcement functions previously allocated to CIC; in addition, it assumed responsibility for the customs program formerly with the Canada Customs and Revenue Agency, and the passenger and initial import inspection services at ports of entry formerly with the Canadian Food Inspection Agency."

<sup>105</sup> *Ibid.* See also "About Us", online: Canada Border Service Agency (CBSA), <<http://www.cbsa.gc.ca/agency-agence/what-quoi-eng.html>>.

## II. Key Federal Exclusions Affecting SAWP Workers

### A. Immigration and Refugee Protection Act <sup>106</sup>(IRPA)

SAWP workers must meet IRPA's requirements in order to work temporarily in Canada.<sup>107</sup> However, as it will be discussed below, unlike other foreign workers, they have been excluded from becoming permanent residents and eventually Canadian citizens. This exclusion is an effective tool to make them "reliable" workers and to have a constant supply of agricultural labour readily available.<sup>108</sup> Finally, this exclusion is key in making them vulnerable to abuse and exploitation.

IRPA's main goals are encapsulated in three components:

- The Social components: Canada facilitates family reunification and permits the nuclear family unit (spouses, dependent children) to immigrated with principal applicants<sup>109</sup>;
- The Humanitarian component: As a party to the *Convention relating to the Status of Refugees*<sup>110</sup> and the *Convention Against Torture*<sup>111</sup>, Canada hears and decides claims for protection made by people arriving

---

<sup>106</sup> IRPA, *supra* note 2.

<sup>107</sup> See IRPA, *supra* note 2, ss 22, 29, & 30; see also *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 194-203. [IRPA Regulations]

<sup>108</sup> See Veena Verma, "The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program under Unionization", (December 2003), online: The North-South Institute < [http://www.nsi-ins.ca/english/pdf/csawp\\_verma\\_final\\_report.pdf](http://www.nsi-ins.ca/english/pdf/csawp_verma_final_report.pdf) > at 40-42. See generally Leigh Binford, "From Fields of Power to Fields of Sweat: the dual process of constructing temporary migrant labour in Mexico and Canada" (2009) *Third World Quarterly*, Vol 30, No 3.

<sup>109</sup> See IRPA, *supra* note 2, s 3(1)(d).

<sup>110</sup> 28 July 1951, 189 UNTS 137.

<sup>111</sup> 10 December 1984, 1465 UNTS 85.

spontaneously in the country. It also assists people overseas by accepting for permanent residence government-assisted and privately sponsored refugees and others in need of protection<sup>112</sup>; and,

- The Economic component: Canada wishes to attract skilled workers and business immigrants who will contribute to the economic life of the country and fill labour market needs.<sup>113</sup>

Temporary foreign workers, including SAWP workers, would probably fall in the economic component since they come to Canada to fill labour shortages (“labour market needs”) in the agricultural sector.

IRPA requires a “foreign national” seeking entry into Canada to have a visa, which must be applied for and obtained in accordance with the *Act*.<sup>114</sup> As well, IRPA and its Regulations<sup>115</sup> apply to the Seasonal Agricultural Workers Program (SAWP) because its participants are workers that are not citizens or permanent residents that come to Canada for temporary employment in agriculture.

### **1. Temporary Workers**

The Temporary Foreign Workers Program is managed by CIC and HRSDC to bring foreign workers into Canada. There are generally five key streams of the Temporary Foreign Worker Program:

- Arranged Employment Opinions,

---

<sup>112</sup> IRPA, *supra* note 2, s 3(2)(b) and (d).

<sup>113</sup> *Ibid* at s 3(1)(c).

<sup>114</sup> *Ibid* at s 11(1).

<sup>115</sup> See IRPA Regulations, *supra* note 107.

## Chapter 2- Federal Framework

- Labour Market Opinion for high-skilled workers,
- Live-in Caregivers,
- **Seasonal Agricultural Workers Program (SAWP),**
- Pilot Project for Occupations Requiring a Lower Level of Formal Training (Low Skill Pilot Project)<sup>116</sup>

SAWP and the Low Skill Pilot Project both allow for the entry of agricultural workers.

However, as it will be examined later, the latter has different requirements and selection criteria and unlike the SAWP, it is open to other industries such as hospitality and construction; as well, it is open to applicants from any country in the world, not just Mexico or the Caribbean states as is the case for the SAWP.<sup>117</sup>

*IRPA* establishes the criteria to accept foreign workers into Canada. It requires an immigration officer to authorize a work permit if the applicant demonstrates that 1) there is an offer of employment and 2) the offer is likely to result in “a neutral or positive economic effect on the labour market in Canada.”<sup>118</sup>

The process to obtain a work permit for any temporary foreign worker is two-fold. First, Human Resources and Skills Development Canada (HRSDC) is required to provide a labour market opinion letter on the likely effects of approving a work permit.<sup>119</sup> The

---

<sup>116</sup> See Appendix IV, HRSDC Deck.

<sup>117</sup> Interview with France Asselin (Manager) and Darlene V. Goodwin (Policy Advisor) from HRSDC/Temporary Foreign Worker Program, Skills and Employment Branch, dated 11 August 2010. See also Elgersma, *supra* note 104.

<sup>118</sup> See *IRPA* Regulations, *supra* note 107, ss 200(1)(c)(iii) and 203(1). Generally, when a foreign worker applies for a work permit, CIC verifies that the job offer from the employer has been “confirmed” by HRSDC; confirms the worker has the qualifications required to perform the job; ensures that worker meets temporary resident criteria related to criminality and security, and is unlikely to remain in Canada illegally; and ensures workers meet medical requirements for the positions in Canada. *Ibid* at ss 20 and 31. See also Appendix IV, HRSDC Deck at 8.

<sup>119</sup> See Appendix IV, HRSDC Deck at 5-7.

rationale for requiring a labour market opinion letter is to demonstrate that there is a need for labour that cannot be satisfied from within Canada and that bringing a foreign national to fill that need will not negatively impact Canadian or permanent residents in obtaining or keeping their jobs.<sup>120</sup>

In drafting its opinion, HRSDC considers factors such as:

- Is the work likely to result in direct job creation or job retention for Canadian citizens or permanent residents?
- Is the work likely to fill a labour shortage?<sup>121</sup>
- Is the offer of employment genuine? **and**
- whether or not, over the past two years, employers who have hired foreign workers, provided wages, working conditions and employment in an occupation that were substantially the same as those listed in the offer of employment?<sup>122</sup>

For example, HRSDC justifies the approval of SAWP workers by pointing out that they plant and harvest crops on time. This allows for other related employment opportunities in agriculture to exist. For instance, if a Mexican worker picks tomatoes on time, then employment is created for Canadian workers in the processing and canning of tomatoes.<sup>123</sup>

Second, an immigration officer authorizes the work permit if it is demonstrated that there is an offer of employment, and the offer is likely to result in “a neutral or

---

<sup>120</sup> *Ibid.* See also “Working in Canada — Applying for a work permit outside Canada (IMM 5487)”, online: CIC < <http://www.cic.gc.ca/english/information/applications/guides/5487E2.asp>>.

<sup>121</sup> See IRPA Regulations, *supra* note 107, s 203(3).

<sup>122</sup> *Ibid* at s 200(1)(A) and (B). See also “Working in Canada” *supra* note 120. The last two factors have been effective since 1 April 2011.

<sup>123</sup> See Verma, *supra* note 108 at 4.

## Chapter 2- Federal Framework

positive economic effect on the labour market in Canada”<sup>124</sup> The actual work permit grants the worker the ability to work in Canada. However, such ability is restricted in time and place of employment. Therefore, generally foreign temporary workers are only authorized to work with the particular employer as established in the work permit. In the case of SAWP workers, they must work with the agricultural employer that requested them and for the specified length of time as stipulated in the Employment Agreement.<sup>125</sup>

Most temporary workers, including SAWP workers, cannot on their own, change employment or the length of time of their stay in Canada. Regarding SAWP workers, as chapter 1 explains, this inability to change employment as well as length of stay in Canada is an attractive and convenient arrangement for the employers as it makes Mexican workers “reliable” because they are not allowed to work anywhere other than their place of work as stipulated in the work permit; nor can they look for employment elsewhere once in Canada. To do so would violate the terms of their work permits and employment agreement.<sup>126</sup> If this were to occur, they would be deported and probably blacklisted from the Program.<sup>127</sup> In fact, as it will be explained later, it is this trait of

---

<sup>124</sup> See IRPA Regulations, *supra* note 107, ss. 200(1)(c)(iii) and 203(1).

<sup>125</sup> See Appendix II, *Employment Agreement*, at Clause IX (5).

<sup>126</sup> See Appendix II, *Employment Agreement*, at Clause VIII (2).

“The EMPLOYER agrees and acknowledges:

2. That the WORKERS approved under the Seasonal Agricultural Workers Program are authorized by their work permit only to perform agricultural labour for the EMPLOYER to whom they are assigned. Any person who knowingly induces or aids a foreign worker, without the authorization of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, to perform work for another person or to perform non-agricultural work, is liable on conviction to a penalty up to \$50,000 or two years imprisonment or both. Immigration and Refugee Protection Act S 124(1)(C) and 125.”

<sup>127</sup> Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada*, (Montreal & Kingston-London-Ithaca : McGill-Queen’s University Press, 2002) at 120-128. See also Verma, *supra* note 108 at 55; see also Binford, *supra* note 108 at 507-509.

“deportability” that makes Mexican workers under the SAWP vulnerable and easy targets of exploitation.

Besides having restrictions stipulated in their work permits as to the length of stay and type and place of work, Mexican workers, unlike other temporary foreign workers (live-in care givers, high-skilled workers, and some workers under the Low Skill Pilot Project), do not meet the required criteria to apply for permanent residence.

*IRPA* selects who may apply for permanent residence under the categories of “family reunification”<sup>128</sup>, “economic immigration”<sup>129</sup> and “refugee immigration”<sup>130</sup>. These three categories are divided into the following classes:

- skilled workers and professionals<sup>131</sup>,
- Quebec-selected skilled immigrants<sup>132</sup>,
- Canadian experience class<sup>133</sup>, investors<sup>134</sup>, entrepreneurs<sup>135</sup> and self-employed people<sup>136</sup>,
- provincial nominees<sup>137</sup>, and

---

<sup>128</sup> See *IRPA*, *supra* note 2, ss 12-13.

<sup>129</sup> *Ibid* at s 12.

<sup>130</sup> *Ibid* at s 12(3).

<sup>131</sup> See “Immigrating to Canada”, online: CIC <<http://www.cic.gc.ca/english/immigrate/index.asp>>.

<sup>132</sup> See *IRPA* Regulations, *supra* note 107, ss 9 and 20(2). This process will be discussed in chapter 4.

<sup>133</sup> See “Canadian Experience Class: Who can Apply”, online: CIC <<http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp>>.

<sup>134</sup> See *IRPA* Regulations, *supra* note 107, s 90.

<sup>135</sup> *Ibid* at s 97.

<sup>136</sup> *Ibid* at s 100.

## Chapter 2- Federal Framework

- family class (sponsorship).<sup>138</sup>

Migrant workers under the SAWP do not fall in the classes or categories above. Those classes and categories generally aim to attract educated individuals who can speak, at least one of Canada's official languages and have monetary stability<sup>139</sup> or individuals with a close relative already living in Canada. Mexican workers under the SAWP cannot fulfill either of these requirements. As discussed in chapter 1, they come from very poor and marginalized areas of Mexico. They are the only means of support for their families in Mexico. They have usually not attained education beyond 4 to 6<sup>th</sup> grade.<sup>140</sup> Consequently, they cannot qualify under any of the prescribed avenues for permanent immigration to Canada.

In fact, not being able to apply for permanent residence excludes them from ever becoming Canadian citizens since, as it is the case with most foreign nationals, one must be a permanent resident to be able to apply for citizenship.<sup>141</sup> This exclusion further perpetuates the “reliability” qualifier placed on SAWP workers. They will not be able to become permanent residents nor citizens; thus, they will always be

---

<sup>137</sup> *Ibid* at ss 96 (Investor selected by a province); 99 (Entrepreneur selected by a province); 101 (Self-employed person selected by a province). See also “Provincial Nominees”, online: CIC <<http://www.cic.gc.ca/english/immigrate/provincial/index.asp>>.

<sup>138</sup> See “Immigrating to Canada”, online: CIC <<http://www.cic.gc.ca/english/immigrate/index.asp>>.

<sup>139</sup> In fact, under the Skilled Workers and Professionals class, the applicants must show that they have enough money to support him/herself and his/her dependents after arrival in Canada. Accordingly, they need to show proof of funds as determined by the size of his/her family. For example, a family of 4 would need to show that it has CAD\$20,654 readily available funds to come to Canada. A family of 6 would need to show proof of CAD\$26,419. See “Skilled Workers and Professionals: Who can Apply-Proof of Funds”, online: CIC <<http://www.cic.gc.ca/english/immigrate/skilled/funds.asp>>.

<sup>140</sup> See “PROGRAMA DE TRABAJADORES AGRÍCOLAS TEMPORALES MÉXICO-CANADÁ”, online: Secretaria del Trabajo y Previsión Social <[http://www.stps.gob.mx/CGSNE/coord\\_empleo\\_stps.htm](http://www.stps.gob.mx/CGSNE/coord_empleo_stps.htm)>.

<sup>141</sup> See IRPA, *supra* note 2, ss 72, 110-115.

temporary employees with restrictions attached to where, for who, and for how long they can work in Canada and always subject to deportability.

In other words, this exclusion will ensure that they are unfree to circulate in the labour market and fearful of being deported if they were to displease their employers.<sup>142</sup> Deducing from history (briefly underscored in chapter 1), it seems the Canadian government does not allow SAWP workers to ever become permanent residents or citizens since they could move on to better jobs in other industries just as other classes of foreign workers in the past who were allowed into Canada with the possibility to become permanent residents; examples of these, as chapter 1 discusses, are the Polish, Displaced Eastern Europeans and the Dutch after World War II. Accordingly, the author submits that this working arrangement creates an unlimited and continuous supply of vulnerable and ‘reliable’ farm workers. “Deportability”, therefore, is the key bargaining tool used by the employer in order to keep a reliable labour supply.<sup>143</sup> This reality, however, is not the case for other temporary foreign workers.

**a. Live-in Caregiver Program**

A case in point is the live-in caregiver program. It creates a framework for the recruitment of foreign workers to provide unsupervised care for children, elderly adults and persons with disabilities in private households.<sup>144</sup> The Program aims to respond to

---

<sup>142</sup> See Binford, *supra* note 108 at 507-509.

<sup>143</sup> *Ibid* at 508.

<sup>144</sup> See Elgersma, *supra* note 104 at 4. See also Penny Becklumb, “Canada’s Immigration Program” (Revised 10 September 2008), Parliamentary Information and Research Service, Library of Parliament, BP-190E at 35.

## Chapter 2- Federal Framework

the shortage of Canadian workers available for live-in care. This Program allows its participants to apply for permanent residence after two years of working in Canada.<sup>145</sup>

Mirroring the SAWP, the Live-In Caregiver Program requires the worker to live on her/his employer's property. However, the similarity ends here, as domestic workers are eligible to apply for permanent residency status after working for two years under this Program.<sup>146</sup>

The Canadian Government's justification for this distinction is the following:

- Live-In Caregivers receive low wages and granting them the opportunity to obtain permanent residence status after two years of participation in the Program is an additional incentive for recruitment;
- Domestic workers take care of people, build bonds and human relationships, and engage in year-round work in Canada as opposed to seasonal work.
- On the other hand, the SAWP was designed as a seasonal, temporary form of employment based on market needs.<sup>147</sup>

Canada's justification above is problematic. Workers under the SAWP also receive low wages and build close social relationships over years of returning to the same farms and communities in Canada.<sup>148</sup> Many of them keep returning for more than two seasons, there are some that have been coming to Canada for 10 or 15 years (seasons). Although

---

<sup>145</sup> See IRPA, *supra* note 2, s 113.

<sup>146</sup> See "Working temporarily in Canada: The Live-In Caregiver Program", online: CIC <<http://www.cic.gc.ca/english/work/caregiver/index.asp>>.

<sup>147</sup> See Verma, *supra* note 108 at 40-41.

<sup>148</sup> See generally K. Preibisch, "Social Relations Practices between Seasonal Agricultural Workers, their Employers, and the Residents of Rural Ontario" (2004), online: North-South Institute <<http://www.nsi-ins.ca/english/research/archive/2004/05.asp>>.

it is true that the SAWP is based on market needs, the same can be said for the Live-In Caregiver Program. It is also aimed to respond to market needs, namely, a shortage in Canadian workers and a great demand for Live-in Caregiver services.

### **b. Low Skill Pilot Project**

The Low Skill Pilot Project was introduced in 2002. It assists employers in hiring foreign workers in occupations that usually require at most secondary education or a maximum of 2 years of job-specific training.<sup>149</sup> Unlike the SAWP, the Low Skill Pilot Project allows employers to hire temporary foreign workers from any country and in any sectors, including agriculture.<sup>150</sup> As well, the Project allows foreign workers to work for a maximum of 24-months; however, seasonal workers are only given confirmation for the duration of the season.<sup>151</sup>

Unlike the SAWP, the Low Skill Pilot Project allows for some of their participants to apply for permanent residence under Provincial Nominee Programs. Usually, if a province is prepared to nominate a worker for occupations requiring secondary education or specific on-the-job training, then the worker may apply for permanent residence. However, most provincial nominee programs are designed to recruit high-skilled workers, international graduates, and business immigrants such as

---

<sup>149</sup> See “Temporary Foreign Workers Program”, online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/lowskill.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml)>; Elgersma, *supra* note 104 at 4. See also HRSDC Deck, Appendix IV at 15-18.

<sup>150</sup> See Appendix IV, HRSDC Deck at 15. An interview with France Asselin, manager, and Darlene V. Goodwin, policy advisor, from HRSDC- Temporary Foreign Workers Program on 11 August 2010 revealed that tourism, hospitality and construction are the other main sectors.

<sup>151</sup> *Ibid.*

## Chapter 2- Federal Framework

investors, business owners, farm owners, and other professionals.<sup>152</sup> On the other hand, some provinces accept “semi-skilled workers”<sup>153</sup> into their provincial nominee programs. This is the case in Alberta, British Columbia, Saskatchewan, and Prince Edward Island.<sup>154</sup>

Although the Pilot Project gives the employer more flexibility in choosing foreign workers from any country in the world and with the ability to work in any sector, not just agriculture like the SAWP, it also imposes the following requirements on the employer:

- undertake comprehensive efforts to recruit Canadians;
- sign an employer-employee contract outlining wages, duties, and conditions related to the transportation, health and occupational safety of the foreign worker;
- ensure there are suitable and affordable accommodations available; pay full airfare for the foreign worker to and from their home country;
- provide medical coverage until the worker is eligible for provincial health insurance coverage; and

---

<sup>152</sup> See for example the Ontario Nominee Program. In order to be eligible for this program, one must first have a permanent full-time job offer for a position in an occupation designed as highly skilled, as well as, at least, two years of work experience in the intended occupation. “Opportunities Ontario: Foreign Workers, online: Government of Ontario <[http://www.ontarioimmigration.ca/en/pnp/OI\\_PNPWORKERS.html](http://www.ontarioimmigration.ca/en/pnp/OI_PNPWORKERS.html)>. Another program requiring high skilled individuals or individuals with capital is the British Columbia’s Provincial Nominee Program. See “Provincial Nominee Program”, online: Government of British Columbia <<http://www.welcomebc.ca/wbc/immigration/come/work/about/index.page?WT.svl=LeftNav>>. For a list of all the provincial and territorial nominee programs and their respecting selecting criteria see “Provincial Nominees: Who can apply”, online: CIC <<http://www.cic.gc.ca/english/immigrate/provincial/apply-who.asp>>.

<sup>153</sup> This term varies in each jurisdiction; it generally means workers whose skill levels are catalogued as C and D in HRSDC’s NOC Skill Level classification list. These occupations usually require high school diploma or a two year on-the-job-training, or short work demonstration or on-the-job training or no formal educational requirements.. See “Tutorial”, online: HRSDC <<http://www5.hrsdc.gc.ca/NOC/English/NOC/2006/Tutorial.aspx>> at page 8.

<sup>154</sup> For detailed information on each jurisdiction’s requirements see “Provincial Nominees: Who can apply”, online: CIC <<http://www.cic.gc.ca/english/immigrate/provincial/apply-who.asp>>.

- register the worker under the appropriate provincial workers compensation/workplace safety insurance plans.<sup>155</sup>

Finally, the Low Skill Pilot Project provides for an agricultural stream for occupations requiring lower levels of formal training. Lower levels of formal training are defined as occupations that, at most, require a high school diploma or a maximum of two years of job-specific training or short work demonstration or on-the-job training or no formal educational requirements. These occupations are labeled as C or D skill level by HRSDC.<sup>156</sup> Examples of such occupations are “harvesting labourers”, general farm workers”, as well as nursery and greenhouse workers”.<sup>157</sup>

### **c. SAWP workers and Low Skill Pilot Project Agricultural Workers**

It may be the case that, similar to SAWP workers, agricultural workers under the Low Skill Pilot Project may not be able to apply for permanent residence through the provincial nominee programs or other avenues in some jurisdictions.<sup>158</sup> However, the impact of the exclusion is less within this stream of migrant workers than with SAWP workers because it reaches fewer workers. Furthermore, some Low Skill Pilot Project

---

<sup>155</sup> See Appendix IV, HRSDC Deck at 16. See also “Temporary Foreign Workers Program”, online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/lowskill.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml)>.

<sup>156</sup> See “Agricultural Stream of the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D)”, online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/Agricultural/directives.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/Agricultural/directives.shtml)>.

<sup>157</sup> See Appendix VI, “Number of temporary foreign worker positions in agriculture (excluding SAWP) on labour market opinion confirmations by province of employment, country of residence and citizenship of foreign worker positions, occupation and skill level, 2009.” These data was provided, upon written request, by Hilary Seddon, Researcher, Human Resources and Skills Development Canada, Program Integrity Division, via electronic mail on 3 December 2010.

<sup>158</sup> Accordingly, agricultural Low Skill Pilot Project workers would also be subject to deportability and such status would also make them vulnerable to exploitation while working in Canada.

## Chapter 2- Federal Framework

workers (semi-skilled individuals for example) are eligible, in some jurisdictions, to apply for permanent residence under the provincial nominee program.<sup>159</sup> For instance, Alberta allows for workers with skills falling at the C or D levels in the food, hospitality, and manufacturing sectors to apply for permanent residence under that province's nominee program.<sup>160</sup>

As stated above, the impact of *IRPA*'s exclusion is less overwhelming on the Pilot Project-Agricultural Stream than the SAWP. That is because the majority of employers requesting foreign agricultural workers use mainly the SAWP and not the Low Skill Pilot Project. Stated differently, there are more foreign agricultural workers being requested through the SAWP than the Low Skill Pilot Project. This is reflected in the number of temporary foreign worker positions confirmed by HRSDC under the SAWP and Low Skill Pilot Project.<sup>161</sup> For instance, in 2009, there were 27,103 SAWP positions confirmed by HRSDC<sup>162</sup>; in contrast, there were approximately 6,871 positions in agriculture (skill level C & D) confirmed under the Low Skill Pilot Project in the same

---

<sup>159</sup> This was confirmed in an interview with France Asselin, manager, and Darlene V. Goodwin, policy advisor, from HRSDC- Temporary Foreign Workers Program on 11 August 2010.

<sup>160</sup> See "Alberta Immigrant Nominee Program", Government of Alberta, online: Government of Alberta <<http://www.albertacanada.com/immigration/immigrating/ainp.aspx>>. The following occupations falling in semi-skilled occupations (NOC C or D) are eligible: Food and beverage processing industry, Hotel and lodging industry: (Food and beverage servers and room attendants, Front desk agent/clerk), Long-Haul Trucking industry, Manufacturing industry, and Foodservices industry (pilot project).

<sup>161</sup> See Appendix VII, "Number of temporary foreign workers positions on labour market opinion confirmations under the Seasonal Agricultural Worker Program (SAWP), by province of employment, source country, occupation and skill level, 2009 season." And Appendix VI, "Number of temporary foreign worker positions in agriculture (excluding SAWP) on labour market opinion confirmations by province of employment, country of residence and citizenship of foreign worker positions, occupation and skill level, 2009." These data was provided, upon written request, by Hilary Seddon, Researcher, Human Resources and Skills Development Canada, Program Integrity Division, via electronic mail on 3 December 2010.

<sup>162</sup> See Appendix VII.

year.<sup>163</sup> Accordingly, about 75 per cent of the total agricultural foreign workers requested by Canadian employers come through the SAWP and only 25 per cent through the Low Skill Pilot Project.

Furthermore, excluding SAWP workers from being eligible to apply for permanent residence status does not place the Low Skill Pilot Project agricultural workers in a better position. In fact, if the SAWP workers were to have an avenue to apply for permanent residence status, the pressure would be on the federal government and the provinces to also include agricultural workers under the Pilot Project. As well, because SAWP is the main source of agricultural labour supply for Canadian employers, it would be reasonable to make SAWP workers a priority in making them eligible to apply for permanent residence. Agricultural workers under the Low Skill Pilot Project could follow.

Alternatively, the ability to apply for permanent residence status could be granted to all eligible agricultural workers under both programs. However, “deportability” is a central concern with SAWP workers because, unlike workers under the Low Skill Pilot Project, SAWP’s employment agreement grants the employer the capacity to repatriate his workers for “any sufficient reason”.<sup>164</sup> Moreover, the employment agreement does not define what circumstances would warrant a “sufficient reason” to repatriate a worker. In contrast, the “employment contract” for agricultural workers under the Low Skill Pilot Project does not contain any such provision.<sup>165</sup>

---

<sup>163</sup> See Appendix VI. Under the SAWP, all positions fall under the C & D skill levels.

<sup>164</sup> See Appendix II, Employment Agreement at Clause X(1).

<sup>165</sup> See Appendix VIII, Employment Contract for the Agricultural Stream of the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC A and D).

In the event that Canada or the provinces are not in a position to include all foreign agricultural workers or, at least, SAWP workers into their various schemes of eligibility for permanent residence status, then the SAWP employment agreement should provide a due process mechanism to review employee repatriations before the worker is removed from Canada.<sup>166</sup> The onus to justify such “sufficient reason” should be placed on the employer. Presently, there are no such due process mechanisms contained anywhere in the SAWP.

## **B. The Employment Insurance Act<sup>167</sup> (EIA)**

### **1. Contextual Background**

The *Constitution Act, 1867*, through an amendment adopted during the second World War, grants the federal Parliament the exclusive power to legislate in matters of “unemployment insurance”.<sup>168</sup> Under such authority, Parliament enacted the *Employment Insurance Act*.<sup>169</sup> Its predecessor, the *Unemployment Insurance Act*<sup>170</sup>, was first enacted in 1940. It was intended to be an actuarial scheme that linked contributions directly to benefits.<sup>171</sup> However, it was not totally an actuarial scheme as neither

---

<sup>166</sup> See “The Status of Migrant Farm Workers in Canada 2010-2011”, online: United Food and Commercial Workers Canada (UFCW-Canada) <[http://www.ufcw.ca/templates/ufcwcwcanada/images/awa/publications/UFCW-Status\\_of\\_MF\\_Workers\\_2010-2011\\_EN.pdf](http://www.ufcw.ca/templates/ufcwcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf)> at 24.

<sup>167</sup> EIA, *supra* note 3.

<sup>168</sup> *Constitution Act, 1867*, *supra* note 1, s 91(2A).

<sup>169</sup> EIA, *supra* note 3.

<sup>170</sup> 1940, SC 1940, c 44.

<sup>171</sup> See *Fraser v. Canada (Attorney General)*, [2005] O.J. No. 5580 at para 32 (Ont Sup Ct Jus) (Lexis). Actuarial is defined as “[p]ertaining to statistical computations, such as those used for mortality rates and pension fund accounting. See “Actuarial Definition”, online: Business Directory <<http://www.businessdictionary.com/definition/actuarial.html#ixzz11CglPIIX>>.

premiums nor benefits were tied directly to the risk of unemployment. Rather, it was guided by social goals such as income redistribution, regional stabilization, and equality.<sup>172</sup> “In other words, the Act manifested both a broad actuarial association between premiums and coverage and a rejection of strict market-based principles: the dual marking of a system of social insurance.”<sup>173</sup> Premiums and benefits were limited to employment sectors with a moderate risk of unemployment. Moreover, during its first year of operation, only 42 per cent of Canadian workers were covered under the *Act*.<sup>174</sup> However, in the late 1960’s, the Canadian government’s perspective regarding employment insurance began to shift from a ‘simple insurance program’ to a scheme of ‘broad income support’.<sup>175</sup> Accordingly, Parliament enacted in 1971 the *Unemployment Insurance Act*<sup>176</sup>, which included one main change, namely, the institution of near universal coverage.<sup>177</sup>

Although the current *Employment Insurance Act*<sup>178</sup> has kept the principle of universality, it also has three basic goals:

- to promote macroeconomic stabilization;

---

<sup>172</sup> *Fraser v. Canada (Attorney General)*, *ibid* at para 36.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid* at para 32.

<sup>175</sup> *Ibid*.

<sup>176</sup> 1971, SC 1970-71-72, c 48.

<sup>177</sup> The coverage encompassed 93 per cent of the Canadian workforce. See *Fraser v. Canada (Attorney General)*, *supra* note 171 at para 32.

<sup>178</sup> See EIA, *supra* note 3.

## Chapter 2- Federal Framework

- it has a redistributive component, displacing the impact of unemployment from ‘regions, occupational or industry groups’ more likely to suffer from unemployment to those less likely; and,
- most importantly, it constitutes a system of ‘social insurance’.<sup>179</sup>

The goal of social insurance was created to correct the market failure of private insurance. That is because premiums for private insurance are determined by the market; therefore, those employees most at risk for unemployment would be charged the highest premiums for insurance and will likely be the least likely to afford them.<sup>180</sup> As well, “social insurance” is not the same as “social assistance”. Under “social assistance” benefits are determined based on need without regard to past contributions.<sup>181</sup> On the other hand, “social insurance” is fundamentally an insurance scheme and as such eligibility is necessarily based on past contributions.<sup>182</sup>

The *Act* and its Regulations<sup>183</sup> provide for the payment of benefits to unemployed workers who meet certain conditions. The *Act* also provides benefits, which include sickness, maternity, parental benefits, and compassionate care benefits.<sup>184</sup> It defines two

---

<sup>179</sup> See *Fraser v. Canada (Attorney General)*, *supra* note 171 at para 34.

<sup>180</sup> *Ibid* at para 35.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Ibid*.

<sup>183</sup> See [Employment Insurance \(Fishing\) Regulations](#), SOR/96-445; [Employment Insurance Regulations](#), SOR/96-332; [Insurable Earnings and Collection of Premiums Regulations](#), SOR/97-33; [Unemployment Insurance \(Collection of Premiums\) Regulations](#), CRC, c 1575; [Unemployment Insurance Account Advance Regulations](#), SOR/83-813; [Unemployment Insurance Benefits Order, 1990](#), SOR/90-54; [Unemployment Insurance Benefits Order, 1991](#), SOR/91-74; [Unemployment Insurance Rate of Premium, 1966, Order](#), SOR/95-588; [Unemployment Insurance Rates of Premium, 1990, Order](#), SOR/90-59.

<sup>184</sup> EIA, *supra* note 3 at ss. 21-23.

types of employment: insurable and excluded<sup>185</sup>. A worker with insurable employment is required to pay premiums.<sup>186</sup>

## 2. Application of the EIA to SAWP Workers

Generally, agricultural work executed under the SAWP is considered insurable employment under the *Act*.<sup>187</sup> Consequently, SAWP workers' wages are subject to mandatory Employment Insurance (EI) deductions.<sup>188</sup> Accordingly, they are entitled to benefits. As previously stated, the *Act* provides for two kinds of benefits. The first, "regular benefits"<sup>189</sup>, provide income replacement during a period of unemployment. The second, "special benefits"<sup>190</sup>, provide for payments for maternity leave, parental leave, sickness and compassionate care. Benefits under the *Act* are determined primarily on the accumulation of hours worked based on regional unemployment rates in a 52-week period.<sup>191</sup> Because the Employment Agreement establishes that workers may work

---

<sup>185</sup> *Ibid* at s 5.

<sup>186</sup> *Ibid* at s 82(1).

"Every employer paying remuneration to a person they employ in insurable employment shall (a) deduct the prescribed amount from the remuneration as or on account of the employee's premium payable by that insured person under section 67 for any period for which the remuneration is paid; and (b) remit the amount, together with the employer's premium payable by the employer under section 68 for that period, to the Receiver General at the prescribed time and in the prescribed manner."

<sup>187</sup> *Ibid* at s 5(1)(a). See "Costs Covered by the Worker", online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tfw/sawp\\_tfw.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml)>. See also Appendix IX, Pay Sheet for Mexican SAWP Workers.

<sup>188</sup> *Ibid*. See also *Fraser v. Canada (Attorney General)*, *supra* note 171.

<sup>189</sup> EIA, *supra* note 3 at ss 6-20.

<sup>190</sup> *Ibid* at ss 21-23.

<sup>191</sup> *Ibid* at s 8(1)(a). To find out the number of hours of insurable employment in relation to the regional rate of unemployment see s. 7. See also André Léonard, "The Employment Insurance Program in Canada: How it Works" (2010), Library of Parliament, Parliamentary Information and Research Service, Publication No. 2010-52-E at 2-3 [Léonard].

## Chapter 2- Federal Framework

under the Program from 240 hours in a term of 6 weeks to 8 months<sup>192</sup>, several SAWP workers are able to accumulate the requisite hours to qualify for benefits.

Therefore, in order to receive either regular or special benefits, a worker must satisfy the following conditions:

- the employment must fall within the statutory definition of “insurable employment” and be subject to deductions for premiums;
- the worker must work a pre-determined number of hours;
- particularly, in order to receive “regular benefits” the worker must be capable and available for work” and physically located within Canada.<sup>193</sup>

Special benefits for maternity leave, parental leave and compassionate care are exempted from the third condition.<sup>194</sup> However, special benefits for sickness are subject to the residency requirement but do not require the recipient to be “capable and available for work.”<sup>195</sup>

Shockingly, SAWP workers have no realistic opportunity to collect regular EI benefits (income replacement during a period of unemployment ) even though they work in insurable employment, pay the required premiums, and many of them accumulate the required number of insurable hours. They are excluded from accessing these benefits because the *Act* clearly states that the claimant must be available to work in Canada in order to be eligible for the benefits:

---

<sup>192</sup> See Appendix II, Employment Agreement at Clause 1(1)(a).

<sup>193</sup> See *Fraser v. Canada (Attorney General)*, *supra* note 171 at para 6.

<sup>194</sup> *Ibid.*

<sup>195</sup> EIA, *supra* note 3, s 55.

## Chapter 2- Federal Framework

Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant (b) is not in Canada.<sup>196</sup>

It is virtually impossible for Mexican workers to receive regular EI benefits since they leave Canada immediately after their employment is completed (as stipulated in their employment agreement and work permits)<sup>197</sup>.

But even if SAWP workers were to stay in Canada after the termination of employment, they would be prohibited by the terms of their work permits from accepting work from different employers. As previously mentioned, SAWP workers' work permits only allow them to work for a specified timeframe, a particular employer and a particular industry, which is exclusively agriculture. As such, SAWP workers would not be considered as "capable and available for work" as required by the *Act*. At the end, SAWP workers are statutorily required to pay EI premiums without the possibility of ever receiving regular benefits.<sup>198</sup> This is clearly an unfair exclusion, which further places SAWP workers in a disadvantageous position where they are being shortchanged for their contributions, which are deducted from their low wages earned through their hard work. Furthermore, the exclusion's main effect is to deny real protection from unemployment; which runs contrary to the intent of the *Act*. As Justice T. Ducharme J. from the Ontario Superior Court of Justice summarized:

---

<sup>196</sup> *Ibid* at s 37.

<sup>197</sup> See Appendix II, Employment Agreement at Clause IX (6). See also *Fraser v. Canada (Attorney General)*, *supra* note 171 at paras 5-7.

<sup>198</sup> See *Fraser v. Canada (Attorney General)*, *supra* note 171 at para 7.

... [T]he effect of the application of the Employment Insurance Act to SAWP workers- that employees are charged premiums while effectively denied the possibility of receiving certain benefits- is contrary to the intent of the Act.<sup>199</sup>

That is because the *Act* was designed for the benefit of workers who are at high risk of unemployment, SAWP workers are an example of this class of workers. Accordingly, requiring to pay premiums, while excluding them from receiving regular benefits “turns the Act completely on its head”.<sup>200</sup>

Although SAWP workers are excluded from accessing regular employment insurance benefits, they, however, can receive “Special Benefits” such as maternity, parental, sickness and compassionate care benefits. Particularly, they can receive maternity, parental and compassionate benefits while they are outside Canada.<sup>201</sup>

However, this is not the case with sickness benefits. Claimants outside Canada are eligible to receive those benefits only in circumstances where they are undergoing treatment not available in Canada.<sup>202</sup>

### **3. Charter Challenge of EIA Exclusion as Applicable to SAWP Workers**

*Fraser v. Canada (Attorney General)*<sup>203</sup> involved a motion by the Attorney General of Canada to strike an application by United Food and Commercial Workers Union Canada (UFCW-Canada) challenging the application of the EIA to SAWP workers. UFCW-

---

<sup>199</sup> *Ibid* at para 40.

<sup>200</sup> *Ibid* at para 41.

<sup>201</sup> See generally *Employment Insurance Regulations*, SOR/96-332, s 55. See also Léonard, *supra* note 191 at 8.

<sup>202</sup> *Ibid*.

<sup>203</sup> *Fraser v. Canada (Attorney General)*, *supra* note 171.

Canada alleged that the *Act* constituted differential treatment amounting to prohibited discrimination under section 15 of the *Charter of Rights and Freedoms*.<sup>204</sup> Therefore, UFCW-Canada sought an order declaring the EIA inapplicable in respect of SAWP workers.<sup>205</sup>

### a. Case Analysis

The Court did not rule on the actual merits of the section 15 challenge. Rather, it addressed the central issues of the case, which were whether the UFCW-Canada be granted public interest standing; was there a serious issue to be tried; did the UFCW-Canada have a genuine interest in the validity of the legislation; and was there any other reasonable and effective manner in which the issue could be brought before the court.<sup>206</sup> Although the Court did not rule on the actual merits of the *Charter* challenge, it is noteworthy to summarize some of the key arguments advanced by both parties in regards to the section 15 challenge.<sup>207</sup>

---

<sup>204</sup> *Ibid* at para 1.

<sup>205</sup> *Ibid*.

<sup>206</sup> *Ibid*.

<sup>207</sup> The Court based its analysis on the principles set by *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 523-24, which are

- First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of section 15(1);
- second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?;
- and third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?

## Chapter 2- Federal Framework

As mentioned earlier, UFCW-Canada claimed that the combined operation of IRPA and EIA violated section 15 of the *Charter*. On the other hand the Attorney General of Canada submitted that the central principle to guide the courts analysis is “that where the government constructs a complex benefits scheme, it is entitled to make distinctions as to the inclusion or exclusion of various groups, provided these distinctions are consistent with the greater social and legislative context”.<sup>208</sup> As such, the Attorney General of Canada submitted that residency is one such legitimate, frequently used distinction.<sup>209</sup>

In response, UFCW-Canada submitted that while the role of residency is important in allocating employment insurance benefits, the application of the EIA to SAWP workers is inconsistent with other important principles underlying the *Act*, namely the principle of “social insurance”.<sup>210</sup> Accordingly UFCW-Canada submitted that social insurance “demands that those who pay premiums are entitled to the possibility of receiving benefits. All workers are either included or excluded, and those that are excluded are both excused from paying premiums and denied the possibility of benefits.”<sup>211</sup> Furthermore, UFCW-Canada argued that the main reason why many Canadians are obliged to pay premiums, yet never receive benefits is because social

---

<sup>208</sup> See *Fraser v. Canada (Attorney General)*, *supra* note 171 at para 63.

<sup>209</sup> *Ibid.* The Attorney General relied on the following cases upholding similar requirements under the EIA and other legislation: *Krock v. Canada*, 2001 FCA 188, [2001] FCJ No 896 (FCA), leave to appeal refused [2001] SCCA No 396 (SCC) (Lexis); *Clarcken v. Ontario (Health Insurance Plan)*, [1998] O.J. No. 1933 (Ont Div Ct) (Lexis); *Pawar v. Canada*, [1999] F.C.J. No. 1421 (FCA) (Lexis), leave to appeal refused [1999] SCCA No 526 (SCC) (Lexis); and *Peterson v. Canada (Minister of State, Grains and Oilseeds)*, (1995) 124 DLR (4<sup>th</sup>) 96, [1995] FCJ No 580 (FCA) (Lexis).

<sup>210</sup> *Fraser v. Canada (Attorney General)*, *supra* note 171 at para 64.

<sup>211</sup> *Ibid.*

## Chapter 2- Federal Framework

insurance foresees a transfer of cost from those more likely to be unemployed to those less likely.<sup>212</sup>

Although the UFCW-Canada agreed with the Attorney General's submission that residency is a central component of the EIA, it argued, however, that such being the case, "a group which by definition can never fulfill this requirement cannot possibly come within its ambit. In this way, the Act constitutes differential treatment in its application to SAWP workers."<sup>213</sup> The Court determined that if the EIA was intended to be a universal scheme with the purpose of paying income support for individuals searching for work in Canada, then SAWP workers had not been differentially treated.<sup>214</sup> However, if the EI scheme was to some extent a program of "social insurance", to which only potential beneficiaries were required to pay, and which is guided by redistributive concerns, then it would be likely that SAWP workers had been differentially treated.<sup>215</sup>

As to whether the differential treatment was based on a "personal characteristic", the Attorney General submitted that "personal characteristic" must be attached to "constructive immutability" and this analysis should be made within the enumerated or analogous grounds analysis.<sup>216</sup> Alternatively, UFCW-Canada advanced four potential personal characteristics: national origin, citizenship, immigration status and status as a foreign migrant agricultural worker.<sup>217</sup>

---

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid* at para 68.

<sup>214</sup> *Ibid* at para 69.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid* at para 70.

<sup>217</sup> *Ibid* at para 71.

**b. Disposition of the Case**

The Court dismissed the motion and held that the UFCW-Canada's case demonstrated that there was a serious issue to be tried since the UFCW-Canada showed that the elements required under section 15 test regarding differential treatment were present. As well, the Court held that the UFCW-Canada had a genuine interest in the validity of the legislation. Finally, the UFCW-Canada demonstrated that there was no other reasonable and effective manner in which the issue could be brought before the court since SAWP workers feared reprisal should they become involved in the litigation and because they lacked the resources to commence or participate in litigation.<sup>218</sup> Thus, the pleadings submitted by the UFCW-Canada were found to have disclosed a reasonable cause of action.

Although UFCW-Canada won standing to pursue its *Charter* challenge, it decided not to proceed further. Therefore, the court never ruled on the merits of the challenge based on the *Charter's* section 15. The author, in a telephone conversation with Mr. Stanley Dean Raper, UFCW-Canada National Representative<sup>219</sup>, inquired what had occurred with the case above. Mr. Raper informed her that UFCW-Canada decided not to pursue the *Charter* challenge because they became aware that SAWP workers were eligible to claim for "special benefits" under the *Act*, namely, parental benefits. As such, the UFCW-Canada began to apply, on behalf of SAWP workers, for these benefits. In fact, they have been successful in filing thousands of claims, which have yielded millions

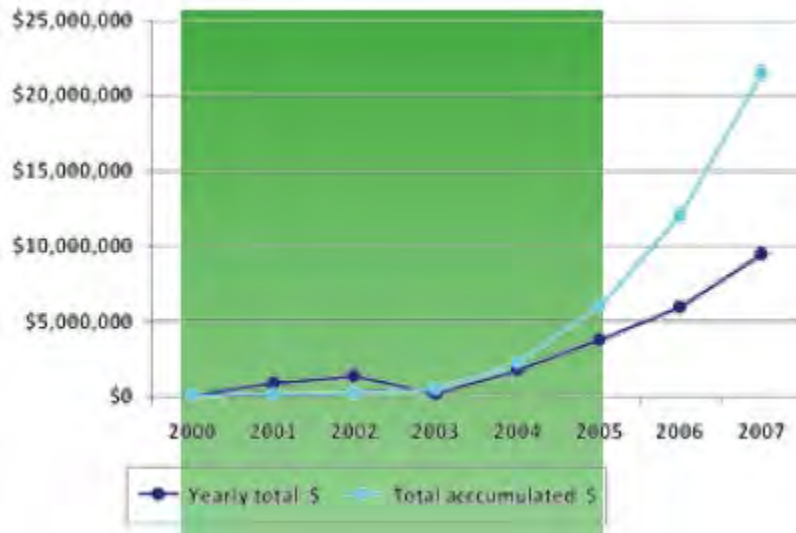
---

<sup>218</sup> *Ibid* at paras 119-122.

<sup>219</sup> Telephone conversation with Mr. Stanley Dean Raper, UFCW-Canada National Representative, dated 12 September 2011.

of dollars in benefits for SAWP workers. Below is a table reflecting the monetary value of parental benefit claims provided by UFCW-Canada.

**Table 3: Parental Benefit Claims**



Monetary Value of Parental Benefit Claims

(National, 2000-2007)<sup>220</sup>

The table above illustrates a continuous increase, each year, in the monetary value of parental benefit claims. For instance, from 2003 to 2007 the increase has been exponentially from almost \$0 million to about 23 millions.

<sup>220</sup> This table was extracted from UFCW Canada Report on “The Status of Migrant Farm Workers in Canada (2008-2009)”, online: UFCW-Canada <<http://www.ufcw.ca/templates/ufcwcanada/images/awa/wp-content/uploads/2009/09/ra0908hstatusreport08-09en3-9.pdf>> at 10.

#### **4. Author's Observations and Suggestions regarding EIA's Exclusion of SAWP Workers**

The key problem with EIA's exclusion as it relates to SAWP workers is that the *Act* does not provide these workers with what it was particularly intended to provide: employment insurance for workers in occupations in high risk of unemployment such as seasonal agricultural work. Furthermore, although the EIA grants eligible SAWP workers "special benefits" such as parental benefits, its exclusion, nevertheless, continues to be unfair and unconscionable towards a class of workers who are and have been marginalized in Canada.

For instance, they are poor, uneducated, unable to speak one of Canada's official languages, and they must not cause their employers to repatriate them; these factors make SAWP workers conspicuous targets for mistreatment and exploitation as soon as they arrive in Canada. As well, besides being excluded from receiving regular employment benefits, SAWP workers have also been excluded from other protections such as overtime pay and the capacity to unionize pursuant to various provincial labour relations legislation<sup>221</sup>. Thus, the workers' backgrounds, the Program's structure and the mentioned exclusions negatively and imminently impact SAWP workers and place them in a perpetual position of vulnerability and marginalization. As such, it seems extremely unconscionable to take away benefits for which they have been charged mandatory deductions.

---

<sup>221</sup> These exclusions, mainly under provincial legislation, will be discussed in chapters 3 and 4.

## Chapter 2- Federal Framework

On the other hand, their Canadian counterparts performing the same work would be entitled to receive said benefits. . In fact, this exclusion specifically contradicts the principles of equality enshrined in the MOU.<sup>222</sup>It reads:

Canada and Mexico have agreed that the guiding principles underlying the Program will be: That workers are to be employed at a premium cost to the employers and are to receive from their respective employers, while engaged in employment in Canada . . . treatment equal to that received by Canadian workers performing the same type of agricultural work, in accordance with Canadian laws.

<sup>223</sup>  
..

This principle seems to only bind the employer from treating workers equally and not the state (Canada). Perhaps that is why the UFCW-Canada was challenging the exclusion based on equality but pursuant to section 15 of the *Charter*. While this may be a prudent and meritorious avenue to pursue, the author prefers to recommend a different avenue<sup>224</sup>; one where Parliament acts and completely includes SAWP workers into the EI scheme or in the alternative, the Minister of HRSDC shifts her policy to deduct a lesser amount of premiums from SAWP workers since they cannot access the full range of benefits of the *Act*.<sup>225</sup>

The author, however, would not suggest to completely exempt SAWP workers from the EI scheme since many of them have been able to access the “special benefits”, such as parental benefits. This is one of the central reasons why the author would not pursue a *Charter* section 15 challenge. If successful, the outcome would likely be to

---

<sup>222</sup> See Appendix I, MOU at Clause 1(b).

<sup>223</sup> *Ibid.*

<sup>224</sup> *Charter* challenges are often long and require vast amount of resources. In practical terms, a shift in the application of the *Act* would probably be sufficient to address SAWP works exclusion from receiving regular benefits.

<sup>225</sup> The feasibility of said suggestions is beyond the scope of this chapter; however, it needs to be further explored.

declare that the EIA constitutes differential treatment amounting to prohibited discrimination under section 15 and may yield a declaration that the *Act* is not applicable to SAWP workers. However, this outcome would contradict the author's suggestion to not completely exempt SAWP workers from the EIA scheme. That is because the ramifications of such outcome would take away their ability to access "special benefits". In short, the desired option would be to fully include SAWP workers into the scheme or to deduct less from their wages since they are entitled to less benefits. If this is not achievable, then the least preferred option would be *status quo*, in that way, at least SAWP workers can receive some benefits.

### **III. Conclusion**

This chapter aimed to underscore the constitutional context in relation to the SAWP regarding employment and labour, agriculture and immigration. It concludes that matters of employment and labour generally fall within provincial competence, and thus are ruled by provincial legislation. Although the SAWP was established by the federal government in order to assist farmers in filling out their labour shortages, it cannot be said that it is a federal law *per se*. Rather, the federal government only administrates the Program through processing the employer application for SAWP workers and issuing the corresponding work permits.

In matters of agriculture, both the federal Parliament and provincial legislatures have concurrent jurisdiction to legislate, with the qualification that any provincial laws shall have effect "as long and as far only as it is not repugnant to a federal law". The meaning of what constitutes agriculture has been defined by the courts and it encompasses practical husbandry and tillage, the growing of crops, the planting and care of fruit trees,

## Chapter 2- Federal Framework

the rearing of domestic animals, the science applied to or bearing upon these subjects, encouragement or support of agriculture, and possibly the disposition of the products by the producer.

In regards to immigration, both levels of government have competence to legislate subject to federal paramountcy in the event of a conflict. Pursuant to this concurrent power, the federal government has assumed legislative responsibility and enacted IRPA. SAWP workers are admitted into Canada subject to IRPA's requirements. However, unlike other foreign workers also admitted under IRPA, they are excluded from applying for permanent residence. The exclusion further places SAWP workers at the mercy of their employers. In other words, if they do not please their employers, they could be repatriated immediately. Thus, being deportable is the most efficacious tool that employers can use in order to make these workers do as they say. Not providing SAWP workers with a path to permanent residence has the effect of creating a continuous and reliable labour supply of unfree migrant workers who will always be vulnerable to exploitation and abuse. As a possible remedy, the author suggested that, at best, Parliament or the provinces include SAWP workers in their immigration schemes such as the provincial nominee program. But if this is not possible, the author suggested that, at least, the Employment Agreement should provide a due process mechanism to determine the circumstances under which a worker may be repatriated and to provide the workers with an appeals process of such decisions.

Finally, this chapter aimed to examine the current *EI* scheme as applicable to SAWP workers. The chapter further explained that the *EIA* excludes SAWP workers from accessing its regular employment benefits even though they pay full premiums.

## Chapter 2- Federal Framework

Simply stated, SAWP workers are being treated less favourably than their local counterparts based on their temporary and immigration status. Their work permits clearly stipulate that they must return to Mexico or the Caribbean immediately upon completion of their contract. In the case of Mexican SAWP workers, for instance, returning to Mexico cancels their eligibility to access full employment benefits under the *EIA* as they are no longer in Canada during their time of unemployment. However, they are entitled to “special benefits” under the *Act*. The author suggested, as a remedy or improvement, that Parliament or the Minister of HRSDC implement the necessary measures or policies to fully include SAWP workers into the scheme or to deduct less from their wages since they are entitled to less benefits. If this is not achievable, then the least preferred option would be *status quo*, in that way, at least SAWP workers can receive some benefits.

## Chapter 3- SAWP Workers in Ontario

Each year, Mexican agricultural workers under the SAWP come to work in the various provinces of Canada. As discussed in Chapter 1, most of them go to Ontario. In fact, in 2009, Citizenship and Immigration Canada (CIC) issued 15,727 work visas to Mexicans working under the SAWP throughout Canada. Out of those 15,727 visas, 9,030 (approximately 57%) were for Mexicans working in Ontario. The table below will provide a distribution on the number of work visas given to Mexicans under the SAWP since 2000 onward as well as a distribution of how many visas per province.

**Table 4: CIC Statistics<sup>1</sup>**

**Canada - Foreign workers in the Seasonal agricultural worker program (Mexican) by Province from 2000-2009**

Province	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Prince Edward Island	0	0	0	0	0	0	--	7	--	--
Nova Scotia	0	0	0	0	--	--	--	--	--	8
New Brunswick	0	0	0	6	0	0	0	13	6	8
Quebec	1,528	2,019	2,396	2,466	2,661	2,693	2,703	2,463	2,654	2,557
<b>Ontario</b>	<b>7,489</b>	<b>8,208</b>	<b>8,128</b>	<b>7,779</b>	<b>7,839</b>	<b>8,127</b>	<b>8,329</b>	<b>9,064</b>	<b>9,618</b>	<b>9,030</b>
Manitoba	25	39	50	12	--	--	14	31	28	28
Saskatchewan	0	0	0	8	5	31	43	55	50	67
Alberta	188	190	214	248	258	433	527	687	796	988
British Columbia	5	0	--	41	66	556	1,313	1,991	2,883	2,628
Province not stated	0	0	--	6	8	22	53	--	237	--
<b>Grand Total</b>	<b>9,235</b>	<b>10,456</b>	<b>10,799</b>	<b>10,566</b>	<b>10,842</b>	<b>11,877</b>	<b>12,987</b>	<b>14,416</b>	<b>16,278</b>	<b>15,727</b>

<sup>1</sup> This table was provided by Citizen and Immigration Canada (CIC)-Statistics Division, upon written request by the author as the information contained is not readily available to the public. The author elected using this data instead of data provided by other sources such as Mexican consulates in Canada because it is the most complete, accurate and trustworthy information available. For instance, while the Mexican consulate in Montreal provided me with the number of SAWP workers in Quebec, the Consulate in Toronto did not respond to my request. As well, the Consulate in Leamington only provided with an approximate of how many workers came to Ontario in 2009. See Appendix V.

## Chapter 3- SAWP Workers in Ontario

Ontario has 57,211 farms.<sup>2</sup> 10,000 of those farms have sales over \$250,000, while 17,965 farms have sales over \$100,000 and 31,883 have sales over \$25,000.<sup>3</sup> The average farm size in Ontario has increased since 1971. For instance, in that year the average farm size was 68 hectares compared to 95 hectares in 2006.<sup>4</sup>

As Table 4 illustrates, Ontario is the province, which has been receiving the majority of Mexican workers under the SAWP since 2000. Quebec and British Columbia follow; for instance in 2009, CIC issued 2,628 work visas for Mexicans working in British Columbia while it issued 2,557 for Mexicans working in Quebec. Considering that Ontario is the main recipient of Mexican workers under the SAWP, Chapter 3 aims to outline a survey that underscores crucial Ontario legislation (Section I), which applies to Mexican workers under the SAWP. This is a non-exhaustive survey; however, it captures Ontario's agricultural workers legal reality; namely, that the current Ontario legal framework, as applicable to all agricultural workers, does not provide protection from unfair treatment and exploitation; rather, it perpetuates such practices. This reality is particularly intensified for Mexican workers under the SAWP.

In particular, Chapter 3 will discuss the following:

- *Occupational Health and Safety Act (OHSA); Employment Standards Act (ESA); the Labour Relations Act (LRA); and the Agricultural Employee Protection Act (AEPA) (Section I); and,*

---

<sup>2</sup> See "Statistical Summary of Ontario Agriculture", online: Ministry of Agriculture, Food and Rural Affairs, <[http://www.omafra.gov.on.ca/english/stats/agriculture\\_summary.pdf](http://www.omafra.gov.on.ca/english/stats/agriculture_summary.pdf)>.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

### Chapter 3- SAWP Workers in Ontario

- the evolution of a *Charter* challenge of the *LRA* and *AEPA* brought to the Supreme Court of Canada (**Section II**).

As examined in Chapter 2, agriculture and immigration fall under the concurrent jurisdiction of both the provinces and the federal government; thus provincial laws relating to agriculture are valid “as far only as [they are] not repugnant to any Act of the Parliament of Canada.”<sup>5</sup> Also, as examined in Chapter 2, the federal government has jurisdiction over general immigration matters in Canada.<sup>6</sup> Such general jurisdiction grants the federal government the capacity to develop foreign worker migration programs like the Seasonal Agricultural Workers Program (SAWP). Therefore, the role of the federal government is to develop the terms and conditions under which foreign workers migrate to Canada to fill various employment positions.<sup>7</sup>

However, once the foreign workers are in Canada, then the determination of what laws apply is linked to whether the occupation in which they are working falls under federal or provincial laws. As chapter 2 explained, the general rule is that all aspects of labour and employment law fall under the exclusive jurisdiction of the provinces over “property and civil rights”, local works and undertakings, and all matters of a merely

---

<sup>5</sup> See *The British North American Act, 1867*, s 95. “In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.”

<sup>6</sup> *Ibid.* See also *Immigration and Refugee Protection Act, 2001*, c 27 [IRPA]

<sup>7</sup> The provinces, on the other hand, provide the statutory framework which will apply to SAWP workers in the fields of employment, labour relations, Health and Safety, and immigration in some jurisdiction such as Quebec.

### Chapter 3- SAWP Workers in Ontario

local or private nature in the province.<sup>8</sup> On the other hand, the federal government retains the power to regulate employment in works and undertakings or businesses within the exclusive legislative authority of Parliament. Most of these involve interprovincial transportation and communications, as well as banking.<sup>9</sup> As well, it must be emphasized that provincial jurisdiction over labour relations and employment is the rule and federal jurisdiction is the exception.<sup>10</sup> Although the SAWP was established by the federal government in order to assist farmers in filling out their labour shortages, it cannot be said that it is a federal law *per se* and thus not subject to provincial jurisdiction over labour and employment. Rather, the federal government only administrates the Program through processing the employer application for SAWP workers and issuing the corresponding work permits.<sup>11</sup> Finally, the author did not find any federal laws in conflict with provincial legislation relating to agricultural labour and employment<sup>12</sup>.

---

<sup>8</sup> See *Attorney General for Canada v. Attorney General for Ontario*, [1937] 1 DLR 679 (JCPC) [*Labour Conventions Case*]; *Attorney General for Canada v. Attorney General for Ontario*, [1937] 1 DLR 684 (JCPC) [*Employment and Social Insurance Act, 1935 Reference*]; See also Joseph E. Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, 4<sup>th</sup> ed., Volume 1, (Cowansville, Quebec: Les Éditions Yvon Blais Inc., 1989) at 285.

<sup>9</sup> *Employment and Social Insurance Act, 1935 Reference*, *supra* note 8 at 686; *R. v. Grand Falls Milling Co. Ltd.*, 2005 NBPC 14 at 4 (available on CanLII); and *Léo Beaugard & fils (Canada) Ltée v. Commission des normes du travail*, [2000] R J Q 1075, [2000] JQ no 1039 (Que CA) (Lexis).

<sup>10</sup> See *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696.

<sup>11</sup> See *Mayfair Farms (Portage) Ltd. (Re)*, 139 CLRBR (2d) 1, [2007] MLBD No 6 (MLB) (Lexis); and *Greenway Farms Ltd. (Re)*, 170 CLRBR (2d) 208, [2009] BCLRBD No 135 (BCLRB) (Lexis). For a detailed analysis of labour, employment, immigration, agriculture and the SAWP please refer to chapter 2. Also, it is important to note that the SAWP is an “intergovernmental arrangement”, not a federal statute. See Appendix 1, *Memorandum of Understanding*, s 2(c).

<sup>12</sup> See *Canada Labour Code*, RSC 1985, c L-2, s 2. Defining federal work as: “federal work, undertaking or business” means any work, undertaking or business that is within the legislative authority of Parliament. . . . “Agricultural work and SAWP work in the provinces was not included in the definition. See also the *Constitution Act, 1867*, s 92(10). Although the SAWP was created to benefit farmers in Canada, the Federal government has not established responsibility over the Program in relation to Labour and Employment. In fact, the Employment Agreement stipulates that it will be subject to provincial laws. See Appendix II, Employment Agreement, Clause XI (3).

Thus, workers under the Program, once in a province, are covered by provincial employment laws like any other agricultural worker in that jurisdiction.

On the other hand, as it was analyzed in the previous chapter, some employment-related statutes fall under federal jurisdiction regardless of occupation and apply to all employees in Canada. For instance, the federal government has exclusive jurisdiction over unemployment insurance under the *Employment Insurance Act*<sup>13</sup> and retirement or disability benefits under the *Canada Pension Plan*<sup>14</sup>.

## **I. Application of Provincial Legislation to Workers under the SAWP- Ontario**

Agricultural workers in Ontario are excluded from several key labour and employment related legislation designed to protect workers. As previously mentioned, the majority of Mexicans, under the SAWP, work in Ontario. Ontario's crippling legislative exclusions, as will be elaborated below, have placed agricultural workers under the SAWP in a perpetual state of vulnerability, marginalization and inequality.

The language in the *Memorandum of Understanding* establishes that Mexican and Caribbean workers will receive "treatment equal to that received by Canadian workers performing the same type of agricultural work".<sup>15</sup> This is misleading as Ontario's farm

---

<sup>13</sup> See *The Constitution Act, 1867*, s 91(2A). See also *Employment Insurance Act*, 1996, c 23.

<sup>14</sup> See *Canada Pension Plan*, RS, 1985, c C-8. However, s 94A of *the Constitution Act, 1867* stipulates that "no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter." In other words, Parliament has jurisdiction to legislate in matters of old age pension and supplementary benefits but if a province decides to make its own law respecting the same subject matter, then the provincial law will not be superseded by federal legislation.

<sup>15</sup> See Appendix 1, MOU, Clause 1 (b).

### Chapter 3- SAWP Workers in Ontario

workers are excluded from key legislative protections for workers<sup>16</sup>. As will be seen in the analysis below, SAWP workers are at a higher disadvantage than their Canadian counterparts since they cannot receive employment insurance benefits; cannot find other employment to supplement the low wages due to their visa restrictions; cannot receive social assistance since they are neither citizens or permanent residents<sup>17</sup>; cannot practically stay to petition redress in the event that their employer breaches the applicable employment legislation or Agreement. They must leave as soon as their work is completed<sup>18</sup>; finally, they do not have the economic means to hire legal representation and stay for the proceedings while supporting their families in Mexico and many of them do not speak English or French. Consequently, they are not similarly situated to their Canadian counterparts.

The following is a description of key statutes as they relate to employment in Ontario. The goal is to analyze how these statutes apply or do not apply, to all agricultural workers in general and to Mexican agricultural workers under the SAWP in particular. It is also relevant to highlight that even if agricultural workers have rights under existing legislation, many of them find it difficult to access those rights because they do not know about them or do not have the means to do so or they are simply afraid to do so, this is particularly the case with Mexican workers under the SAWP.

---

<sup>16</sup> See Wai Suen, Rachel Li, “You Sure Know How to Pick’Em: Human Rights and Migrant Farm Workers in Canada” (2000) 15:1 Geo L J 199 at 206. See also, Veena Verma, “The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program Under Unionization” (2003), online: The North-South Institute <[http://www.nsi-ins.ca/english/pdf/csawp\\_verma\\_final\\_report.pdf](http://www.nsi-ins.ca/english/pdf/csawp_verma_final_report.pdf)>.

<sup>17</sup> See “Ontario Works Policy Directives: Residency Requirements”, online: Ontario Ministry of Community and Social Services <[http://www.mcscs.gov.on.ca/en/mcscs/programs/social/directives/directives/owdirectives/3\\_1\\_OW\\_Directives.aspx](http://www.mcscs.gov.on.ca/en/mcscs/programs/social/directives/directives/owdirectives/3_1_OW_Directives.aspx)>.

<sup>18</sup> See Appendix II, Employment Agreement, Clause IX (6).

### **A. Occupational Health and Safety Act<sup>19</sup>(OHSA)**

Agriculture has been placed at the top of the list when it comes to workplace fatalities.<sup>20</sup> After mining and logging, agriculture is the third most hazardous occupation in Canada. It requires long hours of repetitive work, exposure to harmful chemicals, sun and extreme weather conditions.<sup>21</sup> A study published in the Canadian Medical Association Journal revealed that migrant farm workers tend to arrive healthy but their work places them in a position to face health and safety concerns.<sup>22</sup>As the study states:

[It] has been shown that migrant farm workers face elevated workplace health and safety risks, with common health problems related to chemical exposure, single event injury and musculoskeletal injuries.”<sup>23</sup>

Furthermore the study explained that migrant workers, including farm workers, may also face additional risks in their status as new workers. Factors that heighten migrant farm workers’ vulnerabilities in relation to health and safety are the following:

- Frequent and temporary migration;
- Migration status dependent on employment status, work permit tied to employer;
- Barriers to health care, health insurance, such as inability to speak English or French;

---

<sup>19</sup> *Occupational Health and Safety Act*, RSO 1990, c 0.1 (OHSA).

<sup>20</sup> See “The Status of Migrant Farm Workers in Canada 2008-2009”, online: UFCW-Canada <<http://www.ufcw.ca/Theme/UFCW/files/PDF%202009/2009ReportEN.pdf>>.

<sup>21</sup> See Kerry Preibisch and Jenna Hennebry, *Temporary migration, chronic effects: the health of international migrant workers in Canada*, online: Canadian Medical Association Journal (CMAJ) <<http://www.cmaj.ca>> at 3, published on 18 April 2011.

<sup>22</sup> *Ibid* at 3-5.

<sup>23</sup> *Ibid* at 3.

### Chapter 3- SAWP Workers in Ontario

- Lack of independent monitoring of health and safety violations;
- Insufficient safety equipment and training;
- Lack of information, representation and support;
- Poor and unregulated housing;
- Social exclusion, isolation;
- Linguistic and cultural differences, high rates of illiteracy;
- No direct path to permanent residency<sup>24</sup>

Access to healthcare has been identified above as one of the possible factors that heighten migrant farm workers' vulnerability. In fact, another study conducted by medical doctors and health care providers demonstrated that "[l]anguage related barriers, lack of transportation, long workdays and fear of repatriation may prevent access to and use of health care services".<sup>25</sup> As well the study, based in Ontario, identified the following occupational health concerns for migrant farm workers:

- Musculoskeletal- injuries, pain in back, neck, knee, shoulders, hands or feet;
- Ocular- conjunctivitis, corneal foreign bodies and abrasions, pterygia<sup>26</sup>;

---

<sup>24</sup> *Ibid* at 3.

<sup>25</sup> Michael Pysklywec, Janet McLaughlin, Michelle Tew & Ted Haines, *Doctors within borders: meeting the healthcare needs of migrant farm workers in Canada*, online: Canadian Medical Association Journal (CMAJ) <<http://www.cmaj.ca>>, published on 26 April 2011.

<sup>26</sup> Also known as pterygium. A pterygium is a non-cancerous growth of the clear, thin tissue ([conjunctiva](#)) that lays over the white part of the eye (sclera). One or both eyes may be involved. The cause is unknown, but it is more common in people with excess outdoor exposure to sunlight and wind, such as those who work outdoors. Risk factors are exposure to sunny, dusty, sandy, or windblown areas. Farmers, fishermen, and people living near the equator are often affected. The main symptom of a pterygium is a painless area of raised white tissue, with blood vessels on the inner or outer edge of the cornea. Sometimes it may become inflamed and cause burning, irritation, or a feeling like there's something foreign in the eye. See "Pterygium", online: US National Library of Medicine, National Institute of Health <<http://www.nlm.nih.gov/medlineplus/ency/article/001011.htm>>.

## Chapter 3- SAWP Workers in Ontario

- Dermatologic- contact dermatitis<sup>27</sup>, folliculitis<sup>28</sup>, tinea<sup>29</sup>;
- Psychological- depression, anxiety, inconsistent sleep patterns;
- Sexual and reproductive- sexually transmitted infections (urethritis), HIV infection<sup>30</sup>

OHSA's purpose is "to protect workers against health and safety hazards on the job".<sup>31</sup> OHSA has been in effect since 1979. However, it did not apply to the agricultural sector. In 2006, the Ontario government decided to extend its application to some farming operations<sup>32</sup>, due in part, to pressure from farming advocates such as the United Food and Commercial Workers-Canada (UFCW-Canada).<sup>33</sup>

Ontario's OHSA applies, with some limitations and conditions, to prescribed farming operations that have paid workers under the *Act*. Section 3 (2) relates explicitly to farm operations and states:

---

<sup>27</sup> Contact [dermatitis](#) is an inflammation of the skin caused by direct contact with an irritating or allergy-causing substance ([irritant](#) or [allergen](#)). See "Contact Dermatitis", online: US National Library of Medicine, National Institute of Health <<http://www.nlm.nih.gov/medlineplus/ency/article/000869.htm>>.

<sup>28</sup> Folliculitis occurs when hair follicles become infected, often with *Staphylococcus aureus* or other types of bacteria. Severe infections can cause permanent hair loss and scarring. See "Folliculitis", online: Mayo Clinic <<http://www.mayoclinic.com/health/folliculitis/DS00512>>.

<sup>29</sup> Tinea is the name of a group of diseases caused by a fungus. Types of tinea include ringworm, athlete's foot and jock itch. See "Tinea Infections", online: US National Library of Medicine, National Institute of Health <<http://www.nlm.nih.gov/medlineplus/tineainfections.html>>.

<sup>30</sup> See Pysklywec *et al.*, *supra* note 25 at 2-4.

<sup>31</sup> See "Information for Farming Operations: Enforcement of the Occupational Health and Safety Act-When Self Compliance Fails", online: Ontario Ministry of Labour <<http://www.labour.gov.on.ca/english/hs/pubs/farming/enforcement.php>>.

<sup>32</sup> The inclusion became effective on June 30, 2006 pursuant to a regulation. See *Farming Operations*, O Reg 414/05.

<sup>33</sup> See "The Status of Migrant Farm Workers in Canada 2008-09", *supra* note 20 at p. 11.

(2) Except as is prescribed and subject to the conditions and limitations prescribed, this Act or a Part thereof does not apply to farming operations.<sup>34</sup>

The application of the *Act* to farming operations is prescribed by regulation.<sup>35</sup> Ontario's regulation on farming operations establishes the following:

1. Subject to the limitations and conditions set out in this Regulation, the Act applies to farming operations.

Exception

2. Despite section 1, the Act does not apply to a farming operation operated by a self-employed person without any workers.<sup>36</sup>

### **1. Joint Health and Safety Committee**

The OHSA is based on an “Internal Responsibility System”, which is based on the principle that the parties at the workplace are in the best position to identify health and safety problems, as well as take proactive measures to ensure a safe and healthy workplace pursuant to the *Act* and its regulations.<sup>37</sup> An important way in which the goal of “Internal Responsibility System” may be furthered is through worker health and safety representatives and joint health and safety committees. A joint health and safety committee is composed of individuals who represent the workers and the employer. Working together, they are committed to improve the health and safety conditions in the workplace. The committees identify potential health and safety problems and bring them

---

<sup>34</sup> See OHSA, *supra* note 19, s 3(2).

<sup>35</sup> See *Farming Operations*, *supra* note 32.

<sup>36</sup> *Ibid* at ss 1 & 2.

<sup>37</sup> See “Information for Farming Operations: Enforcement of the Occupational Health and Safety Act-When Self Compliance Fails”, *supra* note 31.

to the employer's attention. They must also keep informed of health and safety developments in the workplace.<sup>38</sup>

The purpose of the joint health and safety committees is to provide greater protection against workplace injury and illness, which would yield to reduce human suffering, work-related accidents and deaths.<sup>39</sup> Its role is to be an advisory body "that helps to stimulate awareness of safety issues, recognizes workplace risks and then deals with these risks".<sup>40</sup> To achieve its objectives, the committee holds meetings and conducts regular workplace inspections.<sup>41</sup>

The *Act* stipulates where a joint health and safety committee is required:

- (2) A joint health and safety committee is required,
  - (a) at a workplace at which twenty or more workers are regularly employed;
  - (b) at a workplace with respect to which an order to an employer is in effect under section 33; or
  - (c) at a workplace, other than a construction project where fewer than twenty workers are regularly employed, with respect to which a regulation concerning designated substances applies.<sup>42</sup>

However, the regulation on *Farming Operations* further narrows where a joint health and safety committee will be required; it states:

- 3.** (1) Despite section 1, subsection 9 (2) of the Act applies only to farming operations where 20 or more workers are regularly employed and have duties that include performing work related to one or more of the operations specified in subsection (2).
- (2) The following are the operations referred to in subsection (1):
  - 1. Mushroom farming.

---

<sup>38</sup> See *A guide for Health and Safety Representatives and Joint Health and Safety Committees on Farming Operations*, 2005, Ontario Ministry of Labour, (Queens's Printer for Ontario) at p. 4.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> See OHSA, *supra* note 19, s 9(2).

2. Greenhouse farming.
  3. Dairy farming.
  4. Hog farming.
  5. Cattle farming.
  6. Poultry farming. O. Reg. 414/05, s. 3 (2).
- (3) Despite section 1, where a joint health and safety committee is required at a farming operation, the requirement for certified members set out in subsection 9 (12) of the Act applies to that farming operation only if 50 or more workers are regularly employed at it.<sup>43</sup>

As stated above the regulation on *Farming Operations* clearly limits the number of farm workers that could benefit from joint health and safety committees. For instance, the coverage does not extend to farm workers picking fruits and vegetables in the fields. The table below<sup>44</sup> shows a distribution of Ontario farms major production type, which reveals that under the regulation on *Farming Operations*, about 60 per cent of the total farming operations in Ontario are excluded from the *Act*. That is because Greenhouse & nursery (4.9%); Dairy farming (8.6%); Hog Farming (3.9%); Beef cattle farming (19.3%) and Poultry & eggs (3.0%), which would be covered under the regulation, amount to approximately 37.7% of the total major product types in Ontario farms.<sup>45</sup> However the other 60 % of the farms are excluded. For instance farms whose major product type is Grains & oilseeds (22.8%) are not covered by the *Act*. In addition, farms with less than

---

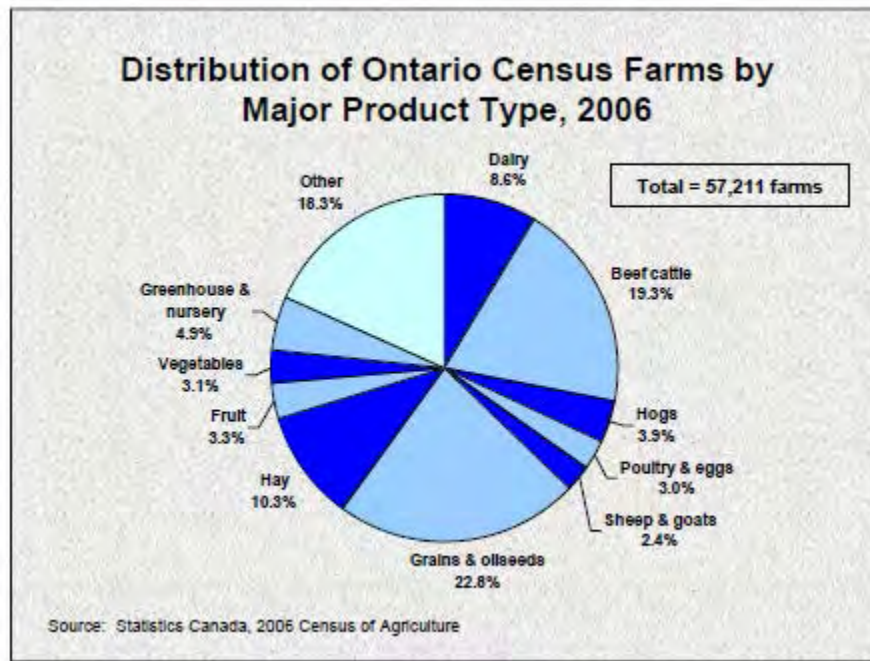
<sup>43</sup> See *Farming Operations*, *supra* note 32, s 3.

<sup>44</sup> This table comes from Statistics Canada, 2006 Census of Agriculture; it was also used in *Statistical Summary of Ontario Agriculture*, *supra* note 2.

<sup>45</sup> According to the latest census (2006) there were 57, 211 farms in Ontario. Their major product type was distributed as follows: 8.6% Dairy; 19.3% Beef cattle; 3.9% Hogs; 3.0% Poultry & eggs; 2.4% Sheep & goats; 22.8% Grains & oilseeds; 10.3% Hay; 3.3% Fruit; 3.1% Vegetables; 4.9% Greenhouse & nursery; and 18.3% Other. See *Statistical Summary of Ontario Agriculture*, *supra* note 2.

50 workers will be excluded even though their major product type falls within the *Farming Operations* regulation.<sup>46</sup>

**Table 5: Distribution of Ontario Census Farms by Major Product Type, 2006**



The exclusion from the *Act* becomes more vivid when one looks at the actual foreign agricultural workers that were excluded in 2008 and 2009. The next chart reflects how many foreign workers filled vacancies by crop in 2008 and 2009.

<sup>46</sup> See *Farming Operations*, *supra* note 32 at s 3(3).

**Table 6: Vacancies Filled by Crop<sup>47</sup>**

CROP	2008	2009
APPLES	1739	1887
CANNING/FOOD PROCESSING	451	403
BEE	14	17
FLOWERS	470	374
FRUIT	3423	3537
GREENHOUSE	3888	3673
NURSERY	1280	1080
SOD	7	8
TOBACCO	1397	1208
VEGETABLE	4553	4529
GINSENG	702	640
TOTALS	17924	17356

The total number of vacancies filled with foreign workers under the SAWP and the Low Skill Pilot Program<sup>48</sup> in 2008 was 17924. However, extracting the amount of vacancies covered by the *Act*, in this case, greenhouse farming reveals that 14034 workers were excluded from the *Act*. Likewise, in 2009, there were 13623 foreign agricultural workers excluded (17356 total vacancies minus 3673 Greenhouse vacancies equals 13623). Accordingly, while the *Act* expanded its coverage to the agricultural sector in 2006, the actual coverage excludes about 60 per cent of the farms in Ontario as only about 40 per cent of them operate in mushroom, greenhouse, dairy, hog, cattle or poultry farming. In addition, by restricting which types of farming are covered, the *Act* further excludes

<sup>47</sup> See “Statistics”, *Vacancies Filled by Crop*, online: FARMS < <http://www.farmsontario.ca> >.

<sup>48</sup> The Low Skill Pilot Program brings foreign workers to Canada to work mainly in the hospitality, construction and agricultural sectors. It is a separate program from the SAWP. See “Temporary Foreign Worker Program”, online: Human Resources and Skills Development Canada (HRSDC) < [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/lowskill.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml) >. Usually, Mexicans cannot participate under the Low Skill Pilot Program if they want to work in Ontario for the agricultural sector. Most Mexicans working in Ontario in agriculture are doing it pursuant to the SAWP. See chapter 2 for further reference.

### Chapter 3- SAWP Workers in Ontario

workers in farming operations which do not fall within the *Act*. In the case of foreign farm workers under SAWP and the Low Skill Pilot Program, there were approximately 78 per cent or 27657 workers excluded from the *Act* in 2008 and 2009.

At least half of the joint health and safety committee must be composed of worker members that are non-management workers at the workplace; and are selected by other non-management workers.<sup>49</sup> The employer also selects members (employer members).<sup>50</sup> Employer members must be people who exercise managerial functions; for instance, employee who has the authority to discipline, hire, fire, or recommend discipline, hiring or firing.<sup>51</sup> Furthermore, in mushroom, greenhouse, dairy, cattle, hog and poultry operations with 50 or more regularly employed workers, the joint health and safety committee will require at least two members, one representing the employer and the other representing the workers, to be chosen for special training as required by the *Act* and its regulations.<sup>52</sup>

Finally, members are entitled to take time to attend committee meetings, inspections and investigations, as well as to accompany ministry of labour inspectors investigating an accident, potential hazard or a work refusal.<sup>53</sup> Members will be paid at

---

<sup>49</sup> See OHSA, *supra* note 19, ss 9(7) and 9(8).

<sup>50</sup> *Ibid* at s 9(9).

<sup>51</sup> See *A guide for Health and Safety Representatives and Joint Health and Safety Committees on Farming Operations*, *supra* note 38 at 5.

<sup>52</sup> See OHSA, *supra* not 19, s 9(12). See also *Farming Operations*, *supra* note 32, s 3(3).

<sup>53</sup> OSHA, *ibid*, ss 9(34) and 54(5).

their regular rate or, where applicable, their premium rate of pay.<sup>54</sup> Given the reality of Mexican workers under the SAWP, it would be very difficult for many of these workers to participate as committee members who can receive training and certification since many of them do not speak English or French. Furthermore, even those that may know enough English or French to become a member may feel discouraged from participating as they may have to report negative results to their employers. Because these workers depend on an employer evaluation to continue in the Program, it would not be far-fetched to deduce that many workers would simply choose to exclude themselves from participation. In addition, even in the event that a Mexican worker under the SAWP knows enough English or French to participate in the Health and Safety Committee, there seems to be, on the part of the farms, a lack of compliance with the *Act*. An interview with the Agricultural Workers Alliance, a workers' association representing agricultural workers throughout Canada, revealed that, in many instances, Health and Safety Committees are not being formed in farms that would be eligible under the *Act*.<sup>55</sup>

---

<sup>54</sup> *Ibid* at s. 9(35).

<sup>55</sup> Interview with Mary and Rene Vidal, representatives of the Agricultural Workers Alliance, Leamington, Ontario, 16 October 2010. The Agriculture Workers Alliance is committed to provide information to all agriculture and migrant workers on how to access the benefits to which they would be entitled. Some of its services include updates on agriculture workers working conditions, help and assistance on tax filling, assistance on CPP & QPP applications, EI benefits, workers compensation benefits and other issues that migrant workers face while working in Canada. See generally Agricultural Workers Alliance, online: < <http://awa-ata.ca/en/>>.

## 2. Health and Safety Representative

Section 8(1) of the *Act* requires farming operations with more than five regularly employed workers and no joint health and safety committee to have a worker health and safety representative.<sup>56</sup> The health and safety representative is committed to improving health and safety conditions in the workplace. With input from other workers, he/she identifies potential health and safety problems and brings them to the employer's attention. The representative is selected by workers at the workplace; however, he/she must be someone who does not exercise managerial functions.<sup>57</sup> Furthermore, the representative does not require special training or certification and is entitled to take paid time to attend inspections and investigations.<sup>58</sup> Having lack of training or certification is problematic because the representative will be inspecting potential hazards which he/she may not be aware of how to handle or how dangerous the circumstances of an inspection may be. The *Act* confers the following powers to the representative:

- to identify situations that may be a source of danger or hazard to workers and to make recommendations or report his or her findings thereon to the employer, the workers and the trade unions representing the workers.
- to obtain information from the constructor or employer concerning the conducting or taking of tests of any equipment, machine, device, article, thing, material or biological, chemical or physical agent in or about a workplace for the purpose of occupational health and safety;

---

<sup>56</sup> OHSA, *supra* note 19, s 8(1).

<sup>57</sup> *Ibid* at s 8(5).

<sup>58</sup> *Ibid* at s 8(15).

### Chapter 3- SAWP Workers in Ontario

- to be consulted about, and be present at the beginning of, testing referred to in clause (a) conducted in or about the workplace if the representative believes his or her presence is required to ensure that valid testing procedures are used or to ensure that the test results are valid; and
- to obtain information from the constructor or employer respecting,
- the identification of potential or existing hazards of materials, processes or equipment, and
- health and safety experience and work practices and standards in similar or other industries of which the constructor or employer has knowledge.
- Where a person is killed or critically injured at a workplace from any cause, the health and safety representative may, subject to subsection 51(2) of the *Act*, inspect the place where the accident occurred and any machine, device, or thing, and shall report his or her findings in writing to a Director.<sup>59</sup>

An untrained or non-certified health and safety representative does not seem to be the best suited individual to be consulted and ensure the validity of testing procedures of a given set of hazardous materials. On what would he/she base such opinion or judgment as to whether certain testing procedures are valid? Likewise, how would he/she identify potential or existing hazards of materials, processes or equipment if he/she is not required to have any training or certification on those subjects? By not requiring any form of training or certification, the *Act* seems to contradict what it is designed to accomplish, which is to protect workers from health and safety risks in the workplace.

---

<sup>59</sup> *Ibid* at ss 8 (10), (11) and (14).

Mexican workers under the SAWP are at a disadvantage from their Canadian counterparts in their ability to become health and safety representatives. The main barrier is their lack of knowledge in English or French and their dependency of an employer evaluation at the end of the season. Accordingly, many of them are likely to find it extremely difficult to take a role where they need to assess, investigate and report in writing since many of them have an elementary education and do not speak English. Likewise, as it is the case with Health and Safety Committees, SAWP workers may not be eager to be Health and Safety Representatives as they need a “good” evaluation from their employer if they want to return to work the next season. Finally, some farms do not have Health and Safety Representatives even though they qualify under the *Act*<sup>60</sup>.

### **3. Right to Refuse or to Stop Work where Health or Safety in Danger**

*OHS*A grants workers a right to refuse or stop work in situations where he has a reason to believe that it is dangerous. Such circumstances may include instances where equipment, physical condition of the workplace, and workplace violence are likely to endanger the worker.<sup>61</sup> In the case of Mexican workers under the SAWP, asserting this right provided by *OHS*A could easily cost them their jobs, which would immediately send them back to Mexico, lose their only means of support for their families and probably become blacklisted from the Program with a negative evaluation from the employer. As discussed in chapter 1, the Employment Agreement clearly stipulates that the employer “shall be entitled for non-compliance, refusal to work, or any other sufficient reason, to terminate the worker’s employment hereunder and so cause the worker to be

---

<sup>60</sup> See Interview with Mary and Rene Vidal, *supra* note 55.

<sup>61</sup> See *OSHA*, *supra* note 19, at s 43(3) and (6).

### Chapter 3- SAWP Workers in Ontario

repatriated.”<sup>62</sup> This fear has been echoed by various authors. They have conveyed that many workers feel obliged to “obey” *el patron* (the boss) at all cost; otherwise, they may receive a negative evaluation. For these workers, a negative evaluation usually means exclusion from the Program.<sup>63</sup> To exacerbate matters, some authors like Basok and Verma suggest that the Mexican Secretary of Labour as well as the Mexican Consulate officials are perceived, by many Mexican workers, as taking the side of the employer when disputes arise between the two parties.<sup>64</sup>

Although the *Act* prohibits reprisals by employer, workers under the SAWP are likely to be repatriated before an actual investigation can commence on whether the employer contravened the *Act* and on whether the employer used reprisals against the workers who dare to speak out. Particularly, the *Act* states that no employer shall dismiss, threaten to dismiss, discipline, impose any penalty, intimidate or coerce a worker who has sought the enforcement of the *Act*.<sup>65</sup> As well, the *Act* provides that when an employer has contravened the *Act*, “the worker may either have the matter deal with by

---

<sup>62</sup> See Appendix II, Employment Agreement, Clause X(1). For instance, in Ontario alone, there were 541 SAWP workers (Mexican and Caribbean) prematurely repatriated in 2011; 493 in 2010; 547 in 2009; 634 in 2008; 653 in 2007; 572 in 2006; 688 in 2005 and 678 in 2004. However, the information does not specify the reason for premature repatriation. This information was provided upon written request by Henry Neufeld, Business Expertise Manager, Foreign Worker Program, Labour Market & Social Development Programs Branch, Service Canada, via electronic mail: henry.neufeld@servicecanada.gc.ca, on 23 August 2012. Although the author requested statistics on all participating jurisdictions, Mr. Neufeld only provided for statistics relating to Ontario as stated above.

<sup>63</sup> See Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada*, (Montreal & Kingston: McGill-Queen’s University Press, 2002) at 99 [Basok]; Verma, *supra* note 16; Maxwell Brem, “Migrant Workers in Canada: A review of the Canadian Seasonal Agricultural Workers Program”, (2006), online, The North-South Institute <<http://nsi-ins.ca>>[Brem]; and Wai Suen, Rachel Li, “You Sure Know Who to Pick’Em: Human Rights and Migrant Farm Workers in Canada” (2000) 15 *Geo Immigr LJ* 1999.

<sup>64</sup> Basok *ibid* at 110-114; Veerma *ibid* at 47-50. See also Min Sook Lee & Karen King-Chigbo, *El Contrato*, produced by the National Film Board of Canada (2006).

<sup>65</sup> OHSA, *supra* note 19, at s 50(1), (2), & (5).

final and binding settlement by arbitration under collective agreement, if any, or file a complaint with the Board. . .”<sup>66</sup>

As is likely that the Mexican worker under the SAWP will be repatriated immediately, he will not have the time or economic means to wait for arbitration or for the Board to rule on those matters. Therefore, while the *Act* does protect agricultural workers in general from retaliation by their employers, it fails to give a meaningful and accessible protection to Mexican SAWP workers. The *Act* does not take into consideration the structural reality of the SAWP (i.e., the stipulation in Part X (1) of the Employment Agreement granting the employer the ability to fire them for any reason and thus causing the workers to be repatriated).<sup>67</sup>

### **B. Employment Standards Act <sup>68</sup>(ESA)**

The *Employment Standards Act* is an *Act* of general application that also applies to SAWP workers. It applies to all agricultural workers in Ontario; it provides statutory minimum standards relating to employment. For example, it includes provisions for minimum wage, hours of work, overtime, statutory holiday, equal pay for equal work, parental and pregnancy leave, emergency benefits, severance pay, and termination notice and pay. However, agricultural workers are excluded from several of those provisions as outlined below.

---

<sup>66</sup> *Ibid* at s 50(2).

<sup>67</sup> See Preibisch, *supra* note 21 at 3.

<sup>68</sup> *Employment Standards Act*, SO 2000, c 4 [ESA].

### Chapter 3- SAWP Workers in Ontario

According to the *ESA*, there are different categories of agricultural workers. The coverage of some provisions and regulations may vary depending on whether the agricultural worker is a “**farm worker**” or “**harvester**”<sup>69</sup>. Mexican workers under the SAWP may fall under either of these definitions depending on the kind of work they have been assigned. A “farm worker” is defined as “a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar, and cultured fish”.<sup>70</sup> A “Farm worker”, is **not** entitled to provisions of the *Act* relating to: hours of work; daily and weekly/bi-weekly rest periods; eating periods; overtime pay; minimum wage; public holidays; and vacation pay.<sup>71</sup>

On the other hand, “harvesters” are defined as “employee[s] who [are] employed on a farm to harvest fruit, vegetables or tobacco for marketing or storage.”<sup>72</sup> Harvesters are required to be paid the statutory minimum wage.<sup>73</sup> The employer is deemed to be in compliance with the minimum wage requirement if his/her workers are paid a piece work rate that is “customarily and generally recognized in the area as having been set so that an employee exercising reasonable effort would, if paid such a rate, earn at least” the

---

<sup>69</sup> See *Exemptions, Special Rules and Establishing Minimum Wage*, O Reg 285/01.

<sup>70</sup> *Ibid* at s 2(2). “Subject to sections 24, 25, 26 and 27 of this Regulation, Parts VII [Hours of Work and Eating Periods], VIII [Overtime Pay], IX [Minimum Wage], X [Public Holidays] and XI [Vacation with Pay] of the Act do not apply to a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish.”

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid* at s 24

<sup>73</sup> *Ibid*.

minimum wage.<sup>74</sup> In addition, “harvesters” are covered by the public holidays and vacation pay provisions but only if they have been employed as harvesters and not as farm workers for at least 13 weeks.<sup>75</sup> Vacation pay is calculated at 4% of total gross earnings. If, for instance, a worker combines “farm work” (i.e. cultivating crops or seeding) and harvesting, then vacation pay would be earned only on the wages earned harvesting.<sup>76</sup> It has been reported that this formula has caused confusion as it is difficult to document when a worker is moving between “farm working” and “harvesting”.<sup>77</sup> Finally, “harvesters” are **not** covered by the provisions regarding: hours of work; daily and weekly/bi-weekly rest periods; eating periods; and overtime pay. See the following table:

**Table 7: Summary of Benefits**

“Farm Workers” NOT Entitled to	“Harvesters” NOT Entitled to
Hours of Work	Hours or Work
Daily and Weekly/Bi-weekly Rest Periods	Daily and Weekly/ Bi-weekly Rest Periods
Eating Periods*	Eating Periods*
Overtime Pay	Overtime Pay
Minimum Wage	
Public Holidays	
Vacation Pay	

\*Mexican workers, under the SAWP, are entitled to eating periods regardless of their work titles (“farm worker” or “harvester”). See Employment Agreement, Part II (2).

While “harvesters” are entitled to minimum wage, public holidays, and vacation pay, “farm workers” are not. Moreover, the *Act* excludes both “farm workers” and

<sup>74</sup> *Ibid* at s 25(1).

<sup>75</sup> *Ibid*.

<sup>76</sup> See “Fact Sheet: Employment Standards Act-Agricultural Workers”, online: Ontario Ministry of Labour < <http://www.ontla.on.ca/library/repository/mon/8000/244566.pdf>>.

<sup>77</sup> See Verma, *supra* note 16 at p. 66.

“harvesters” from the provisions which regulate **hours of work** and **overtime pay**.<sup>78</sup>

Being excluded from these provisions makes Mexican farm workers under the SAWP, in particular, vulnerable for exploitation and abuse as they could be required to work long hours of overtime without the benefit of overtime pay<sup>79</sup>. If they refuse, the employer could simply repatriate them for refusal to work as stipulated in the Employment Agreement. The research gathered on this possibility indicates that this is usually the rule and not the exception.<sup>80</sup> According to information gathered from some of the Mexican consulates the key benefit for the employer under the SAWP is the fact that workers are available to work an average of 10 to 12 hours per day.<sup>81</sup> As eloquently stated:

The impact of their exclusion from basic labour standards is that agricultural workers work long hours in difficult conditions: 40% regularly work more than 50 hours per week. During harvest, it is not unusual for **migrant workers** to work up to 14-16 hours per day, six days per week plus a half-day on Sundays. Agricultural workers also receive low wages, suffer a high rate of work-related injuries and illnesses, and face racial discrimination.<sup>82</sup>

Additionally, the exclusion regarding Daily and Weekly/Bi-weekly Rest Periods, further perpetuates their status as a “reliable and convenient” workforce. In short, Mexican workers under the SAWP are excluded from the protections regarding hours or

---

<sup>78</sup> See O Reg 285/01, *supra* note 52, s 2(2).

<sup>79</sup> See generally “The Status of Migrant Farm Workers in Canada 2008-2009”, *supra* note 20. See also Veronica Islas, “Costly Commute: Foreign Migrant Workers Provide Long Hours of Cheap Labour on Canadian Farms”, online: The Dominion < <http://www.dominionpaper.ca/articles/2344>, dated 7 January 2009; Angela Brunschot, “Absence Grows our Vegetables”, online: Magazine < <http://www.seemagazine.com/article/news/news-main/migrants1120/>>, dated 20 November 2008.

<sup>80</sup> *Ibid.* See also Appendix II, Employment Agreement.

<sup>81</sup> Interview via telephone with the Mexican Consul in Leamington, Ontario, dated 12 July 2010.

<sup>82</sup> See Factum of the Appellants, *Michael J. Fraser, et al and Attorney General of Ontario*, Court File No.: C44886, Court of Appeal for Ontario, online: UFCW < <http://www.yorku.ca/ddoorey/lawblog/wp-content/files/ufcw-fraser-factum.pdf>>.

## Chapter 3- SAWP Workers in Ontario

work and overtime pay, but also they cannot seek any relief (rest periods) from the long and arduous work they execute for up to 14-16 hours per day, 6 and ½ days of the week.

It is also important to point out that the *Act* establishes non-retaliatory protections in the event that an employee attempts to exercise his/her rights under the *Act*. In other words, an employer cannot retaliate or “punish” his employee because he asks the employer to comply with the *Act*; makes inquiries about his rights; files a complaint with the Ministry; exercises his rights; provides information to an employment standards officer; or testifies in a proceeding under the *Act*. Furthermore, the burden of proof will be on the employer to show that he did not contravene the *Act*.<sup>83</sup> Finally, if an employment standards officer finds that a worker faced reprisals for attempting to exercise any of the rights under the *Act*, the officer may order that the employer reinstate the worker and/or pay the worker monetary damages.<sup>84</sup>

The very nature of the SAWP gives the employer ample room to circumvent the *Act*. For example, if a Mexican employee were to launch a complaint with the Ontario Ministry of Labour, it is very likely that he would not be able to do so for lack of time,

---

<sup>83</sup> ESA, *supra* note 68 at s 74(1) & (2).

<sup>84</sup> *Ibid* at s 104(1).

“If an employment standards officer finds a contravention of any of the following Parts with respect to an employee, the officer may order that the employee be compensated for any loss he or she incurred as a result of the contravention or that he or she be reinstated or that he or she be both compensated and reinstated:

1. Part XIV (Leaves of Absence).
2. Part XVI (Lie Detectors).
3. Part XVII (Retail Business Establishments).
4. Part XVIII (Reprisal)”.

### Chapter 3- SAWP Workers in Ontario

money and language skills in Canada's official languages. As well, he would fear being blacklisted from the Program. As mentioned in chapter 1, all employers are asked to write evaluations of their SAWP workers, and those receiving negative reviews will stand no chance of being selected again. The Mexican Ministry of Labour and Social Welfare uses those evaluations to assess whether the worker will be accepted for the next season. As well Mexican workers are in Canada temporarily with strict immigration restrictions, isolated, unable to speak English or French and with no financial capacity to seek legal representation on their own and in many instances, unaware of their rights or how to access them<sup>85</sup>. In fact, many of them would also be at risk of being blacklisted or suspended from the Program, as has happened with many that have attempted to assert their limited rights<sup>86</sup>. But most importantly for the SAWP workers, he cannot afford to be suspended from the Program and lose his only means of economic support for his dependant family. Thus, the non-retaliatory protections of the *Act* seem toothless in the SAWP context.

---

<sup>85</sup> See Interview, *supra* note 81. In fact the Mexican Consul in Leamington, Ontario pointed out that it is usually "ignorance" that creates a negative experience for the Mexican workers since they do not know their rights and obligations and do not take the initiative to learn English.

<sup>86</sup> See "The Status of Migrant Farm Workers in Canada 2008-2009", *supra* note 20. See also Veronica Islas, "Costly Commute: Foreign Migrant Workers Provide Long Hours of Cheap Labour on Canadian Farms", online: The Dominion <<http://www.dominionpaper.ca/articles/2344>>, dated 7 January 2009; "Illustrative Cases" online: Agriculture Workers Alliance <<http://awa-ata.ca/en/media/illustrative-cases/>>; Basok, *supra* note 63.

### **C. The Labour Relations Act<sup>87</sup> (LRA) and the Agricultural Employees Protection Act<sup>88</sup> (AEPA)**

Generally, the LRA defines how a union obtains bargaining rights. It also establishes the procedures by which unions and employers engage in collective bargaining. Its purposes are

1. to facilitate collective bargaining between employers and trade unions;
2. to recognize the importance of workplace parties adapting to change;
3. to promote flexibility, productivity and employee involvement in the workplace;
4. to encourage communication between employers and employees;
5. to recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions;
6. to encourage co-operative participation in resolving workplace issues; and
7. to promote the expeditious resolution of workplace disputes.<sup>89</sup>

Agricultural workers in Ontario have been excluded from the LRA for years; consequently, as will be explained later, they have been totally excluded from exercising an essential labour right, namely, collective bargaining. Currently, the *Act* describes such exclusion as:

3. This Act does not apply,  
**(b.1) to an employee within the meaning of the *Agricultural Employees Protection Act, 2002*;**  
**(c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture. . .**<sup>90</sup>

---

<sup>87</sup> *Labour Relations Act*, 1995, SO 1995, c 1, Sch A [LRA].

<sup>88</sup> *Agricultural Employees Protection Act*, 2002, SO 2002, c 16 [AEPA] Context for both the LRA and AEPA will be given later in the chapter.

<sup>89</sup> See LRA, *supra* note 87 at s 2.

<sup>90</sup> *Ibid* at s 3.

### Chapter 3- SAWP Workers in Ontario

After a long legal challenge brought by agricultural workers and UFCW-Canada, the Supreme Court of Canada granted its landmark decision in *Dunmore v. Ontario*<sup>91</sup>. As it will be analyzed later, the Court articulated that agricultural workers have the right to form “associations” under section 2(d) of the *Charter*. However, the Court failed to include the right to unionize and collectively bargain as being part of section 2(d). In light of the *Dunmore* decision, the government of Ontario crafted the *Agricultural Employees Protection Act* (AEPA) so that agricultural workers have:

- the right to form or join employees’ associations;
- the right to participate the lawful activities of said association;
- the right to assemble;
- the right to make representations to their employers, through said associations, in regards to the terms and conditions of their employment; and
- the right to protection against interference, coercion, and discrimination in the exercise of these rights<sup>92</sup>

In reality, these rights are obsolete for purposes of collective bargaining as they do not amount to the right to join a union and collectively bargain pursuant to the LRA. In fact, section 18 of the AEPA clearly stipulates that the LRA does not apply to the employees or employers in agriculture.<sup>93</sup> Furthermore, the limited right of “association” under the AEPA is irrelevant for the agricultural workers needs. For example the *Act* states:

---

<sup>91</sup> See *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].

<sup>92</sup> AEPA, *supra* note 88, s 1(2).

<sup>93</sup> *Ibid* at s 18.

### Chapter 3- SAWP Workers in Ontario

5. (1) The employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.
- (2) The employees' association may make the representations orally or in writing.
- (6) The employer shall listen to the representations if made orally, or read them if made in writing.
- (7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.<sup>94</sup>

As the *Act* above states, agricultural workers can take their demands to their employer, but the employer is not obliged to respond or to negotiate or to do anything beyond providing a written acknowledgement that he/she read the written representation. Consequently, agricultural workers, in general and Mexican workers under the SAWP, in particular, cannot extract tangible benefits from the AEPA or the *Dunmore* decision. This has been unfortunate, especially for Mexican workers as they do not need “associations” to talk about their problems. Rather, in many cases, they need representation, as defined by LRA, and the right to collectively bargain to have a meaningful chance in the decision-making processes affecting their employment conditions. As discussed in chapter 1, all employment terms and conditions stipulated in the Employment Agreement have been negotiated by Mexico and the Employers without any input from the actual workers. “Associations” as stipulated under the AEPA do not give them the capacity to be taken seriously and to be seen as an equal bargaining party. Most gravely, associations completely cripple these workers from having a say as to what their employment conditions should encompass.

On the other hand, Mexican workers under the SAWP are represented by the various Mexican consulates in Canada. In Ontario the main consulates dealing with

---

<sup>94</sup> *Ibid* at s 5(1)(2)(6)and(7).

### Chapter 3- SAWP Workers in Ontario

Mexican workers are located in Toronto and Leamington. In theory, the consulates oversee that employers and employees abide by the Employment Agreement and when deemed necessary, intervene in disputes between the employer and employee.

Furthermore, as consular officials, their main function is to assist and protect all Mexican nationals within their consular jurisdictions.<sup>95</sup> However, as outlined in chapter 1, the consulate functions as a “double agent” since it represents both the workers’ and employers’ interests. This “double agency” creates confusion and suspicion in the minds of many Mexican workers as to what exactly are the protections they should expect to receive from their consulate.

Furthermore, as explained by officials from the Mexican consulate in Leamington, whenever there is a dispute between the employer and employee, the consulate mainly looks at the Employment Agreement to assess the dispute and then determines how to proceed<sup>96</sup>. This approach is limiting, deficient and disingenuous. As chapter 1 explained, the Employment Agreement seems one-sided in favour of the employer since it is negotiated between Mexico and the employers only. The worker has absolutely no say in such negotiations and thus has no say as to their working conditions, rights and obligations. In fact, the Employment Agreement perpetuates the notion of working a substantial number of hours without overtime pay; also, it allows the employer to fire and consequently repatriate the worker if he/she refuses to work or for any other reason, which has not been clearly defined in the Agreement. In view of the dual role

---

<sup>95</sup> See *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261, Article 5. See also “*Protección a Mexicanos*”, online: Mexican Consulate in Toronto, Ontario <<http://www.consulmex.com/esp/proteccionmexicanos.asp>>. This information was also confirmed during an interview with Mr. Hernán de Jesús Ruiz Bravo, Counsel or Legal Affairs and Human Rights at the Mexican Embassy in Ottawa, dated 27 March 2008.

<sup>96</sup> Interview with Mexican Consulate officials from Leamington, *supra* note 81.

### Chapter 3- SAWP Workers in Ontario

played by the Mexican consulates and the limited framework they use to address labour disputes between employer and employee (i.e. Employment Agreement), it would be more beneficial for Mexican workers to be represented by a union or an agent that would only represent their interests based on the various provincial, federal and international protections applicable to foreign workers in Canada, not just the Employment Agreement.

In fact, since 2005, the Mexican consulate has delegated to a private entity its function to assist Mexican SAWP workers in filling out their income tax forms. The Mexican consul in Leamington informed the author that lack of “infrastructure” was the main justification for transferring that task<sup>97</sup>, which was performed free of charge to the workers, to a private tax preparation provider (Babkirk E Tax Preparation), which charges a “nominal fee” for tax preparation.<sup>98</sup> The arrangement between the Mexican consulate and Babkirk E Tax Preparation confers said tax preparation provider with the receipt of most of the SAWP workers’ T4 forms. Usually, Canada Revenue Agency (CRA) sends the T4s to the Mexican consulate in Toronto and then the consulate sends

---

<sup>97</sup> *Ibid.* By lack of infrastructure, Mexican officials stated that they did not have the necessary personnel and knowledge of Canadian tax law and procedures to undertake the task to fill out Canadian income tax forms for more than 1000 workers each year.

<sup>98</sup> See “T4’s and Filing Tax Returns”, online: FARMS <<http://www.farmsontario.ca/countries.php?divname=Mexico>>. During a telephone interview with the Mexican consul from Leamington, Ontario, dated 12 July 2010, he revealed that Babkirk E Tax Preparation charged \$40.00 for tax preparation from February to April and \$60.00 if the tax preparation was done after April. However, this information could not be confirmed by Babkirk Tax Preparation. In fact, in a telephone conversation with its representative, Ms. Jessie Brouwer, the author attempted to confirm the information provided by the Mexican consul regarding the “nominal fee”. However, Ms. Brouwer did not want to provide any information regarding Babkirk E Tax Preparation’s rates. Rather, Ms. Brouwer’s answer was “that is my business. . . I do not give that information. . . I do not want to get in trouble with the growers and employers”. This telephone conversation took place on 31 October 2011.

### Chapter 3- SAWP Workers in Ontario

them to said tax preparation provider<sup>99</sup>. As well, in the event that a Mexican worker opts for another tax preparation provider, he must request his T4 from Babkirk E Tax Preparation and pay \$25.00 to get said document.<sup>100</sup> In light of this delegation of duties from the Mexican consulate to a private party, one can deduce that the Mexican consulate is not in a position to be an effective and efficacious representative for the SAWP workers. As previously stated, it would be more beneficial for the workers to have their own union or agent representing only their interests. If that were the case, the Mexican consulate would send the T4s to said agent and the agent would hand out the T4s, free of charge, to all the workers and either help with the filling out of the income tax forms, free of charge, or give each worker his T4 so that he finds the most suitable tax preparation provider. Finally, as previously stated, various authors have found that whenever there is a dispute between Mexican workers and their employers, the consulate seems to almost always side with the employers.<sup>101</sup>

---

<sup>99</sup> However, some workers are able to get their T4 forms directly from their employer, but they have to request them. This information was gathered during an interview with Rene and Mary Vidal, *supra* note 55. Again, the author could not confirm this with Babkirk E Tax Preparation. See previous footnote.

<sup>100</sup> *Ibid.* See also interview with Rene and Mary Vidal, *supra* note 55.

<sup>101</sup> This has been echoed by other authors. See Basok, *supra* note 63; and Verma, *supra* note 16.

## II. Charter Challenge of Ontario Legislation

### A. Background

For a short period, agricultural workers in Ontario were granted rights in line with agricultural workers in other provinces. In 1994, the Ontario government enacted the *Agriculture Labour Relations Act*<sup>102</sup> (ALRA). The *Act* extended trade union and collective bargaining rights to agricultural workers.<sup>103</sup> Although SAWP workers were not covered because of their seasonal status, the *Act* provided an avenue for seasonal workers to be included. It stated that “[n]o trade union shall be certified as the bargaining agent for a bargaining unit that contains employees employed on a seasonal basis unless, a regulation had been made allowing for trade unions and the bargaining unit only contain seasonal employees.”<sup>104</sup>

The ALRA incorporated substantial elements of the LRA, including:

- democratic representation,
- protection from unfair labour practices,
- the duty to bargain in good faith, and
- the right to grievance arbitration.

---

<sup>102</sup> See *Agricultural Labour Relations Act*, 1994, SO 1994, c 6. This *Act* was repealed on November 10, 1995 with the *Labour Relations and Employment Statute Law Amendment Act*, 1995, SO 1995, c 1.

<sup>103</sup> See *Agricultural Labour Relations Act*, 1994, *ibid*, PREAMBLE. The statute was administered and enforced by the Ontario Labour Relations Board.

<sup>104</sup> *Ibid* at ss 4 and 24.

## Chapter 3- SAWP Workers in Ontario

It also included special provisions to address the situation of family members working on farms.<sup>105</sup> Instead of strikes and lockouts, the ALRA substituted “final offer selection” to resolve bargain disputes.<sup>106</sup>

The ALRA was the product of a comprehensive two-year consultation conducted by the Task Force on Agricultural Labour Relations. The Task Force included employer, government and labour representatives. Its work led to a consensus that unionization and collective bargaining could work in the agricultural sector.<sup>107</sup> The Task Force recommended the following:

1. the creation of a separate statute for the agricultural sector, the *Agricultural Labour Relations Act*;
2. the extension of the right to organize and bargain collectively to persons employed in agriculture and horticulture;
3. the prohibition of the right to strike or lock-out and substitution of a dispute resolution process that;
  - emphasizes the preference for negotiated settlements between the parties,

---

<sup>105</sup> *Ibid* at s 8.

<sup>106</sup> *Ibid* at s 15. “Final Offer Selection requires that the parties each put before a selector a single final position. The power of the selector is limited to choosing between the positions in light of his/her understanding of the situation; the selector is not free to deviate the positions presented, although he/she may be empowered to send the parties back to reconsider their positions should both be unrealistic.” See Task Force Report, *infra* note 107, at 12.

<sup>107</sup> See “Task Force on Agricultural Labour Relations: Report to the Minister of Labour”(June 1992) and (November 1992). This Report can be requested by writing to the Ontario Workplace Tribunal Library, 7<sup>th</sup> Floor, 505 University Avenue, Toronto, Ontario, M5G 2P2 . For additional information visit <http://owtlibrary.on.ca/> . (Task Force Report)

### Chapter 3- SAWP Workers in Ontario

- provides a conciliation and mediation service to assist the parties in reaching a negotiated settlement,
  - provides an arbitration process for the final and binding resolution of all outstanding matters between the parties following exhaustion of the negotiation process,
4. the creation of conciliation, mediation and adjudicative services, with expertise, for the purpose of administering the *Agricultural Labour Relations Act* and assisting the parties in matters relating to labour relations;
  5. the establishment of educational programs, through existing agricultural organizations, to ensure that participants become and remain informed in matters of labour relations;
  6. the continuation of a Task Force with a mandate to advise on the design of an agricultural labour relations statute and accompanying administrative structure as well as supportive educational programs for participants to the process by September 30, 1992. If there are matters that have not been resolved, discussion on the outstanding issues can continue provided that there is unanimous consensus of the Task Force members and the approval of the Government.<sup>108</sup>

The Task Force Report was greatly incorporated into the ALRA. That legislation was in effect from June 1994 to November 1995. It granted full collective bargaining rights including:

- certification without vote;

---

<sup>108</sup> *Ibid* at I.

### Chapter 3- SAWP Workers in Ontario

- automatic dues check-off;
- requirement to bargain;
- mandatory arbitration if no negotiated agreement;
- no strike or lock-out;
- arbitration of workplace disputes; and
- an avenue to include seasonal workers in collective bargaining

However, in 1995, the new provincial government led by the Conservatives, following an election promise, enacted a new *Labour Relations Act, 1995*<sup>109</sup>. It expressly repealed the ALRA<sup>110</sup> and denied agricultural workers the right to unionize and bargain collectively. Repealing the *ALRA* was not based on any previous consultation or studies regarding its operation<sup>111</sup>. Rather it was based on a policy designed to protect the “family-farm” in Ontario. As the Honourable Elizabeth Witmer then Minister of Labour for Ontario, eloquently said: “. . . unionization of the family farm has no place in Ontario’s key agricultural sector”.<sup>112</sup> This notion was also echoed by then Ontario Minister of Agriculture, Food and Rural Affairs; he stated “[o]ur farmers, who are on the agrifood industry’s front lines, are looking to us to help them maintain their competitive edge in the new global marketplace. . . [T]he Agricultural Labour Relations Act is aimed directly at unionizing the family farm. We do not believe in the unionization of the family farm”.<sup>113</sup> Critics of the new *Labour Relations Act, 1995* argued that the government had not conducted

---

<sup>109</sup> See *Labour Relations Act, 1995*, SO 1995, c 1, Sch A.

<sup>110</sup> *Labour Relations and Employment Statute Law Amendment Act, 1995*, SO 1995, c. 1 (LRESLAA) The *Labour Relations Act, 1995* was Schedule A of the LRESLAA.

<sup>111</sup> See Factum of the Appellants, *supra* note 82 at para 39.

<sup>112</sup> Statement by the Honourable Elizabeth Witmer, Minister of Labour for Ontario, Re: Introduction of Bill 7 (*An Act to Restore Balance and Stability to Labour Relations and to Promote Economic Prosperity*), Queen’s Park, online: Hansard Transcripts (L006-Wed 4 Oct 1995/Mer 4 Oct 1995) < [http://www.ontla.on.ca/house-proceedings/transcripts/files\\_html/1995-10-04\\_L006.htm#P8\\_123](http://www.ontla.on.ca/house-proceedings/transcripts/files_html/1995-10-04_L006.htm#P8_123) >.

<sup>113</sup> *Ibid* at Hansard Trascripts. Statement by the Honourable Noble Villeneuve.

consultations with the people of Ontario to make such repeal and were disingenuously saying that the *ALRA*'s aim was to unionize the family farm. As Mr. Howard

Hampton (Rain River) stated:

I'd like to respond to the announcement by the Minister of Agriculture, first of all to say to him that he will try to create the impression that the Agricultural Labour Relations Act was aimed, somehow, at the unionization of the family farm. He knows that is not true. He knows that the Ontario Federation of Agriculture participated in the drafting of that bill and saw clearly that it was aimed at dealing with that variety of agricultural processing plants that are much like steel plants, auto plants and paper mills in that they employ several hundred people and do processing work. It is impossible to segregate and somehow move them away from other types of manufacturing in the province. You may try all the fancy words in the world; you will not take away those workers' charter rights.<sup>114</sup>

The enactment of the new *Labour Relations Act, 1995* prompted agricultural workers and the United Food and Commercial Workers Union-Canada (UFCWU-Canada) to challenge the legislation all the way to the Supreme Court of Canada in *Dunmore v. Ontario (Attorney General)*<sup>115</sup>.

### **B. *Dunmore***<sup>116</sup>

The *ALRA* was in effect from June 23, 1994 to November 10, 1995. During this short period, UFCW-Canada became certified as the bargaining agent for approximately 200 workers at a mushroom factory in Leamington, Ontario. It also filed two certification applications for workers at the Kingsville Mushroom Farm Inc. and at Fleming Chicks. However, these certifications ended with the passage of the *Labour*

---

<sup>114</sup> *Ibid.* Statements by Mr. Howard Hampton.

<sup>115</sup> *Dunmore*, *supra* note 91.

<sup>116</sup> *Ibid.*

*Relations and Employment Statute Law Amendment Act ( LRESLAA)*<sup>117</sup>. The *Labour Relations Act, 1995* was Schedule A of the LRESLAA.<sup>118</sup>

Accordingly, a *Charter* challenge was brought by individual farm workers and the UFCW-Canada. They challenged the exclusion of farm workers in the *Labour Relations Act, 1995*.<sup>119</sup> They argued that s. 80 of LRESLAA combined with s. 3(b) of the *Labour Relations Act*, 1995 prevented agricultural workers from establishing, joining and participating in the lawful activities of a trade union and therefore violated their *Charter* protected freedom of association (s. 2(d) )<sup>120</sup> and equality rights (s. 15)<sup>121</sup>. The relevant sections of the LRESLAA state:

Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1

**1.**(1) The Labour Relations Act, 1995, as set out in Schedule A, is hereby enacted.

**80.**(1) The Agricultural Labour Relations Act, 1994 is repealed.

(2) On the day on which this section comes into force, a collective agreement ceases to apply to a person to whom that Act applied.

(3) On the day on which this section comes into force, a trade union certified under that Act or voluntarily recognized as the bargaining agent for employees to whom that Act applies ceases to be their bargaining agent.

(4) On the day on which this section comes into force, any proceeding commenced under that Act is terminated.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

3. This Act does not apply,

... (b) to a person employed in agriculture, hunting or trapping...

---

<sup>117</sup> *LRESLAA*, *supra* note 110.

<sup>118</sup> See *Labour Relations Act, 1995*, *supra* note 109.

<sup>119</sup> See *Dunmore supra* note 91 at par. 3.

<sup>120</sup> *Charter of Rights and Freedoms*, s 2(d) “Everyone has the following fundamental freedoms. . . freedom of association.”

<sup>121</sup> *Ibid* at s 15(1).

## 1. Judicial History

The Ontario Court (General Division) found no violation of the *Charter* because it protects the right of workers to form a trade union, but not the right to collective bargaining. Consequently, the Court held that the purpose of the impugned legislation was to deny agricultural workers the right to collective bargain, not to form associations. Any deprivation of the right to form trade unions was due to the private actions of the employers rather than the legislative regime itself. Based on this rationale, the Court held that these actions were not subject to the *Charter*, which only applies to government actions.<sup>122</sup> Regarding the claim based on s. 15(1) Sharp J. held that:

“[N]o hesitation in finding on the evidence that agricultural workers are a disadvantaged group. They are poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility”.<sup>123</sup>

However, he also refused to recognize agricultural workers as an analogous group for purposes of establishing discrimination under s. 15(1). In Mr. Justice’s Sharp’s view, analogous grounds require identification of a “personal trait or characteristic” on which differential treatment was based. An “occupational status”, as in the case of agricultural workers, did not amount to a personal trait or characteristic.<sup>124</sup>

Notwithstanding the Court’s rejection to accepting “occupational status” as analogous grounds for establishing discrimination under s. 15(1), Mr. Justice Sharp J. referred to migrant workers under the SAWP:

---

<sup>122</sup> See generally *Dunmore v. Ontario (Attorney General)* (1997) 155 DLR (4<sup>th</sup>) 193, [1997] O J No 4947 at paras 22-31 (Ont Gen Div) (Lexis). For instance, employers may refuse union organizers access to private property to meet with workers or inflict economic reprisals.

<sup>123</sup> *Ibid* at para 45.

<sup>124</sup> *Ibid* at paras 50-52.

### Chapter 3- SAWP Workers in Ontario

While a sub-category of temporary seasonal workers brought to Ontario pursuant to a highly structured federal program may be identifiable by race and the status of non-citizen, I fail to see how their situation advances the applicants' case. These seasonal foreign workers were not covered by the *ALRA*, they are not subject to *LRA*, and they would not gain the right to be members of a union or enjoy the right to engage in collective bargaining if this application were successful.<sup>125</sup>

The Court accurately found that SAWP works were not covered by the *ALRA* because of their seasonal status. Nevertheless, the Court did not provide reasons for concluding that migrant agricultural workers would not be covered by the *LRA* if agricultural workers in general were included.<sup>126</sup> The Court also failed to elaborate as to why they would not enjoy the right to join a union or engage in collective bargaining if the *UFCW-Canada's* challenge were successful. In fact, the Court neglected to identify the context under which workers under the SAWP are recruited. In particular, it did not take into consideration that Canada and Mexico have agreed that these workers are to be treated the same as their Canadian counterparts in performing the same work. Thus, if Canadian agricultural workers were to benefit from a *Charter* protection to join and form a union and collective bargaining, it would be expected, using Canada's and Mexico's reassurances of equality<sup>127</sup>, that Mexican workers under the SAWP would also be protected.

---

<sup>125</sup> *Ibid* at para 46.

<sup>126</sup> *Ibid*.

<sup>127</sup> See Appendix I, MOU, Clause 1(b).

The decision of the Court of Ontario General Division was then appealed. But, the Ontario Court of Appeal upheld the decision from the lower court without further elaboration.<sup>128</sup> This resulted in an appeal to the Supreme Court of Canada.

## 2. The issues before the Supreme Court of Canada

The majority of the Court concluded that the claim was established under s. 2(d) of the *Charter* (freedom of association) and therefore, declined to deal with the equality analysis of s. 15.<sup>129</sup> However, Justice L'Heureux-Dubé, in her concurring opinion, provided a s. 15 analysis holding that agricultural workers were an analogous group requiring protection of the *Charter*'s equality provision. The Court distinguished this case as one that presented a first opportunity to review the total exclusion of an occupational group from a statutory labour relations regime, where "the group is not employed by the government and has demonstrated no independent ability to organize".<sup>130</sup> Therefore the attack was not on legislation restricting collective bargaining *per se*, but on legislation restricting the "wider ambit of union purposes and activities."<sup>131</sup> The Court concluded that the total exclusion of agricultural workers from the LRA violated s. 2(d) of the *Charter* and could not be justified under s. 1. Therefore, the Court concluded that "at a minimum, whatever protections are necessary to establish and

---

<sup>128</sup> See generally *Dunmore v. Ontario (Attorney General)* (1999) 182 DLR (4<sup>th</sup>) 471, [1999] OJ No 1104 (Ont CA) (Lexis).

<sup>129</sup> The majority decision was delivered by McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.: concurring by L'Heureux-Dubé J and one dissent by Major J.

<sup>130</sup> *Dunmore*, *supra* note 91 at para 2.

<sup>131</sup> See Verma, *supra* note 16 at p 113.

maintain employee associations should be extended to [agricultural workers] in Ontario.”<sup>132</sup>

Since the Court did not address the claim based on s. 15(1), the question of whether “occupational status” was an analogous ground was left unresolved. However, in her concurring opinion, justice L’Heureux-Dubé explored and discussed the issue of equality. She concluded that the “occupational status of agricultural workers constitutes an analogous ground” but made no findings about “occupational grounds” generally.<sup>133</sup>

### 3. Section 2(d) Freedom of Association Analysis

The Court’s majority began its analysis by reviewing its “labour trilogy” cases, which dealt with the right to strike and collectively bargain.<sup>134</sup> The “labour trilogy” held that ‘while [freedom of association] advances many group interests and, of course, cannot be exercise alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise’.<sup>135</sup> The Court articulated in the “trilogy cases” that governments are entitled to grant or withhold such rights unobstructed by *Charter* review.<sup>136</sup> However, in *Dunmore*, the Court seems to move away from the trilogy cases since, for the first time, a strong majority of the Court held that s. 2(d) has a collective aspect.

---

<sup>132</sup> *Dunmore*, *supra* note 91 at para 2.

<sup>133</sup> *Ibid* at paras 168-170.

<sup>134</sup> See *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 31; *P.S.A.C. v. Canada*, [1987] 1 SCR 424; and *R.W.D.S.U. v. Saskatchewan* [1987] 1 SCR 460, (Trilogy Cases). See also *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367 at 401-2.

<sup>135</sup> *Dunmore*, *supra* note 91 at para 14.

<sup>136</sup> See Generally “*Trilogy Cases*”, *supra* note 134.

### Chapter 3- SAWP Workers in Ontario

The Court defined the overall purpose of s. 2(d) as advancing the collective action of individuals in pursuit of their common goals. It stated:

This conception of freedom of association, which was supported by Dickson C.J. in his dissenting judgment. . . , has been repeatedly endorsed by this Court since the *Alberta Reference*. . . . In *Lavigne*, Wilson J. (writing for three of seven judges on this point) conducted an extensive review of this Court's s. 2(d) jurisprudence, concluding that 'this Court has been unanimous in finding on more than one occasion and in a variety of contexts that the purpose which s. 2(d) is meant to advance is the collective action of individuals in pursuit of their common goals'. . . . Wilson J. added that the Court has remained steadfast in this position despite numerous disagreements about the application of s. 2(d) to particular practices.<sup>137</sup>

Accordingly, the Court's inquiry narrowed its quest to the following question: has the State precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?<sup>138</sup> Furthermore, the Court broadened the scope of freedom of association to include not only the protection of the exercise of individual activity through collective action, but also activities which are inherently collective and could not otherwise be exercised by an individual. The very notion of "association" recognizes differences between individuals and collectives. "[T]he community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak. . . ."<sup>139</sup> In the case of trade unions, they develop needs and priorities that are distinct from those of their members individually. These needs cannot be recognized if s. 2(d) is limited to protecting only the lawful activities of individuals. As such, the law must recognize that some union activities may

---

<sup>137</sup> *Dunmore*, *supra* note 91 at para 15.

<sup>138</sup> *Ibid* at para 18.

<sup>139</sup> *Ibid* at para.17.

be central to freedom of association even though they are not at the individual level. Such protected union activities, as cited by the Court, include making collective representations to an employer, adopting a majority political platform and merging with other unions. However, they DO NOT include collective bargaining or the right to strike.<sup>140</sup>

#### **4. Underinclusive Government Action/ Positive Government Obligation**

The Court held that government restraint in the area of labour relations can expose workers to a range of unfair labour practices and bar the effective exercise of the freedom to organize. The Court further held that while there is no constitutional right to protective legislation *per se*, the distinction between positive and negative state obligation ought to be nuanced in the context of labour relations.<sup>141</sup>

The *Dunmore* opinion illustrates how the Supreme Court applied the concept of impermissible under-inclusive state action to invalidate legislation under s. 2 of the *Charter*. The Court indicated that successful claims to unconstitutional underinclusiveness under s. 2 of the *Charter* will likely not be common. However, the Court established three considerations governing such claims:

- (1) The claim must be based in one of the fundamental *Charter* freedoms rather than in access to a particular statutory regime;

---

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid* at para 28.

- (2) Claimants will have to prove, on a proper evidentiary foundation, that “exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity”;
- (3) There must be a minimum of State action before the *Charter* may be invoked.<sup>142</sup>

The court distinguished minimum State action in instances where the underinclusiveness not only discriminates an unprotected class, but it also substantially orchestrates, encourages or sustains the violation of fundamental freedoms.<sup>143</sup> The government’s exclusion of agricultural workers from legislative protection reinforced the disadvantages faced by members of the excluded group in attempting to form employee associations.

### **5. Section 1 Analysis**

The Court began its analysis by stating that “political complexity is not the deciding factor in establishing a margin of deference under s. 1”<sup>144</sup> This was in response to Ontario’s argument that the exclusion of agricultural workers involved “the weighing particular perspectives, priorities, views and assumptions of the policy makers, as well as the political and economic theory to which they subscribe”.<sup>145</sup> Furthermore, Ontario’s defence essentially failed at the minimal impairment stage. The Court explained that in the absence of evidence of any satisfactory effort on the part of the government to protect

---

<sup>142</sup> *Ibid* at paras 24-26.

<sup>143</sup> *Ibid* at para 26.

<sup>144</sup> *Ibid* at para 57.

<sup>145</sup> *Ibid*.

the right to organize, the “categorical exclusion” of agricultural workers could not be justified.<sup>146</sup> The Court found that government effort does not need to satisfy the Court’s idea of what would be most desirable but rather “the legislation must ‘attempt very seriously to alleviate the effects’ of its laws on those whose fundamental freedoms are infringed”.<sup>147</sup> The legislation at issue could not be justified because it mandated a total exclusion. In other words, it excluded all agricultural workers from all aspects of the labour relations regime.

## 6. Remedies

Since it was concluded the legislation was unconstitutionally underinclusive, the Court struck out those aspects of the legislation that excluded agricultural workers. However, it was recognized that this remedy would have the effect of providing the “full panoply of collective bargaining rights” to these workers. This result was not constitutionally mandated. As such the declaration of invalidity was suspended for 18 months.<sup>148</sup> The Court further outlined a precise description of Ontario’s *Charter* obligations:

At a minimum the statutory freedom to organize in s. 5 of the LRA ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right be free from interference, coercion and discrimination in the exercise of these freedoms.<sup>149</sup>

---

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid* at para 60.

<sup>148</sup> *Ibid* at para 66.

<sup>149</sup> *Ibid* at para 67.

Essentially, this description became part of the current *Agricultural Employees Protection Act*.<sup>150</sup> Finally, the Court did not “require nor forbid the inclusion of agricultural workers in a full collective bargaining regime”. Furthermore, the Court placed substantial deference on the legislature regarding the question of whether agricultural workers have the right to strike.<sup>151</sup>

## 7. Dissent

Mr. Major J. dissented from the majority’s opinion. He concluded that the appellants failed to demonstrate that the impugned legislation had, either in purpose or effect, infringed activities protected by s. 2(d) of the *Charter*. Particularly, he explained that in this case s. 2(d) did not impose a positive obligation of protection or inclusion on the state. He further concluded that prior to the enactment of the *Labour Relations Act, 1995, (LRA)* agricultural workers historically faced difficulties organizing and the appellants did not establish that the state is causally responsible for the inability of agricultural workers to exercise a fundamental freedom. Finally, he articulated that agricultural workers were not an analogous group for purposes of s. 15(1) of the *Charter* and consequently, the exclusion of agricultural workers from the *LRA* did not violate their equality rights.<sup>152</sup>

---

<sup>150</sup> See *AEPA*, *supra* note 88 at s 1(2).

<sup>151</sup> *Dunmore*, *supra* note 91 at para 68.

<sup>152</sup> *Ibid* at paras.208-216.

***C. Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*<sup>153</sup> (*BC Health Services*)**

The *Dunmore* decision articulated that the right to freedom of association includes a right to organize into labour associations. It also held that the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by s. 2(d) of the *Charter*. Said right extends to realization of collective, as distinct from individual goals. The *Dunmore* decision also established that legislation or the absence of a legislative framework, which makes the realization of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association. Finally, the guarantee must be interpreted generously and purposively. Accordingly, in some cases, s. 2(d) places a positive obligation on governments to protect that right by enacting appropriate legislative safeguards to allow a process where there is a meaningful pursuit of desired collective goals.

However, *Dunmore* did not go as far as to find that the freedom of association includes the right to collectively bargain; rather, it acknowledged a longstanding trilogy of cases that held that it did not. That holding changed in the 2007 *BC Health Services* decision where the Supreme Court overturned the trilogy and found that the freedom of association does indeed include a right to collectively bargain. The decision also placed an obligation on governments to negotiate in good faith with their public sector workers. *BC Health Services* left a number of questions unanswered:

- Whether private-sector workers might be entitled to state-protected rights to bargaining under the *Charter*; and

---

<sup>153</sup> 2007 SCC 27, [2007] 2 SCR 391.

- Whether s. 2(d) would protect the right to strike.

## 1. Background

The goal of the British Columbia *Health and Social Services Delivery Improvement Act*<sup>154</sup> was to reduce costs and to facilitate the efficient management of the workforce in the health care sector.<sup>155</sup> It became law three days after it was introduced in the legislature.<sup>156</sup> As it turned very significant for the ruling, there were no consultations or negotiation with the unions involved regarding the proposed legislation's impact or ramifications for employees<sup>157</sup>. Essentially, the *Act* granted health care employers greater flexibility to organize their relationships with their employees as they thought appropriate, and in some cases, to do so in a manner that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice. The statute also invalidated key collective agreements provisions and precluded meaningful collective bargaining on specific issues.<sup>158</sup>

## 2. Judicial History

Neither the trial court nor the British Columbia Court of Appeal recognized a right to collective bargaining under s 2(d) of the *Charter*. However, the Court of Appeal acknowledged that the Supreme Court of Canada had opened the door to recognize such right.

---

<sup>154</sup> SBC 2002, c 2.

<sup>155</sup> *BC Health Services*, *supra* note 153 at para 5.

<sup>156</sup> *Ibid.* at para. 6.

<sup>157</sup> *Ibid* at para 7.

<sup>158</sup> *Ibid* at para 11.

**a. British Columbia Supreme Court**<sup>159</sup>

Garson J., dismissed the freedom of association claim on the ground that collective bargaining was not an activity recognized as falling within the scope of s. 2(d). The Court noted, in particular, that Supreme Court of Canada's jurisprudence had held that collective bargaining was not a *Charter* protected activity. The trial court also dismissed the equality claim based on s. 15 of the *Charter* for three reasons:

- The *Act* did not differentiate between the plaintiffs (the affected group) and others in appropriate comparator groups on the basis of personal characteristics. In other words, the statute distinguished on the grounds of “sector of employment” not “personal characteristics.
- “The fact that the group was predominantly female did not shield it from governmental action that could adversely affect them without evidence of being treated differently on the basis of s. 15 characteristics.”<sup>160</sup>
- The *Act* did not discriminate on the basis of an enumerated or analogous ground. The Court characterized the ground of discrimination in terms of occupational status as health workers. The Court also held that the *Act* did not affect the dignity of the claimants.<sup>161</sup>

---

<sup>159</sup> 2003 BCSC 1379, 19 BCLR (4<sup>th</sup>) 37.

<sup>160</sup> *Ibid* at para 174.

<sup>161</sup> *Ibid* at para 189.

**b. British Columbia Court of Appeal<sup>162</sup>**

The Court of Appeal concluded that there was no violation of s. 2(d) or s. 15. Accordingly, it dismissed the appeal. The Court concluded that there was insufficient precedent to conclude that a right of collective bargaining was protected under s. 2(d). The Court also acknowledged that the Supreme Court in *Dunmore* had left room to recognize a right to collective bargaining in future cases. However, the Court of Appeal felt that it was best left to the Supreme Court of Canada to decide whether there is a right of collective bargaining under s., 2(d) of the Charter.<sup>163</sup>

Just as in the lower court, the BC Court of Appeal found that any disadvantage imposed on health care workers under the Act did not involve their personal characteristic, the enumerated or analogous grounds, or their dignity. Rather, it involved their role as health care under a particular labour relations scheme.<sup>164</sup>

**3. Issue before the Supreme Court of Canada**

*BC Health Services* addressed whether a British Columbia statute that nullified a number of existing collective agreement provisions and prohibited collective bargaining on particular matters violated freedom of association and the right to equality under ss 2(d) and 15 of the *Charter*. As well, the Court addressed whether any violation was justified under section 1.<sup>165</sup>

---

<sup>162</sup> 2004 BCCA 377, 30 BCLR (4<sup>th</sup>) 219.

<sup>163</sup> *Ibid* at para 106.

<sup>164</sup> *Ibid* at paras 122, 131, 132, 133 & 139.

<sup>165</sup> See *BC Health Services*, *supra* note 153 at para 1.

For the first time, the Supreme Court of Canada held that the scope of freedom of association includes a degree of protection for collective bargaining. Also, the Court concluded that the impugned legislation could not be justified by s. 1. Finally, the majority held that there was no violation of s. 15. While the partial dissent agreed that freedom of association encompassed a degree of protection for collective bargaining, she, however, disagreed with the test elaborated by the majority, which determined whether a s. 2(d) violation has been made. Although the dissent found a violation of s. 2(d), she would have upheld all provisions of the legislation under s. 1, with the exception of one however. As well, the dissent agreed with the majority that section 15 had not been violated.

#### **4. The Overturn of the “labour trilogy”**

In rendering its decision, the Supreme Court overturned the main pillar of the “labour trilogy”, namely that s. 2(d) did not protect collective bargaining. The majority rejected the trilogy’s portrayal of the right to collectively bargain and to strike as “modern rights”; furthermore, the Court questioned the trilogy’s excessively broad approach to judicial deference in labour relations issues. The Court also questioned the narrowly focused approach on individual activities.<sup>166</sup> As well, instead of viewing it as an inconsistency, the majority viewed *Dunmore* as the starting point for s. 2(d).<sup>167</sup>

Furthermore, in holding that s. 2(d) includes a degree of protection for collective bargaining, the Court established for the first time that the *Charter* protects an individual right to form and join associations with other individuals and a collective right to put

---

<sup>166</sup> *Ibid* at paras 25-29.

<sup>167</sup> *Ibid* at para 33.

forward majority representations to an employer. And for the first time, the Court also recognized the right to engage in collective negotiations with the aim to conclude a collective agreement (economic right).

### **5. Scope of freedom of association**

The Court held that freedom of association protects the right of employees to associate in order to achieve workplace goals through a process of collective bargaining.<sup>168</sup> The right to a process of collective bargaining includes the ability of the employees to unite, to submit demands to the employer collectively and to engage in discussions in order to achieve goals that are workplace-related.

The Court also articulated that such right to a process of collective bargaining equally applies to governments when they act as legislators and employers. Thus, it requires government employers to agree to meet and discuss with employees who collectively put forward demands to the employer. It also restrains the exercise of legislative powers with regards to the right to collective bargaining.<sup>169</sup> However the Court acknowledged that s. 2(d) right to collective bargaining is a limited right. For example, it does not:

- encompass all aspects of collective bargaining;
- ensure a particular outcome in a labour dispute;
- guarantee access to any particular statutory regime;
- include a particular model of labour relations; or

---

<sup>168</sup> *Ibid* at paras 19, 88.

<sup>169</sup> *Ibid* at para 89.

- include a specific bargaining method.<sup>170</sup>

## 6. “Substantial interference”

The Court held that a violation of freedom of association is established when the intent or effect of the law or state action “substantially interferes” with the activity of collective bargaining, and thus discourages the collective pursuit of common goals. “Substantial interference” is found when the intent or effect seriously undercuts or undermines the workers’ ability to come together to pursue the common goals of negotiating terms and conditions of employment. “The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.”<sup>171</sup>

Determining whether there is “substantial interference” requires an initial inquiry to assess whether the impugned legislation interferes with collective bargaining, in purpose or effect. If there is interference, then the assessment shifts to whether the impact is significant enough to substantially interfere with the associational right of collective bargaining to the point where that right has been breached.<sup>172</sup> The Court articulated the following inquiries in order to ascertain if there is such a substantial interference:

---

<sup>170</sup> *Ibid* at paras 19, 91.

<sup>171</sup> *Ibid* at paras 90, 92.

<sup>172</sup> *Ibid* at para 112.

The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.<sup>173</sup>

The Court also explained that the duty to bargain in good faith encompasses the following:

- the duty is essentially procedural and does not impose the content of any particular agreement;
- there is an obligation to meet and commit time to the process;
- there is a duty to engage in meaningful dialogue, to be willing to exchange and explain positions and to make a reasonable effort to arrive at an acceptable contract;
- the parties are not to pretend to want to reach an agreement but in reality they do not have the intention to do so; and
- failure to comply with the duty should be clearly evidenced on the record.<sup>174</sup>

## **7. Underinclusion**

The majority referenced Dunmore's holding with approval; namely, that governments, in extraordinary circumstances, may be required to draft underinclusive legislation affecting particular groups. Such are the following circumstances:

---

<sup>173</sup> *Ibid* at paras 93.

<sup>174</sup> *Ibid* at paras 98-107.

‘in unique contexts, substantially impact the exercise of a constitutional freedom’ (para. 22). This will occur where the claim of underinclusion is grounded in the fundamental *Charter* freedom and not merely in access to a statutory regime (para. 24); where a proper evidentiary foundation is provided to create a positive obligation under the *Charter* (para. 25); and where the state can truly be held accountable for any inability to exercise a fundamental freedom (para. 26). There must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime.<sup>175</sup>

## 8. Applicability outside the collective bargaining context

*BC Health Services* may have limited applicability outside the collective bargaining context since a “contextual approach” to define the scope of s. 2(d) may distinguish freedom of association in the collective bargaining context from other types of associations; particularly because there has been placed much importance to collective bargaining as a process to exercise freedom of association in labour relations. The Court examined the long history of collective bargaining in Canada, reviewed the protection of collective bargaining as an aspect of freedom of association at international law and noted that protection of collective bargaining is consistent with values under the *Charter*.<sup>176</sup>

The majority also recognized the concern that the *Charter* should not be used to protect the substantive outcomes of any and all association; however, it underscored that in the context of collective bargaining, procedure has always been distinguished from final outcomes.<sup>177</sup> Finally, although the majority affirmed the *Dunmore* conclusion that s. 2(d) only protects the “associational aspect” of an activity rather than the activity itself,

---

<sup>175</sup> *Ibid* at paras 34.

<sup>176</sup> Chapter 5 will discuss the international law analysis made by the Supreme Court in this case.

<sup>177</sup> *BC Health Services*, *supra* note 153 at paras 29-30).

it did not clarify how this distinction should be drawn in future cases.<sup>178</sup> The Court also articulated that s. 2(d) may protect “activities” of an association where they are “worthy of constitutional protection”.<sup>179</sup>

The decision left open the question of whether freedom of association protects the right to strike. The majority highlighted that “the present case [did] not concern” the right to strike and that said right was considered in previous s. 2(d) litigation.<sup>180</sup> It is unclear if this was an endorsement of the previous case law since the majority emphasized the “limited nature” of the right to collective bargaining.<sup>181</sup>

### **9. Section 1 Analysis**

The majority found during the course of its s. 2(d) analysis that interference with the collective bargaining process may be justified under s. 1 “on an exceptional and typically temporary basis”.<sup>182</sup> In assessing the government objectives for purposes of the s. 1 test, the Court found them not to be too broad since governments are permitted to put forward a broad objective which is furthered by a series of more precise sub-objectives.<sup>183</sup> The Court also affirmed that the “rational connection” element of s. 1 analysis is “not particularly onerous”, finding that the evidence presented by the

---

<sup>178</sup> *Ibid* at paras 32-33.

<sup>179</sup> *Ibid* at para 29.

<sup>180</sup> *Ibid* at para 19.

<sup>181</sup> *Ibid* at para 91.

<sup>182</sup> *Ibid* at para 108.

<sup>183</sup> *Ibid* at para 146.

government was logical and reasonable to conclude.<sup>184</sup> Although the majority firmly concluded that “legislators are not bound to consult with affected parties before passing legislation”, it warned that a failure to consult could be evidence as to whether other options were explored under the “minimal impairment” assessment.<sup>185</sup>

### **10. Section 15 Analysis**

The Court concluded that there was no violation of s. 15. The plaintiffs argued that the legislation subjected them to differential treatment based on the grounds of sex and being workers who work in “women’s jobs”. However, the Court held that the differential and adverse effects of the legislation on some groups of workers, relate essentially to the type of work they do, and not to the individuals they are.<sup>186</sup>

### **11. Dissenting Opinion**

In her partial dissent, Justice Deschamps disagreed with the analysis relating to the infringement of s. 2(d) and the justification of the infringement”.<sup>187</sup> Particularly, she questioned whether the “importance” element of the “substantial interference” test is too focused on the substance of the workplace issue rather than the process of collective bargaining.<sup>188</sup> She would have held that s. 2(d) is involved either where laws or state actions deny meaningful discussion and consultations about significant workplace issues or where laws nullify negotiated terms on significant workplace issues. Thus, she would

---

<sup>184</sup> *Ibid* at paras 148-49.

<sup>185</sup> *Ibid* at paras 156-59.

<sup>186</sup> *Ibid* at para 165.

<sup>187</sup> *Ibid* at para 176.

<sup>188</sup> *Ibid* at para 178.

have found a violation of s. 2(d) but would have found all but one of the provisions saved under s. 1; in essence, she would have applied a deferential approach in light of the context in which the legislation was passed, namely “sustainability of health care”.<sup>189</sup>

***D. Fraser v. Ontario (Attorney General)*<sup>190</sup>(*Fraser II*)**

On November 17, 2008, the Ontario Court of Appeal released its decision in *Fraser v. Ontario (Attorney General)*. *Fraser* involved a constitutional challenge to the exclusion of agricultural workers from Ontario’s *Labour Relations Act* (LRA)<sup>191</sup> and their inclusion in a separate statutory regime under the *Agricultural Employees Protection Act* (AEPA)<sup>192</sup>. *Fraser II* was the first opportunity for an appellate court to interpret and apply the constitutional protection given by the Supreme Court of Canada in *BC Heath Services* regarding the right to collectively bargain. In *BC Health Services*, the Supreme Court recognized a right to collective bargaining under s. 2(d) of the *Charter*.

**1. The context and the claim**

The *Fraser II* decision involved a constitutional challenge to the exclusion of agricultural workers from the LRA and the constitutionality of their inclusion into the AEPA. Under the AEPA, agricultural workers have the expressed rights to make representations to their employers respecting the terms and conditions of employment. Unlike the LRA, however, the AEPA does not compel employers to respond to and

---

<sup>189</sup> *Ibid* at paras 251-252.

<sup>190</sup> 2008 ONCA 760, 301 DLR (4<sup>th</sup>) 335 [*Fraser II*].

<sup>191</sup> See LRA, *supra* note 87.

<sup>192</sup> Se AEPA, *supra* note 88.

### Chapter 3- SAWP Workers in Ontario

bargain about the representations made by employees; does not regulate labour disputes; and does not require that only one trade union represent employees sharing the same community of interest at a particular workplace. In the Court's opinion, the AEPA provides "no protection" for collective bargaining.<sup>193</sup>

The AEPA had its genesis in an earlier constitutional challenge to the exclusion of agricultural workers from the Ontario *Labour Relations Act, 1995*. In that earlier case, namely the *Dunmore* decision, the Supreme Court of Canada held that the exclusion of agricultural workers from the LRA violated their constitutional right to organize, which was protected by the freedom of association guaranteed in s. 2(d) of the *Charter*.<sup>194</sup>

As explained earlier in this chapter, the *Dunmore* decision did not go as far as to hold that the freedom of association included a right to collectively bargain. However, that holding was nuanced in the 2007 *BC Health Services* decision. There, the Supreme Court of Canada held that the freedom of association does indeed include a right to collectively bargain. Consequently, relying on *BC Health Services*, the Ontario Court of Appeal held that the AEPA violated the right of agricultural workers to bargain collectively and that this violation could not be justified under section 1 of the *Charter*.

Thus, the issue in *Fraser II* was "whether the impugned legislation [AEPA] violated s. 2(d) of the *Charter* by failing to provide agricultural workers in Ontario with

---

<sup>193</sup> See *Fraser II*, *supra* note 190 at paras 78 & 138.

<sup>194</sup> See Section II (B) of this chapter.

sufficient statutory protections to enable them to exercise (a) their freedom to organize and (b) their right to bargain collectively.”<sup>195</sup>

## 2. Judicial History

The Ontario Superior Court of Justice heard the application from the UFCW-Canada and individual applicants.<sup>196</sup> They sought a declaration that the AEPA and s. 3(b.1) of the *LRA* were unconstitutional and of no force and effect since they violated s. 2(d) and s. 15 of the *Charter*, and that such violation could not be saved under s. 1.<sup>197</sup> The trial court dismissed the application. It held that the *AEPA* met the minimum statutory requirements necessary to protect the right to organize as established in *Dunmore*.<sup>198</sup>

As well, the trial court held that nothing in *Dunmore* suggested that s 2(d) encompassed the right to strike and collectively bargain. Finally, the Court dismissed the s. 15 claim, holding that agricultural workers were not denied any benefit or protection on the basis of an enumerated or analogous ground.<sup>199</sup>

## 3. Analysis of the Ontario Court of Appeal

The Court of Appeal found, in its unanimous 3-judge decision, that agricultural workers were a vulnerable group in society and that in light of this vulnerability, it was

---

<sup>195</sup> *Fraser II*, *supra* note 190 at para 10.

<sup>196</sup> See *Fraser v. Canada (Attorney General)*, 79 OR (3<sup>rd</sup>) 219, [2006] OJ No 45 (Ont Sup Ct) (Lexis) [*Fraser I*].

<sup>197</sup> *Ibid* at para 2.

<sup>198</sup> *Ibid* at para 29.

<sup>199</sup> *Ibid* at paras 34 & 35.

“virtually impossible” for agricultural workers to engage in collective bargaining with their employers absent statutory protections for collective bargaining.<sup>200</sup> The Court of Appeal saw the inclusion of agricultural workers under the AEPA as perpetuating or contributing to the inability of agricultural workers to engage in collective bargaining with their employers. On this basis, the Court held that the AEPA substantially interfered with the ability of agricultural workers to exercise their right to collectively bargain and that the government was responsible for this state of affairs.<sup>201</sup>

The Court, in rendering its decision, identified four statutory protections that are required to enable agricultural workers to exercise their right to collectively bargain, namely:

- A statutory duty to bargain in good faith;
- A statutory requirement that employee representatives be selected based on the principles of majoritarianism and exclusivity [This means that agricultural workers must have the right to select a trade union representative on a majoritarian basis and that once selected, that trade union has exclusive representation rights with respect to those workers.];
- A statutory mechanism for resolving bargaining impasses (e.g., strikes/lockouts or binding arbitration); and

---

<sup>200</sup> See *Fraser II*, *supra* note 190 at para 70.

<sup>201</sup> *Ibid* at paras 11-12.

## Chapter 3- SAWP Workers in Ontario

- A statutory mechanism for resolving disputes regarding the interpretation or administration of collective agreements.<sup>202</sup>

In other words, the Ontario Court of Appeal held that s. 2(d) places a positive obligation on the Ontario government to enact legislative protections for the collective bargaining rights of agricultural workers. The Court also ruled that the s. 2(d) right to collective bargaining requires a mechanism for dispute resolution for the interpretation and application of collective agreements, and it requires the recognition of a single representative bargaining body, similar to the exclusivity enjoyed by unions in other industries. The Court stopped short of recognizing a right to strike, however, but noted twice that the appellants had not made this request. Instead, the Court held that s. 2(d) includes a right to a “mechanism for resolving impasses in bargaining.” Noting that “the bargaining process is jeopardized if the parties have nothing to which they can resort in the face of fruitless bargaining.” Justice Winkler seems to indicate that, under s. 2(d), unions have a right to some form of recourse should the bargaining process collapse, but leaves the enumeration of what that might be to the creativity of the legislature. His judgment states that “there exists a broad range of collective bargaining dispute resolution mechanisms” and explains that it is up to the legislature to craft the specifics of an appropriate law.

### **4. s. 1 Analysis**

The Court held that the violation of agricultural workers’ right to bargain collectively could not be saved under s. 1 of the *Charter*. While the Court recognized that the AEPA served the legitimate purposes of protecting the family farm, farm

---

<sup>202</sup> *Ibid* at para 80.

production and farm viability, the Court considered the exclusion of all agricultural workers from a statutory regime to be overbroad and not adequately tailored to meet the objectives of the legislation. The Court was most concerned about the exclusion from a collective bargaining statute of agricultural workers employed at farm enterprises other than family farms.<sup>203</sup>

### **5. s. 15 Analysis**

The Court accepted the appellants' argument that the AEPA perpetuates and reinforces the pre-existing disadvantage of agricultural workers. However, it agreed with the respondent that the distinction is not based on an enumerated or analogous ground.<sup>204</sup> As well, the Court did not find any basis to hold that "agricultural worker" is an analogous ground. It stated:

Likewise, in view of the record in this case, there is no basis for finding that "agricultural worker" is an analogous ground. The *AEPA* identifies an economic sector and limits the access of workers within that sector to aspects of a particular labour relations scheme. "Agricultural worker" includes workers with different qualifications, personal backgrounds and occupations within an economic sector. The category of "agricultural worker" does not denote a personal characteristic of the type necessary to support a s. 15 discrimination claim.<sup>205</sup>

Accordingly, the Court dismissed the s. 15 claim.<sup>206</sup>

### **6. Remedies**

The Ontario Court of Appeal therefore declared that the AEPA is unconstitutional because it substantially impairs the right of agricultural workers to bargain collectively as

---

<sup>203</sup> *Ibid* at paras 122-137.

<sup>204</sup> *Ibid* at para 111.

<sup>205</sup> *Ibid* at para 114.

<sup>206</sup> *Ibid* at para 115.

it provides no statutory protection for collective bargaining. As well, the Court declared the AEPA invalid and ordered the Ontario government “to provide agricultural workers with sufficient protections to enable them to exercise their right to bargain collectively...”<sup>207</sup> However, the Court suspended the declaration of invalidity for 12 months to allow the Ontario government time to determine the method of statutorily protecting the rights of agricultural workers for their engagement in meaningful collective bargaining.<sup>208</sup>

***E. Ontario (Attorney General) v. Fraser*<sup>209</sup> (*Fraser III*)**

Instead of working towards crafting legislation in harmony with the Ontario Court of Appeal’s decision in *Fraser II*, the Ontario government chose to appeal the decision to the Supreme Court of Canada.<sup>210</sup> The Court rendered its decision on April 29, 2011 upholding that the Ontario’s *Agricultural Employees Protection Act* (AEPA) is consistent with the *Charter*’s s. 2(d).<sup>211</sup> The issues addressed by the Court were as follows:

- I) Does the *Agricultural Employees Protection Act* infringe s. 2(d) of the *Canadian Charter of rights and Freedoms*?

---

<sup>207</sup> *Ibid* at para 138.

<sup>208</sup> *Ibid* at para 139.

<sup>209</sup> See *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser III*]. This was an 8-1 majority decision: McLachlin C.J. and LeBel J. (Binnie, Fish, and Cromwell JJ. concurring); concurring in the result Rothstein J. (Charron J. concurring); and Deschamps J. Dissenting: Abbella J.

<sup>210</sup> The case was heard on December 17, 2009. See *Attorney General of Ontario v. Michael J. Fraser on his own behalf and on behalf of the United Food and Commercial Workers Union Canada, et al.*, online: SCC Case Information-Summary, Summary 32968 <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=32968>>.

<sup>211</sup> See *Fraser III*, *supra* note 209.

- II) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
- III) Does s. 3(b.1) of the *Labour Relations Act* infringe s. 2(d) of the *Charter*?
- IV) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
- V) Does the *Agricultural Employees Protection Act* infringe s. 15 of the *Charter*?
- VI) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
- VII) Does s. 3(b.1) of the *Labour Relations Act* infringe s. 15 of the *Charter*?
- VIII) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?<sup>212</sup>

### 1. Majority's Analysis of s. 2(d)

The majority decision, written by Chief Justice McLachlin and Justice LeBel, determined that the Court of Appeal in *Fraser II* had significantly overstated the scope of collective bargaining rights, which are protected by s. 2(d) of the *Charter*.<sup>213</sup> Based on a much narrower approach to collective bargaining under the *Charter*, the majority determined that the AEPA satisfies the applicable constitutional requirements since it provides agricultural workers in Ontario with a meaningful process by which they can pursue workplace goals.<sup>214</sup> Accordingly, the Court rejected the Ontario Court of Appeal's ruling that section 2(d) of the *Charter* requires the enactment of significant

---

<sup>212</sup> *Ibid* at para 118.

<sup>213</sup> *Ibid* at paras 45-46.

<sup>214</sup> *Ibid* at paras 2-3.

additional statutory protections for agricultural workers. In fact, the Court affirmed that the freedom of association guaranteed in s. 2(d) does not go as far as to constitutionalize protections provided by Canadian labour relations legislation (Wagner Model).

The Court summarized key principles from *Dunmore* and *BC Health Services* to craft its conclusion. It underscored:

After *Dunmore*, there could be no doubt that the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of association, and that this right extends to realization of collective, as distinct from individual, goals. Nor could there be any doubt that legislation (or the absence of a legislative framework) that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association. Finally, there could be no doubt that the guarantee must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments.<sup>215</sup>

In short, the Court explained that *Dunmore* requires a process which allows for a meaningful pursuit of individual and common goals and said common goals extend to some collective bargaining activities, including the right to organize and to present submissions to the employer.<sup>216</sup> However, no particular outcome is guaranteed. What is required is a legislative framework that permits a process where it is possible to pursue common goals in a meaningful way.<sup>217</sup>

While *Dunmore* established that substantial impossibility for the exercise of s. 2(d) rights must be demonstrated to compel the government to enact statutory protections, it did not, however, define the scope of the right of association protected by s. 2(d) in the

---

<sup>215</sup> *Ibid* at para 32.

<sup>216</sup> *Ibid* at para 33.

<sup>217</sup> *Ibid*.

context of collective bargaining. Therefore, the Court highlighted that the majority in *BC Health Services* held that legislation and government actions which revoke existing collective agreements and substantially interfere with the possibility of meaningful collective bargaining in the future constitute a limit on s. 2(d) of the *Charter*.<sup>218</sup> Furthermore, the Court explained that *BC Health Services* held that a “process of collective action to achieve workplace goals” requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace”.<sup>219</sup> In summary, *BC Health Services* requires a good faith process where the employer considers employee representations and discusses them with the employee’s representative. “It is difficult to imagine a meaningful collective process in pursuit of workplace aims that does not involve the employer at least considering, in good faith, employee representations.”<sup>220</sup> This protection of collective bargaining in good faith is “a necessary condition of meaningful association in the workplace context”.<sup>221</sup>

The Court defined “good faith” negotiations as instances where parties meet to engage in meaningful dialogue avoiding unnecessary delays and making reasonable efforts to arrive at an acceptable contract. However, section 2(d) does not require a particular process as “different situations may demand different processes and timelines”.<sup>222</sup> As well, the Court emphasized that *BC Health Services* asserted that “good

---

<sup>218</sup> *Ibid* at para 34.

<sup>219</sup> *Ibid* at para 37.

<sup>220</sup> *Ibid* at para 43.

<sup>221</sup> *Ibid*.

<sup>222</sup> *Ibid* at para 41.

faith” negotiations do not require the parties to conclude an agreement or accept any particular terms and does not guarantee a particular model of bargaining nor a particular outcome.<sup>223</sup>”What is protected is associational activity, not a particular process or result”.<sup>224</sup>

Applying the key principles derived from *Dunmore* and *BC Health Services*, the Court concluded that the Ontario Court of Appeal erroneously held that a particular system of collective bargaining was constitutionalized in *BC Health Services*, namely a “full-blown Wagner system of collective bargaining”.<sup>225</sup> Rather, the Court clarified that *BC Health Services* unequivocally held that s. 2(d) does not guarantee a particular model of collective bargaining or a particular outcome.<sup>226</sup> As such what is protected is the right to associate to achieve collective goals. Therefore, the central issue is whether “the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals”.<sup>227</sup>

Applying the principles above to the case at bar, the Court defined the central issue as follows:

Whether the *AEPA* makes meaningful association to achieve workplace goals effectively impossible, as was the case in *Dunmore*. If the *AEPA* process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer effectively impossible, then the exercise of the

---

<sup>223</sup> *Ibid* at para 42.

<sup>224</sup> *Ibid* at para 47.

<sup>225</sup> *Ibid* at para 44.

<sup>226</sup> *Ibid* at para 45.

<sup>227</sup> *Ibid* at para 46.

### Chapter 3- SAWP Workers in Ontario

right to meaningful association guaranteed by s. 2(d) of *Charter* will have been limited, and the law found to be unconstitutional in the absence of justification under s. 1 of the *Charter*. The onus is on the farm workers to establish that the *AEPA* interferes with their s. 2(d) right to associate in this way.<sup>228</sup>

The Court concluded that the *AEPA* provides a process which satisfies the constitutional requirements outlined above since it allows for a meaningful process where employees can make representations to the employer concerning workplace common goals and there is an implied duty to engage in good faith.<sup>229</sup> In determining its conclusion, the Court analysed various sections of the *AEPA*, namely ss. 5(6) and (7). It found that the legislation allows for employee submissions where the employer shall listen to oral representations and read written representations as well as acknowledge having read them. Although the legislation does not expressly refer to a requirement that the employer consider employee representations in good faith, the Court reasoned, it does not rule it out either. Thus, “by implication, they include such requirement.”<sup>230</sup>

The respondent argued that in reality the *AEPA* process will not lead to good faith consideration by the employers since in the past, employees unsuccessfully attempted to engage employers in collective bargaining activities; instead, in each instance, the employer refused to recognize their association and either refused to meet and bargain with it or did not respond to the demands of the employees.<sup>231</sup> The Court addressed this argument by pointing out that, based on the few historical examples provided by the respondents, it was premature to conclude that the *AEPA* is powerless to deal with such

---

<sup>228</sup> *Ibid* at para 98.

<sup>229</sup> *Ibid* at para 107

<sup>230</sup> *Ibid* at paras 101-107.

<sup>231</sup> *Ibid* at para 108.

abuses since it provides a tribunal for the resolutions of disputes. Accordingly, the Court concluded that the tribunal “should be given a fair opportunity to demonstrate its ability to determine whether there has been a contravention of the AEPA and to grant an order or remedy with respect to that breach.”<sup>232</sup>

Therefore, the Court concluded that the AEPA did not breach s. 2(d) of the *Charter* and as such it was unnecessary to consider s. 1 arguments by the Attorney General of Ontario that “the respondents’ demands for full LRA protections would be inappropriate because of the diverse nature of the agricultural sector, ranging from small family operations to larger commercial establishments.”<sup>233</sup> The bottom line for the Court was that the AEPA provides with a meaningful process (which includes good faith by implication) by which agricultural workers in Ontario can pursue workplace goals.<sup>234</sup>

## **2. Majority’s Analysis of s. 15**

Central to respondents’ section 15 argument was the notion that status as an agricultural worker is analogous to the enumerated grounds of discrimination in s. 15(1) since their occupation is a fundamental aspect of their identity.<sup>235</sup> However, the Court found that the s. 15 discrimination claim was premature and thus could not succeed. It explained that while s. 15 deals with substantive discrimination which impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage, it had not been established on the record that the AEPA labour regime “utilizes unfair

---

<sup>232</sup> *Ibid* at paras 108-113.

<sup>233</sup> *Ibid* at para 113.

<sup>234</sup> *Ibid* at para 117.

<sup>235</sup> *Ibid* at para 114.

stereotypes or perpetuates existing prejudice and disadvantage.”<sup>236</sup> The Court expressly said:

Until the regime established by the AEPA is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature.<sup>237</sup>

### 3. Concurring Opinions

Justices Rothstein and Charron concurred in the result that the AEPA respects freedom of association. However, they based their conclusion on the basis that *BC Health Services* was wrongly decided and that there is no such right to bargain collectively protected by s. 2(d).<sup>238</sup> For her part, Justice Dechamps also agreed that the AEPA respects freedom of association. Nonetheless, she did not agree with the majority’s interpretation of *BC Health Services*’ scope which imposed a duty on employers to bargain in good faith. She conveyed that such scope was too broad.<sup>239</sup>

### 4. Dissenting Opinion

Justice Abella was the only dissent. In essence, Justice Abella found that the AEPA does not provide agricultural employees in Ontario with a meaningful process to pursue common workplace goals. She agreed with the interpretation adopted by the majority in *BC Health Services*. Nevertheless, she explained that the “AEPA does

---

<sup>236</sup> *Ibid* at para 116.

<sup>237</sup> *Ibid*.

<sup>238</sup> *Ibid* at paras 119-296.

<sup>239</sup> *Ibid* at paras 297-320.

not protect, and was never intended to protect, collective bargaining rights.”<sup>240</sup> She rationalized her decision by pointing to the fact that the right to collective bargaining as protected by s. 2(d) was not established until *BC Health Services* and as such, the intent of the Ontario legislation could not have included collective bargaining as part of the right to freedom of association.<sup>241</sup>

Furthermore, Justice Abella explained that the AEPA does not have clear language and clear purpose signaling that it grants agricultural workers the right to collective bargaining. In fact, the Ontario government’s intentions to exclude collective bargaining were conspicuous.<sup>242</sup> Justice Abella further underscored that in the years since the AEPA came into force (2002), there has not been any evidence of a “single successfully negotiated collective agreement or even of any negotiations.”<sup>243</sup> As for the reasoning of the majority’s opinion that the legislation provides a tribunal to address contraventions to the *Act*, namely not acting in good faith, the dissent incisively pointed out that “[s]ection 11 of the *AEPA* gives the Tribunal authority to grant a remedy for a contravention of the *AEPA*. But it is not a contravention of the *AEPA* to refuse to engage in a good faith process to make reasonable efforts to arrive at a collective agreement. It is therefore not part of the Tribunal’s mandate. “No mandate, no jurisdiction; no jurisdiction, no remedy”.<sup>244</sup> . Accordingly, the complete

---

<sup>240</sup> *Ibid* at para 322.

<sup>241</sup> *Ibid* at paras 324, 330-331.

<sup>242</sup> *Ibid* at para 332.

<sup>243</sup> *Ibid* at para 334.

<sup>244</sup> *Ibid* at para 341.

absence of any statutory protection for a collective bargaining process in the AEPA substantially impairs s. s. 2(d) of the *Charter*.<sup>245</sup>

The dissent also explained that such impairment restriction was not justified under s.1 of the *Charter*.<sup>246</sup> The two main justifications by the government of Ontario were:

- protection of family farms<sup>247</sup>, and
- protection of the viability of farms and agricultural production<sup>248</sup>

However, the dissent was not persuaded by the logic behind these justifications. Justice Abella asserted that “a one-size-fits-all exclusion” was not proportional to the protection of the family farm; specially since other provinces include agricultural workers in their labour relations legislations without harming their “family farms”.

The first governmental objective of the absolute exclusion is the protection of the family farms. Is a one-size-fits-all exclusion responsive to protecting the family farms? It seems to me clear that less harmful means than outright exclusion are readily available to achieve the objective. Two provinces, for example, Quebec and New Brunswick, have specific exemptions for farms employing less than three or five workers.<sup>249</sup>

As well, she maintained that agriculture is a diversified sector and only some of it consists of family farms. “[T]here is an increasing trend. . .towards corporate farming

---

<sup>245</sup> *Ibid* at paras 368.

<sup>246</sup> *Ibid* at paras 352-367.

<sup>247</sup> *Ibid* at para 356.

<sup>248</sup> *Ibid* at para 359.

<sup>249</sup> *Ibid* at para 356.

and complex agribusiness'.<sup>250</sup> In such circumstances, the production process is not seasonal and resembles a production cycle. Furthermore, the operation involves a considerable amount of employees in a single location reflecting a 'factory atmosphere'.<sup>251</sup>

As for the justification regarding the protection of the viability of farms and agricultural production, the dissent pointed out to the 1992 recommendations of the Ontario government's consultative Task Force on Agricultural Labour Relations.<sup>252</sup> Particularly, Justice Abella focused her reasoning on the fact that the recommendations showed that there are "less harmful means" than an absolute exclusion to achieve the government's objective of protecting agricultural production and viability".<sup>253</sup> For instance, the Task Force considerations prohibited all forms of work stoppage and replaced it by a dispute resolution process.<sup>254</sup> Accordingly, Justice Abella could not be persuaded by Ontario's s.1 arguments.<sup>255</sup>

### **5. *Fraser III's* Impact on Mexican SAWP Workers**

The author agrees with the dissent. The AEPA does not provide agricultural workers in Ontario with a meaningful process to pursue common workplace goals.

Accordingly, the effect of this legislation is to further perpetuate prejudice and

---

<sup>250</sup> *Ibid* at para 357.

<sup>251</sup> *Ibid* at para 358.

<sup>252</sup> See section II of this chapter.

<sup>253</sup> *Fraser III, supra* note 209 at para 359.

<sup>254</sup> *Ibid* at para 361.

<sup>255</sup> *Ibid* at para 367.

### Chapter 3- SAWP Workers in Ontario

disadvantage for all agricultural workers in that province. This reality is particularly intensified for Mexican SAWP workers. The majority's decision failed to consider the impact of the AEPA in the context of the SAWP. It seems the majority overlooked the contextual reality of agricultural workers including SAWP workers advanced by the respondents and some interveners.

For instance, the Factum for the Respondents clearly stated that the federal and provincial governments have actively recruited since the 1900's "unfree immigrants" (including displaced persons and refugees); and "unfree seasonal migrant labourers" from developing nations who have no right of permanent residence, cannot work outside agriculture, and must return to their country of origin when their work is completed. Therefore, the federal and provincial governments have "institutionalized a system that recruits vulnerable workers under employment structures that heighten their vulnerability."<sup>256</sup> Moreover, the respondents explained in their submissions that:

The vulnerability of agricultural workers has been embedded in laws as farm workers have historically been excluded from almost all of the statutory rights and benefits provided to the vast majority of other workers in Ontario. . . Agricultural workers generally remain excluded from employment standards protections for minimum wages, overtime, vacation pay, public holiday pay, maximum hours worked in a day, maximum hours worked in a week, maximum prescribed rest periods between shifts,. . . None of the legislation which applies to farm workers gives them protection to bargain collectively.<sup>257</sup>

Particular to the SAWP and other temporary foreign workers such as the ones under the Low Skill Pilot Project described in chapter 2, the Court had the opportunity to consider,

---

<sup>256</sup> Respondents' Factum, *Attorney General of Ontario v. Michael J. Fraser on his own behalf and on behalf of the United Food and Commercial Workers Union Canada, Xin Yuan Liu, Julia McGorman and Billie-Jo Church*, Court File No. 32968, online: Supreme Court of Canada < <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/fac-mem-eng.aspx?cas=32968>> at paras 24-25.

<sup>257</sup> *Ibid* at para 26.

in addition to the respondents' factum, the submissions by the interveners Justicia for Migrant Workers and Industrial Accident Victims Group of Ontario.<sup>258</sup> The interveners' main goal was to contextualize and offer for consideration the reality and interests of migrant agricultural workers when interpreting *Charter* rights, namely ss. 2(d) and 15.<sup>259</sup> To that end, the interveners eloquently argued that

Migrant agricultural workers are particularly subject to systemic barriers including employer retaliation for union involvement or for asserting their rights, and to consequent dilution of their bargaining units as workers who support unions are repatriated to their home countries and denied recall into the SAWP program or any other TFWP [Temporary Foreign Workers Program].<sup>260</sup>

Unfortunately, the majority seemed to have overlooked or ignored these submissions since its opinion did not substantially address any of these arguments and evidence.

**a. “Meaningful process”**

The conclusion by the majority that the AEPA provides agricultural workers a “meaningful process” to pursue common workplace goals demonstrated the lack of understanding of the majority surrounding SAWP workers' reality once they are in Canada (most of them come to Ontario); namely, that many of those workers, particularly Mexicans, do not have an effective and efficacious representative agent protecting only their interests. The majority also lacked understanding regarding the fact that the SAWP

---

<sup>258</sup> See Factum of the Intervener, Justicia for Migrant Workers and Industrial Accident Victims Group of Ontario, *Attorney General of Ontario v. Michael J. Fraser on his own behalf and on behalf of the United Food and Commercial Workers Union Canada, Xin Yuan Liu, Julia McGorman and Billie-Jo Church*, Court File No. 32968, online: Supreme Court of Canada <<http://www.aspercentre.ca/Assets/Asper+Digital+Assets/Supreme+Court/fraser-intervener-j4mw-iavgo.pdf>>.

<sup>259</sup> *Ibid* at para 1.

<sup>260</sup> *Ibid* at para 22.

### Chapter 3- SAWP Workers in Ontario

Employment Agreement is shockingly one-sided to benefit the employer and that the SAWP workers have absolutely no say as to the terms and conditions stipulated therein.

Furthermore, as it has been discussed throughout this thesis, the majority seemed to have ignored or was ill informed about the lack of trust that many Mexicans have towards their consular officials and how they perceive those officials to side with the employers instead of the workers. And that is why, in order to have a meaningful process, they are in need of having a representative (agricultural association) that can assist them in collectively bargain their employment conditions. Without an effective representative who they can trust, and who focuses on their best interest only, it cannot be said that they are in a position to have a meaningful process to achieve common workplace goals. The majority took away these workers' capacity to have a meaningful process when it overruled the Ontario Court of Appeal's decision in *Fraser II*. The Ontario Court of Appeal seemed to have understood or recognized this reality and accordingly held that there is a right to collectively bargain for agricultural workers in Ontario and that the state has an obligation to provide the statutory means for such right to be realized. Such statutory means include:

- A statutory duty to bargain in good faith;
- A statutory requirement that employee representatives be selected based on the principles of majoritarianism and exclusivity [This means that agricultural workers must have the right to select a trade union representative on a majoritarian basis and that once selected, the trade union has exclusive representation rights with respect to those workers];

- A statutory mechanism for resolving bargaining impasses; and
- A statutory mechanism for resolving disputes regarding the interpretation or administration of collective agreements.<sup>261</sup>

**b. “to Bargain in Good faith”**

The author further disagrees with the majority that the AEPA has an implied duty to bargain in “good faith”. The plain language of the legislation does not support this. As well, the only instances where the legislation requires good faith are found in sections 6 and 13, which read:

An employees’ association shall not act in bad faith or in a manner that is arbitrary or discriminatory in the representation of its members.<sup>262</sup>

Dismissal of proceedings

A panel of the Tribunal appointed under subsection 14 (3.1) of the *Ministry of Agriculture, Food and Rural Affairs Act* may dismiss, without a hearing, an application under section 7 or a complaint under section 11 if it appears to the panel that, . . . the application or the complaint is trivial, frivolous, vexatious or made in bad faith. . .<sup>263</sup>

In other words, the legislation only places the duty to act in “good faith” on employee’s associations and not the employer. As well, the requirement of “good faith” is stipulated as a matter of procedural fairness where a claim or application is brought in bad faith.

Without an explicit stipulation to act in good faith, agricultural workers are placed at a greater disadvantage than their employers during negotiations. The only

---

<sup>261</sup> See *Fraser II*, *supra* note 189 at para.80.

<sup>262</sup> AEPA, *supra* note 88 at s 6.

<sup>263</sup> *Ibid* at s 13(1)(b).

### Chapter 3- SAWP Workers in Ontario

associational right granted by the AEPA is the ability to make representations to the employer in person or in writing. And if the representation is made in writing, then the employer must acknowledge having read them.<sup>264</sup> However, the legislation does not and was never intended to compel the employer to answer said representation or bargain in good faith with employee associations.<sup>265</sup>

In the SAWP context, this is further exacerbated because most SAWP participants are afraid to request and negotiate with their employers since they depend on an evaluation letter at the end of the season. Furthermore, even if some were not afraid, most Mexican workers do not speak English or French. How can they truly negotiate the terms of their employment if they do not speak the language, are afraid to be sent back and lose their jobs and are in desperate need of their employment? Without an explicit legislative framework compelling the employer to bargain or negotiate in good faith with agricultural associations, the right to collective bargaining can never be accessed. As the legislation currently stands, an employer can listen, read and even acknowledge in writing that he has read the employee association's submissions; however, beyond that he does not have to do anything about it. This is certainly no meaningful process; as well, the implied good faith can always be defined and litigated according to the employer's advantage.

Most importantly, because many SAWP workers fear "making trouble", they will be dissuaded to request their employer to bargain in good faith since he can easily fire them and cause them to be repatriated before any negotiations could begin. It will be

---

<sup>264</sup> *Ibid* at s 5.

<sup>265</sup> *Fraser III, supra* note 208 at paras 332-335 (Dissenting Opinion).

fascinating to see what happens with the application of this legislation as instructed to be read and applied by the Supreme Court. The author's opinion is that even with the Court's direction to read "good faith" into the AEPA<sup>266</sup>, it will continue to perpetuate disadvantage and in many cases exploitation for all agricultural workers and specifically for SAWP Mexican workers in Ontario. An explicit duty in the legislation to collectively bargain in good faith with employee associations is what is needed to protect these vulnerable, disadvantaged and, in many instances, exploited workers.

### **III. Conclusion**

This chapter intended to show that Ontario's agricultural workers are excluded from key legislation designed to protect their rights (OHSA, ESA, LRA, AEPA). Section I outlined key legislation which applied to all agricultural workers, in general, and to Mexican workers under the SAWP, in particular. Although the outline is non-exhaustive, it captures the reality of Ontario's agricultural workers; namely that the present legislative framework excludes, marginalizes and makes these workers vulnerable and easy targets for exploitation and unfair treatment in the workplace. This reality is particularly intensified for Mexican workers under the SAWP. As discussed in previous chapters, Mexican workers are not similarly situated to their Canadian counterparts since they have visa restrictions as to where and for how long they can work in Canada (they are not free to circulate in the labour market); the terms of the Employment Agreement give the employer the ability to fire them for almost any reason; they depend on their employers' "good evaluation" letters to

---

<sup>266</sup> *Fraser III, supra* note 208 at para 107. "These considerations lead us to conclude that s. 5 of the *AEPA*, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer. It follows that s. 5 of the *AEPA* does not violate s. 2(d) of the *Charter*."

### Chapter 3- SAWP Workers in Ontario

reapply for the next season; they are desperate to return to work next season as they come from very poor and marginalized areas of Mexico and they are the only means of economic support for their families; as well, most of them do not speak English or French to understand and access whatever limited rights they may have. On top of these disadvantages, they must also face an additional layer of hardship, which is the exclusion from Ontario's legislative framework aimed to protect its workers.

Finally, section II attempted to discuss the evolution of a *Charter* challenge of the *LRA* and *AEPA* brought to the Supreme Court of Canada in *Fraser v. Ontario*. Although the Ontario Court of Appeal ruled that agricultural workers have the right to collectively bargain pursuant to s. 2(d) of the *Charter* and that the state has a positive duty to implement statutory protections for the realization of said right, the government of Ontario appealed the decision to the Supreme Court of Canada. To the disadvantage of migrant workers, the Supreme Court of Canada ruled in favour of Ontario as it took a narrow view holding that there is a right to collectively bargain accordingly farm workers are entitled to a meaningful process by which they can pursue workplace goals but the state cannot be forced to follow a specific regime of how to go about it. Furthermore, the Court held that it was premature to decide whether the *AEPA* violates s. 15(1) of the *Charter*.

## Chapter 4- SAWP Workers in Quebec and British Columbia

An analysis of Mexican workers under the SAWP who work in Ontario (the main receiver of SAWP workers) would not be complete without an examination of Mexican workers under the SAWP who work in Quebec and British Columbia. These two provinces follow Ontario in the number of Mexican workers that they receive each year.<sup>1</sup> In total, Ontario, Quebec and British Columbia received about 90 per cent of Mexican SAWP workers in 2009. Similarly to the SAWP workers in Ontario, SAWP workers in Quebec and British Columbia face extreme disadvantages, especially when compared to agricultural workers in general. And these disadvantages<sup>2</sup> plus the lack of or scarcity of legal protections make Mexican workers, in many instances, either victims of exploitation or extremely vulnerable to it.

This chapter will outline each jurisdiction's key applicable legislation to agricultural workers in general and Mexican workers under the SAWP in particular. Section I will discuss Quebec's legislation, namely, *An Act Respecting Occupational Health and Safety*<sup>3</sup>, *An Act Respecting Labour Standards*<sup>4</sup>, the *Labour Code*<sup>5</sup>, as well as a

---

<sup>1</sup> As Appendix V, shows, CIC issued, in 2009, **2,557** work visas for Mexican under the SAWP intended for Quebec; **2,618** work visas for Mexicans intended for British Columbia. The total number of visas issued for Mexican SAWP workers in 2009 were 15, 727. The number of visas issued for Mexican SAWP workers for Ontario, Quebec and British Columbia in 2009 was 14,205 or 90% of the total visas issued for Mexican SAWP workers that year. (Statistics)

<sup>2</sup> Many of those disadvantages originate from their socio-economic and educational backgrounds, their lack of English or French fluency, as well as from the actual structure of the SAWP, particularly as stipulated in the Employment Agreement.

<sup>3</sup> RSQ c S-2.1 (OHS).

<sup>4</sup> RSQ c N-1.1 (LS).

<sup>5</sup> RSQ c C-27 (LC).

## Chapter 4- SAWP Workers in Quebec and British Columbia

case brought to the *Commission des relations du travail* where a union challenged the constitutionality of a provision of the *Labour Code* which excluded certain agricultural workers from joining a union<sup>6</sup>.

While, section II will highlight British Columbia's [\*Workers Compensation Act\*](#)<sup>7</sup> as it pertains to occupational health and safety, *Employment Standards Act*<sup>8</sup>, and *Labour Relations Code*<sup>9</sup> as well as two collective agreements between farm employers and their workers.<sup>10</sup>

---

<sup>6</sup> See *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 c. L'Écuyer*, 2010 QCCRT 0191 (*Travailleurs et travailleuses*).

<sup>7</sup> RSBC 1996, c 492 (WCA). British Columbia does not have a targeted statute addressing occupational Health and safety. However, under its Workers Compensation Act, it has established regulations addressing occupational health and safety in various industries including "agricultural operations". See *Occupational Health and Safety Regulation*, *infra* note 144 at Part 28.

<sup>8</sup> RSBC 1996, c 113 (ESA).

<sup>9</sup> RSBC 1996, c 244 (LRC).

<sup>10</sup> See Appendix X, *Collective Agreement Between Floralia Plant Growers Ltd, and United Food and Commercial Workers International Union, Local 1518*. A copy of this Agreement was provided to the author, upon her request, by the union on 18 March 2011 via electronic mail. (Floralia Agreement) and, See Appendix XI, *Collective Agreement between Sidhu & Sons Nursery Ltd. and United Food and Commercial Workers International Union, Local 1518*. A copy of this Agreement was provided to the author, upon her request, by the union on 18 March 2011 via electronic mail. (Sidhu & Sons Nursery Agreement).

## I. Quebec

Québec is the largest province in Canada by area.<sup>11</sup> Its territory represents 15.5% of the surface area of Canada and totals 1.5 million km<sup>2</sup>.<sup>12</sup> Census 2006 counted 30,675 farms in Quebec,<sup>13</sup> each averaging 279 acres of land. In the same year, the total area of farmland in Quebec increased to 8.6 million acres.<sup>14</sup> Furthermore, Quebec has had a 36 per cent increase in its agricultural revenues since 2000 while Ontario has only seen an increase of 24 per cent and Canada as a whole saw an increase 38 per cent.<sup>15</sup>

Each year, Quebec farmers employ Mexican workers under the SAWP and Guatemalan workers under the Low Skill Pilot Project.<sup>16</sup> *La fondation des entreprises en recrutement de main-d'oeuvre agricole étrangère (FERME)* assists agricultural employers to recruit foreign workers using both the SAWP or the Low Skill Pilot Project.

FERME's mission is to:

. . . organize and provide all necessary services to facilitate the recruitment of seasonal labor from foreign countries for employers who are members of the foundation. We assist members of FERME in dealing with governments,

---

<sup>11</sup> See "Quebec", online: The Canadian Encyclopedia <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=a1ARTA0006591>>.

<sup>12</sup> *Ibid.*

<sup>13</sup> See "Census of Agriculture counts 30,675 farms in Quebec", online: Statistics Canada <<http://www.statcan.gc.ca/ca-ra2006/analysis-analyses/que-qc-eng.htm>>.

<sup>14</sup> *Ibid.*

<sup>15</sup> See "*L'agriculture québécoise: amélioration de la situation économique*", online: La Page du MAPAQ <<http://www.mapaq.gouv.qc.ca/NR/rdonlyres/940C899F-C5B2-4AD7-91AF-2D023397FA1C/0/TCN21octobre2010.pdf>> dated 21 Octobre 2010.

<sup>16</sup> See *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 c. L'Écuyer*, *supra* note 6 at para. 104. See also "*Procédures et Délais*", online: Fondation des Entreprises en Recrutement de Main-d'oeuvre agricole Étrangère (FERME) <[http://www.fermequebec.com/procedures\\_delais.html](http://www.fermequebec.com/procedures_delais.html)>. The Low Skill Pilot Project is another avenue to recruit foreign workers in agriculture, construction and hospitality. It is open to any country not just Mexico and the Caribbean nations. See Chapter 2.

## Chapter 4- SAWP Workers in Quebec and British Columbia

organizations and agencies in addition to assuming all administrative duties required in managing the employers' applications for foreign workers.<sup>17</sup>

As mentioned in chapter 2, under the *Canada-Quebec Accord*<sup>18</sup>, the federal and Quebec governments share jurisdiction with regards to immigration. Generally employment offers to foreign workers must be approved by both HRSDC/Service Canada and the provincial *Ministère de l'Immigration et des Communautés culturelles* (MICC).<sup>19</sup>

The process to hire a seasonal agricultural worker in Quebec entails the following:

- Employer must forward his application for a Labour Market Opinion (LMO) to HRSDC/Service Canada;
- HRSDC/Service Canada will review the application to make sure it meets the SAWP eligibility criteria<sup>20</sup>;

---

<sup>17</sup> See also “*Qui est FERME?*”, online: FERME < [http://www.fermequebec.com/qui\\_est\\_ferme.html](http://www.fermequebec.com/qui_est_ferme.html)>. This quote is an unofficial translation. The actual text states: “La mission de FERME consiste à organiser et à offrir tous les services nécessaires en vue de faciliter le recrutement de main-d'œuvre saisonnière de pays étrangers pour les employeurs, membres de la fondation. Nous assistons les membres de FERME auprès des gouvernements, organismes et agences en plus d'assumer toutes les fonctions administratives requises dans la gestion des demandes des employeurs.”

<sup>18</sup> *Canada-Quebec Accord*, signed in 1991, online: Ministère des Relations avec les citoyens et de l'Immigration <[http://www.micc.gouv.qc.ca/publications/pdf/Accord\\_canada\\_quebec\\_immigration\\_anglais.pdf](http://www.micc.gouv.qc.ca/publications/pdf/Accord_canada_quebec_immigration_anglais.pdf)> .

<sup>19</sup> *Ibid* at s 22(b).

<sup>20</sup> The eligibility to obtain a LMO is outlined in chapter 2. See chapter 2, footnotes 113 and 114. To obtain an LMO the employer has to demonstrate that there is a need for labour that cannot be satisfied from within Canada and that bringing a foreign national to fill that need will not negatively impact Canadians or permanent residents in obtaining or keeping their jobs. Factors considered by HRSDC when drafting its opinion are:

- Is the work likely to result in direct job creation or job retention for Canadian citizens or permanent residents?
- Is the work likely to fill a labour shortage?
- Is the offer of employment genuine? And
- Whether or not, over the past two years, employers who have hired foreign workers, provided wages, working conditions and employment in an occupation that were substantially the same as those listed in the offer of employment?

## Chapter 4- SAWP Workers in Quebec and British Columbia

- HRSDC/Service Canada will forward a copy of the application to MICC to obtain its approval before issuing an LMO;
- Once the employer obtains the LMO, then he must request a Quebec Acceptance Certificate from MICC. The certificate will be issued for one season.<sup>21</sup>

Once a positive LMO approving the job offer and the Quebec Acceptance Certificate is obtained, then they are sent to the employee. At this point he can apply for a work permit at the Canadian embassy in Mexico City.<sup>22</sup>

Regarding health coverage, SAWP workers who hold a work permit valid for at least 6 months are exempted from the required waiting period for public health coverage.<sup>23</sup> If their work permits are for less time than the minimum 6 months required, the employer must pay for insurance coverage through RBC Insurance.<sup>24</sup> Furthermore, SAWP workers working in Quebec are required to comply with the following deductions:

---

For additional information on the procedures prescribed in Quebec see “*PROCÉDURES ET DÉLAIS*”, supra note 16.

<sup>21</sup> See “Temporary Foreign Workers Program: Seasonal Agricultural Workers Program (SAWP) Requirements in Quebec”, HRSDC, online: Human Resources and Skill Development Canada (HRSDC) <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/SAWPSheets/QC.shtml#il](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/SAWPSheets/QC.shtml#il)>. See “Temporary Foreign Worker Program: Hiring Temporary Foreign Workers in Quebec”, online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/tempwork\\_quebec.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/tempwork_quebec.shtml)>. See also “Agricultural worker from Mexico and the Caribbean countries under the Seasonal Agricultural Worker Program (SAWP)”, online: Immigration et Communautés Culturelles (MICC) <<http://www.immigration-quebec.gouv.qc.ca/en/immigrate-settle/temporary-workers/obtaining-authorizations/agricultural-worker/seasonal-agricultural-worker.html>>.

<sup>22</sup> “Temporary Foreign Worker Program: Hiring Temporary Foreign Workers in Quebec”, *ibid.*

<sup>23</sup> See “Temporary Foreign Workers Program: Seasonal Agricultural Workers Program (SAWP) Requirements in Quebec”, supra note 21.

<sup>24</sup> *Ibid.* The 2011 premium is \$0.60 per day per worker. However, the employer is not responsible for providing medical coverage for Caribbean workers. They are covered under a private medical insurance that is paid through a 25% payroll deduction.

## Chapter 4- SAWP Workers in Quebec and British Columbia

- Employment Insurance Contributions/Quebec Parental Insurance Plan Contributions;
- Quebec Pension Plan Contributions;
- Income Tax Deductions;
- RBC Insurance Premiums (Mexican Workers);
- 25% Administration and Savings Fund fee (Caribbean workers);
- Portion of Transportations Costs<sup>25</sup>

As for transportation, *FERME* created in 2005 its own travel agency, which organizes the transportation for all foreign agricultural workers.<sup>26</sup>

The Mexican Consulate in Montreal, on the other hand, seeks to ensure the compliance by employers and Mexicans who come to work in Quebec under the SAWP with the provisions of the Employment Agreement. The Consulate views its responsibility as follows:

From the time of his arrival on the Canadian Territory, and until his return to Mexico, and in cooperation with Human Resources and Skills Development Canada, Mexican Consular representations have the mandate to supervise the employers in order to ensure that they respect the rights and well being of the workers as well as to help them all times. This support includes the management of formalities upon arrival, supervision of work relations at their place of employment, assistance in case of medical emergency, advice to facilitate the

---

<sup>25</sup> *Ibid.*

<sup>26</sup> See “*FERME/VOYAGES*”, online: FERME < <http://www.fermequebec.com/5-FERME-Voyage-fr.html> >.

remittance of monies to Mexico as well as protection when they face situations which affect their rights in general.<sup>27</sup>

As it will be illustrated later, many Mexican workers in Quebec, however, do not view the Mexican Consulate as helpful whenever they have difficulties with their employers, or when they are ill or have a work related accident. For example, one representative from the Agricultural Workers Alliance in St. Remi, Quebec reported that the Mexican consulate in Montreal has not shown to be actively monitoring the working conditions and relations between its nationals and the Quebec farmers.<sup>28</sup> This perception has been echoed in other books, articles, papers, reports, and documentaries by other scholars and authors.<sup>29</sup>

---

<sup>27</sup> See “The Seasonal Agricultural Worker Program”, online: Consulado General de México en Montreal <<http://portal.sre.gob.mx/montrealenglish/index.php?option=displaypage&Itemid=55&op=page&SubMenu=>>>.

<sup>28</sup> Interview with Juana Vandoorne, representative of the Agricultural Workers Alliance conducted in St. Remi, Quebec on October 10, 2010 The Agricultural Workers Alliance provides varied services which include updates on agriculture workers working conditions, help and assistance on tax filling, assistance on CPP & QPP applications, EI benefits, workers compensation benefits and other issues that migrant workers face while working in Canada. For additional information see Agricultural Workers Alliance, online: <<http://awa-ata.ca/en/about/>>.

<sup>29</sup> See Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada*, (Montreal & Kingston: McGill-Queen’s University Press, 2002); Veena Verma, “The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program under Unionization”, (December 2003), online: the North-South Institute <[http://www.nsi-ins.ca/english/pdf/csawp\\_verma\\_final\\_report.pdf](http://www.nsi-ins.ca/english/pdf/csawp_verma_final_report.pdf)>; “The Status of Migrant Farm Workers in Canada 2006-2007”, online: the United Food and Commercial Workers Union (UFCWU) <<http://www.ufcw.ca/Theme/UFCW/files/PDF2007/StatusReportEN2007.pdf>>; Wai Suen, Rachel Li, “You Sure Know Who to Pick’Em: Human Rights and Migrant Farm Workers in Canada” (2000) 15 Geo Immgr LJ 1999; Min Sook Lee & Karen King-Chigbo, *El Contrato*, produced by the National Film Board of Canada (2006), on file with the author.

### **A. An Act Respecting Occupational Health and Safety<sup>30</sup> (OHS)**

This *Act* applies to any worker defined as “a person, including a student in the cases determined by regulation, who, under a contract of employment or a contract of apprenticeship, even without remuneration, carries out work for an employer. . .”<sup>31</sup> The purpose of *OHS* is “the elimination, at the source, of dangers to the health, safety and physical well-being of workers”.<sup>32</sup> Consequently, the *Act* provides rights and obligations for workers and employers in order to achieve its purpose. For example, section 9 stipulates that “[e]very worker has a right to working conditions that have proper regard for his health, safety and physical well-being.”<sup>33</sup>

#### **1. Rights for Workers**

Particularly, the *Act* provides workers with the following rights:

- To receive appropriate instruction, training, counseling and supervision regarding occupational health and safety<sup>34</sup>;
- To receive preventive and curative health services related to the risks that he/she may be exposed<sup>35</sup>; and
- To refuse to perform work if he/she has a reasonable ground to believe that performing such work would expose him/her to danger to his/her health,

---

<sup>30</sup> See OHS, *supra* note 3.

<sup>31</sup> *Ibid* at s 1. There are two exceptions to such definition: “(1) a person employed as a manager, superintendant, foreman or as the agent of the employer in his relations with his workers; (2) a director or officer of a legal person, except where a person acts as such in relation to his employer after being designated by the workers of by a certified association.”

<sup>32</sup> *Ibid* at s 2.

<sup>33</sup> *Ibid* at s 9.

<sup>34</sup> *Ibid* at s 10(1).

<sup>35</sup> *Ibid* at s 10(2).

safety or physical well-being, or would expose another person to a similar danger.<sup>36</sup>

In addition to a right to refuse work, the *Act* provides workers with an additional protection from retaliation by the employer if they choose to exercise said right.<sup>37</sup>

However, if the employer finds that the worker abused his right, then he may dismiss, suspend or transfer the worker or impose another penalty within ten days following a final decision.<sup>38</sup>

Agricultural workers, as any other type of worker are covered by the *Act*. Accordingly, Mexican SAWP workers are also covered by this legislation. It is very unlikely, however, that Mexican workers can access these legislative rights and protections due to their many disadvantages. As explained in previous chapters (1, 2 and 3), Mexican workers depend on their employers' evaluations at the end of the program to be able to apply for the following working season. A negative evaluation will likely cost them their opportunity to return to Canada the following year. However, they cannot afford to lose this work opportunity as they are the only economic means of support for their families in Mexico.

Furthermore, if a Mexican worker were to refuse work because he reasonably believes it poses danger to his health or safety or physical well-being, the employer could simply terminate his employment and cause him to be repatriated to Mexico. This is because the Employment Agreement gives the employer the ability to terminate the

---

<sup>36</sup> *Ibid* at s 12.

<sup>37</sup> *Ibid* at s 30. The *Act* states: "No employer may dismiss, suspend or transfer a worker, practice discrimination against him or impose any other penalty on him on the ground that the worker exercised the right contemplated in section 12."

<sup>38</sup> *Ibid*.

worker's employment for "non-compliance", "refusal to work", or "any other sufficient reason".<sup>39</sup> Furthermore, the Agreement does not define those terms. As well the Agreement does not provide a mechanism through which the workers could appeal their termination.

During the author's visit to St. Remi, Quebec, she had the opportunity to speak with Juana Vandoorne, a representative of the Agricultural Workers Alliance (AWA), which is committed to provide information to all agriculture and migrant workers on how to access benefits to which they are entitled under Quebec's legislation. Ms. Vandoorne reiterated what other authors have concluded, namely that most of these workers are afraid to speak about their employers because they could get "angry" and not request them next year or write "bad" evaluations.<sup>40</sup> As well, the AWA's representative voiced her concerns on the precarious working conditions that SAWP workers faced every day.<sup>41</sup>

For instance she explained that many *patrones*<sup>42</sup> did not provide their workers with any safety gear such as a mask to protect them from inhaling dust and chemicals. However, SAWP workers are afraid to complain as they are aware that they could be sent home at any time.<sup>43</sup>

---

<sup>39</sup> See Appendix II, *Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico-2011* (Employment Agreement), Clause X (1). The Agreement states: "Following completion of the trial period of employment by the WORKER, The EMPLOYER, after consultation with the GOVERNMENT AGENT, shall be entitled for non-compliance, refusal to work, or any other sufficient reason, to terminate the WORKER'S employment hereunder and so cause the WORKER to be repatriated."

<sup>40</sup> Interview at St. Remi, *supra* note 28.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Patron* is the Spanish and French word for boss.

<sup>43</sup> Interview at St. Remi, *supra* note 28.

Similar concerns have been raised since the early 90's by the Centre for Agricultural Medicine, Department of Medicine at the University of Saskatchewan. Its report titled *Epidemiology of Health and Safety Risks in Agricultural and Related Industries: Practical Applications for Rural Physicians* states:

Health risks in agriculture arise from various exposures, including organic and inorganic airborne dusts and gases, microbes and their toxins, chemicals including fertilizers, insecticides, herbicides, and fungicides, diesel exhaust fumes, physical and mechanical hazards, stress, and behavioural factors. The magnitude of these risks has risen with the increasing industrialization of modern agricultural practices. . .The major recognized or perceived problems among farming populations include respiratory disorders, cancer, neurologic problems, injuries and traumatic deaths, Skin diseases, hearing loss, and stress. . .Some studies document that farmers and those in related industries are at higher risk for the development of cancer of the stomach, soft tissue sarcoma, non-Hodgkin's lymphoma, and multiple myeloma.

Chronic encephalopathy and Parkinson's and Alzheimer's diseases are being studied in relation to agricultural chemicals. The possible carcinogenicity and neurotoxicity of pesticides emphasize the need to promote the safe use of chemicals.<sup>44</sup>

Another example expressed by AWA's representative was that many *patrones* do not provide with the necessary protective gear and dismiss worker's complaints when they are harmed or injured in the workplace. Rather than sending them to the infirmary, they ignore them and demand that they keep working. Also, if they need protective gear, many employers make SAWP workers buy their own.<sup>45</sup>

It seems it is the exception and not the rule when it comes to employers providing protective gears at no charge to their workers. AWA's representative conveyed that the protections granted by Quebec's legislation do not seem to reach SAWP workers. Even

---

<sup>44</sup> Jan E. Zejda, Helen H. McDuffie & James A. Dousman, *Epidemiology of Health and Safety Risks in Agriculture and Related industries: Practical applications for Rural Physicians* (1993), online: The Western Journal of Medicine <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1021941/pdf/westjmed00077-0058.pdf>>.

<sup>45</sup> Interview at St. Remi, *supra* note 28.

if they were to complain and ask for their rights, they could just be sent back to Mexico the next day.<sup>46</sup> In fact, the representative personally knew of cases, as told by other SAWP workers, where Mexicans were sent back because they would complain about their working conditions; become ill or injured.<sup>47</sup>

## 2. Health and Safety Committees

*OHS* provides mechanisms for the participation of workers and employers to accomplish its objectives, which are “the elimination, at the source, of dangers to the health, safety and physical well-being of workers”<sup>48</sup>. Therefore, the *Act* provides for the creation of Health and Safety Committees. It states: “[a] health and safety committee may be established in any establishment employing more than twenty workers and belonging to a category identified for that purpose by regulation.”<sup>49</sup> In essence these committees oversee that appropriate measures are created and carried out in order to protect workers.<sup>50</sup>

---

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *OHS*, *supra* note 3 at s 2.

<sup>49</sup> *Ibid* at s 68.

<sup>50</sup> *Ibid* at s 78. As the *Act* succinctly states: “The functions of a health and safety committee are (1) to choose, in accordance with section 118, the physician in charge of health services in the establishment; (2) to approve the health program prepared by the physician in charge under section 112; (3) to establish, within the prevention program, training and information programs in matters of occupational health and safety; (4) to select the individual protective devices and equipment which, while complying with the regulations, are best adapted to the needs of the workers of the establishment; (5) to take cognizance of the other components of the prevention program and to make recommendations to the employer; (6) to participate in the identification and assessment of the risks connected with certain jobs and certain kinds of work, and the identification of contaminants and dangerous substances connected with certain jobs, for the purposes of section 52; (7) to keep registers of work accidents, occupational diseases and incidents that could have caused them; (8) to send to the Commission the information required by it and an annual report of activities, in accordance with the regulations; (9) to receive copy of notices of accident and to inquire into incidents that have caused or could have caused a work accident or an occupational disease and to submit the appropriate recommendations to the employer and the Commission; (10) to receive suggestions

## Chapter 4- SAWP Workers in Quebec and British Columbia

At least one-half of the members in a health and safety committee must represent the workers, while the other half must represent the employer.<sup>51</sup>

In addition, the *Regulation Respecting Health and Safety Committees*<sup>52</sup> stipulates which categories of establishments may establish a committee. They are

- (A) construction industry,
- (B) chemical and chemical products industries,
- (C) forestry and sawmills,
- (D) mines, quarries and oil wells,
- (E) metal fabricating industries,
- (F) wood industry,
- (G) rubber and plastics industries,
- (H) transportation equipment industries,
- (I) primary metal industries, and
- (J) non-metallic mineral products industries.<sup>53</sup>

Accordingly, the agricultural sector is excluded from the regulation. As such, agricultural workers cannot be represented by health and safety committees in their place of work. This seems to be a grave lapse of judgment on the Quebec government since the agricultural industry is one of the top four most hazardous industries in which to work.<sup>54</sup>

---

and complaints from the workers, the certified association and the employer relating to occupational health and safety, and to examine, record, and answer these suggestions and complaints; (11) to receive and study the reports of inspections made in the establishment; (12) to receive and study the statistical data produced by the physician in charge, the agency and the Commission; (13) to carry out any other task the employer and the workers or their certified association entrust to it under an agreement.”

<sup>51</sup> *Ibid* at s 71.

<sup>52</sup> RQ c S-2.1, r 6.1.

<sup>53</sup> *Ibid* at SCHEDULE 1.

<sup>54</sup> The other three are mining, logging and forestry, and construction. See William Pickett, Lisa Hartling, *et al*, *Fatal Work-Related Injuries in Canada 1991-1995*, online: Canadian Medical Association, online

### 3. Safety Representatives

The agricultural sector is excluded from having safety representatives. That is because there must be a health and safety committee in place in order to designate safety representatives. Since the agricultural sector is excluded by regulation from having health and safety committees then it is also excluded from having safety representatives. The *Act* states: “[w]here a health and safety committee exists in an establishment, one or more persons shall be designated from among the workers of the establishment as safety representatives”.<sup>55</sup> Its regulation further imposes additional restrictions.<sup>56</sup>

Some of the key functions of a safety representative are to inspect the workplace, to investigate accidents, to identify potential dangers at work, to assist workers exercise their rights under the *Act*, and to submit complaints to the Commission.<sup>57</sup> Unfortunately, agricultural workers in Quebec cannot have access to this protection. They have been excluded from key mechanisms created to prevent and address work-related health and safety matters notwithstanding the fact that agricultural work is one of the most hazardous occupations in Canada. This is clearly a great disadvantage for all agricultural workers in Quebec which further intensifies Mexican SAWP workers’ disadvantages at the work place. Quebec agricultural workers may refuse to work or find other

---

<<http://www.cmaj.ca/cgi/reprint/160/13/1843.pdf>> [Pickett, Hartling, et al.]. See generally *Agricultural Fatalities in Canada 1990-2005*, online: Canadian Agricultural Injury Surveillance Program <<http://cair-sbac.ca/natfull.pdf>>. See also Zejda, McDuffie & Dousman, *supra* note 44.

<sup>55</sup> See OHS, *supra* note 3 at s 87. It specifies that “[c]hapter V of the Act respecting occupational health and safety. . . which concerns safety representatives in an establishment, does not apply to establishments with 20 workers or fewer, except for establishments with a health and safety committee established under the second paragraph of section 69 of the Act.”

<sup>56</sup> See *Safety Representatives in Establishments Regulation*, RQ c S-2.1, r 18.01, s 1.

<sup>57</sup> See OHS, *supra* note 3 at s 90.

employment either in another farm or another sector; nevertheless, this is not an option for Mexican SAWP workers.

### **B. An Act respecting Labour Standards<sup>58</sup> (LS)**

The *Act respecting Labour Standards* establishes minimum conditions of employment for all employees in Quebec; therefore, it creates the foundations of a universal system of labour standards. The *Act* applies to all employees in Quebec regardless of where he/she works with some exceptions.<sup>59</sup>

There are exceptions to the applicability of the *Act* which are child or elderly care providers<sup>60</sup>; employees governed by the *Act respecting Labour Relations*<sup>61</sup>; students working during the school year in an establishment selected by an educational establishment<sup>62</sup>; health service and social service beneficiaries working as part of their physical, mental or social rehabilitation at a designated establishment<sup>63</sup>; senior managerial personnel<sup>64</sup>; and persons working in enterprises under federal jurisdiction

---

<sup>58</sup> See LS, *supra* note 4.

<sup>59</sup> *Ibid* at s 2. “This Act applies to the employee regardless of where he works. It also applies (1) to the employee who performs work both in Quebec and outside Quebec for an employer whose residence, domicile, undertaking, head office or office is in Quebec; (2) to the employee domiciled or resident in Quebec who performs work outside Quebec for an employer contemplated in paragraph 1. .

<sup>60</sup> *Ibid* at s 3(2).

<sup>61</sup> *Ibid* at s 3(3).

<sup>62</sup> *Ibid* at. s 3(5).

<sup>63</sup> See “*Labour Standards in Quebec*”, online: Commission des normes du Travail <[http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c\\_0149a.pdf](http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c_0149a.pdf)>.

<sup>64</sup> See LS, *supra* not 4 at s 3(6).

such as chartered banks, interprovincial and international transport businesses and radio stations, to name a few<sup>65</sup>.

### 1. Wages

Agricultural workers who are “mainly assigned to non-mechanized operations relating to the picking or processing vegetables” are excluded from receiving minimum wage as prescribed by the *Act*.<sup>66</sup> However, this section of the Regulation ceased to have effect on 1 January 2011.<sup>67</sup> In fact, as will be explained below, farm workers have been entitled to the regular minimum wage since May 1, 2011.

The *Regulation Respecting Labour Standards* further specifies that farm workers who are “assigned mainly to non-mechanized operations relating to the picking of raspberries or strawberries” must be paid \$2.80 per kilogram for picking raspberries and \$0.74 per kilogram for picking strawberries.<sup>68</sup>

Mexican workers under the SAWP are affected by these provisions; however, they have an additional layer of stipulations prescribed by the Employment Agreement. It states:

3. To pay the WORKER at his place of employment weekly wages in lawful money of Canada at a rate equal to the following, whichever is the greatest:
  - i. the minimum wage for WORKERS provided by law in the province in which the WORKER is employed;
  - ii. the rate determined annually by HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA to be the prevailing wage rate for the type of agricultural work being carried out by the WORKER in the province in which the work will be done; or

---

<sup>65</sup> These employees are covered by the *Canada Labour Code*, RSC 1985, c L-2.

<sup>66</sup> See *Regulation Respecting Labour Standards*, RRQ, c N-1.1, r 3, s 2(6).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at s 4.1.

- iii. the rate being paid by the EMPLOYER to his Canadian workers performing the same type of agricultural work;
- 4. That the average minimum work week shall be 40 hours. . .<sup>69</sup>

A December 22, 2010 press release by la *Commission des normes du travail* announced that the minimum wage rate in Quebec would increase from \$9.50 to \$9.65 per hour effective May 1, 2011.<sup>70</sup> As well, farm workers (those not assigned to the picking of strawberries and raspberries) would be remunerated at the general minimum wage (\$9.65 as of May 1, 2011).<sup>71</sup> As for pickers of strawberries and raspberries the yield-based rate would increase to \$0.75 per kilogram (for strawberries) and to \$2.84 per kilogram (for raspberries).<sup>72</sup> Although the increase in minimum wage may be welcomed and viewed as a positive step to bringing agricultural workers to parity with other workers in Quebec, nonetheless, as will be discussed below, their inability to benefit from overtime pay will diminish such parity.

## 2. Duration of the Regular Workweek

The regular workweek, as stipulated by the *Act*, facilitates the interested parties to determine the time that an employee is working overtime and therefore must be paid accordingly. Generally, the regular workweek is 40 hours.<sup>73</sup> However, agricultural workers are excluded from this formula.<sup>74</sup> Instead the *Act* provides that “. . .the

---

<sup>69</sup> Appendix II, Employment Agreement, Clause III (3) and (4).

<sup>70</sup> See “The minimum wage will increase by \$0.15 an hour on May 1, 2011”, online: la Commission des normes du travail < <http://www.cnt.gouv.qc.ca/en/the-commission-informsyou/news/news/annee/2010/comm/249/91/index.html>>.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> See LS, *supra* note 4, s 52.

<sup>74</sup> *Ibid* at s 54(7).

Government may, by regulation, prescribe the number of hours it determines as the regular workweek for the categories of employees mentioned in . . .” subparagraph 7 referring to farm workers.<sup>75</sup> The author notes that during the drafting of this thesis, the Quebec government had not clearly stipulated what is the definition of a “regular workweek” for farm workers. The *Regulation Respecting Labour Standards* is silent on this matter, even though it has defined the scope of such term for other categories of employees such as

- A watchman guarding a property for an enterprise supplying a surveillance service (44 hours)<sup>76</sup>;
- any other watchman (60 hours)<sup>77</sup>;
- an employee working in a forestry operation (47 hours)<sup>78</sup>;
- an employee working in a sawmill (47 hours)<sup>79</sup>;
- an employee working on a remote area (55 hours)<sup>80</sup>; and
- an employee working on the James Bay territory (55 hours)<sup>81</sup>.

---

<sup>75</sup> *Ibid.* at s. 54(9). Under “Regular workweek”

<sup>76</sup> See *the Regulation Respecting Labour Standards*, *supra* note 66 at s 9.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid* at s 10.

<sup>79</sup> *Ibid* at s 11.

<sup>80</sup> *Ibid* at s 12.

<sup>81</sup> *Ibid* at s 13.

## Chapter 4- SAWP Workers in Quebec and British Columbia

Although Quebec legislation excludes farm workers from the regular definition of a workweek, Mexican workers under the SAWP are bound by the Employment Agreement to work as follows:

2. The normal working day is 8 hours, but the EMPLOYER may request of the WORKER and the WORKER may agree to extend his/her hours when the urgency of the situation requires it, and where the conditions of employment involves a unit of pay, and such requests shall be in accordance with the customs of the district and the spirit of this program, giving the same rights to Mexican workers as given to Canadian workers. The urgent working day should not be more than 12 hours daily.<sup>82</sup>

As discussed in chapter 3, the reality surrounding Mexican workers seems to be incongruent with the stipulation of the Agreement. First of all, most workers are required to work more than 8 hours per day, every day. The regular working day, as conveyed to the author by AWA's representatives during her interview at St. Remi, Quebec, is 12 to 14 hours.<sup>83</sup> Furthermore, the workers are required to do so otherwise they may be sent back to Mexico for "refusal to work". Therefore, it is very unlikely that most workers "may agree" to work, rather they **must** agree to work. Finally, the Agreement makes it appear as if the long 12 hour working day is an exception only during emergencies. The reality however is that the 12 plus hour working day is the norm for most Mexican workers under the SAWP. Accordingly, they work long hours without the benefit of ever receiving overtime payment. When it comes to overtime pay, Mexicans working in Quebec suffer from the same exclusion than Mexicans working in Ontario.

---

<sup>82</sup> Appendix II, Employment Agreement, Clause I (2).

<sup>83</sup> Interview at St. Remi, *supra* note 28.

### 3. Weekly Rest Periods

Under Quebec legislation, an employee is entitled to a rest period of not less than 32 consecutive hours each week.<sup>84</sup> Nevertheless, in the case of farm workers, such day of rest may be postponed to the following week subject to the employee's consent.<sup>85</sup> In the case of Mexican workers under the SAWP, the Employment Agreement reduces their weekly rest period from 32 hours to one day of rest (24hours). It states:

3. For each six consecutive days of work, the WORKER will be entitled to one day of rest, but where the urgency to finish farm work cannot be delayed, the EMPLOYER may request the WORKER's consent to postpone that day until a mutually agreeable date.<sup>86</sup>

This provision, which makes it appear as if delaying the one day of rest was done in exceptional cases due to an emergency and subject to the worker's consent is misleading. As previous chapters point out, Mexican workers are afraid to say NO. They are afraid to refuse to work during their day of rest since exercising that right may anger their employer. Because Mexican workers rely in their employers' evaluations to be re-hired the next season, it is unlikely that they will cause their *patron* to write a negative evaluation because they refused to work during their rest period. In addition, they live in fear of saying no because they can easily be sent home for "refusal to work" or any other reason.<sup>87</sup> As such, Mexicans working in Quebec suffer from the same lack of protection when it comes to rest periods than Mexicans working in Ontario.

---

<sup>84</sup> See LS, *supra* note 4 at s 78.

<sup>85</sup> *Ibid.*

<sup>86</sup> Appendix II. Employment Agreement, Clause I (3).

<sup>87</sup> *Ibid* at Clause X (1).

#### 4. The Right to Refuse to Work

An employee may exercise his/her right to refuse to work in the following circumstances:

- (1) more than four hours after regular daily working hours or more than 14 working hours per 24 hour period, whichever period is the shortest or, for an employee whose daily working hours are flexible or non-continuous, more than 12 working hours per 24 hour period;
- (2) subject to section 53, more than 50 working hours per week or, for an employee working in an isolated area or carrying out work in the James Bay territory, more than 60 working hours per week.<sup>88</sup>

However, the right to refuse to work cannot be exercised where:

. . .there is a danger to the life, health or safety of employees or the population, where there is a risk of destruction or serious deterioration of movable or immovable property or in any other case of superior force, or if the refusal is inconsistent with the employee's professional code of ethics.<sup>89</sup>

Although this protection exists for all workers in Quebec, the reality for Mexican workers under the SAWP is that such protection does not shield them from being sent back to Mexico in the event that they refuse to work for longer hours as stipulated in the *Act* or in the Employment Agreement. Consequently in many respects Mexican workers under the SAWP cannot avail themselves of key protections from Quebec's legislation.

#### 5. Annual Leave with Pay

Employees subject to the *Act* are entitled to the annual leave provided by it.<sup>90</sup> Some exceptions apply to:

- Students employed in a vacation camp or in a social or community non-profit organization<sup>91</sup>;

---

<sup>88</sup> LS, *supra* note 4 at s 59.0.1.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid* at s 66.

- A real estate agent<sup>92</sup>;
- A representative of a securities dealer or adviser within the meaning of applicable legislation<sup>93</sup>;
- A representative respecting the distribution of financial products and services<sup>94</sup>;
- A trainee within the framework of a vocational training program recognized by law.<sup>95</sup>

The annual leave must be taken in the 12 months following the reference year.<sup>96</sup> Farm workers are included in this provision. Nevertheless, Mexican workers under the SAWP cannot access this benefit because they cannot satisfy the “reference year” requirement. The *Act* stipulates that the “reference year is a period of twelve consecutive months during which an employee progressively acquires entitlement to an annual leave.” As well the “reference year” is measured from 1 May of the preceding year to 30 April of the current year unless a different starting date is approved by agreement or decree.<sup>97</sup> Mexican workers can only work up to 8 months per year<sup>98</sup>; therefore, they can never

---

<sup>91</sup> *Ibid* at s 77(2).

<sup>92</sup> *Ibid* at s 77(3).

<sup>93</sup> *Ibid* at s 77(4).

<sup>94</sup> *Ibid* at s 77(5).

<sup>95</sup> *Ibid* at s 77(7).

<sup>96</sup> *Ibid* at s 66.

<sup>97</sup> *Ibid*.

<sup>98</sup> See Appendix II, Employment Agreement, Clause I (1)(a). “. . . [T]he EMPLOYER agrees to hire the WORKER(S). . . for a term of employment of not less than 240 hours in a term of 6 weeks or less, nor longer than 8 months . . .”

satisfy the 12 month reference year requirement and as such are excluded from the “annual leave with pay” benefit.

### **C. Labour Code<sup>99</sup> (LC)**

The *Labour Code* protects the right of employees to join a union of their choice by making it an unfair labour practice for an employer to discriminate against employees for joining a union or participating in any of its lawful activities.<sup>100</sup> Furthermore, the *Code* requires the employer to bargain in good faith with the union chosen as bargaining agent by a majority of his employees. Accordingly, the *Labour Code* gives employees in Quebec, with some exceptions<sup>101</sup>, the right of association. In particular it states:

3. Every employee has the right to belong to the association of employees of his choice, and to participate in the formation, activities and management of such association.<sup>102</sup>

Generally, farm workers are covered in the *Code*; but section 21, paragraph 5 diminishes their right of association by further imposing requirements as to which farm employees’ associations are to be certified. The *Code* establishes that

Any association of employees comprising the absolute majority of the employees of an employer or, in the case provided for in paragraph b of section 28 or in section 32 or 37, the association that obtains, following the ballot provided for in

---

<sup>99</sup> LC, *supra* note 5.

<sup>100</sup> *Ibid* at s 13 and 14.

[13] “No person shall use intimidation or threats to induce anyone to become, refrain from becoming or cease to be a member of an association of employees or an employers’ association.”

[14] “No employer nor any person acting for an employer or an employers’ association may refuse to employ any person because that person exercises a right arising from this Code, or endeavour by intimidation, discrimination or reprisals, threat of dismissal or other threat, or by the imposition of a sanction or by any other means, to compel an employee to refrain from or to cease exercising a right arising from this Code.”

<sup>101</sup> *Ibid* at s 1(l).

<sup>102</sup> *Ibid* at s 3.

the said sections, the absolute majority of the votes of the employees of the employer having the right to vote, is entitled to be certified.<sup>103</sup>

However, with regards to farm workers:

Persons employed in the operation of a farm shall not be deemed to be employees for the purposes of this division unless at least three of such persons are ordinarily and continuously so employed.<sup>104</sup>

The *Code* does not define what is “ordinarily and continuously so employed”. Mexican workers under the SAWP have not been able to certify their employee associations because their work is deemed to be seasonal. This exclusion resulted in a legal challenge<sup>105</sup>, which will be discussed below, brought by a group of seasonal agricultural workers from Mexico.

***D. Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 c. Johanne L'Écuyer & Pierre Locas (Travailleurs et travailleuses)***<sup>106</sup>

This case was brought by six Mexican agricultural workers who worked at the farm L'Écuyer & Locas. Said farm employed Mexican workers during a period of about less than eight months per year. Except for this period, there were fewer than three employees working the farm.<sup>107</sup> The Mexican workers sought to certify their employee association pursuant to s. 21 of the *Labour Code*. However, section 21, paragraph 5 of the *Code* provides that person employed for farm working are not considered among

---

<sup>103</sup> *Ibid* at s 21.

<sup>104</sup> *Ibid* at para 5.

<sup>105</sup> See *Travailleurs et travailleuses*, *supra* note 6.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* at para 2.

employees that could have an accredited association if they do not work “ordinarily and continuously” with a minimum number of three employees.<sup>108</sup>

In other words, the 40-year-old section of the *Quebec Labour Code* (section 21) only allowed union organizing at Quebec farms with three or more employees continuously employed throughout the year. As such, the *Code*’s provision excluded many industrial-scale Quebec farms, where most workers are only employed seasonally. The farm employer argued that the association could not be certified because it failed to fulfill section 21, paragraph 5 of the *Code*.<sup>109</sup> Also, *FERME* and the Quebec attorney general made arguments to la *Commission des relations du travail* that section 21, paragraph 5 was reasonable and should remain in force. Particularly, they argued that the freedom of association of the six migrant workers in question was not impaired because these workers were not prevented from forming an association to deal with the employer regarding their working conditions.<sup>110</sup> As well, they argued that these workers were not guaranteed a particular bargaining regime. Furthermore, they submitted that the union was seeking a positive action by the state in support of an unsubstantiated right.<sup>111</sup> However, all that the Canadian *Charter* required was non-interference with any such right. Alternatively, they argued, if the rights of the migrant workers were infringed, such infringement was justified as a reasonable limit on fundamental rights by s. 1 of the *Charter*. In that case, the infringement was motivated by and rationally connected to, the pressing and substantial state objective of protecting the family farms, and the

---

<sup>108</sup> *Ibid* at para 3.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* at paras 216 and 295.

<sup>111</sup> *Ibid* at para 326.

impairment of rights was minimal and proportional to the objective.<sup>112</sup> Finally, the Attorney General of Quebec asked that, if the Board were to find the impugned provision unconstitutional, it should not proceed with certifying the bargaining unit but rather should give the government time to legislatively address the problem.<sup>113</sup> *La Commission* ultimately disagreed with the employer, *FERME* and Quebec's Attorney General.

## 1. The Issues

The union representing the Mexican farm workers challenged the constitutionality of said provision of the *Code*. Therefore, the central issue of this case was whether section 21, paragraph 5, of the *Code* violates, without justification, the employees' freedom of association and their right to equality.<sup>114</sup>

### a. Freedom of Association

In deciding whether section 21 of the *Code* violated freedom of association, la *Commission des relations du travail* analyzed in particular *Dunmore*<sup>115</sup>, *BC Health Services*<sup>116</sup> and *Fraser*<sup>117</sup>. Consequently it held that section 21, paragraph 5, of the *Labour Code* was unconstitutional as it violated s. 2(d) of the *Charter*<sup>118</sup> and s. 3 of the

---

<sup>112</sup> *Ibid* at paras 379-384.

<sup>113</sup> *Ibid* at para 310.

<sup>114</sup> *Ibid* at paras 5 and 215.

<sup>115</sup> *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].

<sup>116</sup> *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*].

<sup>117</sup> *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, 301 DLR (4<sup>th</sup>) 335 [*Fraser II*].

<sup>118</sup> See *The Constitution Act, 1982*, being Schedule B to the [Canada Act 1982 \(U.K.\), 1982, c 11](#), s 2(d). (*Charter*)

“Everyone has the following fundamental freedoms:

Quebec *Charter of Human Rights and Freedoms*<sup>119</sup>. Accordingly, it found paragraph 5 of section 21 of the *Labour Code* inoperative. As part of its rationale for holding that section 21, paragraph 5 of the *Code* violated s.2(d) of the Canadian *Charter*, the *Commission* explained that workers under the SAWP did not have a collective bargaining regime; that only the employers are represented when deciding about working conditions.<sup>120</sup> The *Commission* further stated that:

[308] En l'absence de tout autre régime pouvant permettre d'atteindre les mêmes fins, l'exclusion du régime général prévue au *Code* empêche les travailleurs saisonniers exclus d'influencer véritablement sur leurs conditions de travail. L'État contribue ainsi à ce que soit nié à ce groupe de personnes la plénitude des avantages qui découlent de la liberté d'association qui est constitutionnellement garantie à leur égard.<sup>121</sup>

In short, the *Commission* declared that in the absence of any other plan that could achieve the same purpose as a certified union, the exclusion in the *Labour Code* prevents seasonal workers from having a say or influencing their working conditions; and by having such exclusion in the *Code*, the state contributes to the denial of full benefits for workers under the SAWP arising from freedom of association as constitutionally guaranteed.<sup>122</sup>

With regards to the Attorney General's petition that the issue be treated narrowly as pertaining to only the requested certification of bargaining unit at the farm in question where the six Mexican workers were employed, the *Commission* rejected this petition by

---

(d) freedom of association.”

<sup>119</sup> See *Charter of human rights and freedoms*, R.S.Q. c. C-12, at s. 3. “Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.”

<sup>120</sup> See *Travailleurs et travailleuses*, *supra* note 6 at para 307.

<sup>121</sup> *Ibid.* at para. 308.

<sup>122</sup> *Ibid.*

stating that the exclusion affects thousands of workers employed by farms that ‘ordinarily and continuously’ employ fewer than three persons.<sup>123</sup> As well, the *Commission* rejected the argument that the exclusion was saved under s. 1 of the *Charter*. Instead, it found that the evidence did not show that the farming business, which by virtue of s. 21(5) of the *Labour Code* are ‘sheltered’ from eventual unionization of their work force, are in a precarious situation or are on the brink of failure.<sup>124</sup> Finally, the *Commission* rejected the argument that the rights of seasonal workers were not infringed because nothing prevented them from associating with others and reaching an agreement with the employer regarding their employment conditions. The *Commission* found that to be a mere theoretical right without a real process to exercise real influence over their working conditions.<sup>125</sup>

**b. s. 15 Equality Rights**

On the other hand, the *Commission* rejected the equality argument based on s. 15 of the *Charter*.<sup>126</sup> It stated that “occupational status” *vis-à-vis* “agricultural workers” is not an analogous ground for purposes of s. 15 analysis as “agricultural workers” did not form a group identified by personal characteristics.<sup>127</sup> With regard to migrant farm workers, the *Commission* also rejected the argument that they were discriminated on the basis of “national origin” or “ethnicity” since the *Code* does not differentiate based on personal

---

<sup>123</sup> *Ibid* at para 219.

<sup>124</sup> *Ibid* at paras.380-390.

<sup>125</sup> *Ibid* at para 297.

<sup>126</sup> *Ibid* at para 414.

<sup>127</sup> *Ibid* at para 365.

characteristics of these people. Rather, the exclusion applies to all agricultural workers who work in a farm. Although migrant farm workers represent a large and increasing portion of the farm labour force, they are all not initially treated differently from other persons subject to the exclusion.

In summary, the *Commission* held that the differential treatment does not follow from any of the personal characteristics of migrant agricultural workers; rather, said treatment is based on the workers place of work (farms as stipulated by s. 21, paragraph 5 of the *Code*).<sup>128</sup> As well, the *Commission* explained that the intent of the *Code* was not to discriminate against migrant workers since at the time of its adoption, the demographic reality in the farm industry was different than today's, (i.e. a major portion of the farm labour force today is composed of migrant workers mainly from Mexico and Guatemala).<sup>129</sup>

### c. Union Accreditation

Finally, having declared s. 21, paragraph 5 of the *Code* unconstitutional because it violated s. 2(d) of the Canadian *Charter*, the *Commission* accredited United Food and Commercial Workers Union, Local 501 to represent all employees within the meaning of the *Labour Code*, excluding clerical employees assigned to administration.<sup>130</sup>

---

<sup>128</sup> *Ibid* at paras 368-373.

<sup>129</sup> *Ibid* at para.372. *La Commission* states: “De plus, malgré le fait que les travailleurs agricoles migrants constituent une part appréciable de la main-d'oeuvre agricole saisonnière, on ne peut induire de cette situation que la différence de traitement applicable aux travailleurs saisonniers exclus s'appuie, formellement ou implicitement, sur leurs caractéristiques personnelles, d'autant qu'au moment de l'adoption des dispositions législatives concernées, le portrait de la main-d'oeuvre était fort différent.”

<sup>130</sup> *Ibid* at para 414.

## 2. New Developments and Observations

Shortly after the *Commission* delivered its decision, the Attorney General of Quebec requested a judicial review by the Superior Court of Quebec (*Cour Supérieure*). In its factum, the Attorney General of Quebec challenged the correctness of the *Commission's* decision.<sup>131</sup> As of the drafting of this thesis, the Court has not rendered its decision yet.<sup>132</sup> Accordingly, this section of the chapter will be divided in two. It will first comment on the decision of the *Commission*. Secondly, it will shift its focus to comment on the Attorney General's arguments for a judicial review of the decision, particularly in light of the Supreme Court's decision in *Ontario (Attorney General) v. Fraser (Fraser III)*.<sup>133</sup>

### a. Commentary on the *Commission's* Decision

The author makes the following observations about the *Commission's* decision, in particular to its s. 15 equality analysis, namely that it failed to look at the complete reality of Mexican workers under the SAWP. As well, it focused part of its analysis on the **intention** and not the **effect** of the exclusion in the legislation.

---

<sup>131</sup> See Mémoire du Procureur Général du Québec, *Procureur Général du Québec c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 et Johanne L'Écuyer et Pierre Locas*, Dossier No. 500-17-058556-104 at para. 8 (Que Sup Ct). [*Procureur Général du Québec c. Travailleurs et travailleuses*, Mémoire du Procureur Général du Québec]

“Compte tenu du fait que la présente affaire soulève des questions de nature constitutionnelle, la norme de contrôle applicable est celle de la décision correcte.”

<sup>132</sup> The hearing for this case took place on November 23, 2011. Dossier Number: 500-17-058556-104.

<sup>133</sup> 2011 SCC 20, [2011] 2 SCR 3. [*Fraser III*] See chapter 3 for a considerable analysis of this case.

The seminal case of *Andrews v. Law Society of British Columbia*<sup>134</sup> (*Andrews*) as furthered developed in a series of cases culminating in *Law v. Canada*<sup>135</sup> (*Law*), identified two key elements for a successful s. 15(1) claim. First, there must be differential treatment based on one of the grounds listed in s. 15(1) or on an analogous ground. Second, there must be discrimination involving factors such as prejudice, stereotyping, and disadvantage.<sup>136</sup>

Particularly, a decade after *Andrews*, the Supreme Court indicated in *Law*<sup>137</sup> that section 15(1)'s purpose is to prevent the violation of "human dignity" by the imposition of disadvantage, stereotyping, or political or social prejudice. The Court also distinguished four factors relevant to determine whether legislation has the EFFECT of violating dignity in the relevant sense: (i) pre-existing disadvantage experienced by the individual or group alleging a *Charter* violation, (ii) the relationship between the ground on which the claim is based and the nature of the differential treatment, (iii) the ameliorative purpose or effects of the impugned measure on a more disadvantaged individual or group, and (iv) the nature and scope of the interest affected by the legislation.<sup>138</sup>

Nine years later, the Court indicated in *R. v. Kapp (Kapp)*<sup>139</sup> that *Law* should not be understood as having imposed a new test for discrimination, but rather as having affirmed

---

<sup>134</sup> [1989] 1 SCR 143.

<sup>135</sup> [1999] 1 SCR 497.

<sup>136</sup> See *R. v. Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 17.

<sup>137</sup> See *Law*, *supra* note 135.

<sup>138</sup> *Ibid* at paras 62-75.

<sup>139</sup> See *Kapp*, *supra* note 136.

the basic approach set out in *Andrews*. The Court also suggested that the analysis in any particular case should focus on the idea of discrimination with “perpetuation of disadvantage and stereotyping” as the primary indicators of discrimination.<sup>140</sup>

After *Kapp*, the Court further shaped its section 15 equality jurisprudence in *Withler v. Canada*.<sup>141</sup> This case holds that claimants attempting to bring a section 15 claim no longer need to establish that they are worse off than a “mirror comparator” group. The Court states:

If follows that a formal analysis based on comparison between the claimant group and a “similarly situated” group, does not assure a result that captures the wrong to which s. 15(1) is directed—the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.<sup>142</sup>

---

<sup>140</sup> *Ibid* at paras 23-25. “[23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

[24] Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

[25] The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.”

<sup>141</sup> See *Withler v. Canada (A.G.)*, 2011 SCC 12, [2011] 1 SCR 396 (*Withler*).

<sup>142</sup> *Ibid* at para 40.

When looking at the effect of the exclusion in section 21, paragraph 5, of the Quebec *Labour Code*, one notices that it disproportionately affects migrant workers in particular since, unlike their Quebecois counterparts, they cannot work “ordinarily and continuously” because they are of a different national origin (Mexican citizens) and thus foreigners. Therefore, they must have a work permit to work in Canada. The work permit stipulates the seasonal nature of their work; it usually grants them work authorization from 6 weeks to 8 months. In addition to their immigration restrictions, the Employment Agreement sets out that the maximum amount of time allowed to work in Canada is 8 months.<sup>143</sup>

Therefore, all Mexican workers under the SAWP can never meet the “ordinarily and continuously” requirement of the *Code*; whereas their Quebecois counterparts do have this capacity. This reality suggests that the differential treatment is based on a personal characteristic, namely, that they are foreigners, non-Canadian citizens (all of them are clearly of a different national origin and most of them have a different ethnicity) with strict employment and mobility restrictions placed by Canada. As well, because they are not Canadian citizens, they are one of the most marginalized groups since they do not have the political capital to shield themselves from exploitation. Simply put, they cannot vote because they are foreigners and as such they do not have political representation looking out for their interests as Canadians do. Hence, the differential treatment executed through the legislative exclusion in section 21, paragraph 5 of the Quebec *Labour Code*, perpetuates SAWP Mexican workers disadvantages and vulnerabilities by denying them

---

<sup>143</sup> See Appendix II, Employment Agreement, Clause I ( 1)(a).

the right to have a say regarding their working conditions and the right to join and certify a union to represent them.<sup>144</sup>

Finally, the issue of whether the government intended to cause the disadvantageous distinction is not relevant to the inquiry regarding section 15 analysis.<sup>145</sup> As Social Justice Professor Sheila McIntyre noted:

The [Supreme] Court affirmed [in *Andrews*] the principle already established in its human rights jurisprudence that equality claimants need not prove discriminatory intent in order to establish a section 15 infringement: proof of discriminatory effects would suffice. Indeed, the focus of section 15 analysis should be on the impact of the challenged law or policy on members of historically disadvantaged or stigmatized groups, the politically marginalized and those commonly burdened by stigmatization and negative stereotyping.<sup>146</sup>

In summary, the differential treatment may result from an expressed distinction in government action or may be the result of the effect of government action experienced because of the particular personal characteristics of the claimants. Thus, the inquiry about the effect of government action may be pursued by asking whether the government has failed to consider the already disadvantaged position of a group within Canadian society resulting in substantively different treatment on personal characteristics.<sup>147</sup>

Based on the Supreme Court's analysis of s.15(1), the *Commission* failed to take into account the already disadvantaged position of Mexican migrant workers within Quebec

---

<sup>144</sup> The Supreme Court in *Withler* stated that “[p]erpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group.” See *Withler*, *supra* note 141 at para 35.

<sup>145</sup> See *Andrews*, *supra* note 134 at 168. “Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application”

<sup>146</sup> Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*. (Markham, Ont.: LexisNexis Butterworths, 2006) at 7.

<sup>147</sup> See *Kapp*, *supra* note 136 at para 25.

society; it failed to contextualize this group's reality; it failed to understand how the legislative exclusion continues to perpetuate those workers' disadvantages and vulnerabilities. In other words, as the Supreme Court of Canada ascertained in *Withler*, “[t]he focus of the inquiry is on the actual impact of the impugned law taking full account of social, political, economic and historical factors concerning the group,”<sup>148</sup> the *Commission* failed to do this.

As a final note in this section, it is relevant to highlight that the *Commission des droits de la personne et des droits de la jeunesse* has published an opinion supporting the authors overall assessment of SAWP workers in Quebec, namely that all migrant workers, including SAWP workers, face “severe vulnerability” since they are victims of systemic discrimination on the basis of their ethnic or national origin, race, social condition, language and in the case of live-in caregivers, their sex.<sup>149</sup>

#### **b. Arguments of the Attorney General of Quebec**

As mentioned before, shortly after the *Commission* rendered its decision, the Attorney General of Quebec requested a judicial review by Superior Court of Quebec. He challenged the correctness of the Commission's decision.<sup>150</sup> One of his main arguments was that the *Commission* should have recognized, like the Supreme Court of Canada that the legislature pursued a pressing and substantial objective, i.e., the

---

<sup>148</sup> *Withler*, *supra* note 141 at para 39.

<sup>149</sup> See “LA DISCRIMINATION SYSTÉMIQUE À L'ÉGARD DES TRAVAILLEUSES ET TRAVAILLEURS MIGRANTS”, (Décembre 2011), online: Commission des droits de la personne et des droits de la jeunesse < [http://www2.cdpcj.qc.ca/publications/Documents/Avis\\_travailleurs\\_immigrants.pdf](http://www2.cdpcj.qc.ca/publications/Documents/Avis_travailleurs_immigrants.pdf)>.

<sup>150</sup> See *Procureur Général du Québec c. Travailleurs et travailleuses*, Mémoire du Procureur Général du Québec, *supra* note 131.

protection of small or family farms. Therefore, a partial exclusion was rationally connected to achieving this goal.<sup>151</sup> Furthermore, the Attorney General argued that the *Commission* completely ignored the fact that the working conditions of Mexican SAWP workers are negotiated through bilateral negotiations between Mexico and Canada.<sup>152</sup>

As for the remedy chosen by the *Commission*, the Attorney General submitted that the *Commission* erroneously decided to impose on the government how to respond to a breach of freedom of association pursuant to the Canadian *Charter*. In other words, if the exclusion was a direct breach on freedom of association, then the *Commission* should have left it to the legislature to determine the appropriate response in the circumstances.<sup>153</sup> Furthermore, the Attorney General submitted that the *Commission* noted the existence of a positive state obligation to implement ways to promote the exercise of freedom of association. However, the Attorney General argued that instead of telling the government how to implement and promote the exercise of freedom of association, the *Commission* ought to leave to the State how it intends to fulfil this obligation.<sup>154</sup>

Although there has not been a decision on this case yet, the author would like to comment on the possible outcome of this case in light of the Supreme Court of Canada decision in *Fraser III*.<sup>155</sup> The author believes that the Superior Court of Quebec will rule in favour of the Attorney General since it was clear in *Fraser III* that the Supreme Court

---

<sup>151</sup> *Ibid* at para 18.

<sup>152</sup> *Ibid* at para 19.

<sup>153</sup> *Ibid* at para 21.

<sup>154</sup> *Ibid* at para 22-24.

<sup>155</sup> See *Fraser III*, *supra* note 133.

of Canada's interpretation of freedom of association will give government or the state ample deference in how it elects to fulfil its *Charter* obligations in relation to freedom of association.

To begin crafting her opinion, the author identified one main issue that may be central to the court's siding with the Attorney General of Quebec. That issue is the fact that, as a general rule, the *Labour Code* does provide workers with the right to associate and collectively bargain through a certified employee association or union. The actual legal challenge comes from an exception to the general rule, namely that "[p]ersons employed in the operation of a farm shall not be deemed to be employees for the purposes of this division unless at least three of such persons are ordinarily and continuously so employed".<sup>156</sup> As well, Quebec justified the existence of said exception to protect small or family farms. However, the author could not find in the Attorney General's factum the reason linking the need to have such exception to Quebec's "pressing" and "substantial" objectives. Simply put, it seemed Quebec did not explain how excluding SAWP workers from its labour relations regime would protect small or family farms.

On the other hand, the arguments in *Fraser III* proposed that the legislation completely barred all agricultural workers in Ontario from having employee associations or unions, which could represent them, specifically in collective bargaining exercises relating to their employment conditions, as defined by the Ontario *Labour Relations Act*. In fact, agricultural workers in Ontario are completely excluded from its labour relations regime. In that case, the Court rejected the Ontario Court of Appeal's ruling that s. 2d of the Canadian *Charter* requires the enactment of significant additional statutory

---

<sup>156</sup> LC, *supra* note 5, s 21(5).

protections for agricultural workers. In fact, the Court affirmed that the freedom of association guaranteed in s. 2d does not go as far as to constitutionalized protections provided by Canadian labour relations legislation. All that is required is a provision of a meaningful process by which one can pursue workplace goals.<sup>157</sup> And that the “process of collective action to achieve workplace goals requires the parties to meet and bargain in good faith on issue of fundamental importance in the workplace”.<sup>158</sup>

In other words, the Court held that s. 2(d) does not guarantee a particular model of collective bargaining or a particular outcome.<sup>159</sup> Thus, what is protected is the right to associate to achieve collective goals. As such, the central issue is whether “the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals”.<sup>160</sup> In view of this rationale, the Superior Court of Quebec is likely to find that the legislation at issue does “provide with a process of collective action to achieve workplace goals” and that the exception in paragraph 5 is only that, an exception to protect small or family farms. Furthermore, the Superior Court may also find that there is nothing in the legislation to prevent SAWP workers from having employee associations to “associate to achieve collective goals”. The fact that said associations cannot be certified pursuant to the *Labour Code* does not mean that they are useless in trying to achieve collective goals.

The emphasis would probably be on the reasonableness behind the exclusion, namely the protection of small or family farms or any other “pressing and substantial” state

---

<sup>157</sup> See *Fraser III*, *supra* note 133 at paras 2-3.

<sup>158</sup> *Ibid* at para 37.

<sup>159</sup> *Ibid* at para 45.

<sup>160</sup> *Ibid* at para 46.

objectives. Observing the deference given by the Supreme Court of Canada under *Fraser III*, it is likely that the Superior Court will give Quebec ample deference and will overrule the *Commission's* decision. If that is the case, the author submits that it would be detrimental to the vast majority of SAWP Mexican workers and any other seasonal foreign agricultural worker in Quebec. In short, most if not all of these workers would never be able to benefit from Quebec's labour relations protections and benefits (ability to certify their own employee associations and collectively bargain to have a say in their employment conditions) enumerated in its *Labour Code*.

In fact, the author argues that, if the Superior Court rules in favour of the Attorney General of Quebec, it will create a loophole for agricultural employers by allowing them the possibility to always keep less than three workers working "continuously and ordinarily". Nevertheless, the same employer could have hundreds of seasonal workers in his not so small farm and still be exempted from having to deal with a certified union when negotiating the terms and conditions of employment of SAWP workers.

## II. British Columbia

### A. Background

Each year, thousands of agricultural workers, including SAWP workers, labour in support of British Columbia's agricultural industry. Agricultural workers are essential to this industry; however, their work comprises one of the lowest paid, least protected, and most vulnerable occupational categories in that province.<sup>161</sup> As well, agriculture is classified as one of the most dangerous work.<sup>162</sup>

Since 2004, British Columbia has complemented its agricultural labour force with Mexican SAWP workers. From 2004 to 2009, that province has received approximately 9500 Mexican SAWP workers.<sup>163</sup> British Columbia's horticultural industry plays a significant role in provincial and national agricultural production. As well, it is one of the most important horticultural regions in Canada. For instance, British Columbia is Canada's top producer of blueberries, raspberries, sweet cherries, cranberries, and greenhouse peppers.<sup>164</sup> As well, it ranks second in the production of flowers, nursery stock, apples, grapes, and greenhouse tomatoes and cucumbers.<sup>165</sup>

Horticulture farms account for approximately 40 per cent of the total number of farms in British Columbia. Most of these farms are located in three regions: the Thompson-

---

<sup>161</sup> See Gerardo Otero & Kerry Preibisch, *Farmworker Health and Safety: Challenges for British Columbia* (August 2010), online: Simon Fraser University <<http://www.sfu.ca/~otero/docs/Otero%20and%20Preibisch%20Final%20Nov-2010.pdf>> at 10 (Otero & Preibisch).

<sup>162</sup> See Pickett, Hartling, et al, *supra* note 54. See generally *Agricultural Fatalities in Canada 1990-2005*, *supra* note 54.

<sup>163</sup> See Table 1, *supra* note 1.

<sup>164</sup> See Otero & Preibisch, *supra* note 161 at 16.

<sup>165</sup> *Ibid.*

Okanagan Valley, the Lower Mainland, and the Fraser Valley. Each of these regions has different predominant products. For instance, fruit and tree-nut farming prevails in the Thompson-Okanagan Valley, while the production of greenhouse vegetables and flowers prevails in the Lower Mainland.<sup>166</sup>

Similarly to Ontario and other provinces, British Columbian employers wishing to contract Mexican SAWP workers make a request to their nearest Service Canada Centre via an application for a Labour Market Opinion (LMO). Once Service Canada approves the application with a positive Labour Market Opinion, Citizenship and Immigration Canada (CIC) makes the final decision as to whether individual foreign workers will be allowed to enter and work in Canada. If that is the case, it issues the corresponding work permits.<sup>167</sup>

Key elements of the Employment Agreement for British Columbia differ from the national contract used by other provinces such as Ontario and Quebec. For instance, in British Columbia the employer cannot recover costs from foreign workers for the round trip transportation to bring them to Canada and places of work as well as for their return to Mexico. Furthermore, employers can pay workers for piece work at the provincially established rate for the commodity, with guaranteed minimum earnings of \$9.28/hour for every hour worked; may deduct, by way of payroll deductions, a portion of the costs for providing suitable housing on the farm or off the premises. Deductions may be made as follows:

---

<sup>166</sup> *Ibid.* Most of the province's labour-intensive production involves greenhouse vegetables and flowers.

<sup>167</sup> See chapter 2 for a detailed explanation of this process. See also "Temporary Foreign Workers Program: Hiring Foreign Agricultural Workers in Canada", online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/sawp.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml)>.

## Chapter 4- SAWP Workers in Quebec and British Columbia

- Mexican workers may be charged ten (10) percent of their gross pay up to a maximum of \$632 for the entire stay;
- Caribbean workers may be charged \$4.20 per working day beginning on the first day of full employment up to a maximum of \$505 for the entire stay.
- Furthermore, as for health coverage, workers must have valid work permits issued for six months or more to be eligible for the provincial Medical Services Plan. There is a three-month waiting period to apply for that Plan. During the waiting period, workers must pay for private health insurance, which is obtained through RBC Insurance. The 2011 premium is \$0.96 per day per worker.<sup>168</sup>

Another notable difference between the Employment Agreement for British Columbia and the national contract used by other provinces such as Ontario and Quebec is its “Premature Repatriation” clause which states:

If the worker has to be repatriated due to medical reasons which are verified by a Canadian doctor, the Employer shall pay the cost of reasonable transportation and subsistence expenses except in instances where repatriation is necessary due to a physical or medical condition which was present prior to the WORKER’S departure in which case the Government of Mexico will pay the full cost of repatriation.<sup>169</sup>

In other words, unlike the other contract used in Ontario and Quebec, the British Columbia contract stipulates that premature repatriation will be due to medical reasons

---

<sup>168</sup> See “Seasonal Agricultural Worker Program (SAWP) Requirements in British Columbia”, online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/SAWPSheets/BC.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/SAWPSheets/BC.shtml)>.

<sup>169</sup> Appendix III, *Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico in British Columbia for the Year 2011*, Clause IX (1). (SAWP Agreement-B.C.).

## Chapter 4- SAWP Workers in Quebec and British Columbia

and not for non-compliance, refusal to work, or any other sufficient reason as stipulated in the other contract.<sup>170</sup>

The Mexican Consulate in Vancouver is responsible for receiving and addressing the concerns of its workers and to oversee that the terms and conditions stipulated in the Employment Agreements be followed by all the parties involved. However, similarly to Ontario and Quebec, research suggests that consular “intervention and resolution of worker concerns is a rarity”.<sup>171</sup>

This portion of chapter 4 aims to underscore British Columbia’s key legislation as it applies to agricultural workers in general and Mexican SAWP workers in particular. Although the legislation discussed is not meant to be an exhaustive list, it nevertheless, highlights agricultural workers lack of health and safety, as well as employment standards protections, which makes all agricultural workers vulnerable to exploitation and abuses. Moreover, this vulnerability is intensified among Mexican SAWP workers.

---

<sup>170</sup> See Appendix II, Employment Agreement, Clause X (1).

<sup>171</sup> See Otero & Preibisch, *supra* note 161 at 83. Unlike the research gathered through interviews in Ontario and Quebec, the author did not have the opportunity to visit British Columbia for lack of financial resources. As such, the information provided in this section does not include face to face interviews with SAWP workers in British Columbia.

## 1. Health and Safety for Agricultural Workers

### a. The Legislation

As previously discussed agriculture has been ranked as one of the most hazardous occupations in Canada. It ranks fourth in terms of incidence of workplace fatalities after mining, quarrying and oil wells; logging and forestry; and fishing and trapping.<sup>172</sup> Agriculture in British Columbia is not exempted from such ranking. Therefore, farm work remains among that province's most dangerous occupations.<sup>173</sup> British Columbia does not have a targeted statute addressing Occupational Health and Safety. However, under its *Workers Compensations Act*<sup>174</sup>, it has established regulations addressing occupational health and safety in various industries. The *Occupational Health and Safety Regulation*<sup>175</sup> (OHSR) covers "agricultural operations".<sup>176</sup>

For instance Part 28 of the OHSR provides for the instruction about safety performance or duties to seasonal and temporary workers.<sup>177</sup> Furthermore, the regulation provides for the orientation and training regarding health and safety for young or new workers.<sup>178</sup> Some of the subjects that must be included in the young or new worker's

---

<sup>172</sup> See generally Pickett, Hartling, et al., *supra* note 54. See also *Agricultural Fatalities in Canada 1990-2005*, *supra* note 54.

<sup>173</sup> See Otero & Preibisch, *supra* note 161 at 24.

<sup>174</sup> See WCA, *supra* note 7.

<sup>175</sup> See *Occupational Health and Safety Regulation*, BC Reg 296/27 (OHSR).

<sup>176</sup> *Ibid* at Part 28.

<sup>177</sup> *Ibid* at s 28.6.

<sup>178</sup> *Ibid* at s 3.23(1).

orientation and training are workplace health and safety rules; potential working hazards; personal protective equipment and emergency procedures.<sup>179</sup>

As well the regulation stipulates that an employer must provide adequate potable drinking water during the workday<sup>180</sup> and must ensure that workers are provided adequate cleaning facilities when handling hazardous substances such as lead, mercury, asbestos, silica or pesticides.<sup>181</sup> Other parts of the *OHSR* also stipulate that workers must provide their own clothing needed for protection against the natural elements as well as working gloves, appropriate footwear including safety footwear and safety headgear.<sup>182</sup> On the other hand, the employer is responsible for providing, free of charge to the worker, “all other items of personal protective equipment required by this Regulation”.<sup>183</sup>

Furthermore, one key right provided to agricultural workers by the *OHSR* is the right to refuse work when such work is deemed unsafe.<sup>184</sup> As well, the regulation prohibits

---

<sup>179</sup> This is not an exhaustive list. *Ibid* at s 3.23(2).

<sup>180</sup> *Ibid* at s 28.10.

<sup>181</sup> *Ibid* at s 28.11(2).

<sup>182</sup> *Ibid* at Part 8, s 8.2(1).

<sup>183</sup> *Ibid* at s 8.2(2).

<sup>184</sup> *Ibid* at Part 3, s 3.12.

“(1) A person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person.

(2) A worker who refuses to carry out a work process or operate a tool, appliance or equipment pursuant to subsection (1) must immediately report the circumstances of the unsafe condition to his or her supervisor or employer.

(3) A supervisor or employer receiving a report made under subsection (2) must immediately investigate the matter and

(a) ensure that any unsafe condition is remedied without delay, or

(b) if in his or her opinion the report is not valid, must so inform the person who made the report.

(4) If the procedure under subsection (3) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, the supervisor or employer must investigate the matter in the presence of the worker who made the report and in the presence of

(a) a worker member of the joint committee,

(b) a worker who is selected by a trade union representing the worker, or

discriminatory actions against a worker who has refused to work due to unsafe working conditions.<sup>185</sup> Finally, the regulation provides minimum safety standards for the transportation of agricultural workers from their residence to the pale of work and from the various working fields they must attend.<sup>186</sup>

Although the *OHSR* appears to provide basic occupational health and safety protections to agricultural workers, research shows that this group of workers is vulnerable to many health and safety risks and in fact many of them are victims of work-related injuries and illnesses.

### **b. Research Findings**

This portion of the chapter focuses on research conducted by prominent sociology researchers in Canada.<sup>187</sup> Professors Otero and Preibisch conducted a study in British Columbia's agricultural industry which revealed the following key findings regarding health and safety in the workplace:

---

(c) if there is no joint committee or the worker is not represented by a trade union, any other reasonably available worker selected by the worker.

(5) If the investigation under subsection (4) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, both the supervisor, or the employer, and the worker must immediately notify an officer, who must investigate the matter without undue delay and issue whatever orders are deemed necessary.”

<sup>185</sup> *Ibid* at s 3.13.

“(1) A worker must not be subject to discriminatory action as defined in section 150 of Part 3 of the *Workers Compensation Act* because the worker has acted in compliance with section 3.12 or with an order made by an officer. (2) Temporary assignment to alternative work at no loss in pay to the worker until the matter in section 3.12 is resolved is deemed not to constitute discriminatory action.”

<sup>186</sup> *Ibid* at Part 16, s 16.31; Part 17; and Part 28, s 28.50.

<sup>187</sup> Gerardo Otero is professor of Sociology and Latin American Studies at Simon Fraser University. As well, Kerry Preibisch is an Associate Professor of Sociology at the University of Guelph. They conducted extensive research, published by Simon Fraser University, which culminated in the publication of their work titled *Farmworker Health and Safety: Challenges for British Columbia* (August 2010). See Otero & Preibisch, *supra* note 161.

#### Chapter 4- SAWP Workers in Quebec and British Columbia

- A significant proportion of immigrant and migrant (SAWP) farmworkers do not receive adequate workplace health and safety training, one of the most important steps to mitigate and prevent occupational hazards;
- Workplace health and safety for BC farmworkers faces challenges of poorly maintained, inadequate farm equipment; deficient hygiene and sanitation at worksites; and lack of personal protective equipment;
- Unsafe vehicles and careless driving continue to put farmworkers at risk as they are transported to and from work and between worksites. Workers report an insufficient number of seatbelts when traveling in vans or buses by Farm Labour Contractors and to work on larger farms;
- A considerable number of Mexican SAWP workers are living in accommodations that are unsafe, inadequate, and/or poorly furnished;
- Immigrant Canadian and Mexican SAWP workers face language barriers in the workplace and as such are unable to understand instructions and read health and safety information, which is rarely available in their language;
- BC farmworkers work extremely long hours, a factor that increases the risk of workplace injury or accident;
- Farmworkers often do not refuse to work or transportation perceived as dangerous out of fear that it may jeopardize their current and future employment opportunities. Similarly, they work when ill or injured and/or avoid reporting injuries;

## Chapter 4- SAWP Workers in Quebec and British Columbia

- When farmworkers do report health concerns to their employers, these requests are at times met with indifference, delays, or completely ignored;
- The potential risks of employer failure to respond to worker requests for medical attention are heightened for SAWP workers who experience restricted mobility in rural or remote locations;
- The cost of medical treatment is among the main barriers impeding SAWP workers access to medical care as the majority of SAWP in BC do not have immediate access to the Medical Service Plan<sup>188</sup> and are forced to rely on private insurance provided by RBC, which requires that workers pay for health services upfront.<sup>189</sup>

These findings identified the following concerns which relate to all agricultural workers in British Columbia, namely that many farm employers appear to be failing to comply with *OHSR*; further, in the case of Mexican SAWP workers, their status as foreign workers, who must also abide by the Employment Agreement, intensifies their vulnerabilities when employers fail to comply with the legislation. For instance, even though *OHSR* clearly stipulates that all young and new workers must receive training on health and safety in the workplace, the research findings above reveals otherwise. In fact, the research shows that 74 per cent of Mexicans reported receiving no workplace health and safety information at all<sup>190</sup>; this is clearly contrary to *OHSR* Part 3<sup>191</sup> and Part 28.<sup>192</sup>

---

<sup>188</sup> Mexican workers under the SAWP must wait three months before they can apply for coverage under the provincial medical Service Plan. See “Seasonal Agricultural Worker Program (SAWP) Requirements in British Columbia”, *supra* note 168.

<sup>189</sup> See Otero & Preibisch, *supra* note 161 at 4-6.

<sup>190</sup> *Ibid* at p57.

Furthermore, poorly maintained and inadequate equipment as well as deficient hygiene and sanitation at worksites and lack of personal protective equipment are contrary to *OHSR* requirements.<sup>193</sup>

In particular, as described above, the research findings revealed that Mexican SAWP workers work extremely long hours, a factor that increases their risk of workplace injury or accident because they are afraid to jeopardize their jobs if they refuse to work long hours.<sup>194</sup> In fact, the daily shifts during periods of high production for Mexican workers ranged from 8 to 16 hours. In some cases, workers reported working ‘from seven in the morning until one, two in the morning.’<sup>195</sup> One of the interviews conducted by Otero and Preibisch and included in their findings explained the context in which Mexican SAWP workers make choices to accept long hours or unsafe work:

‘They don’t really have the ability to refuse work because if they do, they can be repatriated to Mexico. [A SAWP worker] doesn’t have the freedom to say “listen, I’m not working 20 hours today, I’m only going to work 16 because if he does, then the farmer can say “You don’t want to work? See you later, I’ll get the next guy to come in”, which is a huge problem. What we have found with accidents on farms-and it’s one of the highest industries for deaths and injury in Canada-is that the workers are being pushed to an extent where accidents and injuries are almost inevitable, to the point where they’re so tired that errors are being made... We keep saying we’ve got to do more in terms of health and safety, well, hours of work to us is one of the provisions that needs to be addressed’.<sup>196</sup>

---

<sup>191</sup>See *OHSR*, *supra* note 175 at Part 3, s 3.23. “(1) An employer must ensure that before a young or new worker begins work in a workplace, the young or new worker is given health and safety orientation and training specific to that young or new worker’s workplace.”

<sup>192</sup> *Ibid* at Part 28, s 28.6. “When workers, including seasonal and temporary, start employment, the employer and the employer’s supervisor must ensure that they are instructed about the safe performance of their duties.”

<sup>193</sup> *Ibid* at Parts 4, 8 and 28.

<sup>194</sup> See Otero & Preibisch, *supra* note 161 at 37-40.

<sup>195</sup> *Ibid* at p 37.

<sup>196</sup> *Ibid* at p 39.

As well, the research found that Mexican SAWP workers in British Columbia, similarly to their Ontario and Quebec counterparts, are less likely to refuse work they perceive dangerous or unsafe for fear that it may jeopardize future opportunities. This is in spite of OHSR's protections<sup>197</sup>. In general, SAWP workers felt they could not voice their concerns against their employers or refuse unsafe work. One Mexican worker explained: 'It's rare that I say something. Sometimes they take reprisals against you, especially against us [Mexicans]. . . At times, we will bring something to their attention but we are afraid to speak up'.<sup>198</sup>

Similarly to SWAP workers in Ontario and Quebec, Mexican workers in British Columbia must have an evaluation from their employers at the end of their contract. The *Secretaria del Trabajo y Previsión Social* in Mexico requires this evaluation to determine whether the worker will be called to work in Canada the next season.<sup>199</sup> A negative evaluation is likely to mean being cut off the Program.<sup>200</sup> Therefore, Mexican workers are afraid to speak up or refuse unsafe work because they could receive a negative evaluation or simply be repatriated immediately for refusal to work.<sup>201</sup> As mentioned in

---

<sup>197</sup> See OHSR, *supra* note 175 at Part 3, s 3,12.

<sup>198</sup> See Otero & Preibisch, *supra* note 161 at 40.

<sup>199</sup> See "Mexico: Comments from the Country", online: FARMS <<http://www.farmsontario.ca/countries.php?divname=Mexico>>.

<sup>200</sup> See Basok; Verma, "The Status of Migrant Farm Workers in Canada 2006-2007"; Wai Suen & Rachel Li; and Min Sook Lee & Karen King-Chigbo, *supra* note 29.

<sup>201</sup> This reality is stipulated in the Employment Agreement applicable to Ontario and Quebec. Although the Employment Agreement applicable to British Columbia only provides for premature repatriation due to a physical or medical condition, the fact remains that the employer can simply take note and either write a negative evaluation or not request the worker for the following season.

previous chapters, they cannot risk losing their jobs as in most cases they are the only means of support for their families.

Although British Columbia's *OHSR* includes "agricultural operations", agricultural workers continue to be exposed to many health and safety hazards and risks for the following reasons: (1) the employer's lack of compliance with the regulation; and (2) in the case of Mexican SAWP workers, the nature of the Program being mainly stipulated by the Employment Agreement and the work permits issued by CIC, which exclude them from the protections provided by the regulations, i.e. right to refuse to work when work deemed unsafe.

## **2. Employment Standards Act (ESA)<sup>202</sup>**

One of *ESA*'s main purposes is to ensure that employees in British Columbia receive basic minimum standards of compensation and employment.<sup>203</sup> However, this section will reveal that farm workers in British Columbia are excluded, as their Ontario and Quebec counterparts, from an essential employment standard protection, namely, "hours of work and overtime". As well, particularly to British Columbia, they are excluded from "statutory holidays".

---

<sup>202</sup> See *ESA*, *supra* note 8.

<sup>203</sup> *Ibid* at s 2. The other purposes are "to promote the fair treatment of employees and employers; to encourage open communication between employers and employees, to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act; to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia; to contribute in assisting employees to meek work and family responsibilities."

**a. Hours of Work and Overtime**

*ESA* provides that an employer must pay an employee overtime wages “if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week”.<sup>204</sup> In that event, the employer must generally pay the worker 1 ½ times the regular wage for the time over 8 hours and “double the [worker’s] regular wage for any time over 12 hours.”<sup>205</sup> Unfortunately agricultural workers are excluded from this protection. The *Employment Standard Regulation*<sup>206</sup> (*ESR*) clearly prevents farm workers from having standardized hours of work and receiving overtime pay.<sup>207</sup> This explains the long hours that Mexican SAWP workers are required to work particularly during the high season. As the research conducted by professors Otero and Preibisch points out,

The daily shift during periods of high production for Mexican workers ranged from 8 to 16 hours, indicating that some farmworkers are laboring extraordinarily long hours. [In one farm], the Mexican workers’ shifts stretched from 1pm to 1am, requiring them to work a good portion of their shift harvesting in dark fields with only the lights on the tractor for illumination. In one extreme case, an employer was requiring his Mexican employees to work 20 hours shifts and even set the alarm clock to ensure they only slept for four hours.<sup>208</sup>

In comparison, Canadian workers worked for approximately 4 to 15.5 hours.<sup>209</sup>

The research by the mentioned academics as well as research gathered in Ontario and Quebec by the author suggests that Mexican workers may be more accepting of long

---

<sup>204</sup> *Ibid* at s 35.

<sup>205</sup> *Ibid* at s 40.

<sup>206</sup> BC Reg 396/95.

<sup>207</sup> *Ibid* at s 34.1.

<sup>208</sup> See Otero & Preibisch, *supra* note 161 at 37-38.

<sup>209</sup> *Ibid*.

hours because they come to Canada without their families and have the extra time to work, they are afraid to refuse long hours of work as they could receive a negative evaluation by the employer; thus jeopardizing future employment opportunities within the Program; and they are afraid to say no to long hours of work because they can be sent back to Mexico and replace immediately.<sup>210</sup> The effects of this exclusion take away from agricultural workers the ability to earn extra money while giving employers access to cheap labour. At the same time, it exposes workers to health and safety risks as they are working under exhaustive conditions.<sup>211</sup> This vulnerability and exploitation is intensified for Mexican SAWP workers as they are afraid to say NO.

**b. Statutory Holidays**

*ESA* stipulates that if an employee works on a statutory holiday, then he/she must be paid for that day as follows:

- 1 ½ times the employee’s regular wage for the time worked up to 12 hours;
- Double the employee’s regular wage for any time worked over 12 hours;
- and
- An average day’s pay, as determined by the *Act* (s. 45(11)).<sup>212</sup>

However, farm workers are excluded from this benefit.<sup>213</sup> In short, farm workers must work long hours and cannot access benefits if they work during statutory holidays.

---

<sup>210</sup> *Ibid.* See also Basok, *supra* note 29; See also “The Status of Migrant Farm Workers in Canada 2008-2009”, online: UFCW-Canada <<http://www.ufcw.ca/Theme/UFCW/files/PDF%202009/2009ReportEN.pdf>>.

<sup>211</sup> This is a reality in spite of section 39 of the *ESA*, which provides that “an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee’s health or safety.” See *ESA*, *supra* note 8 at s 39.

<sup>212</sup> *Ibid* at s 46.

Again, this is intensified in the case of Mexican SAWP workers because they have no choice but to accept such working conditions. While their Canadian counterparts may look for employment in any other industry to supplement their low income from farm work or to leave the farm work, Mexicans do not have this capacity due to their socioeconomic status, mobility restrictions imposed by their work permits and their corresponding Employment Agreement.

### 3. Labour Relations Code (LRC)<sup>214</sup>

British Columbia's *LRC* stipulates that "[e]very employee is free to be a member of a trade union and to participate in its lawful activities."<sup>215</sup> Agricultural employees, including Mexican SAWP workers, are covered under the *Code*. As well, the *Code* prohibits against dismissals, discrimination or intimidation for exercising such rights.<sup>216</sup> Although the *Code* allows SAWP workers to unionize, there are currently only two farms whose SAWP workers are unionized. They are Sidhu & Sons Nursery Ltd<sup>217</sup> and Floralia Growers Ltd.<sup>218</sup> The following portion of this section will highlight relevant sections of the corresponding collective agreements between the two farms named above and United Food and Commercial Workers International Union, Local 1518 as they apply to SAWP workers.

---

<sup>213</sup> See ESR, *supra* note 206 at s 34.1.

<sup>214</sup> See LRC, *supra* note 9.

<sup>215</sup> *Ibid* at s 4(1).

<sup>216</sup> *Ibid* at s 5.

<sup>217</sup> See Vikki Hopes, "'Precedent-setting' Contract a First for Migrant Farm Workers", *Abbotsford News*, 12 November 2010.

<sup>218</sup> See "Historic Union Contract for Migrant Workers in B.C.", online: The National Union of Public and General Employees <<http://www.nupge.ca/node/2597>>.

**a. Floralia Agreement**<sup>219</sup>

The Agreement became effective on September 22, 2009 and will expire on September 22, 2012.<sup>220</sup> It aims to establish and maintain “conditions which will promote a harmonious relationship between the employer and employees” and “to provide methods for fair and amicable resolution of disputes which may arise between them as well as to promote efficiency and improved operations.”<sup>221</sup>

The Agreement is intended for all agricultural workers at this farm including foreign workers hired under the SAWP.<sup>222</sup> One of its stipulations relating the use of SAWP workers is the duty to discuss and negotiate in the event that the employer should wish to “examine any new Government Foreign Worker Program [other than the SAWP]”.<sup>223</sup> Furthermore, the Agreement provides for a probationary period of five months from the first day of work. During the probationary period, “the employer may, at [his] sole discretion, discipline or discharge any employee and said employee shall have no recourse to the Grievance and Arbitration sections of [the] Agreement.”<sup>224</sup> However, this is contrary to the stipulations of the SAWP Agreement. It states that

The Employer will give the Worker a trial period of fourteen actual working days from the date of his arrival at the place of employment. The Employer shall not

---

<sup>219</sup> See Appendix X, *Collective Agreement Between Floralia Plant Growers Ltd, and United Food and Commercial Workers International Union, Local 1518*. A copy of this Agreement was provided to the author upon her written request, by the union on 18 March 2011 via electronic mail. (Floralia Agreement)

<sup>220</sup> *Ibid* at Art 26.01.

<sup>221</sup> *Ibid* at PREAMBLE.

<sup>222</sup> *Ibid* at Arts 1.02 & 4.01.

<sup>223</sup> *Ibid* at Art 4.01.

<sup>224</sup> *Ibid* at Art 5.01.

discharge the Worker except for sufficient cause or refusal to work during that trial period.<sup>225</sup>

In short, the collective agreement expands the probationary period from 14 days as stipulated in the SAWP Agreement to 5 months resulting in a bigger time span of vulnerability for SAWP workers. It is not clear from the collective agreement if it supersedes the SAWP agreement in the event of a conflict. The author submits that if it does, then SAWP workers are more vulnerable under the collective agreement.

Although the Floralia Agreement expands the length of the probationary period, it also creates the benefit of seniority.<sup>226</sup> The principles of seniority apply to the hiring, layoff and recall. The Agreement stipulates that “[u]pon completion of the probationary period, seniority shall be calculated based on accumulated hours worked, whether in the current or . . . previous season for all employees.”<sup>227</sup> As well the Agreement provides that domestic employees will take precedence over the seniority of foreign workers in obtaining and maintaining employment. Finally, it stipulates that “seniority of foreign workers in prior seasons shall be maintained, notwithstanding termination of employment at the end of a season pursuant to the SAWP Program”.<sup>228</sup> However, when a SAWP worker is transferred to the employer from another farm, pursuant to the terms of the SAWP Agreement, his/her prior service with that other farm will not be counted towards seniority as stipulated by the Floralia Agreement.<sup>229</sup>

---

<sup>225</sup> See Appendix III, SAWP Agreement-B.C., Clause 1(9).

<sup>226</sup> See Appendix X, Floralia Agreement, Art 7.

<sup>227</sup> *Ibid* at Art7.01.

<sup>228</sup> *Ibid*.

<sup>229</sup> *Ibid*.

## Chapter 4- SAWP Workers in Quebec and British Columbia

Furthermore, the Floralia Agreement prohibits discrimination or harassment against an employee for being a member or participating in the union.<sup>230</sup> While this is a positive step to protecting farm workers from retaliation, the Agreement, just as the *ESA*, fails to provide them with other benefits such as overtime pay.<sup>231</sup> Regarding work breaks, the Agreement stipulates that a worker's daily shift shall include one thirty minute lunch break, without pay, and two fifteen minute breaks, without pay.<sup>232</sup> This is slightly better than what it is provided in the SAWP Agreement as it allows for two, unpaid, ten minute breaks instead.<sup>233</sup>

Other benefit provided by the Agreement is a grievance procedure that would address matters arising out of its interpretation, application, administration or alleged violation.<sup>234</sup> Arbitration is another tool provided in the Agreement to resolve disputes between the parties.<sup>235</sup> A particular benefit created by the Agreement as it relates to SAWP workers is the right to leave of absences under different circumstances such as bereavement of an immediate family member. SAWP workers are entitled to 14 days of leave, without pay, for bereavement. As well, there are other circumstances that warrant a leave of absence, namely, compassionate leave (eight weeks); maternity leave (seventeen weeks); parental leave (thirty-seven weeks); and family leave (three days).<sup>236</sup>

---

<sup>230</sup> *Ibid* at Art 8.01.

<sup>231</sup> *Ibid* at Art 10.01(a).

<sup>232</sup> *Ibid* at Art 10.03(a).

<sup>233</sup> See Appendix III, SAWP Agreement-B.C., Clause II(5).

<sup>234</sup> See Appendix X, Floralia Agreement, Art 13.01.

<sup>235</sup> *Ibid* at Art 14.

<sup>236</sup> *Ibid* at Art 15.04.

SAWP workers are entitled to all these types of leave without pay.<sup>237</sup> There was no such benefit under the SAWP Agreement. In essence, the Floralia Agreement has incorporated leave benefits granted under the *ESA*.<sup>238</sup>

Another positive step to protect farm workers taken by the Floralia Agreement is in Article 16, which binds the employer and union to “maintain working conditions, which are conducive to the safety and health of all workers and to take reasonable steps to correct any conditions that are detrimental to the safety and health of any workers.”<sup>239</sup> Hopefully, this article binds the employer to comply with the *Occupational Health and Safety Regulation*<sup>240</sup> (*OHSR*). As previously discussed, research conducted by leading academics has shown that many farm employers in British Columbia appear to be failing to comply with *OHSR*.

Another key component of the Floralia Agreement is assurance that there shall be no strikes by the employees nor will the employer agree for a lockout of employees.<sup>241</sup> Furthermore, the Agreement provides that in the event of layoffs, seniority will dictate who goes first, those with less seniority. On the other hand, recalls will be also conducted

---

<sup>237</sup> *Ibid.*

<sup>238</sup> See *ESA*, *supra* note 8 at Part 6, ss 50, 51, 52, 53, & 55.

<sup>239</sup> See Appendix X, Floralia Agreement, Art 16.01.

<sup>240</sup> See *OHSR*, *supra* note 175.

<sup>241</sup> See Appendix X, Floralia Agreement, Art 19.

The terms strike and lockout are defined pursuant to the British Columbia *Labour Relations Code*: “Strike includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services. . .” *LRC*, *supra* note 9, s 1.

“Lockout includes closing a place of employment, a suspension of work or a refusal by an employer to continue employ a number of his or her employees, done to compel his or her employees or to aid another employer to compel his or her employees to agree to conditions of employment.” *LRC*, *supra* note 9, s. 1.

based on seniority; however, those with most seniority will be recall first.<sup>242</sup> Finally, the Agreement grants employees with a vacation allowance of four per cent of their gross wages in each year or term of employment. And after three consecutive years, the allowance shall be of six per cent.<sup>243</sup> This reflects the vacation pay benefits covered in the *ESA*, however, instead of five consecutive years of employment for one to earn the six per cent of annual vacation pay<sup>244</sup>, the Agreement only requires three years.

**b. Sidhu & Sons Nursery Agreement<sup>245</sup>**

This collective agreement applies exclusively to SAWP workers from Mexico.<sup>246</sup> It is distinct from the Floralia Agreement since that agreement covered both domestic and foreign workers. Furthermore, the Sidhu & Sons Nursery Agreement clearly stipulates that the SAWP Agreement supersedes it in the event of conflict.<sup>247</sup> The Sidhu & Sons Nursery Agreement became effective on November 3, 2010 and will expire on November 3, 2013.<sup>248</sup>

The aim of the Agreement is to establish and maintain conditions that “will promote a harmonious relationship between the employer and SAWP [workers] and to

---

<sup>242</sup> See Appendix X, *ibid*, Art 20.

<sup>243</sup> *Ibid* at Art 21.01.

<sup>244</sup> See *ESA*, *surpa* note 8 at Part 7, s 58.

<sup>245</sup> See Appendix XI, *Collective Agreement between Sidhu & Sons Nursery Ltd. and United Food and Commercial Workers International Union, Local 1518* [Sidhu & Sons Nursery Agreement]. A copy of this Agreement was provided to the author upon her written request, by the union on 18 March 2011 via electronic mail.

<sup>246</sup> *Ibid* at PREAMBLE.

<sup>247</sup> *Ibid* at PREAMBLE (d) & s 4.03.

<sup>248</sup> *Ibid* at Art 20.

provide methods for the fair and amicable resolutions of disputes.”<sup>249</sup> However, it clearly states that the SAWP Agreement is not a part of it. In fact, it states that “[a]ny disputes regarding the terms of the SAWP Agreements will not be subject to the Grievance Procedure or Arbitration under Articles 12 and 13 of this Agreement.”<sup>250</sup> Moreover, the Agreement further stipulates that it is not intended to conflict with the terms of the SAWP Agreement. Therefore, in the event of conflict, the terms of the SAWP Agreement will govern.<sup>251</sup>

Regarding the length of the probationary period, the Sidhu & Sons Nursery Agreement, like the Floralia Agreement, states that it shall be for five months beginning from the first day worked.<sup>252</sup> However, this stipulation may be superseded by Clause 1(9) of the SAWP Agreement, which provides that the trial period is for 14 actual working days from the date of arrival at the place of employment. It further states that the employer shall not discharge the employee except for sufficient cause or refusal to work during the trial period.<sup>253</sup>

On the other hand, the Sidhu & Sons Nursery Agreement provides that during the probationary period of five months, the employer may, at its sole discretions, discipline or discharge any probationary SAWP worker and he/she shall not have recourse to the Grievance Procedure or Arbitration under the Agreement.<sup>254</sup> There seems to be a conflict

---

<sup>249</sup> *Ibid* at PREAMBEL (f).

<sup>250</sup> *Ibid* at Art 4.02.

<sup>251</sup> *Ibid* at Art 4.03.

<sup>252</sup> *Ibid* at Art 5.01.

<sup>253</sup> See Appendix III, SAWP Agreement-B.C., Clause I (9).

<sup>254</sup> See Appendix XI, Sidhu & Sons Nursery Agreement, *supra* note 245, Art 5.01.

regarding the probationary period between the collective bargaining agreement and the SAWP Agreement. However since the Sidhu & Sons Nursery Agreement stipulates that the SAWP Agreement will govern in the event of conflict, it follows that the probationary period should be of fourteen days not five months. This seems to benefit SAWP workers as they will be vulnerable for only 14 days instead of five months.

Another possible conflict between the collective agreement and SAWP Agreement is regarding work breaks. The Sidhu & Sons Nursery Agreement states that SAWP employees working more than four hours shall have one lunch break of thirty minutes without pay and two breaks of fifteen minutes with pay.<sup>255</sup> In addition, the Agreement states that SAWP employees working beyond ten hours in a day shall receive an additional fifteen minute paid break.<sup>256</sup> In contrast, the SAWP Agreement only provides for “at least two rest periods of 10 minutes duration. . . paid or not paid in accordance with provincial labour legislation.”<sup>257</sup> Again, following what is stipulated in the collective agreement, the ten minute breaks will supersede what is provided in the Sidhu & Sons Nursery Agreement. This does not place SAWP workers in a more beneficial position.

As well, the collective agreement does not provide the workers with the benefit of overtime pay.<sup>258</sup> Rather, it states that the average minimum work week is of forty hours; however, the employer may request, and the SAWP worker may agree to work more than

---

<sup>255</sup> *Ibid* at Art 9.03(a).

<sup>256</sup> *Ibid* at Art 9.03(b).

<sup>257</sup> See Appendix III, SAWP Agreement-B.C., Clause II (5).

<sup>258</sup> *Ibid* at Art 9.01(a).

8 hours per day or forty hours in a week.<sup>259</sup>This is similar to what is stipulated in the SAWP Agreement; it states that the average work week shall be of forty hours<sup>260</sup>and “the [e]mployer may request of the worker and the worker may agree to extend his/her hours when the urgency of the situation requires it. . .”<sup>261</sup> In short both the Sidhu & Sons Nursery Agreement and the SAWP Agreement do not grant Mexican workers the benefit of overtime pay. This is also the case under the *ESA*.

Some benefits provided by the Sidhu & Sons Nursery Agreement are seniority<sup>262</sup>; freedom of membership and participation in the union without retaliation in the form of discrimination or harassment<sup>263</sup>; a grievance procedure<sup>264</sup> and arbitration<sup>265</sup>; leave of absence<sup>266</sup>; vacation pay<sup>267</sup>and safety<sup>268</sup>. Particularly, the Agreement seems to take a positive step regarding the safety of the workers given the worrisome findings in the research conducted by professors Otero and Preibisch.<sup>269</sup> Accordingly, it provides that a SAWP worker handling chemicals and/or pesticides will be provided, at the employer’s expense, adequate protective clothing and formal or informal training and supervision to

---

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid* at Clause I (4)(i).

<sup>261</sup> *Ibid* at Cause I (7).

<sup>262</sup> See Appendix XI, Sidhu & Sons Nursery Agreement, Art 7.

<sup>263</sup> *Ibid* at Art 8.

<sup>264</sup> *Ibid* at Art 12.

<sup>265</sup> *Ibid* at Art 13.

<sup>266</sup> *Ibid* at Art 14.

<sup>267</sup> *Ibid* at Art 17.

<sup>268</sup> *Ibid* at Art 15.

<sup>269</sup> See Otero & Preibisch, *supra* note 161 at 10.

ensure his/her health and safety.<sup>270</sup> This seems to echo the SAPW Agreement's requirement that the employer agrees to provide to the worker handling chemicals and/or pesticides protective clothing, free of charge to the worker, and appropriate formal or informal training and supervision.<sup>271</sup>

Although there seems to be a defined obligation for the employer regarding safe and safety, the same cannot be said for the benefit of vacation pay. While the Agreement specifies that all SAWP workers shall receive vacation pay of four per cent of their annual gross wages, it does not provide for actual paid holidays. In other words, if a SAWP employee wants to take Canada Day off, as his vacation, he will not be paid for that. But in the event that the SAWP employee chooses to work on Canada Day, he/she will not be entitled to be paid 1 ½ times his/her regular wages for the time worked as prescribed in the *ESA*<sup>272</sup>. As previously discussed, all farm workers are excluded from this benefit.<sup>273</sup>

Finally, the Sidhu & Sons Nursery Agreement imposes that the employer may layoff SAWP workers at any time during the season in the event of insufficient work or for economic reasons due to operational changes.<sup>274</sup> This seems to conflict with the SAWP Agreement requirement that the employer accepts the terms and conditions under the program, namely the length of work that a worker shall perform under the Agreement,

---

<sup>270</sup> See Appendix XI, Sidhu & Sons Nursery Agreement, Art 15.01.

<sup>271</sup> See Appendix III, SAWP Agreement-B.C., Clause VII (3).

<sup>272</sup> See *ESA*, *supra* note 8, s 46.

<sup>273</sup> See *ESR*, *supra* note 206, s 34.1.

<sup>274</sup> See Appendix XI, Sidhu & Sons Nursery Agreement, Art 16.01.

#### Chapter 4- SAWP Workers in Quebec and British Columbia

which can be from 240 hours in a term of 6 weeks or less up to 8 months.<sup>275</sup> As well, the SAWP Agreement requires the employer to give the worker a monetary advance to cover personal expenses where, for any reason whatsoever, no actual work is possible.<sup>276</sup> In fact, the SAWP Agreement does not seem to provide for instances where the employer may lay-off workers. As such, since the SAWP Agreement supersedes the Sidhu & Sons Nursery Agreement, then layoffs may not be as viable for the employers as stipulated in the collective agreement. This may work to the advantage of the workers.

---

<sup>275</sup> See Appendix III, SAWP Agreement-B.C., Clause I (1), 2(i) & (ii).

<sup>276</sup> *Ibid* at Clause I (4)(iii).

## **B. Observations-Limitations**

Unlike Ontario and Quebec, British Columbia's legislation grants agricultural workers, without particular exclusions, the right to collectively bargain through a union. In fact, there are currently two farms whose workers have joined a union and are under a collective agreement. Furthermore, it is noteworthy to mention that one of these collective agreements is exclusively applicable to Mexican farm workers under the SAWP. However, it is too early to clearly see the benefits or failures of the agreements. It is also beyond the scope of this thesis to unequivocally show why there are only two farms whose workers are unionized even though the legislation grants all agricultural workers the right to collectively bargain and unionize. More research is needed to reach a conclusion. However, it is a relevant question which merits further inquiry. Other questions that need further research:

- Are there any other impediments for the SAWP workers to join unions?
- Are there any other impediments for employers to enter into collective agreements with unionized workers?
- What is the government of Mexico's position on this matter?
- How do the current unionized workers feel about the collective agreements; do they feel more protected?<sup>277</sup>

---

<sup>277</sup> The author has found, at best, scarce or a lack of sources that could address said questions. However, a good starting point could be to contact the two employers of Floralia and Sidhu & Sons Nursery to get their perspective. As well, it would be beneficial to contact the union representing the workers under the mentioned agreements to further get their feedback. Also, it would be beneficial to contact British Columbia's agricultural employer's associations to get their perspective. Finally, and most difficult of all, would be to interview the actual workers under the agreements to gather their experiences, opinions and concerns. The author states that this would be the most difficult to gather since it is her experience (from interviewing SAWP workers in Ontario and Quebec) that they are reluctant to come forward for fear of displeasing their employers and thus losing their jobs.

### III. Conclusion

This chapter's objective was to provide an illustrative sample which reflects the reality faced by SAWP workers in Quebec and British Columbia (after Ontario, they are second and third in receiving the majority of SAWP Mexican workers<sup>278</sup>). This reality is shaped by the exclusion from key legislation aimed at protecting workers' labour and safety rights, as well as their dignity. The findings in this chapter are similar to the findings of chapter 3; SAWP workers are 'unfree' labourers vulnerable to exploitation and in fact many are exploited and placed in precarious situations at the workplace. Particularly, in both provinces, just as in Ontario, agricultural workers are excluded from the following benefits:

- overtime pay;
- hours of work; and,
- adequate safety training and protection

As for the right to collectively bargain and form unions, British Columbia grants this right to all agricultural workers. Quebec, on the other hand, grants the same right but limits its benefit for seasonal employees. Although *la Commission des relations du travail* has ruled that such exclusion violates s. 2(d) of the *Charter* and s. 3 of the Quebec *Charter of Human Rights and Freedoms*, the Attorney General of Quebec has applied for a judicial review of the decision, which as of the writing of this thesis has not been decided. However, in light of the *Fraser III* decision, it is likely that the Superior Court of Quebec rule in favour of the Attorney General and overrule the *Commission's*

---

<sup>278</sup> See Statistics *supra* note 1. The total number of visas issued for Mexican SAWP workers in 2009 were 15, 727. The number of visas issued for Mexican SAWP workers for Ontario, Quebec and British Columbia in 2009 was 14,205 or 90% of the total visas issued for Mexican SAWP workers that year.

decision. In that case, SAWP workers in Quebec would be in a similar position than SAWP workers in Ontario.<sup>279</sup>

On the other hand, British Columbia grants the right to collectively bargain and unionize to all agricultural workers. There are currently only two farms whose employees have a collective agreement and are members of a union. Particularly, one of them has a collective agreement exclusively with Mexican SAWP workers; accordingly those workers are members of a union. While this is a positive step to protect the vulnerability of SAWP workers in Canada, there needs much more to be done. The right of collective bargain and unionize must be a constitutional right for all agricultural workers. The State should not create barriers (as in the case of Ontario) or exceptions (as in the case of Quebec) to disenfranchise SAWP workers from such fundamental rights as freedom of association and to collectively bargain.

Furthermore, there needs to be more inclusive and robust labour standards as well as health and safety regulations, which must be followed by the employers and enforced by the provincial authorities. Moreover, the Mexican consulates in Montreal and Vancouver must become more involved in overseeing that the rights of their citizens are respected. The dual nature of representing both their citizens and employers should be abolished. The Mexican consulates should only represent their citizens. Finally, Mexican SAWP workers will continue to be disadvantaged and exploited (“unfree labourers”) as long as they have employment and mobility restrictions placed by their employment agreement and visa restrictions and as long as they are required to receive a final evaluation from their employers at the end of the season.

---

<sup>279</sup> See Chapter 3. That is because the author does not see the *Fraser III* decision as a positive step to further these workers freedom of association and their right to collectively bargain and a such as any potential improvement of their working conditions.

## Chapter 5- Application of International Law to SAWP Workers in Canada

Canada is not a party to numerous international instruments, which grant rights and protections to agricultural workers, and particularly, to migrant workers including Mexican SAWP workers. In fact, Canada is not a party to key treaties and conventions granting collective bargaining rights as well as other human rights. The given rationale or justification for this inability or unwillingness to become a party to various international instruments originates in Canada's federalism; an in-depth discussion will follow later.

Below is a list of some of the international instruments that protect workers in general and agricultural and migrant workers in particular to which Canada has failed to become a party:

- International Labour Organization (*ILO*) *Convention 11- Right of Association (Agriculture) Convention, 1921*<sup>1</sup>;
- *ILO Convention No. 98- Right to Organize and Collective Bargaining, 1949*<sup>2</sup>;
- *ILO Convention No. 143- Concerning Migration in Abusive Conditions and the Promotion of Equity and Opportunity and Treatment of Migrant Workers*<sup>3</sup>;
- *ILO Recommendation No. 151 Concerning Migrant Workers*<sup>4</sup>;

---

<sup>1</sup> *C11 Right of Association (Agriculture) Convention, 1921*, online: International Labour Organization (ILO) <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

<sup>2</sup> *C98 Right to Organise and Collective Bargaining Convention, 1949*, online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

<sup>3</sup> *C143 Migrant Workers (Supplementary Provisions) Convention, 1975*, online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

<sup>4</sup> *R151 Migrant Workers Recommendation, 1975*, online: ILO <<http://www.ilo.org/ilolex/english/recdisp1.htm>>.

## Chapter 5- Application of International Law to SAWP Workers in Canada

- *ILO Convention 97-Concerning Migration for Employment (Revised 1949)*<sup>5</sup>;
- *ILO Convention 101-Holidays with Pay (Agriculture), 1952*<sup>6</sup>
- *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”*<sup>7</sup>; and
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*<sup>8</sup>.

Although the author could not find with certainty the justification for Canada’s failure to become a party to the above international instruments, this chapter will underscore that the concept of division of powers (federalism) is one of the main reasons identified by legal scholars as to why Canada has failed to become a party to some of those instruments.

While Canada is not a party to the above international instruments, it nonetheless, is a party to ILO Convention No. 87-*Freedom of Association and Protection of the Right to Organize*<sup>9</sup> (1948) and ILO’s *Declaration on Fundamental Principles and Rights at Work*<sup>10</sup>. As well, Canada is generally bound by customary international law.<sup>11</sup> As it will

---

<sup>5</sup> *C97 Migration for Employment Convention (Revised), 1949*, online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

<sup>6</sup> *CI01 Holidays with Pay (Agriculture) Convention, 1952*, online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

<sup>7</sup> 17 November 1988, OAS TS No. 69.

<sup>8</sup> 18 December 1990, 2220 UNTS 3.

<sup>9</sup> *C87 Freedom of Association and Protection of the Right to Organise Convention, 1948*, online: ILO <<http://www.ilo.org/ilolex/english/index.htm>>. For particular reference see articles 1, 2, 3, 5, 7, 8, and 10.

<sup>10</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, online: ILO <<http://www.ilocarib.org.tt/images/stories/contenido/pdf/InternationLabourStandards/ILO%20declaration%20on%20fundamental%20principles%20and%20followup.pdf>>.

<sup>11</sup> See generally John H. Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, (Toronto: Irwin Law Inc., 2007), at 120—21 & 133-34. [Currie, Forcese &

## Chapter 5- Application of International Law to SAWP Workers in Canada

be discussed later, customary international law is directly incorporated by the common law, without the need of implementing legislation but can be overruled by conflicting domestic legislation or binding precedent.<sup>12</sup>

The purpose of this chapter is to sketch how international law, in the Canadian context, applies to agricultural workers, including Mexican SAWP workers in Canada. The right to organize and collectively bargain will be used as an example or case in point to frame the analysis. The author will interchangeably use “migrant workers” and “SAWP workers” as the latter is a category of the former under the Canadian immigration context.<sup>13</sup>

Accordingly, there is one central preposition encompassing this chapter:

1) The implementation<sup>14</sup> of international law within the Canadian context hinders the grant of essential labour and human rights, as stipulated in well-established treaties or conventions, for all agricultural workers and particularly SAWP workers. Therefore, such implementation makes international law inadequate to protect domestic and SAWP workers’ rights to organize and collectively bargain.

---

Oosterveld]; See also Armand de Mestral & Evan Fox-Decent, “Rethinking the Relationship Between International and Domestic Law” (2008) 53 McGill LJ 573 at para 7 (Lexis) [de Mestral & Fox-Decent].

<sup>12</sup> See Gib van Ert, “Dubious Dualism: the Reception of International Law in Canada” (Spring 2010) 44 Val UL Rev 927 at 930 (QL) [Gib van Ert]; See also de Mestral & Fox-Decent, *supra* note 11.

<sup>13</sup> See generally “Working Temporarily in Canada”, online: Citizen and Immigration Canada (CIC) <<http://www.cic.gc.ca/english/work/index.asp>>. Other categories are workers under the Low Skill Pilot and workers under the Live-In Caregiver Program.

<sup>14</sup> The author defines “implementation” in its broad sense as “. . . the process of giving effect to the provisions of a treaty within the national legal system.” See Hugh M. Kindred & Saunders M., Phillip, et al., *International Law Chiefly as Interpreted and Applied in Canada*, 7<sup>th</sup> ed., (Toronto: Emond Montgomery Publications Limited, 2006), at 206 [Kindred, Saunders, Phillip, et al.].

## Chapter 5- Application of International Law to SAWP Workers in Canada

As a result, SAWP workers are placed in a vulnerable position exposed to abuse and exploitation.<sup>15</sup>

This chapter will be divided as follows: section I will provide a brief background on Canada's domestic implementation of international law. Section II will argue that it is this implementation that obstructs the capacity to fully apply international law's protections in Canada; thus, rendering such application inadequate to protect SAWP workers particularly. A recent International Labour Organization (ILO) decision<sup>16</sup> regarding agricultural workers' right to collectively bargain in Ontario will be a case in point for this analysis. Finally section III will recommend an alternative approach to alleviate said inadequacy.

### **I. Background on Canada's Domestic Implementation of International Law**

International law requires each State to respect and fulfil its international obligations. However, it gives them a large degree of latitude as to how they will fulfil this goal.<sup>17</sup> There are two main theories in common law, which identify how international law can be incorporated into domestic law. The first one is the "adoption theory"; it holds that international law is automatically part of domestic law unless it conflicts with domestic statutory laws or the common law.<sup>18</sup> The "transformation

---

<sup>15</sup> It is important to note that while international law may grant substantial protections to domestic and SAWP workers, it is its application within the Canadian context that is inadequate.

<sup>16</sup> ILO Report, Case No. 2704, 18 November 2010, online: ILO at 335-361 <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_146695.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_146695.pdf)> .

<sup>17</sup> De Mestral & Fox-Decent, *supra* note 11 at para 23.

<sup>18</sup> *Ibid* at para 25. See also van Ert, *supra* note 12 at 930-31. Van Ert calls refers to the holding of this theory as "the incorporation doctrine".

theory” is the second theory identified. It “holds that international law can only become incorporated into domestic law when it has been integrated into domestic law by way of a legislative enactment”.<sup>19</sup>

Accordingly, there are two ways in which international law might enter Canadian law. It may apply immediately and directly, without any legislative or executive action; this is called the *monist* approach.<sup>20</sup> On the other hand, it might apply only upon being confirmed or consented by the executive or legislative branches of the State; this is called the *dualist* approach.<sup>21</sup> Canada’s approach to the domestic effect of international law is considered a “hybrid”; in other words, it follows a *dualist* approach with respect to the domestic effect of international treaties<sup>22</sup> but a *monist* approach toward customary international law.<sup>23</sup> In summary,

Canada generally takes a dualist approach to treaty law, requiring that an international treaty be transformed into Canadian law prior to having domestic legal effect. Canada’s approach to customary international law is very different. Here, Canada takes a monist approach: customary international law is presumed automatically to form part of the common law. Note, however, that this presumption of direct incorporation of customary international law into domestic common law can always be displaced by irreconcilably contrary Canadian statute law or binding precedent.<sup>24</sup>

---

<sup>19</sup> *Ibid.* See also van Ert, *supra* note 12 at 928.

<sup>20</sup> “The theory behind this model is that international law and the domestic law of the state in question are one (hence, monism, from the Greek monos or ‘single’.” See Gibran Van Ert, *Using International Law in Canadian Courts*, (The Hague/London/New York: Kluwer Law International, 2002) at 50 [Gibran Van Ert 2].

<sup>21</sup> *Ibid.* “In a dualist jurisdiction, international law and domestic law are treated as distinct legal systems whose discrepancies can only be cured by positive acts of the legislative and/or executive organs of the state.”

<sup>22</sup> See Currie, Forcese & Oosterveld, *supra* note 11 at 104.

<sup>23</sup> *Ibid* at 144.

<sup>24</sup> *Ibid.*

### A. Customary International Law

Norms defined as customary international law must meet two conditions under international law: (1) must have *opinion juris sive necessitates* (a sense that it is necessary by rule of law) and (2) must be reflected in the general practice of nations.<sup>25</sup> In other words, norms that fall under customary international law are acts that are over time widely repeated by states(State practice); and those acts must occur out of a sense of obligation (*opinio juris*).

As explained above, customary international law does not need implementing legislation to become part of Canadian law. Rather, it is a direct source of domestic legal rules. That is because it automatically becomes part of the common law. However, it is vulnerable to conflicting legislation and legal precedents.<sup>26</sup> This approach was affirmed by English jurists as early as the eighteenth century. For instance, in *Buvot v. Barbut*, Lord Talbot declared that the law of nations was to its full extent part of the law of England.<sup>27</sup> As well, Lord Mansfield stated in *Heathfield v. Chilton* that the law of nations was part of the common law of England.<sup>28</sup> The automatic incorporation of

---

<sup>25</sup> See *Statute of the International Court of Justice*, Art. 38(b), 26 June 1945, Can TS 1945 No 7 [ICJ Statute]; See also Francisco Forrest Martin, “Delineating a Hierarchical Outline of International Law Sources and Norms” (2002) 65 Sask L Rev 333 at para 37 (LEXIS) [Forrest Martin].

<sup>26</sup> See *R. v. Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*]. In paragraphs 34-39, the Court provided with an analysis defining the relationship between domestic law and customary international law as well as customary international law and the common law. Particularly, it explains and affirms that customary international law is part of the common law and is subject to conflicting legislation or precedent.

<sup>27</sup> *Barbut's Case* (1737), Cas Temp Ld Talb 281 at 283, 25 ER 777, LC.

<sup>28</sup> (1767), 4 Burr 2015 at 2016, 98 ER 50 (K.B.).

international law into the common law was further affirmed by Lord Langdale in *Brunswick (Duke) v. King of Hanover*.<sup>29</sup>

Canada has followed the English tradition regarding the direct incorporation of international law as part of the common law. This was confirmed in the early case of *The Ship "North" v. R*<sup>30</sup>, where Justice Davies declared that "[t]he right of hot pursuit... being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge..."<sup>31</sup> Another more recent example of this approach is found in *Reference Re Newfoundland Continental Shelf*<sup>32</sup>. In that case, the Supreme Court of Canada unanimously identified a relevant rule of customary international law in determining whether Canada or Newfoundland had the right to explore and exploit natural resources of the continental shelf at the moment of Newfoundland's entry into confederation.<sup>33</sup>

In addition to the Supreme Court of Canada's decisions, the principle that customary international law is directly received by Canada as part of the common law has been eloquently explained by international law scholars as follows:

Customary international law is said to be directly incorporated by the common law, without the need for legislative intervention but subject to conflicting domestic litigation. Thus, if a litigant can establish before a Canadian court that a given proposition represents a rule of customary international law, and is not

---

<sup>29</sup> (1844), 6 Beav 1 at 45, 49 ER 724 (Rolls Court).

<sup>30</sup> (1906), 37 S.C.R. 385 (LEXIS).

<sup>31</sup> *Ibid* at 394.

<sup>32</sup> [1984] 1 SCR 86.

<sup>33</sup> The customary international rule identified by the Court was that a consensus developed that the exploitation of natural resources should be under control of the coastal State. Thus, the Court held that Canada had the right to explore and exploit the mineral and other natural resources of the continental shelf; as well, Canada had legislative jurisdiction to make laws in relation to the exploration and exploitation of the said minerals and other natural resource.

ousted by express statutory provision, she may proceed to rely on that rule as if it were a common law rule.<sup>34</sup>

In theory, the direct applicability of customary international law into the common law seems encouraging. This is so particularly when such customary international laws may protect from abuse and exploitation. However, in practice, very few “Canadian cases have recognized rules of customary international law as decisive in the outcome of disputes”.<sup>35</sup> International law scholar Gib van Ert explains that there a few Canadian cases whose outcome was decisively weighted by customary international law for the following reasons:

- Not many rules of customary international law have relevance to domestic legal disputes as customary rules tend to define the rights and powers of States against other states;
- Providing support for a supposed custom by the required degree of State practice and *opinion juris* is particularly difficult in an Ontario or Saskatchewan trial court;
- Since rules of custom enter Canadian law through the common law, they are susceptible to legislative curtailment; where an alleged custom is contrary to an existing Canadian statute its incorporation by the common law is pre-empted by that legislative fact.<sup>36</sup>

---

<sup>34</sup> Gib van Ert, *supra* note 12 at 930.

<sup>35</sup> *Ibid* at 931. For instance in the Secession Reference the Court took into account some aspects of international law with regard to state secession; however, it did not clearly identified those parts of the law which were customary in nature and as such enjoyed direct effect in Canadian law. See De Mestral & Fox-Decent, *supra* note 11. See also *Secession Reference* [1998] 2 SCR 217.

<sup>36</sup> *Ibid.*

## Chapter 5- Application of International Law to SAWP Workers in Canada

In the context of SAWP workers in Canada, customary international law would not be very effective in granting them, for instance, rights to collectively bargain and form unions. To begin with, as explained below, said rights may not be deemed to be customary international law.

### 1. Do they fulfil the requirements of *opinion juris* and State practice?

It would be difficult to fulfil these requirements as these rights have been codified in ILO conventions<sup>37</sup> and other international instruments<sup>38</sup>. Thus, some may argue that those

---

<sup>37</sup> See International Labour Organization (*ILO*) *Convention 11- Right of Association (Agriculture) Convention, 1921*, *supra* note 1; *ILO Convention No. 98- Right to Organize and Collective Bargaining, 1949*, *supra* note 2; *Convention No. 87-Freedom of Association and Protection of the Right to Organize (1948)*, *supra* note 9; and *ILO's Declaration on Fundamental Principles and Rights at Work*, *supra* note 10.

<sup>38</sup> See *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"*, *supra* note 7 at Art 8. It reads:

#### *Trade Union Rights*

##### *1. The States Parties shall ensure:*

*a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;*

*b. The right to strike.*

See also *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, *supra* note 8 at Art 26. It reads:

##### 1. States Parties recognize the right of migrant workers and members of their families:

(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;

(b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;

(c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

rights are not part of customary international law; rather they are part of treaties or conventional international law.<sup>39</sup> Some authors have stated that fulfilling these requirements in court can be daunting and extremely difficult. De Mestral & Fox-Decent state that

Customary international law does pose special difficulties for those arguing for its adoption into the domestic legal framework. The difficulty results from the fact that the use of customary international norms requires the party seeking their application to demonstrate the existence of ‘wide-sweeping objective and subjective evidence of the establishment of a custom’. This burden is often hard to discharge, as it can be daunting to determine what states believe as opposed to what they say.<sup>40</sup>

2. In the event that question number one above is answered in the affirmative, would those rights, which would be part of customary international law and thus part of the common law survive in Canadian courts?

The author answers this question in the negative. Although in theory these rights would be part of the common law, they, nevertheless would be pre-empted by the various provincial statutes,<sup>41</sup> which grant in full or in part or not at all the rights to collectively bargain and unionize for agricultural workers. Moreover, the recent decision in *Fraser*<sup>42</sup> would further limit the possible application of said common law rights. For example, in

---

2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (order public) or the protection of the rights and freedoms of others.

<sup>39</sup> However, others may also argue that the rights to unionize and collectively bargain are customary international law since they are widely adopted in multilateral human rights treaties, *vis a vis*, ILO’s conventions no. 11, 98, 87 and its *Declaration on Fundamental Principles and Rights at Work*; therefore reflecting that States have accepted such practices and feel they are obliged to follow them. For further analysis see Forrest Martin, *supra* note 25.

<sup>40</sup> De Mestral & Fox-Decent, *supra* note 11 at para 28.

<sup>41</sup> See for example British Columbia’s *Labour Relations Code*, RSBC 1996, c 244; Quebec’s *Labour Code*, RSQ c C-27; and Ontario’s *Labour Relations Act*, 1995, SO 1995, c 1, Sch A.

<sup>42</sup> See *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

*Fraser* the Supreme Court took a narrow view holding that there is a right to collectively bargain and thus farm worker are entitled to a meaningful process by which they can pursue workplace goals but the state cannot be forced to follow a specific regime in how to go about it. This decision overruled the Ontario Court of Appeal decision<sup>43</sup> holding that agricultural workers have the right to collectively bargain pursuant to s. 2(d) of the *Charter* and that the state has a positive duty to implement statutory protections for the realization of said right.<sup>44</sup> In fact, the Ontario Court of Appeal identified four statutory protections that are required to enable agricultural workers to exercise their right to collectively bargain, namely:

- A statutory duty to bargain in good faith;
- A statutory requirement that employee representatives be selected based on the principles of majoritarianism and exclusivity;
- A statutory mechanism for resolving bargaining impasses such as strikes and lockouts; and
- A statutory mechanism for resolving disputes regarding the interpretation or administration of collective agreements.<sup>45</sup>

The following analysis will, for the sake of illustration, assume that the quoted international conventions below are norms deemed to be customary international law. Viewed in that light, the author makes the following submissions. When compared to

---

<sup>43</sup> See *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, 92 OR (3d) 481 [*Fraser II*].

<sup>44</sup> For an in depth analysis of *Fraser* see chapter 3.

<sup>45</sup> *Fraser II*, *supra* note 43 at para 80.

*ILO Declaration on Fundamental Principles and Rights at Work* and *Convention 98 (Right to Organize and Collective Bargaining)*, one notices that the Ontario Court of Appeal seems to align with them while the Supreme Court of Canada seems to sharply deviate from them. Below are relevant portions of these ILO conventions, which help to illustrate the author's argument:

*ILO Declaration on Fundamental Principles and Rights at Work*

Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation;  
The International Labour Conference,

1. Recalls:

(a) That in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia and have undertaken to work towards attaining the overall objectives of the Organization...

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, promote, and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) Freedom of association and the effective recognition of the right to collective bargaining...<sup>46</sup>

As well, *ILO Convention 98* provides the following rights and obligations:

i. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment<sup>47</sup>;

---

<sup>46</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, *supra* note 10.

<sup>47</sup> ILO Convention 98, *supra* note 2 at art. 1. Such protection shall apply more particularly in respect of acts calculated to--  
(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;  
(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

- ii. Workers shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration<sup>48</sup>;
- iii. Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organize as defined in the preceding Articles<sup>49</sup>; and
- iv. Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.<sup>50</sup>

The Ontario Court of Appeal in *Fraser II* seems to have taken a more robust interpretation regarding the obligations of the state to provide the appropriate machinery to ensure respect for the right to organize and collectively bargain as required with particularity in Article 2 of the *ILO Declaration on Fundamental Principles and Rights at Work* as well as *ILO Convention 98* as stipulated in (iii) and (iv) above. On the other hand, the Supreme Court of Canada seems to have taken a more narrow approach and held that the State cannot be obliged to provide a specific machinery to ensure said rights. In fact, the Supreme Court seems to give great deference to the Province of Ontario regarding how it should fulfil its obligation under s. 2(d) of the *Charter*. In other words, the Court left it to Ontario to decide how to provide its agricultural workers with the right to associate and collectively bargain.<sup>51</sup> Therefore, even if the right to collectively bargain and unionize were defined as customary international law, its application would be limited by both the Ontario legislation and the Supreme Court of Canada's *Fraser*

---

<sup>48</sup> *Ibid* at art 2.

<sup>49</sup> *Ibid* at art 3.

<sup>50</sup> *Ibid* at art 4.

<sup>51</sup> See chapter 3 for a detailed critique by the author of the Supreme Court's Decision in *Fraser*.

decision. The author submits that in reality what has happened at the end of the day is that agricultural workers, particular SAWP workers in Ontario, are left with very few protections and tools to exercise their right to collectively bargain and unionize. They cannot practically benefit from customary international law in the given circumstances.

## **B. Treaties**

A treaty is an expressed agreement that can be between States, between States and international organizations, or between international organizations.<sup>52</sup> Treaties create legally binding rights and obligations for its parties; they are governed by international law on matters relating to their validity, application, interpretation and enforceability.<sup>53</sup> Treaties are also known as “conventions”, “charters”, “covenants”, “protocols”, “pacts”, “acts”, “statutes” and “agreements”.<sup>54</sup> Treaties can address or deal with a myriad of subject matters such as crime, trade, human rights, national security, environmental protection; they can also create normative regimes to govern state conduct.<sup>55</sup>

As earlier identified, Canada requires international treaties to “be transformed into Canadian law prior to having domestic legal effect”.<sup>56</sup> Because Canada is a “highly decentralized federation”<sup>57</sup>, some authors have claimed that “Canada’s treaty scheme is

---

<sup>52</sup> See Joanna Harrington, “Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament” (2005) 50 McGill LJ 465 at para 6 (Lexis).

<sup>53</sup> *Ibid.* See also the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331. This applies to treaties between states.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> See Currie, Forcese & Oosterveld, *supra* note 11.

<sup>57</sup> Koren L. Bell, “From Laggard to Leader: Canadian Lessons on a Role for the U.S. States in Making and Implementing Human Rights Treaties” (2002) 5 Yale HR & Dev LJ 255 at 257 [Bell].

perhaps the most complex in the world.”<sup>58</sup> The main reason that seems to support this statement is the fact that in Canada, treaty-making and implementation does not rest solely within federal powers. Jurisdiction over treaty implementation is generally subject to the ordinary constitutional division of powers.<sup>59</sup> Accordingly, depending on the subject matter, the responsibility for implementing international law falls not only on the federal government but also on the provinces. This is particularly the case with labour and human rights instruments.<sup>60</sup>

### 1. Who is Responsible for What?

In Canada, the treaty-making power is generally the function of the federal executive alone.<sup>61</sup> There is no legal requirement to consult or involve at all the legislative branch when the executive decides to negotiate and ratify treaties.<sup>62</sup> Such powers are only vested in the Minister of Foreign Affairs and International Trade.<sup>63</sup> However, as it will be discussed later, treaty implementation competence depends on

---

<sup>58</sup> *Ibid.* See also Irit Weiser, “Undressing The Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System” (2004) 37 UBC L Rev 113-155 at para 21 [Weiser].

<sup>59</sup> See Bell, *ibid.* See also de Mestral & Evan Fox-Decent, *supra* note 11 at paras. 51-56.

<sup>60</sup> See Harry W. Arthurs, “Labour and the “Real” Constitution “(2007) 48 C de D 43-64 at paras 25-27 (Lexis).

<sup>61</sup> See *Attorney General for Canada. v. Attorney General for Ontario*, [1937] 1 DLR 673 at 679 (J.C.P.C.). [*Labour Convention Case*]

<sup>62</sup> However, in 2008, the Treaty Section of DFAIT informed that it would implement a policy on Tabling of Treaties in Parliament. This policy would place treaties before Parliament for at least twenty-one sitting days before ratification. Nevertheless, it is important to note that this policy does not give Parliament any right to negotiate and ratify any treaties; rather it would seem to only be for information purposes. See “Policy on Tabling of Treaties in Parliament”, online: Canada Treaty Information < <http://www.treaty-accord.gc.ca/procedures.aspx>>.

<sup>63</sup> De Mestral & Fox-Decent, *supra* note 11 at paras. 40-50; see also van Ert, *supra* note 12 at 927.

whether the subject matter falls within section 91 or 92 of the *Constitution Act, 1867*.<sup>64</sup>

However, Hogg points out that Canada is not always “precluded from signing, ratifying or performing treaties upon subject matters within the legislative competence of the provinces.”<sup>65</sup> However, he states that in the end, “Canada’s difficulty in making and fulfilling treaty making obligations is one of the prices of federalism”.<sup>66</sup>

The division of powers between the federal and the provincial governments under the Canadian Constitution is based on the concept that every possible subject matter falls under either exclusive federal or exclusive provincial jurisdiction.<sup>67</sup> Labour and employment law is not a subject matter expressly listed in the Canadian Constitution. Therefore, the development of the present division of powers in these areas between the two levels of government has been the product of judicial interpretation.<sup>68</sup> The basic rule in the Canadian constitutional law context is that all aspects of labour and employment law fall under the exclusive jurisdiction of the provinces over “property and civil

---

<sup>64</sup> *Labour Convention Case*, *supra* note 61 at 679.

<sup>65</sup> See Peter W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed, vol 1, (Toronto: Carswell, 2009), at p 11-16. In fact, Hogg identifies instances where this can be the case: “[t]he federal government can consult with the provinces before assuming treaty obligations which would require provincial implementation, and if all provinces (or all affected provinces) agree to implement a particular treaty, then Canada can adhere to a treaty without reservations. Even where prior provincial consent has not been obtain, Canada may feel free to adhere to a treaty because it includes a ‘federal state clause’ . . . Another device which enables a federal state to adhere to a treaty upon a subject matter outside central legislative competence is a ‘reservation’ . . . in respect of obligations within provincial competence.”, at p 11-16.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Labour Convention Case*, *supra* note 61 at 684.

<sup>68</sup> See generally *Labour Convention Case*, *supra* note 61; *Attorney General for Canada v. Attorney General for Ontario*, [1937] 1 DLR 684. [*Employment and Social Insurance Act, 1935 Reference*]; See also *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45, [2010] 2 SCR 696. In this case the entire Court reaffirmed the principle that provincial jurisdiction over labour relations is the norm and federal authority is exceptional.

rights”<sup>69</sup>. Therefore, generally, individual and collective employment relations in each province fall under the exclusive jurisdiction of that province.

On the other hand, the federal government has exclusive jurisdiction over labour and employment relations in the industries expressly assigned to its jurisdiction in Section 91 of the *Constitution Act, 1867*. Most of these involve interprovincial or international transportation and communications, as well as banking.<sup>70</sup>

In the 1937 *Labour Convention Case*<sup>71</sup>, the Judicial Committee of the Privy Council in the UK (then Canada’s highest appellate court) dealt with the issue of whether the federal Parliament was competent to implement treaty obligations incurred on Canada’s behalf by the federal government. The implementing *Acts* enacted by the federal Parliament at issue sought to implement significant labour reforms proposed by conventions adopted by the International Labour Organization (ILO). Some of the reforms related to the regulation of wages, working hours and rest days in industrial undertakings.<sup>72</sup> Lord Atkin, speaking for the Board, held that the federal government does not have the authority to enact legislation implementing international treaties or conventions on matters within provincial jurisdiction as established in s. 92 of the *Constitution Act, 1867*.<sup>73</sup> He clearly articulated:

---

<sup>69</sup>See *Labour Conventions Case* supra note 61, at 681; *Employment and Social Insurance Act, 1935 Reference*, *ibid*, at 686; See also *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s. 92(13). [*The Constitution Act, 1867*].

<sup>70</sup> See “The International Comparative Legal Guide to: Employment & Labour Law 2011 A Practical Cross-Border Insight into Employment and Labour Law”, online: Global Legal Group <<http://www.iclg.co.uk/khadmin/Publications/pdf/4392.pdf>>.

<sup>71</sup> See *Labour Convention Case*, supra note 61.

<sup>72</sup> *Ibid* at 673-74.

<sup>73</sup> *Ibid* at 679, 681-83.

. . . [I]t cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the functions of the executive alone. . . But in a state where the Legislature does not possess absolute authority: in a federal state where legislative authority is limited by a constitutional document: or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures: and the executive have the task of obtaining the legislative assent not of one Parliament to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed and that depends upon the authority of the competent Legislature or Legislatures.<sup>74</sup>

Therefore, the provinces must agree (usually by crafting their own legislation) to be bound by those treaties or conventions so that they can be in effect in their particular jurisdictions.<sup>75</sup> For example, although Canada is a party to the *North American Agreement on Labour Cooperation*<sup>76</sup>, which obligates Canada to observe its own labour legislation, the federal government, however, cannot require the provinces to observe theirs. Their obligation to comply would only be triggered by their accession to the agreement.<sup>77</sup> As underscored by law Professor Harry Arthurs:

[B]ilateral agreements between Canada and its hemispheric trading partners, as well as obligations assumed under interAmerican and international treaties, are unenforceable insofar as they relate to labour market, labour standards or industrial relations issues under provincial jurisdiction. So too, presumably, are UN human rights conventions bearing on labour issues.<sup>78</sup>

The federal government's limited capacity to implement certain areas of international law (particularly regarding labour rights) significantly inhibits its capacity to

---

<sup>74</sup> *Ibid* at 679.

<sup>75</sup> Arthurs, *supra* note 60 at para 25.

<sup>76</sup> See generally the *North American Agreement on Labour Cooperation (NAALC)*, online: Secretariat of the Commission for Labor Cooperation <<http://www.naalc.org/naalc.htm>>.

<sup>77</sup> Arthurs, *supra* note 60 at para25.

<sup>78</sup> *Ibid* at para 26.

grant labour rights and protections, as provided by ILO conventions and other international treaties, to all agricultural workers in Canada. That is because, in Canada, labour standards and labour relations generally fall under provincial jurisdiction; hence, unless they agree, the provinces are not legally bound by the obligations imposed to the federal government under international instruments. In simple terms, the provinces would be bound only if each of them were to agree to the various ILO and other international conventions granting certain protections in labour relations and standards. Consequently, as it pertains to both domestic and migrant agricultural workers, it would be irrelevant that the federal government ratify many of these international instruments and become legally bound by them if the provinces did not agree to incorporate those instruments in their jurisdictions. This conflict between federal and provincial jurisdiction has been one of the main arguments supporting the lack of participation and compliance with key international convention granting all agricultural workers the right to collectively bargain and strike.<sup>79</sup>

. . . [H]uman rights treaties often concern matters of exclusive provincial jurisdiction, and treaty ratification does not change our constitutional division of powers.<sup>80</sup> Canada has signed but has yet to ratify Convention No. 98 [*Organize and Collective Bargaining*] due to certain provinces continuing to exclude farm workers and some professionals from collective bargaining.<sup>81</sup>

---

<sup>79</sup> See Ken Norman, "ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep", (2004) 67 Sask L Rev 591 at para 4.

<sup>80</sup> *Ibid.* Quotation from Ms. Irit Weiser, Director, Human Rights Section, Department of Justice Canada.

<sup>81</sup> *Ibid* at para 8. See also Nicole LaViolette, "Problems Concerning Human Rights: Article: The Principal International Human Rights Instruments To Which Canada Has Not Yet Adhered" (2006) 24 Windsor YB Access Just 267. Professor LaViolette provides with an in-depth examination of the motives underlying the Canadian Government's refusal to ratify various international human rights instruments.

## 2. Complaint Against the Government of Canada Before the ILO

A poignant example of the discussion above is a complaint to the ILO based on the current reality faced by all agricultural workers in Ontario, namely, that they do not have the right to collectively bargain and form unions as defined in that province's *Labour Relations Act*<sup>82</sup>. As chapter 3 explained, Ontario has excluded agricultural workers from its labour relations legislation and instead granted them the limited right to form workers' associations under the *Agricultural Employees Protection Act*<sup>83</sup> (*AEPA*).

The complaint was presented to the ILO by the United Food and Commercial Workers Union- Canada (UFCW-Canada) and supported by the Canadian Labour Congress and UNI Global Union. UFCW-Canada argued that Ontario's *AEPA* violated ILO principles regarding freedom of association and collective bargaining pursuant to the *ILO Constitution*; *Convention No. 87* (Freedom of Association and Protection of the Right to Organize); *Convention No. 98* (the Right to Organize and Collective Bargaining), and the *Declaration on Fundamental Principles and Rights at Work*.<sup>84</sup> The complainant stressed that agricultural workers have been, and continue to be, denied the right to collectively bargain and unionize.<sup>85</sup> Specifically, UFCW-Canada argued that under the *AEPA* agricultural workers had only the right to join or to form employee's associations; the right to participate in their lawful activities, and the right to make representations to their employers regarding employment terms and conditions through

---

<sup>82</sup> SO 1995, c 1, Sch A.

<sup>83</sup> SO 2002, c 16.

<sup>84</sup> ILO Report, *supra* note 16 at para 338.

<sup>85</sup> *Ibid* at para 339.

said associations.<sup>86</sup> However, the complainant pointed out that, while the *AEPA* provides that the employer shall give an employees' association "a reasonable opportunity to make representations", the employer only has the obligation to listen to the representation that were made orally or read them if in writing. However, the complainant lamented that the legislation did not impose any obligation on the employer to bargain at all.<sup>87</sup>

**a. The Government's Response**

The Government of Ontario responded to the allegation that the *AEPA* contravened *Conventions No. 87* and *No. 98* by pointing out that Canada has not ratified *Convention No. 98*. This first response illustrates compellingly the author's argument that the implementation of international law in Canada hinders its application and effectiveness. That is because even if Canada were to ratify *Convention No. 98*, agricultural workers in Ontario would not automatically benefit from this commitment, unless Ontario would agree to implement said convention. In that case, Ontario would have to amend or repeal its legislation, namely the *AEPA*, in order to comply with the international convention's obligations.

Moreover, even if the principles in *Convention No. 98* were to be accepted as customary international law and thus automatically part of the common law in Canada, agricultural workers in Ontario would still be excluded from such rights and protections because the *AEPA* would contradict said common law.

The provincial government further stated that the *Act* provides an alternative labour policy which appropriately addresses the circumstances of farm labour and the

---

<sup>86</sup> *Ibid* at para 342.

<sup>87</sup> *Ibid*. As discussed in chapter 3, the *AEPA* does not compel the employer to even respond to the employers' representations.

agricultural sector's unique characteristics.<sup>88</sup> As well, it claimed that the *AEPA* contains almost identical provisions to the *Labour Relations Act* establishing the right to organize and which prohibits unfair practices.<sup>89</sup> Furthermore, Ontario asserted that nothing in the *AEPA* impaired any collective bargaining between employees' associations, including trade unions, and farm employers. In fact, the province emphasized that parties in the agricultural sector were free to collectively negotiate the terms and conditions of employment without interference.<sup>90</sup>

**b. The Committee's Conclusions and Recommendations**

The Committee based its decision primarily on a case it had already considered, which concerned the denial of the right to collectively bargain to certain categories of workers, including domestic and agricultural workers, in Ontario.<sup>91</sup> The Committee emphasized that in that case, it looked at the preliminary work for the adoption of *Convention No. 87*. Said work clearly showed that 'one of the main objectives of the guarantee of freedom of association is to enable employers and workers to form organizations independent of the public authorities and capable of determining wages and other conditions of work by means of freely concluded collective agreements'.<sup>92</sup> Accordingly, in that case, the Committee requested the Government to take the necessary measures to guarantee said workers access to "machinery and procedures" that assist the

---

<sup>88</sup> *Ibid* at para 347.

<sup>89</sup> *Ibid*.

<sup>90</sup> *Ibid* at para 348.

<sup>91</sup> *Ibid* at para 357. See ILO Case No. 1900, 308<sup>th</sup> Report, para 139-194.

<sup>92</sup> *Ibid*.

exercise of collective bargaining.<sup>93</sup> In that same case, the Committee also recognized the capacity to voluntarily negotiate collective agreements and the autonomy of the bargaining parties as fundamental characteristics of the principles of freedom of association.<sup>94</sup>

Shifting its focus to the case at hand, the Committee observed that neither the government nor the complainant referred to any successfully negotiated agreement since the adoption of the *AEPA* in 2002. In fact, the Committee pointed out that there had not been any good faith negotiations either.<sup>95</sup> Thus, it concluded that agricultural workers in Ontario continue to lack any machinery for the promotion of collective bargaining; therefore, such lack of machinery is “an impediment to one of the principal objectives of the guarantee of freedom of association- the forming of independent organizations explicitly capable of concluding collective agreements.”<sup>96</sup>

In light of its findings, the Committee recommended and requested the Government of Canada to take the necessary measures to ensure that the Ontario Government place appropriate machinery and procedures for the promotion of collective bargaining in the agricultural sector.<sup>97</sup> Because at the time of this case the Supreme Court of Canada had not yet published its decision for *Ontario (Attorney General) v. Fraser*<sup>98</sup> concerning the constitutionality of the *AEPA*, the Committee also requested that it be

---

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid* at para 358.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid* at para 361(a).

<sup>98</sup> *Fraser, supra* note 42.

provided with the decisions as soon as it was handed down.<sup>99</sup> Given that the Supreme Court of Canada's decision has been issued and that it held that the *AEPA* does not violate s. 2(d) of the *Charter*, it is difficult to predict if the Committee will change its decision and recommendations. However, article 27 of *Vienna Convention on the Law of Treaties* stipulates that states cannot plead internal legal or constitutional difficulties in mitigation of their treaty obligations.<sup>100</sup>

It is important to note that the Committee directed its recommendations to the government of Canada and not the provincial government. Thus, even if the government of Canada were to follow the recommendations and request the Ontario government to incorporate them accordingly, unless Ontario were to agree, such recommendations based on international law would not protect agricultural workers and grant them the right to collectively bargain and unionize. As such, said application of international law in the Canadian context, is inadequate to address agricultural workers rights under international law. Finally, given that the Supreme Court of Canada ruled in favour of Ontario by not declaring the *AEPA* unconstitutional, it would be very unlikely that the government of Canada apply any pressure to Ontario to change or amend its legislation to grant agricultural workers the right to collectively bargain and unionize as defined in international law.

---

<sup>99</sup> ILO Report, *supra* note 16 at para 361(b).

<sup>100</sup> See *Vienna Convention on the Law of Treaties*, *supra* note 53 at art 27.

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.” Article 46 states:

“Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

See also Kindred, Saunder, Phillip, et al., *supra* note 14 at 129.

## II. Author's Proposed Recommendations

This section intends to provide a possible alternative to protect domestic and SAWP workers in spite of the inadequate application of international law due to Canada's implementation processes. Simply stated, it offers a possible strategy to improve the current reality, which is that the protections offered by international law, namely the rights to collectively bargain and unionize, cannot be fully accessed by all agricultural workers in Canada. That is because said rights are encompassed within the subject matter falling under provincial jurisdiction. Thus, the provinces must agree to be bound and implement said international rights into their legislation; however, this has not been the case in all Canadian provinces.<sup>101</sup> Therefore, while the problem identified by the author in the Canadian context regarding international law is found in its implementation, the author will focus her recommendation on the treatment of international law in Canadian jurisprudence. In simpler terms, the author submits that the use of international law as a persuasive tool of interpretation by the courts is a useful approach to access the benefits of international law.

### A. The Presumption of Conformity

In Canada, there is an interpretative presumption of conformity, which requires administrative officials and courts to interpret domestic law in a manner that respects

---

<sup>101</sup> In fact Ontario and Alberta are the only two provinces that completely exclude agricultural workers from collectively bargain and the right to belong to a union pursuant to those provinces labour relations legislation. As discussed in chapter 3, Ontario excludes agricultural workers from collectively bargain and unionization as a means to protect the family farm. Regarding Alberta, see its *Labour Relations Code*, RSA 2000, c L-1, s. 4(2)(e).

The Alberta Federation of Labour states that Alberta has excluded agricultural workers from collective bargaining and other labour rights due to "intense fiscal pressure they face from agribusiness". See "The Regulatory Exclusion of Agricultural Workers in Alberta", online: Alberta Federation of Labour <[http://www.afl.org/index.php?option=com\\_customproperties&content\\_element=content&lang=en&show\\_section=6&tagId=137](http://www.afl.org/index.php?option=com_customproperties&content_element=content&lang=en&show_section=6&tagId=137)>.

Canada's international legal obligations.<sup>102</sup> However, it is uncertain how this presumption will be applied in a given case. In *Re Arrow River and Tributaries Slide & Boom Co. v. Pigeon Timber Co.*<sup>103</sup>, the Supreme Court of Canada was asked to decide if a portion of a provincial legislation violated an international treaty. Justice Smith recognized that the presumption of conformity holds unless legislators clearly and explicitly express their intention to violate international treaty law.<sup>104</sup> Nevertheless, Justice Smith avoided using the presumption of conformity by constructing the treaty so narrowly in order to support the position that it did not apply to the areas regulated under the impugned legislation. On the other hand, Justice Lamont argued that the legislatures are sovereign to violate international law and that the courts should not enforce a treaty unless the legislatures clearly express their intention that the legislation be read consistently with their international legal obligations.<sup>105</sup> International law scholar Gib van Ert explains that “[t]he interpretative rule for conformity with international legal obligations is most usually described as a rebuttable presumption”<sup>106</sup>; this means that “a party who seeks to advance an internationally non-compliant interpretation of a given Canadian legal norm must overcome”<sup>107</sup>. This presumption has been well defined by Justice Lebel in *R. v. Hape*.<sup>108</sup> He articulated that

---

<sup>102</sup> See *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, 2004 SCC 4, [2004] 1 SCR 76 at paras 31-40.

<sup>103</sup> [1932] SCR 495, [1932] 2 DLR 250 (SCC) [*Re Arrow River*].

<sup>104</sup> *Ibid* at 263-65.

<sup>105</sup> *Ibid* at 259-60.

<sup>106</sup> Gib van Ert, *supra* note 12 at 931.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Hape*, *supra* note 26.

[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation<sup>109</sup>.

Gib van Ert notes that the passage above makes various important points about the Canadian interpretative approach respecting international law. First, he notes that the presumption of conformity is typified as a "judicial policy". This characterization suggests that "an absence of positive legislative intent to conform to international law, is not decisive, nor relevant".<sup>110</sup> Secondly, he notices that this passage distinguishes international law as a contextual factor to be considered along other factors when interpreting a given statute for example. The other factor would be the legislation's express terms, scheme, and object. In other words Van Ert notices that the Court above has affirmed that "international law is part of the interpretative exercise".<sup>111</sup> Finally, the quote above affirms that the presumption of conformity is rebuttable. That is because Canadian legislatures are sovereign and thus empowered to legislate on any matter.

---

<sup>109</sup> *Ibid* at para 53.

<sup>110</sup> Gib van Ert, *supra* note 12 at 932.

<sup>111</sup> *Ibid* at 933.

However, their sovereignty is qualified by the written constitution; it imposes some jurisdictional limits on Parliament and the provincial legislatures and those limits are enforced by the judiciary.<sup>112</sup> However, Canadian legislatures remain “all powerful” and “all competent” in those areas not subject to judicial review; international law is one of them.<sup>113</sup> Accordingly,

The quoted passage states that parliamentary sovereignty requires courts to give effect to statutes that demonstrate ‘unequivocal legislative intent to default’ on the state’s international obligations. That appears to be a very high standard. Certainly there are very few cases which Canadian courts have held that the presumption of conformity with international law was rebutted by express legislative action.<sup>114</sup>

One of said few cases is *Coop. Com. On Japanese Canadians v. Canada (Attorney General)*<sup>115</sup>. In this case the Privy Council upheld the forcible removal of “persons of Japanese race” from Canada to Japan. It rejected the appellants argument that the legislation enabling their removal must be construed in light of international law and under such reading the removals were contrary to international law. The Privy Council found the presumption to be rebutted by war-time conditions.<sup>116</sup>

Although it seems clear from *Hape* that the principle of conformity has been endorsed by the Supreme Court of Canada, there seems to be a remaining question as to whether the presumption can justify the use of unimplemented treaties and under what

---

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> [1947] AC 87 (PC).

<sup>116</sup> *Ibid.*

circumstances.<sup>117</sup> Courts have used international treaties to interpret implementing legislation only when there are obvious ambiguities within the legislation. For instance, in *Capital Cities Communication v. C.R.T.C*<sup>118</sup> the majority upheld this interpretation of the rule. However, the dissent argued that “it is an oversimplification to say that treaties are of no legal effect unless implemented by legislation”.<sup>119</sup> About a decade later, the Supreme Court of Canada stated that treaties may be used to identify “latent” ambiguities in domestic legislation; accordingly, they may be used to identify vagueness and/or mixed meanings.<sup>120</sup> *R. v. Wedge*<sup>121</sup>, *Spitz v. Canada (Secretary of State)*<sup>122</sup>, *R. v. Sikyea*<sup>123</sup> and *Schavernoch v. Canada (Foreign Claims Commission)*<sup>124</sup>, are other cases where Canadian courts have uniformly reaffirmed the rule that treaties will be used as interpretative tools only upon related implementing legislation.

More recently, Canadian courts have crafted and justified decision using treaties which have not yet been implemented. This was the case in *Baker v. Canada*<sup>125</sup> where the Supreme Court made reference to the *Convention on the Rights of the Child* (a non-implemented treaty) to assist in determining what constitutes the reasonable exercise of

---

<sup>117</sup> Weiser, *supra* note 58 at paras 35, 41; see also Gib van Ert, *supra* note 12 at 931-933.

<sup>118</sup> [1978] 2 SCR 141.

<sup>119</sup> *Ibid* at 188.

<sup>120</sup> See *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 SCR 1324.

<sup>121</sup> [1939] 4 DLR 323, [1939] CCS NO 226 (BCSC).

<sup>122</sup> [1939] 2 DLR 546, [1939] Ex CR 162 (Exchequer Court of Canada).

<sup>123</sup> [1964] 46 WWR 65, [1964] NWTJ No 1 (N.W.T.C.A.) (LEXIS).

<sup>124</sup> [1982] 1 SCR 1092, [1982] 136 DLR 447.

<sup>125</sup> [1999] 2 SCR 817 [*Baker*].

## Chapter 5- Application of International Law to SAWP Workers in Canada

discretionary decision-making.<sup>126</sup> In that case, the Court explained that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”<sup>127</sup> Although some justices have demonstrated an increased willingness to use international law as a source of decision-making, others have argued that “international sources have little relevance” and do not constitute “law”.<sup>128</sup>

---

<sup>126</sup> As well, the Court used a similar approach of international law in *R. v. Sharp*, 2001 SCC 2, [2001] 1 SCR 45; and *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Town of Hudson*, 2001 SCC 40, [2001] 2 SCR 241.

<sup>127</sup> *Baker*, *supra* note 125 at para 70.

<sup>128</sup> See concurring opinion by Justice LeBel in *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Town of Hudson*, *supra* note 126 at para 48.

## B. Conformity in *Charter* Cases

In the area of *Charter* cases, there seems to be an unpredictable or ambiguous approach by the Supreme Court of Canada. For example, in *Reference Re Public Service Employee Relations Act (Alta)*<sup>129</sup>, Chief Justice Dickson, as he then was, stated in his dissenting opinion that “Canada’s international human rights obligations” are “important indicia of the meaning of ‘the full benefit of the *Charter*’s protection.”<sup>130</sup> He stated:

The *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.<sup>131</sup>

However, Justice Dickson seems to have made a contradictory affirmation earlier in the case when he stated that “various sources of international human rights law” may be “relevant and persuasive sources of interpretation of the *Charter*’s provisions,” and that these sources include non-binding international legal norms, which function similar to foreign law.<sup>132</sup> This apparent contradiction has been identified by international law scholar Gibran Van Ert. He claims that the passages above present two contradictory rules.<sup>133</sup> The first is a presumption of minimal protection where consideration for international human rights may be required. Thus, if counsel establishes the existence of a right at international law, then the presumption protects that right; opposing counsel

---

<sup>129</sup> [1987] 1 SCR 313.

<sup>130</sup> *Ibid* at 349.

<sup>131</sup> *Ibid*.

<sup>132</sup> *Ibid* at 348.

<sup>133</sup> See Gibran Van Ert 2, *supra* note 20 at 253-54.

must then rebut the presumption in order to limit the right.<sup>134</sup> Under this view, judges, while not obliged to consider international law, are obligated to protect international rights once they are established by counsel through *Charter* litigation.

The second rule identified by Van Ert is called the “relevant and persuasive approach”. Under this view, international law is treated as being identical in kind to foreign law. As such, judges are never bound by the norm of international law in interpreting the *Charter*. Although counsel may be allowed to make use of international and foreign law, neither judges nor opposing counsel are obliged to recognize the relevance or applicability of such law.<sup>135</sup>

The first rule appears to have been taken by the Court in *B.C. Health Services*<sup>136</sup>. In that case the Court referred to international conventions, to which Canada is a party, that recognize freedom of association as encompassing collective bargaining. The Court reinforced the notion that Canada’s international obligations can assist the courts in interpreting the *Charter*; thus framing an approach that the *Charter* should be “presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified”.<sup>137</sup> Moreover, since the *Charter* is a “living document” that speaks to the current situations and needs of Canadians, “Canada’s

---

<sup>134</sup> *Ibid* at 269.

<sup>135</sup> *Ibid* at 257, 260-63.

<sup>136</sup> See *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391[*BC Health Science*]. For a detailed discussion of this case see chapter 3. The Court made reference to *Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize; Declaration on Fundamental Principles and Rights at Work; International Covenant on Civil and Political Rights*, particularly art. 22(1),(2); and *International Covenant on Economic, Social and Cultural Rights*, particularly Art. 8(1)(c).

<sup>137</sup> See *BC Health Science*, *ibid* at para 70.

current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*”.<sup>138</sup>

As well in *Fraser*<sup>139</sup>, the Court adopted the same view regarding the use of international law to interpret *Charter* rights. It stated:

The majority in *Health Services* discussed both Canada’s current international law commitments and the current state of international thought on human rights... *Charter* rights must be interpreted in light of Canadian values and Canada’s international and human rights commitments.

In *Dunmore*, Bastarache J. emphasized the relevance of these in interpreting s. 2(d) in the context. The fundamental question from the perspective of s. 2(d) is whether Canada’s international obligations support the view that collective bargaining is constitutionally protected in the minimal sense discussed in *Health Services*. The majority in *Health Services* relied on three documents that Canada has endorsed: the International Covenant on Economic, Social and Cultural Rights, ..., the International Covenant on Civil and Political Rights, ... , and the International Labour Organization’s ...Convention (No. 87) concerning freedom of association and protection of the right to organize ,...<sup>140</sup>

Using the view that international law is an interpretative tool to identify the scope of the right of freedom of association in s. 2(d), the Court reaffirmed that indeed collective bargaining and the duty to bargain in good faith were included within that right. While the author does not agree with the overall outcome of the majority in *Fraser*<sup>141</sup>, she does agree with the Court’s approach regarding the use of international law as an interpretative tool. The author sees this as a possible opportunity to give more “bite” to international law in Canadian courts when, for instance, a litigant claims the

---

<sup>138</sup> *Ibid* at para 78.

<sup>139</sup> *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

<sup>140</sup> *Ibid* at paras 92-93.

<sup>141</sup> The author provides a critique of this decision in chapter 3.

protection of a *Charter* right such as the right to associate. This could also be applied to other *Charter* rights such as equality for example.

Accordingly, the author submits that, save a constitutional amendment, it is virtually impossible to change the implementation reality of international law in Canada. This is particularly the case with international treaties since they must be implemented by the competent jurisdiction according to sections 91 and 92 of the *Constitution Act, 1867*. Therefore, it is very tangible and indeed real to use international law in the courts if they follow the approach taken in *Fraser* and *B.C. Health above*. Moreover, the author would further advance said approach by adopting the principle in *Re Arrow River and Tributaries Slide & Boom Co. v. Pigeon Timber Co*<sup>142</sup> and particularly *Hape*<sup>143</sup>, namely that the presumption of conformity holds unless legislators clearly and explicitly express their intention to violate international law. At the very least, this would add an element of accountability and perhaps, at times, political embarrassment. In sum the author submits that a possible strategy to give international law more force in Canada lies in its interpretation and not implementation.

To the end of focusing on interpretation, the author has borrowed the principles underscored from the various cases above. These principles are advocated by the author; they propose that

- Canada's international obligations can assist the courts in interpreting the *Charter*;

---

<sup>142</sup> See *Re Arrow River*, *supra* note 103.

<sup>143</sup> *Hape*, *supra* note 26.

## Chapter 5- Application of International Law to SAWP Workers in Canada

- the *Charter* should be “presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified”;
- “Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter”; and
- The presumption of conformity holds unless legislators clearly and explicitly express their intention to violate international law.

The author submits that these principles would, possibly, yield a more beneficial outcome for SAWP workers hoping to access the rights of collectively bargain and unionization as defined in international instruments such as *ILO’s Declaration on Fundamental Principles and Rights at Work*<sup>144</sup> and *ILO Convention No. 98-Right to Organize and Collectively Bargain*<sup>145</sup>. For instance, SAWP workers could argue in a competent court that the *AEPA*<sup>146</sup> is presumed to conform to Canada’s international legal obligations unless the Ontario legislature clearly and explicitly expressed their intention to violate international law with the *AEPA*. The actual text of the *AEPA* does not clearly and expressly provide an intention to violate international law.

---

<sup>144</sup> See *Declaration on Fundamental Principles and Rights at Work*, *supra* note 10.

<sup>145</sup> See *ILO Convention No. 98-Right to Organize and Collectively Bargain*, *supra* note 2.

<sup>146</sup> See *Agricultural Employees Protection Act*, 2002, SO 2002, c 16 [*AEPA*].

## Chapter 5- Application of International Law to SAWP Workers in Canada

As well, since the decision in *Fraser* has held that there is a right to collectively bargain encompassed in s. 2(d) of the *Charter*,<sup>147</sup> it follows that SAWP workers may argue that the *AEPA* must be read as to provide “at least a great level of protection as is found in international human rights documents that Canada has ratified” such as *ILO’s Declaration on Fundamental Principles and Rights at Work* and *ILO Convention No. 87-Freedom of Association and Protection to the Right to Organize*. As well should be read in alignment with the ILO decision<sup>148</sup> regarding Ontario’s inability to provide agricultural workers with the necessary machinery to assist them in the realization of their rights to collectively bargain and unionize. As well, SAWP worker could submit that a competent court may interpret the *AEPA* taking into account “Canada’s current international law commitments and the current state of international thought on human rights”.

By applying these principles, SAWP workers could be in a better position to persuade a competent court to read the *AEPA* and conclude that it does provide them with the right to collective bargaining even though it does not expressly stipulate that; or that it compels the employers to engage in “good faith” negotiations with the workers or their associations/unions. Although the actual text is silent on these<sup>149</sup>, read in light of the

---

<sup>147</sup> In fact the majority opinion read the requirement of “good faith” into the *AEPA*. For a detailed analysis see chapter 3.

<sup>148</sup> See ILO Report, Case No. 2704, *supra* note 16.

<sup>149</sup> Regarding “good faith” the *AEPA* only expressly stipulate that “An employees’ association shall not act in bad faith or in a manner that is arbitrary or discriminatory in the representation of its members.” See *AEPA*, *supra* note 146 at s. 6. “Regarding collective bargaining, the legislation only expresses the following: The following are the rights of agricultural employees referred to in subsection (1):

1. The right to form or join an employees’ association.
2. The right to participate in the lawful activities of an employees’ association.
3. The right to assemble.
4. The right to make representations to their employers, through an employees’ association, respecting the terms and conditions of their employment.
5. The right to protection against interference, coercion and discrimination in the exercise of their rights.”

principles outlined above, it could be argued that the spirit of the legislation does provide those rights and protections, which are in alignment with Canada's international obligations and "the current state of international thought on human rights".

### **III. Conclusion**

This chapter discussed one key point. It identified that the implementation of international law within the Canadian context obstructs the capacity to fully apply international law's protections in Canada. Therefore, such application of international law is inadequate to protect SAWP workers in particular. That is because on the one hand customary international law although automatically part of the common law, is completely subject to conflicting legislation or precedent. In the case of agricultural workers, even if there were customary international norms granting them the right to unionize and collectively bargain, such rights would be subject to the various provincial legislations dealing with labour relations as well as to the *Fraser* decision. In Ontario for instance, they would not get much protections.

On the other hand, the implementation of international treaties comes with barriers regarding who must legislate (the provincial legislatures or Parliament) to make them part of domestic law. Accordingly, even if the federal government was to sign and ratify ILO Convention 98 for instance, its rights and protections would not be part of Canadian law until the provinces agree to implement them.

The author notes that a possible solution to lessen said inadequacy rests in the courts willingness to use international law as an interpretative tool to define a given right,

---

See *AEPA*, supra note 146 at s. 2. If fact, one cannot find anywhere in the legislation a duty on the part of the employer to engage in collectively bargain with the employees. Yes, the employee association may make representations but the employer is not obliged to answer.

particularly a *Charter* right. The author advocates for such use to be a generous interpretative tool, which requires legislators to clearly and explicitly express their intention to violate international law in a given legislation.

## Conclusion

This thesis revealed two key problems faced by all SAWP workers, particularly Mexican workers in Canada, namely, (1) they lack key legal rights and protections relating to labour relations, employment and health and safety standards at the structural level of the SAWP; and at the federal, provincial, and international levels. (2) Even when they have rights under legislation relating to the above-mentioned subject matters, Mexicans, especially, lack the capacity to access them. Therefore becoming ‘unfree labourers’ placed in a perpetual state of disadvantage, vulnerable to abuse and exploitation once in Canada.

The thesis explained that these problems have been created, perpetuated or exacerbated by the following: the structure of the SAWP, namely its employment agreement, since it creates an environment ripe for abuse and exploitation as it contains unconscionable terms benefiting the employers. Furthermore, since SAWP workers are admitted to Canada subject to *IRPA*, they are subject to deportation when circumstances arise. It is possible that many employers take advantage of this status. In fact, this thesis argues that it is this trait of deportability that makes Mexican workers reliable and obedient. If they do not obey, they can just be sent back home at the employer’s will.

As well, Mexican SAWP workers face exclusions from key provincial as well as federal legislation granting labour, employment, health and safety rights and protections. Ontario, being the principal recipient of Mexican SAWP workers, has excluded them from its labour relations legislation, from overtime pay benefits, and from important health and safety standards regulations. Although workers fought back in the Ontario

## Conclusion

Appellate Court and won the right to collectively bargain, Ontario successfully appealed the decision in the Supreme Court of Canada (*Fraser*).

Quebec also excludes agricultural workers from the benefit of overtime pay benefits and from important health and safety standards. On the other hand, it grants its agricultural workers, with some exceptions, the right to certify a union and collectively bargain. However, many SAWP workers fall within the exception and thus do not benefit from this right. Given the Supreme Court's Decision in *Fraser*, it is unlikely that anything will change in Quebec.

As for British Columbia, although it includes all agricultural workers in its labour relations legislation, to date, there are only two collective agreements between employers and unions representing Mexican SAWP workers. As well, British Columbia excludes agricultural workers from key and employment rights or benefits. Although, this jurisdiction includes agricultural workers in its health and safety legislation, in practice, however, SAWP workers do not get any benefits from it.

Furthermore, SAWP workers cannot realistically access the benefits of international law regarding the right to unionize and collectively bargain. That is because the incorporation of international law hinders such opportunity. In fact such implementation makes international law inadequate to protect and grant domestic and SAWP workers said rights.

Finally, even though the analysis of this thesis is of a descriptive and exploratory nature, the author provides recommendations to alleviate the weaknesses or problems identified above. While the thesis was not based on rigorous empirical research, it should

## Conclusion

not preclude the author's ability to make recommendations. Accordingly, some of recommendations include:

- taking away from the employers the ability to repatriate for “any sufficient reason”;
- including SAWP workers in the *EIA* in order for them to receive all and not some benefits;
- creating a path for permanent residence in order to stop the perpetual state of fearing being deported and thus terminated from the program;
- including them fully in the applicable provincial legislations;
- advocating for a more robust enforcement in jurisdictions where they are included in the legislation; and
- using international law as a persuasive interpretative tool to define the scope of domestic law applicable to SAWP workers.

# Bibliography

## I. Constitution

*Constitution Act, 1867*, 30 & 31 Vict, c 3.

*Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

## II. Federal Legislation

*Agricultural and Rural Development Act (ARDA)*, RSC 1985, c A-3.

*Agricultural Marketing Programs Act*, SC 1997, c 20.

*Agricultural Products Cooperative Marketing Act*, RSC 1985, c A-5.

*Agricultural Products Marketing Act*, RSC 1985, c A-6.

*Agriculture and Agri-Food Administrative Monetary Penalties Act*, SC 1995, c 40.

*Canada Labour Code*, RSC 1985, c L-2.

*Canada Pension Plan*, RS, 1985, c C-8.

*Citizenship Act*, RSC, 1985, c C-29.

*Employment Insurance (Fishing) Regulations*, SOR/96-445.

*Employment Insurance Act*, SC 1996, c 23.

*Employment Insurance Regulations*, SOR/96-332, s 55.

*Employment Insurance Regulations*, SOR/96-332.

*Farm Credit Canada Act*, SC 1993, c 14.

*Farm Debt Mediation Act*, SC 1997, c 21.

*Farm Income Protection Act*, SC 1991, c 22.

*Farm Products Agencies Act*, RSC 1985, c F-4.

*Immigration and Refugee Protection Act*, SC 2001 c 27.

*Immigration and Refugee Protection Regulations*, SOR/2002-227.

*Insurable Earnings and Collection of Premiums Regulations*, SOR/97-33.

## Bibliography

- The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.
- Unemployment Insurance (Collection of Premiums) Regulations*, CRC, c 1575.
- Unemployment Insurance Account Advance Regulations*, SOR/83-813.
- Unemployment Insurance Act*, 1940, SC 1940, c 44.
- Unemployment Insurance Act*, 1971, SC 1970-71-72, c 48.
- Unemployment Insurance Benefits Order, 1990*, SOR/90-54.
- Unemployment Insurance Benefits Order, 1991*, SOR/91-74.
- Unemployment Insurance Rate of Premium, 1966, Order*, SOR/95-588.
- Unemployment Insurance Rates of Premium, 1990, Order*, SOR/90-59.

### III. Provincial Legislation

- Agricultural Employees Protection Act*, 2002, SO 2002, c 16.
- Agricultural Labour Relations Act*, 1994, SO 1994, c 6 (REPEALED).
- An Act Respecting Labour Standards*, RSQ c N-1.1.
- An Act Respecting Occupational Health and Safety*, RSQ c S-2.1.
- Charter of human rights and freedoms*, R.S.Q. c. C-12.
- Employment Standard Regulation*, BC Reg 396/95.
- Employment Standards Act*, RSBC 1996, c 113.
- Employment Standards Act*, SO 2000, c 4.
- Exemptions, Special Rules and Establishing Minimum Wage*, O Reg 285/01.
- Farming Operations*, O Reg 414/05.
- Industrial Relations Act*, RSNB 1973, c I-4
- Labour Act*, RSPEI 1988, c L-1.
- Labour Code*, RSQ c C-27.
- Labour Relations Act*, 1995, SO 1995, c 1, Sch A.

## Bibliography

*Labour Relations Act*, CCSM c L10.

*Labour Relations Act*, RSNL 1990, c L-1.

*Labour Relations and Employment Statute Law Amendment Act*, 1995, SO 1995, c 1.

*Labour Relations Code*, RSA 2000, c L-1.

*Labour Relations Code*, RSBC 1996, c 244.

*Labour-Management Dispute (Temporary Provisions) Act*, SS 1981-82, c L-0.1.

*Occupational Health and Safety Act*, RSO 1990, c 0.1.

*Regulation Respecting Labour Standards*, RRQ, c N-1.1, r 3, s 2(6).

*Safety Representatives in Establishments Regulation*, RQ c S-2.1, r 18.01, s 1.

*Trade Union Act (amended)*, SNS 2011, c 71.

*Trade Union Act*, RSS 1978, c T-17.

*Workers Compensation Act*, RSBC 1996, c 492.

## IV. Jurisprudence

*114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Town of Hudson*, 2001 SCC 40, [2001] 2 SCR 241.

*Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

*Attorney General for Canada v. Attorney General for Ontario*, [1937] 1 DLR 673 (JCPC).

*Attorney General for Canada v. Attorney General for Ontario*, [1937] 1 DLR 684 (JCPC).

*Bank of Montreal v. Hall*, [1990] 1 SCR 121.

*Barbuit's Case* (1737), Cas Temp Ld Talb 281 at 283, 25 ER 777, LC.

*British Columbia (Milk Board) v. Bari Cheese Ltd.*, [1991] BCJ No 2444 (BCCA) (Lexis).

*British Columbia (Milk Board) v. Clearview Dairy Farm Inc.*, [1987] BCJ No 324 (BCCA) (Lexis).

## Bibliography

- British Columbia (Milk Marketing Board) v. Bari Cheese Ltd.*, 42 ACWS (3d) 202, [1993] BCJ No. 1748 (BCSC) (Lexis).
- British Columbia v. Singh*, [1908] 13 BCR 477, [1908] BCJ No 33 (BCSC) (Lexis).
- Brooks v. Moore*, 13 BCR 91, [1907] B.C.J. No. 18 (BCSC) (Lexis).
- Brunswick (Duke) v. King of Hanover*, (1844), 6 Beav 1 at 45, 49 ER 724 (Rolls Court).
- Budisukma Puncak Sendirian Berhad v. Canada*, 2004 FC 501.
- Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, 2004 SCC 4, [2004] 1 SCR 76.
- Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3.
- Capital Cities Communication v. C.R.T.C.*, [1978] 2 SCR 141.
- Clarcken v. Ontario (Health Insurance Plan)*, [1998] O.J. No. 1933 (Ont Div Ct) (Lexis).
- Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 SCR 754 .
- Dominion Stores Ltd. v. R.*, [1980] 1 SCR 844.
- Dunmore v. Ontario (Attorney General)* (1997) 155 DLR (4<sup>th</sup>) 193, [1997] O J No 4947 (Ont Gen Div) (Lexis).
- Dunmore v. Ontario (Attorney General)* (1999) 182 DLR (4<sup>th</sup>) 471, [1999] OJ No 1104 (Ont CA) (Lexis).
- Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016.
- Fraser v. Canada (Attorney General)*, [2005] O.J. No. 5580 (Ont Sup Ct Jus) (Lexis).
- Fraser v. Canada (Attorney General)*, 79 OR (3<sup>rd</sup>) 219, [2006] OJ No 45 (Ont Sup Ct) (Lexis).
- Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, 301 DLR (4<sup>th</sup>) 335.
- Greenway Farms Ltd. (Re)*, [2009] BCLRBD No 135, 170 CLRBRC (2d) 208 (British Columbia Labour Relations Board).
- Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.
- Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2003 BCSC 1379, 19 BCLR (4<sup>th</sup>) 37.

## Bibliography

*Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2004 BCCA 377, 30 BCLR (4<sup>th</sup>) 219.

*Heathfield v. Chiltion*, (1767), 4 Burr 2015 at 2016, 98 ER 50 (K.B.).

*Holland et al. v. Saskatchewan*, 2004 SKQB 478, (2004) 258 Sask R 243 (QB).

ILO Report, Case No. 2704, 18 November 2010, online: ILO at 335-361<  
[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_146695.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_146695.pdf)> .

*Krock v. Canada*, 2001 FCA 188, [2001] FCJ No 896 (FCA), leave to appeal refused [2001] SCCA. No 396 (SCC) (Lexis).

*Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113.

*Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 SCR 113.

*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

*Law v. Canada*, [1999] 1 SCR 497.

*Léo Beauregard & fils (Canada) Ltée v. Commission des norms du travail* [2000] RJQ 1075 (Que CA).

*Léo Beauregard & fils (Canada) Ltée v. Commission des norms du travail*, [2000] R J Q 1075, [2000] JQ no 1039 (Que CA) (Lexis).

*M & D Farm Ltd., v. Manitoba Agricultural Credit Corp.*, [1999] 2 SCR 961.

*Mayfair Farms (Portage) Ltd. (Re)* [2007] MLRB No 6, 139 CLRBR (2d) 1 (Manitoba Labour Board).

*Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 2000 NSCA 95.

*Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161.

*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 SCR 1324.

*NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696.

*Northern Telecom v. Communications Workers*, [1980] 1 SCR 115.

*O'Grady v. Sparling*, [1960] SCR 804.

*Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

*Ordon Estate v. Grail*, [1998] 3 SCR 437.

## Bibliography

- P.S.A.C. v. Canada*, [1987] 1 SCR 424.
- Pawar v. Canada*, [1999] F.C.J. No. 1421 (FCA) (Lexis), leave to appeal refused [1999] SCCA No 526 (SCC) (Lexis).
- Peterson v. Canada (Minister of State, Grains and Oilseeds)*, (1995) 124 DLR (4<sup>th</sup>) 96, [1995] FCJ No 580 (FCA) (Lexis).
- Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367.
- Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536.
- R. v. Bradfoard Fertilizer Co.*, [1972] 1 OR 229, [1971] O.J. No. 1763 (Ont CA) (Lexis).
- R. v. Bradford Fertilizer Co.*, [1971] OJ No 1763 (Ont CA) (Lexis).
- R. v. Davenport*, [1928] 23 Alta LR 525, [1928] AJ No 1 (Alta CA) (Lexis).
- R. v. Davenport*, 23 Alta LR 525, [1928] 2 D.L.R. 852 (Alta App Div) (Lexis).
- R. v. Dominion Stores Ltd.*, [1980] 1 SCR 844.
- R. v. Eastern Terminal Elevator Co.*, [1925] SCR 434.
- R. v. Grand Falls Milling Co. Ltd.*, 2005 NBPC 14 (available on CanLII).
- R. v. Grand Falls Milling Co. Ltd.*, 2005 NBPC 14 (available on CanLII).
- R. v. Hape*, 2007 SCC 26, [2007] 2 SCR 292.
- R. v. Kapp*, 2008 SCC 41, [2008] 2 SCR 483.
- R. v. Manitoba Grain Co.*, 32 Man R 52, (1922) 66 DLR (Man CA).
- R. v. Manitoba Grain Co.*, 66 DLR 406, [1922] MJ No 4 (Man CA) (Lexis).
- R. v. Neuman*, 1998 ABCA 261, [1998] AJ No 881 (Alta CA) (Lexis).
- R. v. Neuman*, 1998 ABCA 261, 62 Alta LR (3d) 79 (Alta CA).
- R. v. Newman*, 1998 ABCA 261, [1998] AJ No 881 (Alta CA) (Lexis).
- R. v. Sharp*, 2001 SCC 2, [2001] 1 SCR 45.
- R. v. Sikyea*, [1964] 46 WWR 65, [1964] NWTJ No 1 (N.W.T.C.A.) (LEXIS).
- R. v. Wedge*, [1939] 4 DLR 323, [1939] CCS NO 226 (BCSC).

## Bibliography

- R.W.D.S.U. v. Saskatchewan* [1987] 1 SCR 460.
- Re Agricultural Products Marketing Act*, [1978] 2 SCR 1198.
- Re Arrow River and Tributaries Slide & Boom Co. v. Pigeon Timber Co.*, [1932] SCR 495, [1932] 2 DLR 250 (SCC).
- Reference Re Farm Security Act 1944 (Saskatchewan) S. 6*, [1947] SCR 394.
- Reference Re Newfoundland Continental Shelf*, [1984] 1 SCR 86.
- Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 31.
- Reference Re Validity of Section 5(a) of the Dairy Industry Act (Importation of Margarine)*, [1948] SCR 1, affd [1951] AC 179 (JCPC).
- Reference Re Validity of Section 5(a) of the Dairy Industry Act (Importation of Margarine)*, [1948] SCR 1, affd [1951] AC 179 (JCPC).
- Reference re: Agricultural Products Marketing Act, 1970*, [1978] 2 SCR 1198.
- Reza v. Canada*, [1994] 2 SCR 394; and *Suresh v. Canada*, [1998] 38 OR (3d) 267 (Ont Ct Gen Div), affd [1999] 42 OR (3d) 797 (Ont Div Ct).
- Robinson v. Countrywide Factors Ltd.*, [1978] 1 SCR 753.
- Ross v. Registrar of Motor Vehicles*, [1975] 1 SCR 5.
- Saskatchewan (Attorney General) v. Canada (Attorney General)*, [1949] 2 DLR 145, [1948] JCJ No 1 (JCPC) (Lexis).
- Schavernoeh v. Canada (Foreign Claims Commission)*, [1982] 1 SCR 1092, [1982] 136 DLR 447.
- Secession Reference* [1998] 2 SCR 217.
- Smith v. the Queen*, [1960] SCR 776.
- Spitz v. Canada (Secretary of State)*, [1939] 2 DLR 546, [1939] Ex CR 162 (Exchequer Court of Canada).
- Stephens v. the Queen*, [1960] SCR 823.
- The Ship "North" v. R.*, (1906), 37 S.C.R. 385 (LEXIS).
- Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 c. L'Écuyer*, 2010 QCCRT 0191.

## Bibliography

*Union Colliery Co. of British Columbia v. Bryden*. [1899] AC 580, [1899] JCI No 2 (JCPC) (Lexis).

*Withler v. Canada (A.G.)*, 2011 SCC 12, [2011] 1 SCR 396.

## V. Agreements

*Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers – 2011* [Appendix XIII].

*Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers in British Columbia – 2011* [Appendix XIV].

*AGREEMENT FOR THE EMPLOYMENT IN CANADA OF SEASONAL AGRICULTURAL WORKERS FROM MEXICO – 2011* [Appendix II].

*Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico in British Columbia for the Year 2011* [Appendix III].

*Canada-Quebec Accord, signed in 1991, online: Ministère des Relations avec les citoyens et de l'Immigration*  
<[http://www.micc.gouv.qc.ca/publications/pdf/Accord\\_canada\\_quebec\\_immigration\\_anglais.pdf](http://www.micc.gouv.qc.ca/publications/pdf/Accord_canada_quebec_immigration_anglais.pdf)>.

*Collective Agreement Between Floralia Plant Growers Ltd, and United Food and Commercial Workers International Union, Local 1518* [Appendix X].

*Collective Agreement between Sidhu & Sons Nursery Ltd. and United Food and Commercial Workers International Union, Local 1518* [Appendix XI].

*Memorandum of Understanding Between the Government of the United Mexican States and the Government of Canada Concerning the Mexican Seasonal Agricultural Workers Program* [Appendix I].

*Pilot Project Employment Contract for the Agricultural Stream* [Appendix VIII].

*The Canada-Ontario Immigration Agreement, online: CIC*  
<<http://www.cic.gc.ca/english/departement/laws-policy/agreements/ontario/ont-2005-agree.asp>>.

## Bibliography

### VI. International Instruments

*Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”*, 17 November 1988, OAS TS No. 69.

*C101 Holidays with Pay (Agriculture) Convention, 1952*, online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

*C11 Right of Association (Agriculture) Convention, 1921*, online: International Labour Organization (ILO) <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

*C143 Migrant Workers (Supplementary Provisions) Convention, 1975*, online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

*C87 Freedom of Association and Protection of the Right to Organise Convention, 1948*, online: ILO <<http://www.ilo.org/ilolex/english/index.htm>>.

*C97 Migration for Employment Convention (Revised), 1949*, online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

*C98 Right to Organise and Collective Bargaining Convention, 1949*, online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

*Constitution of the International Labour Organisation*, online: ILO <<http://www.ilo.org/ilolex/english/iloconst.htm>>.

*General Agreement on Tariffs and Trade 1994*, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf)>.

*ILO Declaration on Fundamental Principles and Rights at Work*, online: ILO <[http://www.ilocarib.org.tt/images/stories/contenido/pdf/InternationLabourStandards/IL\\_0%20declaration%20on%20fundamental%20principles%20and%20followup.pdf](http://www.ilocarib.org.tt/images/stories/contenido/pdf/InternationLabourStandards/IL_0%20declaration%20on%20fundamental%20principles%20and%20followup.pdf)>.

*International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

*International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, 2220 UNTS 3.

*International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

*North American Agreement on Labour Cooperation (NAALC)*, online: Secretariat of the Commission for Labor Cooperation <<http://www.naalc.org/naalc.htm>>.

*R151 Migrant Workers Recommendation, 1975*, online: ILO <<http://www.ilo.org/ilolex/english/recdisp1.htm>>.

## Bibliography

*Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7.

*The General Agreement on Tariffs and Trade (GATT 1947)*, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf)>.

*Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261.

*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

### VII. Secondary Materials: Monographs

Avery, D., *Reluctant Hosts: Canada's Response to Immigrant Workers, 1896-1994*, (Toronto: McClelland & Stewart, 1995).

Basok, Tanya, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada*, (Montreal & Kingston: McGill-Queen's University Press, 2002).

Beaudoin, Gerald A. & Errol Mendes, *The Canadian Charter of Rights and Freedoms*. 4th ed. (Markham, ON: LexisNexis Butterworths, 2005).

Brownlie, Ian, *Principles of Public International Law*, 7<sup>th</sup> ed., (Oxford; New York: Oxford University Press, 2008).

Buckingham, Donald E. & Ken Norman, eds., *Law Agriculture and the Farm Crisis*, (Saskatoon, Saskatchewan : Purich Publishing, 1992).

Conklin, William E., *Images of a Constitution*, (Toronto; Buffalo; London: University of Toronto Press, 1989).

Crawford, R., *The Creation of States in International Law*, (Oxford: Oxford University Press, 2006).

Currie, John H., Forcese Craig & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, (Toronto: Irwin Law Inc., 2007).

Funston, Bernard W. & Eugene Meehan, *Canada's Constitutional Law in a Nutshell*. 3rd ed. (Toronto: Carswell, 2003).

Galabuzi, G., *Canada's Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century*, (Toronto: Canadian Scholars Press, 2006).

Hodgins, Bruce & Robert Page, eds., *Canadian History since Confederation*, (Georgetown, Ontario: Irwin-Dorsey Limited, 1979).

Hogg, Peter, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2009).

## Bibliography

- Kelly, N. & M. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, (Toronto: University of Toronto Press, 2000).
- Kindred, Hugh M., & Saunders M., Phillip, et al., *International Law Chiefly as Interpreted and Applied in Canada*, 7<sup>th</sup> ed., (Toronto: Emond Montgomery Publications Limited, 2006).
- Knowles, V., *Strangers at our Gates: Canadian Immigration and Immigration Policy, 1540-2006*, (Toronto: Dundurn Press, 2007).
- Magnet, Joseph E., *Constitutional Law of Canada: Cases, Notes and Materials*, 4th ed., Volume 1, (Cowansville, Quebec: Les Éditions Yvon Blais Inc., 1989).
- McIntyre, Sheila & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*. (Markham, Ont.: LexisNexis Butterworths, 2006).
- Monahan, Patrick J. *Constitutional Law*. 3rd ed. (Toronto: Irwin Law, 2006).
- Ochoa Campos, Moisés, *La Revolución Mexicana: Sus Causas Sociales*, Tomo II, online: Instituto Nacional de Estudios Históricos de la Revolución Mexicana <[http://www.bicentenario.gob.mx/bdb/bdbpdf/LaRevolucionMexicanaSusCausasSociales\\_Tomo-II/LaRevolucionMexicanaSusCausasSociales\\_Tomo-II-Cap01.pdf](http://www.bicentenario.gob.mx/bdb/bdbpdf/LaRevolucionMexicanaSusCausasSociales_Tomo-II/LaRevolucionMexicanaSusCausasSociales_Tomo-II-Cap01.pdf)>.
- Pietropaolo, Vincenzo, *Harvest Pilgrims: Mexican and Caribbean Migrant Farm Workers in Canada*, (Toronto: Between The Lines, 2009).
- Sack, Jeffrey, Mitchell, Michael C. & Sandy Price, *Ontario Labour Relations Law and Practice*, 3<sup>rd</sup> ed., (Markham: Lexis-Nexis, 1997, loose leaf).
- Satzewich, Vic, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945*, (London and New York: Routledge, 1991).
- Sharma, N., *Home Economics: Nationalism and the Making of Migrant Workers in Canada*, (Toronto: University Press, 2006).
- Sharpe, Robert J. & Kent Roach. *The Charter of Rights and Freedoms*. 4th ed. (Toronto: Irwin Law, 2009).
- Shaw, Malcom N., *International Law*, 6<sup>th</sup> ed., (Cambridge: Cambridge University Press, 2008).
- Shelton, Dinah, ed., *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, (Oxford: Oxford University Press, 2003).
- Van Ert, Gibran, *Using International Law in Canadian Courts*, (The Hague/London/New York: Kluwer Law International , 2002).

## VIII. Secondary Materials: Other than Monographs

“2007 ADMINISTRATIVE AND PROCESSING PROCEDURES”, online: Service Canada, <<http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>.

“About the Board”, online: Immigration and Refugee Board of Canada (IRB) <<http://www.irb-cisr.gc.ca/Eng/brdcom/abau/Pages/Index.aspx>>.

“About Us”, online: Canada Border Service Agency (CBSA), <<http://www.cbsa.gc.ca/agency-agence/what-quoi-eng.html>>.

“Actuarial Definition”, online: Business Directory <<http://www.businessdictionary.com/definition/actuarial.html#ixzz11CglPIIX>>.

“Administrative and Processing: Processing Procedures”, online: FARMS <<http://www.farmsontario.ca/program.php?divname=AdministrativeAndProcessing>>.

“Agricultural Stream of the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D)”, online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/Agricultural/directives.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/Agricultural/directives.shtml)>.

“Agricultural worker from Mexico and the Caribbean countries under the Seasonal Agricultural Worker Program (SAWP)”, online: Immigration et Communautés Culturelles (MICC) <<http://www.immigration-quebec.gouv.qc.ca/en/immigrate-settle/temporary-workers/obtaining-authorizations/agricultural-worker/seasonal-agricultural-worker.html>>.

“Agriculture Programs and Services: Overview”, online: Service Canada <<http://www.servicecanada.gc.ca/eng/on/epb/agri/overview.shtml>>.

“Alberta Immigrant Nominee Program”, Government of Alberta, online: Government of Alberta <<http://www.albertacanada.com/immigration/immigrating/ainp.aspx>>.

“Canadian Experience Class: Who can Apply”, online: CIC <<http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp>>.

“CanAg Travel Services”, online: FARMS <<http://www.farmsontario.ca/canag.php>>.

“Caribbean and Mexican Seasonal Agricultural Workers Program: Operating Guidelines”, online: Service Canada <<http://www.servicecanada.gc.ca/eng/on/epb/agri/operations.shtml>>.

“Caribbean and Mexican Seasonal Agricultural Workers Program: Operational Guidelines, 2006 Administrative and Processing Procedures”, online: Service Canada <<http://www.servicecanada.gc.ca/eng/on/epb/agri/operations.shtml>>.

## Bibliography

- “Caribbean and Mexican Seasonal Agricultural Workers Program: Policy”, online: Service Canada <<http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>.
- “Caribbean and Mexican Seasonal Agricultural Workers Program: Policy”, online: Service Canada <<http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>.
- “Census of Agriculture counts 30,675 farms in Quebec”, online: Statistics Canada <<http://www.statcan.gc.ca/ca-ra2006/analysis-analyses/que-qc-eng.htm>>.
- “Concurrency”, online: Centre for Constitutional Studies, <<http://www.law.ualberta.ca/centres/ccs/keywords/?id=18>>.
- “Contact Dermatitis”, online: US National Library of Medicine, National Institute of Health <<http://www.nlm.nih.gov/medlineplus/ency/article/000869.htm>>.
- “Costs Covered by the Worker”, online: HRSDC <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tfw/sawp\\_tfw.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml)>.
- “Fact Sheet: Employment Standards Act-Agricultural Workers”, online: Ontario Ministry of Labour <<http://www.ontla.on.ca/library/repository/mon/8000/244566.pdf>>.
- “Federal-Provincial/Territorial Agreements”, online: CIC <<http://www.cic.gc.ca/english/departement/laws-policy/agreements/index.asp>>.
- “*FERME/VOYAGES*”, online: FERME <<http://www.fermequebec.com/5-FERME-Voyage-fr.html>>.
- “Folliculitis”, online: Mayo Clinic <<http://www.mayoclinic.com/health/folliculitis/DS00512>>.
- “Growing Forward: Toward a New Agriculture Policy Framework”, online: Agriculture and Agri-Food Canada <<http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1200339470715&lang=eng>>.
- “Historic Union Contract for Migrant Workers in B.C.”, online: The National Union of Public and General Employees <<http://www.nupge.ca/node/2597>>.
- “Illustrative Cases” online: Agriculture Workers Alliance <<http://awa-ata.ca/en/media/illustrative-cases/>>.
- “Immigrating to Canada”, online: CIC <<http://www.cic.gc.ca/english/immigrate/index.asp>>.
- “Information for Farming Operations: Enforcement of the Occupational Health and Safety Act-When Self Compliance Fails”, online: Ontario Ministry of Labour <<http://www.labour.gov.on.ca/english/hs/pubs/farming/enforcement.php>>.

## Bibliography

- “Integration and Settlement in Ontario”, online: CIC  
<<http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/can-ont-index.asp>>.
- “*L’agriculture québécoise: amélioration de la situation économique*”, online: La Page du MAPAQ <<http://www.mapaq.gouv.qc.ca/NR/rdonlyres/940C899F-C5B2-4AD7-91AF-2D023397FA1C/0/TCN21octobre2010.pdf>> dated 21 Octobre 2010.
- “*Labour Standards in Quebec*”, online: Commission des norms du Travail  
<[http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c\\_0149a.pdf](http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c_0149a.pdf)>.
- “Mandate”, online: Agriculture and Agri-Food Canada <<http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1173965157543&lang=eng>>.
- “Mexican Seasonal Agricultural Workers Direction” [Appendix XII].
- “Mexican Seasonal Agricultural Workers Program”, online: Consejería Agroalimentaria de México en Canadá <<http://www.nasda.org/accord/Mx-CanProgTrabAgr.pdf>>.
- “Migrantes mexicanos fallecidos en la frontera sur de EUA en su intent por internarse sin documentos”, online: Secretaria de Relaciones Exteriores (SRE)  
<[http://www.sre.gob.mx/movil\\_sre/images/stories/dgpme/estadisticas/Cons\\_ycausas\\_2004\\_2011\\_26ago.pdf](http://www.sre.gob.mx/movil_sre/images/stories/dgpme/estadisticas/Cons_ycausas_2004_2011_26ago.pdf)>.
- “Opportunities Ontario: Foreign Workers, online: Government of Ontario  
<[http://www.ontarioimmigration.ca/en/pnp/OI\\_PNPWORKERS.html](http://www.ontarioimmigration.ca/en/pnp/OI_PNPWORKERS.html)>.
- “Participating Countries: Mexico”, online: FARMS  
<<http://www.farmsontario.ca/countries.php?divname=Mexico>>.
- “Policy on Tabling of Treaties in Parliament”, online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/procedures.aspx>>.
- “Policy Statement Regarding Access to and the Termination of Assistance to an Employer under the Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Program”, online: Service Canada  
<<http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>.
- “Policy Statement Regarding Access to and the Termination of Assistance to an Employer under the Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Program”, online: Service Canada  
<<http://www.servicecanada.gc.ca/eng/on/epb/agri/policy.shtml>>.
- “*Procédures et Délais*”, online: Fondation des Entreprises en Recrutement de Main-d’oeuvre agricole Étrangère (FERME) <[http://www.fermequebec.com/procedures\\_delais.html](http://www.fermequebec.com/procedures_delais.html)>.

## Bibliography

- “Program Details: Statement of Policy”, online: FARMS,  
<<http://www.farmsontario.ca/program.php?divname=StatementOfPolicy>>.
- “PROGRAMA DE TRABAJADORES AGRÍCOLAS TEMPORALES MÉXICO-CANADÁ”, online: Secretaria del Trabajo y Previsión Social  
<[http://www.stps.gob.mx/CGSNE/coord\\_empleo\\_stps.htm](http://www.stps.gob.mx/CGSNE/coord_empleo_stps.htm)>.
- “*Protección a Mexicanos*”, online: Mexican Consulate in Toronto, Ontario  
<<http://www.consulmex.com/esp/proteccionmexicanos.asp>>.
- “Provincial Nominee Program”, online: Government of British Columbia  
<[http://www.welcomebc.ca/wbc/immigration/come/work/about/index\\_page?WT.svl=LeftNav](http://www.welcomebc.ca/wbc/immigration/come/work/about/index_page?WT.svl=LeftNav)>.
- “Provincial Nominees: Who can apply”, online: Citizenship and Immigration Canada (CIC) <<http://www.cic.gc.ca/english/immigrate/provincial/apply-who.asp>>.
- “Pterygium”, online: US National Library of Medicine, National Institute of Health <<http://www.nlm.nih.gov/medlineplus/ency/article/001011.htm>>.
- “Quebec”, online: The Canadian Encyclopedia  
<<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=a1ARTA0006591>>.
- “*Qui est FERME?*”, online: FERME <[http://www.fermequebec.com/qui\\_est\\_ferme.html](http://www.fermequebec.com/qui_est_ferme.html)>.
- “Resumen de los Servicios de Vinculación Laboral”, online: Secretaria del Trabajo y Prevencion Social (Mexican Secretariat of Labour and Social Welfare)  
<[http://www.stps.gob.mx/CGSNE/resultados\\_programas\\_listado\\_stps.htm](http://www.stps.gob.mx/CGSNE/resultados_programas_listado_stps.htm)>.
- “Salarios mínimos 2011”, online: Servicio de Administración Tributaria  
<[http://www.sat.gob.mx/sitio\\_internet/asistencia\\_contribuyente/informacion\\_frecuente/salarios\\_minimos/default.asp](http://www.sat.gob.mx/sitio_internet/asistencia_contribuyente/informacion_frecuente/salarios_minimos/default.asp)>.
- “Seasonal Agricultural Worker Program (SAWP) Requirements in British Columbia”, online: HRSDC  
<[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/SAWPSheets/BC.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/SAWPSheets/BC.shtml)>.
- “Seasonal Agricultural Workers Program (SAWP): Mexico-Canada (1974-2006)”, Secretaría del Trabajo y Previsión Social.
- “Seasonal Agricultural Workers Program”, online: Foreign Affairs and International Trade Canada <<http://www.canadainternational.gc.ca/mexico-mexique/work-travail/sawp-ptag.aspx?lang=en>>.

## Bibliography

- “Seasonal Agricultural Workers Program”, online: Human Resources and Skills Development Canada (HRSDC)  
<[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tfw/sawp\\_tfw.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml)>.
- “Skilled Workers and Professionals: Who can Apply-Proof of Funds”, online: CIC <<http://www.cic.gc.ca/english/immigrate/skilled/funds.asp>>.
- Smith, Adrian A., “Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers” (2005) 20 No. 2 Can JL & Soc’y 95 .
- “Statement of Policy”, online: FARMS  
<<http://www.farmsontario.ca/program.php?divname=StatementOfPolicy>>.
- “Statistical Summary of Ontario Agriculture”, online: Ministry of Agriculture, Food and Rural Affairs, <[http://www.omafr.gov.on.ca/english/stats/agriculture\\_summary.pdf](http://www.omafr.gov.on.ca/english/stats/agriculture_summary.pdf)>.
- “Statistics”, *Vacancies Filled by Crop*, online: FARMS <<http://www.farmsontario.ca>>.
- “T4”s and Filing Tax Returns”, online: FARMS  
<<http://www.farmsontario.ca/countries.php?divname=Mexico>>.
- “Temporary Foreign Worker Program: Hiring Temporary Foreign Workers in Quebec”, online: HRSDC  
<[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/tempwork\\_quebec.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/tempwork_quebec.shtml)>.
- “Temporary Foreign Workers Program: Seasonal Agricultural Workers Program (SAWP) Requirements in Quebec”, HRSDC, online: Human Resources and Skill Development Canada (HRSDC)  
<[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/SAWPSheets/QC.shtml#il](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/SAWPSheets/QC.shtml#il)>.
- “Temporary Foreign Workers Program”, online: Human Resources and Skills Development Canada (HRSDC)  
<[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/sawp.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml)>.
- “The International Comparative Legal Guide to: Employment & Labour Law 2011 A Practical Cross-Border Insight into Employment and Labour Law”, online: Global Legal Group <<http://www.iclg.co.uk/khadmin/Publications/pdf/4392.pdf>>.
- “The minimum wage will increase by \$0.15 an hour on May 1, 2011”, online: Commission des normes du travail <<http://www.cnt.gouv.qc.ca/en/the-commission-informsyou/news/news/annee/2010/comm/249/91/index.html>>.
- “The Regulatory Exclusion of Agricultural Workers in Alberta”, online: Alberta Federation of Labour  
<[http://www.afl.org/index.php?option=com\\_customproperties&content\\_element=content&lang=en&show\\_section=6&tagId=137](http://www.afl.org/index.php?option=com_customproperties&content_element=content&lang=en&show_section=6&tagId=137)>.

## Bibliography

“The *Seasonal Agricultural Worker Program*”, online: Consulado General de México en Montreal

<<http://portal.sre.gob.mx/montrealenglish/index.php?option=displaypage&Itemid=55&op=page&SubMenu=>>>.

“The Status of Migrant Farm Workers in Canada 2006-2007”, online: the United Food and Commercial Workers Union (UFCW)

<<http://www.ufcw.ca/Theme/UFCW/files/PDF2007/StatusReportEN2007.pdf>>.

“The Status of Migrant Farm Workers in Canada 2008-2009”, online: UFCW-Canada

<<http://www.ufcw.ca/Theme/UFCW/files/PDF%202009/2009ReportEN.pdf>>.

“The Status of Migrant Farm Workers in Canada 2010-2011”, online: United Food and Commercial Workers Canada (UFCW-Canada)

<[http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status\\_of\\_MF\\_Workers\\_2010-2011\\_EN.pdf](http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf)>.

“Tinea Infections”, online: US National Library of Medicine, National Institute of Health

<<http://www.nlm.nih.gov/medlineplus/tineainfections.html>>.

“Who We Are”, online: CIC <<http://www.cic.gc.ca/english/departement/mission.asp>>.

“Working in Canada — Applying for a work permit outside Canada (IMM 5487)”, online: CIC <

<http://www.cic.gc.ca/english/information/applications/guides/5487E2.asp>>.

“Working temporarily in Canada: The Live-In Caregiver Program”, online: CIC

<<http://www.cic.gc.ca/english/work/caregiver/index.asp>>.

<[http://www.mcsc.gov.on.ca/en/mcsc/programs/social/directives/directives/owdirectives/3\\_1\\_OW\\_Directives.aspx](http://www.mcsc.gov.on.ca/en/mcsc/programs/social/directives/directives/owdirectives/3_1_OW_Directives.aspx)>.

<[http://www.nsi-ins.ca/english/pdf/Farmworkers\\_Eng.pdf](http://www.nsi-ins.ca/english/pdf/Farmworkers_Eng.pdf)>.

>,”How to Hire a Temporary Foreign Workers”, online: Citizenship and Immigration Canada (CIC) <<http://www.cic.gc.ca/English/resources/publications/tfw-guide.asp>>.

*A guide for Health and Safety Representatives and Joint Health and Safety Committees on Farming Operations*, 2005, Ontario Ministry of Labour , (Queens’s Printer for Ontario).

*Actualidad Economica en America del Norte*, Boletin Periodistico Semanal del 13 al 19 de noviembre de 2004, Año V, No. 43, online: Secretaria de Relaciones Exteriores

<[http://www.sre.gob.mx/laredo/images/pre\\_bol\\_eco\\_2004\\_43.htm](http://www.sre.gob.mx/laredo/images/pre_bol_eco_2004_43.htm)>.

*Agricultural Fatalities in Canada 1990-2005*, online: Canadian Agricultural Injury Surveillance Program < <http://cair-sbac.ca/natfull.pdf>>.

## Bibliography

A.J. Trevino et al., "What's so critical about critical race theory?", *Contemporary Justice Review*, Vol 11, No 1(March 2008).

Ankersen, Thomas T. & Thomas Ruppert, "Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America", (Spring, 2006) 19 *Tul Envtl LJ* 69.

Austin Carly & Harald Bauder, "Jus Domicile: A Pathway to Citizenship for Temporary Foreign Workers?", (December 2010), CERIS Working Paper No 81, online: CERIS – The Ontario Metropolis Centre <[http://www.ceris.metropolis.net/wp-content/uploads/pdf/research\\_publication/working\\_papers/wp81.pdf](http://www.ceris.metropolis.net/wp-content/uploads/pdf/research_publication/working_papers/wp81.pdf)>.

Bankes, Nigel D. & Alstair R. Lucas, "Kyoto: Constitutional Law and Alberta's Proposal", (2004) 42 *Alta L Rev* 355.

Barrón, Antonieta, "Migraciones internas e internacionales. Mercados primarios, condiciones de trabajo secundarias. Jornales a San Quintin, Baja California, México y a Niagara on the Lake, Ontario, Canadá" (1998), online: Asociación de Estudios Latinoamericanos (LASA) <<http://lasa.international.pitt.edu/LASA98/Barron.pdf>>.

Basok, Tanya, "Canada's Temporary Migration Program: A Model Despite Flaws", online: Migration Information Source <<http://www.migrationinformation.org/Feature/display.cfm?ID=650>>.

Becerril Quintana, Ofelia, "A New Era of Seasonal Mexican Migration to Canada", online: The Canadian Foundation for the Americas (FOCAL) <<http://www.focal.ca/publications/focalpoint/467-june-2011-ofelia-becerril-quintana-en>>.

Becklumb, Penny, "Canada's Immigration Program" (Revised 10 September 2008), Parliamentary Information and Research Service, Library of Parliament, BP-190E.

Bell, Koren L., "From Laggard to Leader: Canadian Lessons on a Role for the U.S. States in Making and Implementing Human Rights Treaties" (2002) 5 *Yale HR & Dev LJ* 255.

Binford, Leigh, "From Fields of Power to Fields of Sweat: the Dual Process of Constructing Temporary Migrant Labour in Mexico and Canada", *Third World Quarterly*, Vol. 30, No. 3, (2009).

Binford, Leigh, "The Seasonal Agricultural Workers Program and Mexican Development" (September 2006), online: The Canadian Foundation for the Americas (FOCAL) <[http://www.focal.ca/pdf/migration\\_Binford\\_seasonal%20agricultural%20workers%20program%20Mexican%20development\\_August%202006\\_FPP-06-07.pdf](http://www.focal.ca/pdf/migration_Binford_seasonal%20agricultural%20workers%20program%20Mexican%20development_August%202006_FPP-06-07.pdf)>.

Brunschot, Angela, "Absence Grows our Vegetables", online: Magazine <<http://www.seemagazine.com/article/news/news-main/migrants1120/>>, dated 20 November 2008.

## Bibliography

Canada-Foreign Workers in the Seasonal Agricultural Workers Program (Mexican) by Province from 2000-2009, prepared by Citizenship and Immigration Canada, Research and Evaluation Branch [Appendix V].

Charney, Jonathan I., "Universal International Law", (1993) 87 AJIL 529.

CIA World Fact Book, "Mexico", online: CIA  
<<https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html>>.

Clemens, Lisa, "Cargill reports third-quarter fiscal 2011 earnings", online: Cargill  
<<http://www.cargill.com/news-center/news-releases/2011/NA3043120.jsp>>.

De Mestral, Armand & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill LJ 573 at para 7 (Lexis).

Deck prepared by Human Resources and Skills Development Canada, Temporary Foreign Worker Program, 11 August 2010 [Appendix IV].

Downes, Andrew & Cyrilene Odle-Worrell, "Canadian Migrant Agricultural Workers Program Research Project-The Caribbean Component", online: The North-South Institute  
<[http://www.nsi-ins.ca/english/pdf/exec\\_sum\\_downes.pdf](http://www.nsi-ins.ca/english/pdf/exec_sum_downes.pdf)>.

Elgersma, Sandra, "Temporary Foreign Workers"(7 September 2007), Library of Parliament, Political and Social Affairs Division, PRB 07-11E.

Esquirol, Jorge L., "The Failed Law of Latin America", (Winter, 2008) 56 Am J Comp L 75.

Factum of the Appellants, *Michael J. Fraser, et al and Attorney General of Ontario*, Court File No.: C44886, Court of Appeal for Ontario, online: UFCW <<http://www.yorku.ca/ddoorey/lawblog/wp-content/files/ufcw-fraser-factum.pdf>>.

Factum of the Intervener, *Justicia for Migrant Workers and Industrial Accident Victims Group of Ontario, Attorney General of Ontario v. Michael J. Fraser on his own behalf and on behalf of the United Food and Commercial Workers Union Canada, Xin Yuan Liu, Julia McGorman and Billie-Jo Church*, Court File No. 32968, online: Supreme Court of Canada <<http://www.aspercentre.ca/Assets/Asper+Digital+Assets/Supreme+Court/fraser-intervener-j4mw-iavgo.pdf>>.

Forrest Martin, Francisco, "Delineating a Hierarchical Outline of International Law Sources and Norms" (2002) 65 Sask L Rev 333 at para 37 (LEXIS).

Gerardo Otero & Kerry Preibisch, *Farmworker Health and Safety: Challenges for British Columbia* (August 2010), online: Simon Fraser University  
<<http://www.sfu.ca/~otero/docs/Otero%20and%20Preibisch%20Final%20Nov-2010.pdf>>.

## Bibliography

- Gibb, Heather, "Farmworkers from Afar" (2006), online: The North-South Institute <[http://www.nsi-ins.ca/content/download/Farmworkers\\_Eng.pdf](http://www.nsi-ins.ca/content/download/Farmworkers_Eng.pdf)>.
- Gould, David M., "Mexico's Crisis: Looking Back to Assess the Future", online: Economic Review, (Federal Reserve Bank of Dallas: Second Quarter 1995) <<https://www.dallasfed.org/research/er/1995/er9502a.pdf>>.
- Harrington, Joanna "Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament" (2005) 50 McGill LJ 465 (Lexis).
- Harry W. Arthurs, "Labour and the "Real" Constitution" (2007) 48 C de D 43-64 (Lexis).
- Hirschman, Albert O., "The Political Economy of Import-Substituting Industrialization in Latin America", The Quarterly Journal of Economics, vol. 82, No. 1 (Feb., 1968).
- Hoefler, Michael, Rytina, Nancy & Bryan C. Baker, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010", online: U.S. Department of Homeland Security <[http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf)>.
- Hopes, Vikki, "'Precedent-setting' Contract a First for Migrant Farm Workers", Abbotsford News, 12 November 2010.
- Interview with Mr. Hernan de Jesus Ruiz Bravo, counselor from the Embassy of Mexico in Canada, interview date: March 27, 2008.
- Islas, Veronica, "Costly Commute: Foreign Migrant Workers Provide Long Hours of Cheap Labour on Canadian Farms", online: The Dominion <<http://www.dominionpaper.ca/articles/2344>>, dated 7 January 2009.
- Jan E. Zejda, Helen H. McDuffie & James A. Dousman, *Epidemiology of Health and Safety Risks in Agriculture and Related industries: Practical applications for Rural Physicians* (1993), online: The Western Journal of Medicine <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1021941/pdf/westjmed00077-0058.pdf>>.
- Johnson, Kevin R., "The Intersection of Race and Class in U.S. Immigration Law and Enforcement", Law and Contemporary Problems, Vol 72:1 Fall 2009.
- Knop, Karen, "Here and There: International Law in Domestic Courts", (2000) 32 NYUJ Int'l L & Pol 501.
- "LA DISCRIMINATION SYSTÉMIQUE À L'ÉGARD DES TRAVAILLEUSES ET TRAVAILLEURS MIGRANTS"(Décembre 2011), online: Commission des droits de la personne et des droits de la jeunesse <[http://www2.cdpcj.gc.ca/publications/Documents/Avis\\_travailleurs\\_immigrants.pdf](http://www2.cdpcj.gc.ca/publications/Documents/Avis_travailleurs_immigrants.pdf)>.

## Bibliography

LaViolette, Nicole, “Problems Concerning Human Rights: Article: The Principal International Human Rights Instruments To Which Canada Has Not Yet Adhered” (2006) 24 Windsor YB Access Just 267.

Leeder, Jessica, “Do Corporate Buyouts Signal the End of the Family Farm?” *The Globe and Mail* (24 November 2010).

Legal Aid Research Series, “Representation for Immigration and Refugee Claimants: Final Study” (2002), online: Department of Justice Canada <[http://publications.gc.ca/collections/collection\\_2011/jus/J3-10-16-eng.pdf](http://publications.gc.ca/collections/collection_2011/jus/J3-10-16-eng.pdf)>.

Leigh Binford, “From Fields of Power to Fields of Sweat: the dual process of constructing temporary migrant labour in Mexico and Canada” (2009) *Third World Quarterly*, Vol 30, No 3.

Léonard, André, “The Employment Insurance Program in Canada: How it Works” (2010), Library of Parliament, Parliamentary Information and Research Service, Publication No. 2010-52-E.

Mémoire du Procureur Général du Québec, *Procureur Général du Québec c, Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 et Johanne L'Écuyer et Pierre Locas*, Dossier No. 500-17-058556-104 (Que Sup Ct).

Montoya, Margaret E., *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENV U L REV 467 (2001)

Montpetit, Caroline, “Les travailleurs migrants sont victims de discrimination”, (21 Février 2012), *Le Devoir*, at A2.

Monterrosa, Fátima, “El Otro Rostro de la Migración Mexicana Hacia El Norte”, online: EMEEQUIS <<http://www.telediccion.com.mx/artman2/uploads/3/Canada.pdf>>, 22 se septiembre de 2008.

Norman, Ken, “ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep”, (2004) 67 Sask L Rev 591.

Olson, Dennis R., “Lessons from NAFTA: Food and Agriculture” (December 2, 2008), online: Institute for Agriculture and Trade Policy <[http://www.iatp.org/files/451\\_2\\_104576.pdf](http://www.iatp.org/files/451_2_104576.pdf)>.

Pay Sheet for Mexican SWAP Workers [Appendix IX].

Perez Garcia, Nancy, “Cruces en la Frontera: Migración Indocumentada y Muertes en la Frontera México-Estados Unidos”, online: SRE <<http://portal.sre.gob.mx/pcdh/libreria/libro5/nancy%20perez.pdf>>.

## Bibliography

Pickett, William, Lisa Hartling, *et al*, *Fatal Work-Related Injuries in Canada 1991-1995*, online: Canadian Medical Association, online <<http://www.cmaj.ca/cgi/reprint/160/13/1843.pdf>>.

Preibisch, Kerry, “Canada’s Seasonal Agricultural Workers Program as a Model of Best Practices in Migrant Worker Participation in the Benefits of Economic Globalization Project: Social Relations Practices between Seasonal Agricultural Workers, their Employers, and the Residents of Rural Ontario”, online: The North-South Institute <[http://www.nsi-ins.ca/english/pdf/exec\\_sum\\_preibisch.pdf](http://www.nsi-ins.ca/english/pdf/exec_sum_preibisch.pdf)>.

Preibisch Kerry, “Local Produce, Foreign Labour: Labour Mobility Programs and Global Trade Competitiveness in Canada”, *Rural Sociology*, Vol 72, No 3, September 2007.

Preibisch, Kerry, “Social Relations Practices between Seasonal Agricultural Workers, their Employers, and the Residents of Rural Ontario” (2004), online: North-South Institute <<http://www.nsi-ins.ca/english/research/archive/2004/05.asp>>.

Preibisch, Kerry & Evelyn Encalada, “Migrant Women Farm Workers in Canada” (July 2008), online: University of Guelph <[http://www.rwmc.uoguelph.ca/cms/documents/182/Migrant\\_Worker\\_Fact\\_Sheet.pdf](http://www.rwmc.uoguelph.ca/cms/documents/182/Migrant_Worker_Fact_Sheet.pdf)>.

Preibisch, Kerry and Jenna Hennebry, *Temporary migration, chronic effects: the health of international migrant workers in Canada*, online: Canadian Medical Association Journal (CMAJ) <<http://www.cmaj.ca>> at 3, published on 18 April 2011.

Pysklywec, Michael, McLaughlin, Janet, Tew, Michelle & Ted Haines, *Doctors within borders: meeting the healthcare needs of migrant farm workers in Canada*, online: Canadian Medical Association Journal (CMAJ) <<http://www.cmaj.ca>>, published on 26 April 2011.

Respondents’ Factum, *Attorney General of Ontario v. Michael J. Fraser on his own behalf and on behalf of the United Food and Commercial Workers Union Canada, Xin Yuan Liu, Julia McGorman and Billie-Jo Church*, Court File No. 32968, online: Supreme Court of Canada <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/fac-mem-eng.aspx?cas=32968>>

Seddon, Hilary, Number of temporary foreign worker positions in agriculture (excluding SAWP) on labour market opinion confirmations by province of employment, country of residence and citizenship of foreign worker positions, occupation and skill level, 2009 [Appendix VI].

Seddon, Hilary, Number of temporary foreign workers position on labour market opinion confirmations under the Seasonal Agricultural Worker Program (SAWP), by province of employment, source country, occupation and skill level, 2009 session [Appendix VII].

See “Task Force on Agricultural Labour Relations: Report to the Minister of Labour”(June 1992) and (November 1992).

## Bibliography

See “Tutorial”, online: HRSDC

<<http://www5.hrsdc.gc.ca/NOC/English/NOC/2006/Tutorial.aspx>>.

See Encalada Grez, Evelyn, “Vulnerabilities of female migrant farm workers from Latin America and the Caribbean in Canada” (April 2011), online: The Canadian Foundation for the Americas (FOCAL)

<[http://oppenheimer.mcgill.ca/IMG/pdf/Labour\\_Mobility\\_Encalada\\_Vulnerabilities\\_of\\_female\\_migrant\\_farm\\_workers\\_from\\_Latin\\_America\\_and\\_the\\_Caribbean\\_in\\_Canada\\_April\\_2011\\_e.pdf](http://oppenheimer.mcgill.ca/IMG/pdf/Labour_Mobility_Encalada_Vulnerabilities_of_female_migrant_farm_workers_from_Latin_America_and_the_Caribbean_in_Canada_April_2011_e.pdf)>.

Smith, Adrian A., “Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers” (2005) 20 No. 2 Can JL & Soc’y 95 .

Sook Lee, Min & Karen King-Chigbo, *El Contrato*, produced by the National Film Board of Canada (2006).

Suggs, Robert E., *Poisoning the Well: Law & Economics and Racial Inequality*, 57 Hastings LJ 255 (2005).

The Status of Migrant Farm Workers in Canada (2008-2009)”, online: UFCW-Canada

<<http://www.ufcw.ca/templates/ufcwcanada/images/awa/wp-content/uploads/2009/09/ra0908hstatusreport08-09en3-9.pdf>>.

Van Ert, Gib, “Dubious Dualism: the Reception of International Law in Canada” (Spring 2010) 44 Val UL Rev 927 at 930 (Lexis).

Van Ert, Gibran, “The Legal Character of Provincial Agreements with Foreign Governments”, (2001) 42 C de D 1093.

Verma, Veena, “The Regulatory and Policy Framework of the Caribbean Seasonal Agricultural Workers Program”(April 2007), online: The North-South Institute

<[http://www.nsi-ins.ca/english/pdf/Regulatory\\_Policy\\_Verma.pdf](http://www.nsi-ins.ca/english/pdf/Regulatory_Policy_Verma.pdf)>.

Verma, Venna, “The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program under Unionization”, (December 2003), online: The North-South Institute < [http://www.nsi-ins.ca/english/pdf/csawp\\_verma\\_final\\_report.pdf](http://www.nsi-ins.ca/english/pdf/csawp_verma_final_report.pdf)>.

Wai Suen, Rachel Li, “You Sure Know Who to Pick’Em: Human Rights and Migrant Farm Workers in Canada” (2000) 15 Geo Immigr LJ 1999 at 203.

Warner La Forest, Anne, “Domestic Application of International Law in Charter Cases: Are We There Yet?”, (2004) 37 UBC L Rev 157-218.

Waters, Melissa A., “Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties”, (April, 2007) 107 Colum L Rev 628.

## Bibliography

Weiser, Irit, “Undressing The Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System” (2004) 37 UBC L Rev 113-155.

Weston, Ann, “The Changing Economic Context for Canada’s Seasonal Agricultural Workers Program” (May 2007), online: The North-South Institute <[http://www.nsi-ins.ca/english/pdf/economic\\_context%20CSAWP.pdf](http://www.nsi-ins.ca/english/pdf/economic_context%20CSAWP.pdf)>.

Witmer, Elizabeth, Minister of Labour for Ontario, Re: Introduction of Bill 7 (*An Act to Restore Balance and Stability to Labour Relations and to Promote Economic Prosperity*), Queen’s Park, online: Hansard Transcripts (L006-Wed 4 Oct 1995/Mer 4 Oct 1995) <[http://www.ontla.on.ca/house-proceedings/transcripts/files\\_html/1995-10-04\\_L006.htm#P8\\_123](http://www.ontla.on.ca/house-proceedings/transcripts/files_html/1995-10-04_L006.htm#P8_123)>.

# **Appendix I – Memorandum of Understanding**

**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE GOVERNMENT OF THE UNITED MEXICAN STATES  
AND THE GOVERNMENT OF CANADA CONCERNING THE  
MEXICAN SEASONAL AGRICULTURAL WORKERS PROGRAM**

THE GOVERNMENT OF THE UNITED MEXICAN STATES (hereinafter referred to as "Mexico") as represented by the Secretary of "External Relations"

and

THE GOVERNMENT OF CANADA (hereinafter referred to as "Canada") as represented by the Minister of Employment and Immigration/Human Resources Development Canada

Desiring to continue to develop the Seasonal Agricultural Workers Program which has been in existence since 1974 and which symbolizes the close bonds of friendship, understanding and cooperation existing between them;

Desiring to ensure that the Program continues to be of mutual benefit to both parties and facilitates the movement of Mexican Seasonal Agricultural Workers into all areas of Canada where Canada determines that such workers are needed to satisfy the requirements of the Canadian agricultural labour market;

Canada and Mexico have agreed that the guiding principles underlying the Program will be:

1. (a) that the operation of the program will be administered according to the Operational Guidelines, attached as Annex I which will be subject to annual review by both parties and amended as necessary to reflect changes required for the successful administration of the Program and adherence to the principles contained in this Memorandum;
- (b) that workers are to be employed at a premium cost to the employers and are to receive from their respective employers, while engaged in employment in Canada, adequate accommodation and treatment equal to that received by Canadian workers performing the same type of agricultural work, in accordance with Canadian laws;
- (c) that workers are to be employed in any activity performed by Canadian workers in the Canadian agricultural sector only during those periods determined by Canada to be periods when workers resident in Canada are unavailable; and
- (d) that each worker and each employer will sign an Employment Agreement a copy of which is attached as Annex II, outlining the conditions of employment under the Program, which agreement will be subject to annual review by both parties and amended after consultation with employer groups in Canada to reflect changes required for the successful administration of the Program and adherence to the principles contained in this Memorandum.

And have further agreed that:

2. This Memorandum of Understanding:

- (a) may be amended at any time with the approval in writing of both parties;
- (b) will be implemented with retroactive effect on January 1, 1995 and will continue in force until January 1, 2000. The Memorandum of Understanding will continue in force thereafter unless terminated by either party giving at least three months notice in writing to the other party; and
- (c) is an intergovernmental administrative arrangement and does not constitute an international treaty and that any difference with regard to the interpretation or application of this Memorandum of Understanding or its attachments will be resolved through consultation between both parties.

Done in two copies in the English, French and Spanish languages, each version being equally authoritative.

Signed at Ottawa

this 27<sup>th</sup> day of April 1995



For Mexico

Signed at Ottawa

this 27<sup>th</sup> day of April 1995



For Canada

# **Appendix II – SAWP Employment Agreement**



## AGREEMENT FOR THE EMPLOYMENT IN CANADA OF SEASONAL AGRICULTURAL WORKERS FROM MEXICO - 2011

WHEREAS the Government of Canada and the Government of the United Mexican States are desirous that employment of a seasonal nature be arranged for Mexican Agricultural Workers in Canada where Canada determines that such workers are needed to satisfy the requirements of the Canadian agricultural labour market; and,

WHEREAS the Government of Canada and the Government of the United Mexican States have signed a Memorandum of Understanding to give effect to this joint desire; and,

WHEREAS the Government of Canada and the Government of the United Mexican States agree that an Agreement for the Employment in Canada of seasonal agricultural workers from Mexico be signed by each participating employer and worker; and,

WHEREAS the Government of Canada and the Government of the United Mexican States agree that an agent for the Government of the United Mexican States known as the "GOVERNMENT AGENT" shall be stationed in Canada to assist in the administration of the program;

THEREFORE, the following agreement for the employment in Canada of seasonal agricultural workers from Mexico is made in duplicate this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

### I SCOPE AND PERIOD OF EMPLOYMENT

The EMPLOYER agrees to:

Employ the WORKER(S) assigned to him by the Government of the United Mexican States under the Mexican Seasonal Agricultural Workers Program and to accept the terms and conditions hereunder as forming part of the employment Agreement between himself and such referred WORKER(S). The number of WORKERS to be employed shall be as set out in the attached clearance order.

The PARTIES agree as follows:

1. (a) subject to compliance with the terms and the conditions found in this agreement, the EMPLOYER agrees to hire the WORKER(S) as a \_\_\_\_\_ for a term of employment of not less than 240 hours in a term of 6 weeks or less, nor longer than 8 months with the expected completion of the period of employment to be the \_\_\_\_\_ day of \_\_\_\_\_, 2011.
- (b) in the case of a TRANSFERRED WORKER, the term of employment shall consist of a cumulative term of not less than 240 hours.
- (c) the EMPLOYER needs to respect the duration of the employment agreement signed with the WORKER(S) and their return to the country of origin by no later than December 15th with the exception of extraordinary circumstances (e.g. medical emergencies).
2. The normal working day is 8 hours, but the EMPLOYER may request of the WORKER and the WORKER may agree to extend his/her hours when the urgency of the situation requires it, and where the conditions of employment involves a unit of pay, and such requests shall be in accordance with the customs of the district and the spirit of this program, giving the same rights to Mexican workers as given to Canadian workers. The urgent working day should not be more than 12 hours daily.
3. For each six consecutive days of work, the WORKER will be entitled to one day of rest, but where the urgency to finish farm work cannot be delayed, the EMPLOYER may request the WORKER's consent to postpone that day until a mutually agreeable date.
4. To give the WORKER a trial period of fourteen actual working days from the date of his arrival at the place of employment. The EMPLOYER shall not discharge the WORKER except for sufficient cause or refusal to work during that trial period.
5. The RECEIVING EMPLOYER shall be provided by the SENDING EMPLOYER at the time of transfer an accurate record of earnings and deductions to the date of transfer, noting that the record needs to clearly state what, if any, deductions can still be recovered from the WORKER.
6. An EMPLOYER shall, upon requesting the transfer of a WORKER, give a trial period of seven actual working days from the date of his arrival at the place of employment. Effective the eighth working day, such a WORKER shall be deemed to be a "NAMED WORKER" and clause X - 1.(i) will apply.
7. The EMPLOYER shall provide the WORKER, and where requested, the GOVERNMENT AGENT with a copy of rules of conduct, safety discipline and care and maintenance of property as the WORKER may be required to observe.

07-2011

## II LODGING, MEALS AND REST PERIODS

The EMPLOYER agrees to:

1. Provide suitable accommodation to the WORKER, without cost. Such accommodation must meet with the annual approval of the appropriate government authority responsible for health and living conditions in the province where the WORKER is employed. In the absence of such authority, accommodation must meet with the approval of the GOVERNMENT AGENT.
2. Provide reasonable and proper meals for the WORKER and, where the WORKER prepares his own meals, to furnish cooking utensils, fuel, and facilities without cost to the WORKER and to provide a minimum of thirty minutes for meal breaks.
3. Provide the WORKER with at least two rest periods of 10 minutes duration, one such period to be held mid morning and the other mid afternoon, paid or not paid, in accordance with provincial labour legislation.

## III PAYMENT OF WAGES

The EMPLOYER agrees:

1. To allow HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA (HRSDC) or its designate access to all information and records necessary to ensure contract compliance.
2. That a recognition payment of \$4.00 per week to a maximum of \$128.00 will be paid to WORKERS with 5 or more consecutive years of employment with the same EMPLOYER, and ONLY where no provincial vacation pay is applicable. Said recognition payment is payable to eligible WORKERS at the completion of the contract.
3. To pay the WORKER at his place of employment weekly wages in lawful money of Canada at a rate equal to the following, whichever is the greatest:
  - i) the minimum wage for WORKERS provided by law in the province in which the WORKER is employed;
  - ii) the rate determined annually by HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA to be the prevailing wage rate for the type of agricultural work being carried out by the WORKER in the province in which the work will be done; or
  - iii) the rate being paid by the EMPLOYER to his Canadian workers performing the same type of agricultural work;
4. That the average minimum work week shall be 40 hours; and
  - i) that, if circumstances prevent fulfilment of Clause 4 above, the average weekly income paid to the WORKER over the period of employment is as set out in Clause 4 above at the hourly minimum rate; and
  - ii) that where, for any reason whatsoever, no actual work is possible, the WORKER, shall receive an advance with a receipt signed by the WORKER to cover personal expenses, the EMPLOYER shall be entitled to deduct said advance from the WORKER'S pay prior to the departure of the WORKER.

The GOVERNMENT AGENT and both PARTIES agree:

That in the event the EMPLOYER is unable to locate the WORKER because of the absence or death of the WORKER, the EMPLOYER shall pay any monies owing to the WORKER to the GOVERNMENT AGENT. This money shall be held in trust by the GOVERNMENT AGENT for the benefit of the WORKER. The GOVERNMENT AGENT shall take any or all steps necessary to locate and pay the money to the WORKER or, in the case of death of the WORKER, the WORKER'S lawful heirs.

## IV DEDUCTIONS OF WAGES

The WORKER agrees that the EMPLOYER:

1. Shall recover the cost of non-occupational medical coverage by way of regular payroll deduction at a premium rate of \$0.60 per day per WORKER in Ontario, Quebec, and Saskatchewan and \$1.28 per day per WORKER in all other provinces.
2. May deduct from the WORKER'S wages a sum not to exceed \$6.50 per day for the cost of meals provided to the WORKER.

07-2011

3. May deduct from the WORKER wages in an amount to reflect utility costs in relation to the employment of the WORKER in the provinces of Alberta, Saskatchewan\*, Manitoba, Ontario, New Brunswick and Prince Edward Island only. The amount of the deduction is to be \$2.16 Canadian dollars per working day and to be adjusted annually on a year over year basis beginning January 1, 2012, by a percentage consistent with variation in SAWP wages as per Section III, Subsection (3) of the agreement. A working day for the purpose of this deduction is to be such that a WORKER completes a minimum of four (4) hours of work in a given day. Said deductions withheld under this provision are to be made for the current pay period only.

\* In Saskatchewan, workers employed by greenhouses and nurseries are exempted from this deduction

4. Will make deductions from the wages payable to the WORKER only for the following:
  - i) those employer deductions required to be made under law;
  - ii) all other deductions as required pursuant to this agreement.

#### V INSURANCE FOR OCCUPATIONAL & NON-OCCUPATIONAL INJURY AND DISEASE

The EMPLOYER agrees to:

1. Comply with all laws, regulations and by-laws respecting conditions set by competent authority and, in addition, in the absence of any laws providing for payment of compensation to WORKERS for personal injuries received or disease contracted as a result of the employment, shall obtain insurance acceptable to the GOVERNMENT AGENT providing such compensation to the WORKER;
2. Report to the GOVERNMENT AGENT within 48 hours all injuries sustained by the WORKER which require medical attention.

The WORKER agrees that:

3. The EMPLOYER shall remit in advance directly to the insurance company engaged by the Government of Mexico the total amount of insurance premium calculated for the stay period in Canada. Such amount will be recovered by the EMPLOYER with the deduction made to the WORKER'S wages according to clause IV - 1. In the case where the WORKER leaves Canada before the employment agreement has expired, the EMPLOYER will be entitled to recover any unused portion of the insurance premium from the insurance company;
4. He will report to the EMPLOYER and the GOVERNMENT AGENT, within 48 hours, all injuries sustained which require medical attention.
5. The coverage for insurance shall include:
  - i) the expenses for non-occupational medical insurance which include accident, sickness, hospitalization and death benefits;
  - ii) any other expenses that might be looked upon under the agreement between the Government of Mexico and the insurance company to be of benefit to the WORKER.
6. If the WORKER dies during the period of employment, the EMPLOYER shall notify the GOVERNMENT AGENT and upon receipt of instructions from the GOVERNMENT AGENT, either:
  - i) provide suitable burial; or
  - ii) remit to the GOVERNMENT AGENT a sum of money which shall represent the costs that the EMPLOYER would have incurred under Clause 6 (i) above, in order that such monies be applied towards the costs undertaken by the Government of Mexico in having the WORKER returned to his relatives in Mexico.

#### VI MAINTENANCE OF WORK RECORDS AND STATEMENT OF EARNINGS

The EMPLOYER agrees to:

1. Maintain and forward to the GOVERNMENT AGENT proper and accurate attendance and pay records.
2. Provide to the worker a clear statement of earnings and deductions with each pay.

## VII TRAVEL AND RECEPTION ARRANGEMENTS

The EMPLOYER agrees to:

1. Pay to the travel agent the cost of two-way air transportation of the WORKER for travel from Mexico City to Canada by the most economical means.
2. Make arrangements:
  - i) to meet or have his agent meet and transport the WORKER from his point of arrival in Canada to his place of employment and, upon termination of his employment to transport the WORKER to his place of departure from Canada; and
  - ii) to inform and obtain the consent of the GOVERNMENT AGENT to the transportation arrangements required in (i) above.

The WORKER agrees to:

3. Pay to the EMPLOYER costs related to air travel and the work permit processing fee as follows:
  - i) Costs related to travel will be deducted by way of regular payroll deductions at a rate of 10 percent of the WORKER'S gross pay from the first day of full employment. The amount deducted for travel is not to exceed \$632.00.
  - ii) A cost of \$150 for the work permit processing fee. This amount will be deducted during the first six weeks of work through weekly proportional deduction.

The aggregate payment to the EMPLOYER for travel and the work permit processing fee is not to be less than \$150.00 or greater than \$782.00.

Where a federal/provincial agreement on the selection of foreign workers exists with associated cost recovery fees, the cost of such provincial fees will be reimbursed to the EMPLOYER from the WORKER'S final vacation pay cheque.

The contracting PARTIES agree:

4. That in the case of a TRANSFERRED WORKER, the second EMPLOYER may continue to make deductions in expenses associated with the program, starting from the aggregate amount deducted by the first EMPLOYER, without exceeding the amounts indicated in the preceding paragraphs.

The contracting PARTIES agree:

5. In the event that at the time of departure a named worker is unavailable to travel the EMPLOYER agrees, unless otherwise stipulated in writing on the request form, to accept a substitute WORKER.

The RECEIVING EMPLOYER agrees:

6. That in the case of a TRANSFERRED WORKER the receiving EMPLOYER agrees to pay the travel agent in advance the cost of one-way air transportation of the worker between Canada and Mexico by the most economical means as expressed in the Memorandum of Understanding.

## VIII OBLIGATIONS OF THE EMPLOYER

The EMPLOYER agrees:

1. That the WORKER shall not be moved to another area of employment or transferred or loaned to another EMPLOYER without the consent of the WORKER and the prior approval in writing of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA and the GOVERNMENT AGENT.

The EMPLOYER agrees and acknowledges:

2. That the WORKERS approved under the Seasonal Agricultural Workers Program are authorized by their work permit only to perform agricultural labour for the EMPLOYER to whom they are assigned. Any person who knowingly induces or aids a foreign worker, without the authorization of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, to perform work for another person or to perform non-agricultural work, is liable on conviction to a penalty up to \$50,000 or two years imprisonment or both. Immigration and Refugee Protection Act S 124(1)(C) and 125.

The EMPLOYER agrees:

3. That WORKERS handling chemicals and/or pesticides have been provided with protective clothing at no cost to the WORKER, received appropriate formal or informal training and supervision where required by law.

07-2011

The EMPLOYER agrees:

4. That according to the approved guidelines in the province where the worker is employed the EMPLOYER shall take the WORKER to obtain health coverage according to provincial regulations.

The EMPLOYER agrees and recognizes:

5. To be responsible for arranging transportation to a hospital or clinic, whenever the worker needs medical attention. The Consulate will work in partnership with the employer to ensure proper medical attention is provided to the worker in a timely fashion.

## IX OBLIGATIONS OF THE WORKER

The WORKER agrees:

1. To work and reside at the place of employment or at such other place as the EMPLOYER, with the approval of the GOVERNMENT AGENT, may require.
2. To work at all times during the term of employment under the supervision and direction of the EMPLOYER and to perform the duties of the agricultural work requested of him in a workmanlike manner.
3. To obey and comply with all rules set down by the EMPLOYER relating to the safety, discipline, and the care and maintenance of property.
4. That he:
  - i) shall maintain living quarters furnished to him by the EMPLOYER or his agent in the same state of cleanliness in which he received them; and
  - ii) realizes that the EMPLOYER may, with the approval of the GOVERNMENT AGENT, deduct from his wages the cost to the EMPLOYER to maintain the quarters in the appropriate state of cleanliness.
5. That he shall not work for any other person without the approval of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, the GOVERNMENT AGENT and the EMPLOYER, except in situations arising by reason of the EMPLOYER'S breach of this agreement and where alternative arrangements for employment are made under clause X - 4.
6. To return promptly to Mexico upon completion of his/her authorized work period.
7. To submit/file his tax return. For that purpose, the GOVERNMENT AGENT shall provide information on the adequate options to meet this obligation.

## X PREMATURE REPATRIATION

1. Following completion of the trial period of employment by the WORKER, the EMPLOYER, after consultation with the GOVERNMENT AGENT, shall be entitled for non-compliance, refusal to work, or any other sufficient reason, to terminate the WORKER'S employment hereunder and so cause the WORKER to be repatriated. The cost of such repatriation shall be paid as follows:
  - i) if the WORKER was requested by name by the EMPLOYER, the full cost of repatriation shall be paid by the EMPLOYER;
  - ii) if the WORKER was selected by the Government of Mexico and 50% or more of the term of the contract has been completed, the full cost of returning the WORKER will be the responsibility of the WORKER;
  - iii) if the WORKER was selected by the Government of Mexico and less than 50% of the term of the contract has been completed, the cost of the north-bound and south-bound flight will be the responsibility of the WORKER. In the event of insolvency of the WORKER, the Government of Mexico, through the GOVERNMENT AGENT will reimburse the EMPLOYER for the unpaid amount less any amounts collected under Clause VII - "The WORKER Agrees to:".
2. If it is the opinion of the GOVERNMENT AGENT that personal and/or domestic circumstances of the WORKER in the home country warrant, the WORKER shall be repatriated with full cost of the repatriation paid by the WORKER.
3. If the WORKER has to be repatriated due to medical reasons, which are verified by a Canadian doctor, the EMPLOYER shall pay reasonable transportation and subsistence expenses. The EMPLOYER cannot continue recovering the costs incurred through the cheques issued to the WORKERS by the insurance companies. The Government of Mexico will pay the full cost of repatriation when it is necessary due to a physical or medical condition, which was present prior to the WORKER'S departure from Mexico.
4. That if it is determined by the GOVERNMENT AGENT, after consultation with HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, that the EMPLOYER has not satisfied his obligations under this agreement, the agreement will be rescinded by the GOVERNMENT AGENT on behalf of the WORKER, and if

07-2011

alternative agricultural employment cannot be arranged through HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA for the WORKER in that area of Canada, the EMPLOYER shall be responsible for the full costs of repatriation of WORKER to Mexico City, Mexico; and if the term of employment as specified in Clause I - 1., is not completed and employment is terminated under Clause X - 4., the WORKER shall receive from the EMPLOYER a payment to ensure that the total wages paid to the WORKER is not less than that which the WORKER would have received if the minimum period of employment had been completed.

5. That if a transferred WORKER is not suitable to perform the duties assigned by the receiving EMPLOYER within the seven days trial period, the EMPLOYER shall return the WORKER to the previous EMPLOYER and that EMPLOYER will be responsible for the repatriation cost of the WORKER.

#### XI MISCELLANEOUS

1. In the event of fire, the EMPLOYER'S responsibility for the WORKER'S personal clothing shall be limited to 1/3 its replacement cost to a maximum of \$150.00. The government of Mexico shall bear responsibility for the remaining cost of the replacement of the WORKER'S clothing.
2. The WORKER agrees that any personal information held by the Federal Government of Canada and the Government of the Province in which the work is performed may be released to HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, to Citizenship & Immigration Canada to the GOVERNMENT AGENT, to the Foreign Agricultural Resource Management Service, in the case of Quebec, to the Fondation des entreprises en recrutement de main-d'oeuvre agricole étrangère and to the Insurance Company designated by the GOVERNMENT AGENT, so as to facilitate the operation of the Foreign Seasonal Agricultural Workers Program.

The consent of the WORKER to the release of information includes, but is not restricted to:

- i) information held under the Employment Insurance Act, (including the worker's Social Insurance Number);
  - ii) any health, social service or accident compensation related information held by the government of the province in which the work is performed, including any unique alpha-numerical identifier used by any province;
  - iii) Medical and health information and records which may be released to Citizenship & Immigration Canada as well as the Insurance Company designated by the GOVERNMENT AGENT.
3. That the agreement shall be governed by the laws of Canada and of the province in which the worker is employed. French, English and Spanish versions of this contract have equal force.
  4. This contract may be executed in any number of counterparts, in the language of the signatory's choice, with the same effect as if all the PARTIES signed the same document. All counterparts shall be construed together, and shall constitute one and the same contract.
  5. The PARTIES agree that no term or condition of this agreement shall be superseded, suspended, modified or otherwise amended, in any way, without the express written permission of the competent Canadian and Mexican authorities, as well as the EMPLOYER and his WORKER.
  6. Upon request of the WORKER, the GOVERNMENT AGENT agrees to assist the WORKER and the EMPLOYER with the completion of the necessary parental benefit forms.

WITNESS THEREOF THE PARTIES STATE THAT THEY HAVE READ OR HAD EXPLAINED TO THEM AND AGREED WITH ALL THE TERMS AND CONDITIONS STIPULATED IN THE PRESENT CONTRACT

DATE: \_\_\_\_\_

EMPLOYEE'S SIGNATURE: \_\_\_\_\_

NAME OF EMPLOYEE: \_\_\_\_\_

EMPLOYER'S SIGNATURE: \_\_\_\_\_

WITNESS: \_\_\_\_\_

NAME OF EMPLOYER: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CORPORATE NAME: \_\_\_\_\_

TELEPHONE: \_\_\_\_\_ FAX: \_\_\_\_\_

PLACE OF EMPLOYMENT OF WORKER IF DIFFERENT FROM ABOVE: \_\_\_\_\_

GOVERNMENT AGENT'S SIGNATURE: \_\_\_\_\_

WITNESS: \_\_\_\_\_

To enhance readability, the masculine gender is used to refer to both men and women.

# **Appendix III – SAWP Employment Agreement (British Columbia)**



## AGREEMENT FOR THE EMPLOYMENT IN CANADA OF SEASONAL AGRICULTURAL WORKERS FROM MEXICO IN BRITISH COLUMBIA FOR THE YEAR 2011

WHEREAS the Government of Canada and the Government of the United Mexican States are desirous that employment of a seasonal nature be arranged for Mexican Agricultural Workers in Canada where Canada determines that such workers are needed to satisfy the requirements of the Canadian agricultural labour market; and,

WHEREAS the Government of Canada and the Government of the United Mexican States have signed a Memorandum of Understanding to give effect to this joint desire; and,

WHEREAS the Government of Canada and the Government of the United Mexican States agree that an Agreement for the Employment in Canada of seasonal agricultural workers from Mexico be signed by each participating employer and worker; and,

WHEREAS the Government of Canada and the Government of the United Mexican States agree that an agent for the Government of the United Mexican States known as the "GOVERNMENT AGENT" shall be stationed in Canada to assist in the administration of the program;

THEREFORE, the following agreement for the employment in Canada of seasonal agricultural workers from Mexico is made in duplicate this \_\_\_\_\_ day of \_\_\_\_\_ 2011.

### 1 SCOPE AND PERIOD OF EMPLOYMENT

1. The EMPLOYER agrees to employ the WORKER(S) assigned to him by the Government of the United Mexican States under the Mexican Seasonal Agricultural Workers Program and to accept the terms and conditions hereunder as forming part of the employment Agreement between himself and such referred WORKER(S). The number of WORKERS to be employed shall be as set out in the attached clearance order.
2.
  - i) Subject to compliance with the terms and the conditions found in this agreement, the EMPLOYER agrees to hire the WORKER(S) as \_\_\_\_\_ for a term of employment of not less than 240 hours in a term of 6 weeks or less, nor longer than 8 months with the expected completion of the period of employment to be the \_\_\_\_\_ day of \_\_\_\_\_ 2011;
  - ii) in the case of a TRANSFERRED WORKER, the term of employment shall consist of a cumulative term of not less than 240 hours.
  - iii) the EMPLOYER needs to respect the duration of the employment agreement signed with the WORKER(S) and their return to the country of origin by no later than December 15th with the exception of extraordinary circumstances (e.g. medical emergencies).
3. The employer shall pay the WORKER the approved piece work rate as set out in the "Minimum Piece Rates - Hand harvested crops" published by the B.C. Ministry of Skills Development and Labour for harvesting. The worker shall be paid at least the equivalent of \$9.26 per hour for every hour worked harvesting on a piece work basis.  
The EMPLOYER shall pay the WORKER \_\_\_\_\_ per hour for any period spent performing duties other than harvesting. (This hourly rate shall be no less than the most current minimum wage for 2011).
4. The EMPLOYER agrees:
  - i) that the average minimum work week shall be 40 hours;
  - ii) that, if circumstances prevent fulfilment of Clause 1 (4) (i) above, the average weekly income paid to the WORKER over the period of employment is as set out in Clause 1 (4) (i) above at the hourly minimum rate;
  - iii) that where, for any reason whatsoever, no actual work is possible, the WORKER, shall receive an advance with a receipt signed by the WORKER to cover personal expenses, the EMPLOYER shall be entitled to recover said advance from the WORKER prior to the departure of the WORKER.
5. The RECEIVING EMPLOYER shall be provided by the SENDING EMPLOYER at the time of transfer an accurate record of earnings and deductions to the date of transfer, noting that the record needs to clearly state what, if any, deductions can still be recovered from the WORKER.

6. The GOVERNMENT AGENT and both PARTIES agree:  
That in the event the EMPLOYER is unable to locate the WORKER because of the absence or death of the WORKER, the EMPLOYER shall pay any monies owing to the WORKER to the GOVERNMENT AGENT. This money shall be held in trust by the GOVERNMENT AGENT for the benefit of the WORKER. The GOVERNMENT AGENT shall take any or all steps necessary to locate and pay the money to the WORKER or, in the case of death of the WORKER, the WORKER'S lawful heirs.
7. The normal working day is not to exceed 8 hours, but the EMPLOYER may request of the WORKER and the WORKER may agree to extend his/her hours when the urgency of the situation requires it, and where the conditions of employment involves a unit of pay, and such requests shall be in accordance with the customs of the district and the spirit of this program, giving the same rights to Mexican workers as given to Canadian workers. The urgent working day should not be more than 12 hours daily.
8. For each six consecutive days of work, the WORKER will be entitled to one day of rest, but where the urgency to finish farm work cannot be delayed, the EMPLOYER may request the WORKER'S consent to postpone that day until a mutually agreeable date.
9. The EMPLOYER will give the WORKER a trial period of fourteen actual working days from the date of his arrival at the place of employment. The EMPLOYER shall not discharge the WORKER except for sufficient cause or refusal to work during that trial period.
10. An EMPLOYER shall, upon requesting the transfer of a WORKER, give a trial period of seven actual working days from the date of his arrival at the place of employment. Effective the eighth working day, such a WORKER shall be deemed to be an employee of that EMPLOYER.
11. The EMPLOYER shall provide the WORKER, and where requested, the GOVERNMENT AGENT with a copy of rules of conduct, safety discipline and care and maintenance of property as the WORKER may be required to observe.

## II LODGING, MEALS AND REST PERIODS

1. The EMPLOYER will:
  - i) Provide suitable accommodation to the WORKER. Such accommodation must meet with the annual approval of the appropriate government authority responsible for health and living conditions in British Columbia or with the approval of a private housing inspector licensed by the province of British Columbia. In the absence of such authority, accommodation must meet with the approval of the GOVERNMENT AGENT; OR
  - ii) Ensure that reasonable and suitable accommodation is affordably available for the WORKER in the community. If the worker's accommodation is not on the farm the employer will pay any costs for transporting the worker to the worksite.
2. Costs related to accommodation will be paid by the WORKER at a rate of 10 percent of the WORKER'S gross pay from the first day of full employment. The amount paid for accommodation during the WORKER'S stay in Canada is not to exceed \$632.00.
3. The EMPLOYER will provide reasonable and proper meals for the WORKER; OR where the WORKER prepares his own meals, will furnish cooking utensils, fuel, and facilities without cost to the WORKER and to provide a minimum of thirty minutes for meal breaks.
4. Where the EMPLOYER is providing meals to the worker, the EMPLOYER will charge the worker a sum not to exceed \$6.50 per day for the cost of meals provided to the WORKER.
5. The EMPLOYER will provide the WORKER with at least two rest periods of 10 minutes duration, one such period to be held mid morning and the other mid afternoon, paid or not paid, in accordance with provincial labour legislation.
6. The contracting PARTIES agree:  
That in the case of a TRANSFERRED WORKER, the second EMPLOYER may continue to make deductions in expenses associated with the program, starting from the aggregate amount deducted by the first EMPLOYER, without exceeding the amounts indicated in the preceding paragraphs.

## III DEDUCTIONS OF WAGES

1. The EMPLOYER will deduct from the wages payable to the WORKER those employer deductions required to be made under law.
2. The EMPLOYER can deduct from the WORKER'S wages the actual premiums payable for health insurance as described in s. IV.2(i) below of \$1.28 per day per WORKER.

04-2011

#### IV INSURANCE FOR OCCUPATIONAL & NON-OCCUPATIONAL INJURY AND DISEASE

1. The EMPLOYER agrees to:
  - i) Comply with all laws, regulations and by-laws respecting conditions set by competent authority and, in addition, in the absence of any laws providing for payment of compensation to WORKERS for personal injuries received or disease contracted as a result of the employment, shall obtain insurance acceptable to the GOVERNMENT AGENT providing such compensation to the WORKER.
  - ii) Report to the GOVERNMENT AGENT within 48 hours all injuries sustained by the WORKER which require medical attention.
2. The WORKER agrees that:
  - i) The EMPLOYER shall remit in advance directly to the insurance company engaged by the Government of Mexico the total amount of insurance premium calculated for the stay period in Canada. In the case where the WORKER leaves Canada before the employment agreement has expired, the EMPLOYER will be entitled to recover any unused portion of the insurance premium from the insurance company.
  - ii) He will report to the EMPLOYER and the GOVERNMENT AGENT, within 48 hours, all injuries sustained which require medical attention.
3. The coverage for insurance shall include:
  - i) the expenses for non-occupational medical insurance which include accident, sickness, hospitalization and death benefits;
  - ii) any other expenses that might be looked upon under the agreement between the Government of Mexico and the insurance company to be of benefit to the WORKER.
4. If the WORKER dies during the period of employment, the EMPLOYER shall notify the GOVERNMENT AGENT and upon receipt of instructions from the GOVERNMENT AGENT, either:
  - i) provide suitable burial; or
  - ii) remit to the GOVERNMENT AGENT a sum of money which shall represent the costs that the EMPLOYER would have incurred under Clause 4 (i) above, in order that such monies be applied towards the costs undertaken by the Government of Mexico in having the WORKER returned to his relatives in Mexico.

#### V MAINTENANCE OF WORK RECORDS AND STATEMENT OF EARNINGS

The EMPLOYER agrees to:

1. Maintain and forward to the GOVERNMENT AGENT proper and accurate attendance and pay records; and provide to the worker a clear statement of earnings and deductions with each pay.

#### VI TRAVEL AND RECEPTION ARRANGEMENTS

The EMPLOYER agrees to:

1. Pay the cost of two-way air transportation of the WORKER for travel from Mexico City to Canada by the most economical means.

The EMPLOYER is responsible for the cost two-way airfare for the WORKER, regardless of any early termination of the contract, whether by EMPLOYER or WORKER, and for any reason.

Notwithstanding the foregoing, where the WORKER becomes a transfer worker, within the meaning of clause 1 (9), the transfer employer is responsible for the return airfare of the WORKER.

2. Make arrangements:

- i) to meet or have his agent meet and transport the WORKER from his point of arrival in Canada to his place of employment and, upon termination of his employment to transport the WORKER to his place of departure from Canada; and

04-2011

- ii) to inform and obtain the consent of the GOVERNMENT AGENT to the transportation arrangements required in (i) above.
- 3. The contracting PARTIES agree:  
In the event that at the time of departure a named worker is unavailable to travel the EMPLOYER agrees, unless otherwise stipulated in writing on the request form, to accept a substitute WORKER.

#### VII OBLIGATIONS OF THE EMPLOYER

- 1. The EMPLOYER agrees that the WORKER shall not be moved to another area of employment or transferred or loaned to another EMPLOYER without the consent of the WORKER and the prior approval in writing of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA and the GOVERNMENT AGENT.
- 2. The EMPLOYER agrees and acknowledges that the WORKERS approved under the Seasonal Agricultural Workers Program are authorized by their work permit only to perform agricultural labour for the EMPLOYER to whom they are assigned. Any person who knowingly induces or aids a foreign worker, without the authorization of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, to perform work for another person or to perform non-agricultural work, is liable on conviction to a penalty up to \$50,000 or two years imprisonment or both. Immigration and Refugee Protection Act S 124(1)(C) and 125.
- 3. The EMPLOYER agrees that WORKERS handling chemicals and/or pesticides will be provided with protective clothing at no cost to the WORKER, receive appropriate formal or informal training, and supervision where required by law.
- 4. The EMPLOYER agrees:  
That according to the approved guidelines in the province of British Columbia, the EMPLOYER shall take the WORKER to obtain health coverage according to provincial regulations.

#### VIII OBLIGATIONS OF THE WORKER

The WORKER agrees:

- 1. To work at the place of employment.
- 2. To work at all times during the term of employment under the supervision and direction of the EMPLOYER and to perform the duties of the agricultural work requested of him in a workmanlike manner.
- 3. To obey and comply with all rules set down by the EMPLOYER relating to the safety, discipline, and the care and maintenance of property.
- 4. That he shall not work for any other person without the approval of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, the GOVERNMENT AGENT and the EMPLOYER, except in situations arising by reason of the EMPLOYER'S breach of this agreement and where alternative arrangements for employment are made.
- 5. To return promptly to Mexico upon completion of his/her authorized work period.
- 6. The worker agrees to repay to the employer for the work permit processing fee, which the employer has paid to CIC on behalf of the worker. It is agreed that the \$150 amount will be repaid in two equal amounts during the first month of work.

#### IX PREMATURE REPATRIATION

- 1. If the worker has to be repatriated due to medical reasons which are verified by a Canadian doctor, the EMPLOYER shall pay the cost of reasonable transportation and subsistence expenses except in instances where repatriation is necessary due to a physical or medical condition which was present prior to the WORKER'S departure in which case the Government of Mexico will pay the full cost of repatriation.

#### X MISCELLANEOUS

- 1. In the event of fire, the EMPLOYER'S responsibility for the WORKER'S personal clothing shall be limited to 1/3 its replacement cost to a maximum of \$150.00. The government of Mexico shall bear responsibility for the remaining cost of the replacement of the WORKER'S clothing.

01-2011

2. The WORKER agrees that any personal information held by the Federal Government of Canada and the Government of the Province in which the work is performed may be released to HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, to Citizenship & Immigration Canada to the GOVERNMENT AGENT, to the Western Agriculture Labour Initiative and to the Insurance Company designated by the GOVERNMENT AGENT, so as to facilitate the operation of the Foreign Seasonal Agricultural Workers Program.

The consent of the WORKER to the release of information includes, but is not restricted to:

- i) information held under the Employment Insurance Act, (including the WORKER'S Social Insurance Number);
  - ii) any health, social service or accident compensation related information held by the government of the province in which the work is performed, including any unique alpha-numerical identifier used by any province;
  - iii) Medical and health information and records which may be released to Citizenship & Immigration Canada as well as the Insurance Company designated by the GOVERNMENT AGENT.
3. The EMPLOYER agrees to allow HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA or its designate access to all information and records necessary to ensure contract compliance.
  4. This agreement shall be governed by the laws of Canada and of British Columbia. English and Spanish versions of this contract have equal force.
  5. This contract may be executed in any number of counterparts, in the language of the signatory's choice, with the same effect as if all the Parties signed the same document. All Counterparts shall be construed together, and shall constitute one and the same contract.
  6. The Parties agree that no term or condition of this agreement shall be superseded, suspended, modified or otherwise amended, in any way, without the express written permission of the competent Canadian and Mexican authorities, as well as the EMPLOYER and the WORKER.

IN WITNESS THEREOF THE PARTIES STATE THAT THEY HAVE READ OR HAD EXPLAINED TO THEM AND  
AGREED WITH ALL THE TERMS AND CONDITIONS STIPULATED IN THE PRESENT CONTRACT

DATE: \_\_\_\_\_

EMPLOYER'S SIGNATURE: \_\_\_\_\_

WITNESS: \_\_\_\_\_

NAME OF EMPLOYER: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CORPORATE NAME: \_\_\_\_\_

ACCOUNT NUMBER FOR "WORKSAFE BC": \_\_\_\_\_

NAME OF WORKER: \_\_\_\_\_

WORKER'S SIGNATURE: \_\_\_\_\_

TELEPHONE: \_\_\_\_\_ FAX: \_\_\_\_\_

PLACE OF EMPLOYMENT OF WORKER  
IF DIFFERENT FROM ABOVE: \_\_\_\_\_

To enhance readability, the masculine gender is used to refer to both men and women.

# **Appendix IV – HRSDC Deck**



# Canada's Temporary Foreign Worker Program

MEETING WITH IRMA CRUZ-LOPEZ, PHD CANDIDATE

Temporary Foreign Worker Program  
Human Resources and Skills Development Canada  
August 11, 2010



Government  
of Canada

Gouvernement  
du Canada



## Purpose

- To briefly summarize the main elements of the Canada's Temporary Foreign Worker Program (TFWP).
- To present two key components of the TFWP for the entry of agricultural workers:
  - Seasonal Agricultural Worker Program (SAWP)
  - Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C & D)



## Overview of Canada's Temporary Foreign Worker Program (TFWP)

- The *Immigration and Refugee Protection Act (IRPA)* regulates the entry of all temporary foreign workers into Canada
- The **Temporary Foreign Worker Program (TFWP)** is jointly managed by Citizenship and Immigration Canada (CIC) and Human Resources and Skills Development Canada/Service Canada (HRSDC/SC).
- **HRSDC/SC's role** is to review employer applications for temporary foreign workers (TFWs) and issue a labour market opinion (LMO) on the likely impact of the entry of a TFW on the Canadian labour market;
- **CIC's role** is to review work permit applications from individual foreign workers to see if they meet the criteria for entry into Canada to work.



## The Entry of Temporary Foreign Workers in Canada is Driven by Employer Demand

- Process generally starts when Service Canada receives a request from an employer to hire a TFW.
- There are no numerical limits or quotas.
- Employers can recruit TFWs from any country in the world (except for employers hiring TFWs under SAWP).
- Employers in any province/city can hire foreign workers.
- Under IRPA, employers can apply to hire workers in any occupation.
- All TFWs who enter Canada are covered by provincial labour standards, as are Canadians.
- Option exists for some TFWs to transition, if desired, to eventual permanent status (e.g. via Provincial Nominee Programs).



## Role of HRSDC/SC

- When assessing an LMO application, Service Canada evaluates six factors listed in section 203 of the *Immigration and Refugee Protection Regulations (IRPR)*:
  1. Whether the employment of the TFW will result in direct job creation or retention for Canadian citizens and permanent residents;
  2. Whether this employment will result in the creation or transfer of skills to Canadians;



## **Role of HRSDC/SC (cont'd)**

3. Whether there is a labour shortage;
4. Whether the wages and working conditions being offered are consistent with the prevailing wage of Canadians in the same occupation;
5. Whether the employer has made reasonable efforts to train or hire Canadians; and
6. Whether the employment of the TFW will adversely affect the settlement of a labour dispute in progress.



## Role of HRSDC/SC Cont'd

- Once a positive or neutral LMO has been issued by HRSDC, the foreign national can then apply to Citizenship and Immigration Canada (CIC) for a work permit.



## **Role of CIC**

- When a foreign national applies for a work permit, CIC:
  - Verifies that the job offer from the employer has been “confirmed” by HRSDC (i.e., a positive or neutral LMO has been issued);
  - Confirms the worker has the qualifications required to perform the job ;
  - Ensures that worker meets temporary resident criteria related to criminality and security, and is unlikely to remain in Canada illegally; and
  - Ensures workers meet medical requirements for the positions in Canada.



## **Key Streams of the Temporary Foreign Worker Program (TFWP)**

- Arranged Employment Opinions
- LMO for high-skilled workers (NOC 0, A & B)
- Live-in Caregivers
- Seasonal Agricultural Worker Program (SAWP)
- Pilot Project for Occupations Requiring a Lower Level of Formal Training (NOC C & D)
  
- *NOTE: SAWP & NOC C & D pilot both allow for the entry of agricultural workers*



## Seasonal Agricultural Worker Program (SAWP)

- SAWP allows for the organized entry of foreign workers into Canada to meet the temporary seasonal need for labour in the agricultural sector when Canadian workers or permanent residents are not available.
- SAWP operates according to bilateral agreements between Canada and each country party to the agreement (Jamaica-1966, Barbados and Trinidad & Tobago-1967, Mexico-1974, OECS-1976).
- Work permits are issued for a maximum of 8 months.
- Currently involves mainly the horticultural sector.



## SAWP Cont'd

- SAWP is active in all provinces except for Newfoundland and Labrador.
- SAWP is formally reviewed at annual intergovernmental review meetings, which are attended by all parties to the bilateral agreements.
- The number of SAWP workers has increased steadily from 264 in 1966 to around 24,000 in 2009.
- The vast majority of workers go to Ontario and Quebec, but the program is growing rapidly in British Columbia.



## **SAWP Cont'd**

**In addition to the regular TFWP guidelines, the SAWP imposes several additional requirements on employers, including:**

- Signing of an employer-employee contract outlining wages, duties, and conditions related to the transportation, accommodation, health and occupational safety of the foreign worker;
- Pay for part of transportation to and from the worker's country of origin;
- Provide free accommodation for workers that meets provincial standards;
- Ensure the worker is registered to private health insurance until he/she is eligible for provincial health insurance coverage; and
- Register the worker under the appropriate provincial workers' compensation or workplace safety insurance plans.



## **Additional Roles under SAWP**

### **Role of source country:**

- Assist in the recruitment and selection of bona fide agricultural workers;
- Maintain pool of workers who are ready to depart when requests are received from Canadian employers; and
- Appoint agents at consulates to assist the Government of Canada in program administration (re: documentation, health, repatriation of workers) and to serve as contact point for workers (re: working conditions, employer complaints, etc.)



## **Additional Roles Cont'd**

### **Role of FARMS/FERME/WALI (in certain regions):**

- Overall administration: receives application forms from employers and notifies SC and appropriate liaison service of requests for workers; facilitates air and ground transportation of workers in Canada;
- Communicates with appropriate Canadian Embassy or High Commission regarding work permit requests;
- Provides all government agencies with program updates as required;
- Obtains employer signature on employment contracts; and
- Transmits contracts to the respective liaison offices.



## **Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C & D)**

- This pilot was introduced in July 2002 for employers who wish to hire TFWs from any country and in any occupations/sectors (incl. agriculture) which require at most a high school diploma or job-specific training (NOC C & D).
- 24-month maximum limit on LMO confirmations and work permits. Seasonal workers are only given confirmations for the duration of the season.
- If a province is prepared to nominate a worker (for NOC C & D occupations) under a provincial nominee program, HRSDC would facilitate this process by extending employment confirmations until the worker can become a landed immigrant.



## Pilot Project Cont'd

- **In addition to the regular TFWP guidelines, the pilot project imposes several additional requirements on employers, including:**
  - Undertake comprehensive efforts to recruit Canadians;
  - Sign an employer-employee contract outlining wages, duties, and conditions related to the transportation, health and occupational safety of the foreign worker;
  - Ensure there are suitable and affordable accommodations available;
  - Pay full airfare for the foreign worker to and from their home country;
  - Provide medical coverage until the worker is eligible for provincial health insurance coverage; and
  - Register the worker under the appropriate provincial workers compensation/workplace safety insurance plans.



## Protection of Agricultural Workers

- SAWP and NOC C & D workers receive the same protections offered to Canadians working in the agricultural sector.
- Enforcement of labour standards fall under Provincial jurisdiction. All TFWs, including seasonal agricultural workers, have the same rights as Canadian citizens in filing a complaint against an employer under provincial labour standards codes.
- HRSDC continually works with provincial and foreign governments, and employers, to address issues related to working conditions, health coverage, occupational safety and housing.
- Wages in the agricultural sector are in line with the prevailing wage rate that Canadians receive and have increased on an annual basis in recent years.
- Employers and foreign agricultural workers sign an employer-employee contract.



## Protection of Agricultural Workers Cont'd

### In addition, under SAWP:

- Employers are required to have their seasonal housing inspected and approved by the appropriate provincial or municipal authority prior to confirming the entry of the foreign workers into Canada.
- Issues raised by workers during the season are raised by foreign governments at SAWP annual intergovernmental meetings and, if appropriate, changes are made to SAWP guidelines and contracts to address the concerns of workers.



## Protection of Agricultural Workers Cont'd

### In addition, under SAWP (cont'd):

- Workers receive additional support and assistance through their respective government's consulate, which serves as representatives to the worker if requested, when dealing with employer-worker complaints or concerns.
- Finally, if an employer is found to be in breach of contract, Mexican/Caribbean consular officials may:
  - (a) remove workers from the situation and assist them in finding employment with another farmer and
  - (b) stop service to that particular employer in future years.

# **Appendix V – CIC Statistics on SAWP Works by Province from 2000-2009**

Canada - Foreign workers in the Seasonal agricultural worker program (Mexican) by Province from 2000-2009

Province	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Prince Edward Island	0	0	0	0	0	0	--	7	--	--
Nova Scotia	0	0	0	0	--	--	--	--	--	8
New Brunswick	0	0	0	6	0	0	0	13	6	8
Quebec	1,528	2,019	2,396	2,466	2,661	2,693	2,703	2,463	2,654	2,657
Ontario	7,489	8,208	8,128	7,779	7,839	8,127	8,329	9,064	9,618	9,030
Manitoba	25	39	50	12	--	--	14	31	28	28
Saskatchewan	0	0	0	8	5	31	43	55	50	67
Alberta	188	190	214	248	258	433	527	687	796	988
British Columbia	5	0	--	41	66	556	1,313	1,991	2,883	2,628
Province not stated	0	0	--	6	8	22	53	--	237	--
<b>Grand Total</b>	<b>9,235</b>	<b>10,456</b>	<b>10,799</b>	<b>10,566</b>	<b>10,842</b>	<b>11,877</b>	<b>12,987</b>	<b>14,416</b>	<b>16,278</b>	<b>15,727</b>

Note: Due to privacy considerations, some cells in this table have been suppressed and replaced with the notation "--". As a result, components may not sum to the total indicated. In general we have suppressed cells containing less than five cases except in circumstances where, in our judgment, we are not releasing personal information on an identifiable individual.

Source: Citizenship & Immigration Canada, RDM, Facts and Figures 2009

Data request tracking number: RE.10.0643.

**Appendix VI – Number of Temporary  
Foreign Workers in Agriculture  
(excluding SAWP)**

Number of temporary foreign worker positions in agriculture (excluding SAWP) on labour market opinion confirmations by province of employment, country of residence and citizenship of foreign worker positions, occupation and skill level, 2009.

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions	
Alberta	Algeria	Algeria	8431	General Farm Workers	NOC C and D	*	
	Australia	Australia	8251	Farmers and Farm Managers	NOC 0, A and B	*	
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
			8431	General Farm Workers	NOC C and D	*	
		United States	8431	General Farm Workers	NOC C and D	*	
	Austria	Austria	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
	Belize	Mexico	8431	General Farm Workers	NOC C and D	*	
	Bosnia-Herzegovina	Bosnia-Herzegovina	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*	
	Canada	Australia	Australia	8251	Farmers and Farm Managers	NOC 0, A and B	*
				8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Belarus		8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Belize		9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Brazil		8251	Farmers and Farm Managers	NOC 0, A and B	*
		China		8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		Colombia		8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
				9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	69
		Denmark		8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		El Salvador		8431	General Farm Workers	NOC C and D	*
				9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	15
		United Kingdom		8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
				8255	Landscaping and Grounds Maintenance Contractors and Managers	NOC 0, A and B	*
				8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
		Fiji		8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		Germany		8251	Farmers and Farm Managers	NOC 0, A and B	*
				8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
				8255	Landscaping and Grounds Maintenance Contractors and Managers	NOC 0, A and B	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		Guatemala	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	±
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
		Hong Kong	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	±
		Hungary	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		India	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Indonesia	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	±
		Jamaica	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		South Korea	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	±
		Mexico	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	26
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	27
			8452	Nursery and Greenhouse Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	39
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	35
		Morocco	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Nepal	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Netherlands	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		New Zealand	8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
		Nicaragua	8251	Farmers and Farm Managers	NOC 0, A and B	*
		Norway	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Peru	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Philippines	8251	Farmers and Farm Managers	NOC 0, A and B	13

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	56
			8431	General Farm Workers	NOC C and D	16
			8432	Nursery and Greenhouse Workers	NOC C and D	10
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	29
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	264
		Poland	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Portugal	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		Russia	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		Sri Lanka	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Thailand	8431	General Farm Workers	NOC C and D	*
		Ukraine	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	16
		United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		United States	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Uruguay	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		Vietnam	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		N/A	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8432	Nursery and Greenhouse Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	56
	Canary Islands	Philippines	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Chile	Chile	8432	Nursery and Greenhouse Workers	NOC C and D	*
	China	China	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	13
	Colombia	Colombia	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Costa Rica	Costa Rica	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
8431			General Farm Workers	NOC C and D	*	
Nicaragua		8431	General Farm Workers	NOC C and D	*	
	Croatia	Croatia	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Denmark	Denmark	8431	General Farm Workers	NOC C and D	*
	El Salvador	El Salvador	8431	General Farm Workers	NOC C and D	*
8612			Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
9617			Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*	
	United Kingdom	United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
8255			Landscaping and Grounds Maintenance Contractors and Managers	NOC 0, A and B	*	
8253			Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
N/A		8431	General Farm Workers	NOC C and D	*	
	Fiji	Fiji	8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
8612			Landscaping and Grounds Maintenance Labourers	NOC C and D	13	
	Finland	Finland	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	France	France	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
8431			General Farm Workers	NOC C and D	*	
	Germany	Germany	8251	Farmers and Farm Managers	NOC 0, A and B	*
8253			Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
8431			General Farm Workers	NOC C and D	*	
8612			Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
N/A		8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
	Guatemala	Guatemala	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	123
		N/A	8431	General Farm Workers	NOC C and D	*
	Guyana	Guyana	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Haiti	Dominican Republic	8431	General Farm Workers	NOC C and D	*
	Honduras	Honduras	8431	General Farm Workers	NOC C and D	40
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Hong Kong	Philippines	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Hungary	Hungary	8431	General Farm Workers	NOC C and D	*
	India	India	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	10
	Indonesia	Indonesia	8431	General Farm Workers	NOC C and D	*
	Ireland	United Kingdom	8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
		Ireland	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
		Ukraine	8431	General Farm Workers	NOC C and D	*
	United Kingdom	8431	General Farm Workers	NOC C and D	*	
Israel	Israel	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
Italy	India	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
Jamaica	Jamaica	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
		8431	General Farm Workers	NOC C and D	*	
		8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
Japan	Japan	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
	South Korea	Philippines	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Lebanon	Lebanon	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Malaysia	Philippines	8432	Nursery and Greenhouse Workers	NOC C and D	*
	Mauritania	Mauritania	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	16
	Mauritius	Mauritania	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Mayreau	Mexico	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Mexico	Macao	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		Mexico	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	43
			8254	Nursery and Greenhouse Operators and Managers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	40
			8432	Nursery and Greenhouse Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	242
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	24
		N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	18
	Moldova	Moldova	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Netherlands	Netherlands	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	New Zealand	New Zealand	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		Philippines	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Nicaragua	Nicaragua	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	38
	United Kingdom	United Kingdom	8431	General Farm Workers	NOC C and D	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
	Palestine	Jordan	8254	Nursery and Greenhouse Operators and Managers	NOC 0, A and B	*
	Panama	Panama	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Peru	Peru	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8252	Agricultural and Related Service Contractors and Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	16
			8431	General Farm Workers	NOC C and D	*
	Philippines	Canada	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Philippines	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	55
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	116
			8432	Nursery and Greenhouse Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	60
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	396
		N/A	8431	General Farm Workers	NOC C and D	*
	N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
	Poland	Poland	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Qatar	Philippines	8431	General Farm Workers	NOC C and D	*
	Saudi Arabia	Philippines	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Serbia and Montenegro	Serbia and Montenegro	8431	General Farm Workers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	South Africa	South Africa	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	South Korea	South Korea	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Spain	Spain	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
	Sri Lanka	Sri Lanka	8431	General Farm Workers	NOC C and D	10
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Sweden	Sweden	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Taiwan	Philippines	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Taiwan	8432	Nursery and Greenhouse Workers	NOC C and D	*
		Thailand	8432	Nursery and Greenhouse Workers	NOC C and D	*
	Thailand	Thailand	8431	General Farm Workers	NOC C and D	*
			8432	Nursery and Greenhouse Workers	NOC C and D	74
			8611	Harvesting Labourers	NOC C and D	19
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		N/A	8432	Nursery and Greenhouse Workers	NOC C and D	*
	Trinidad and Tobago	Trinidad and Tobago	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Ukraine	Ukraine	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	43
		N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	United Kingdom	United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Romania	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		United Kingdom	8251	Farmers and Farm Managers	NOC 0, A and B	*
8253			Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
8431			General Farm Workers	NOC C and D	*	
N/A		9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*	
United States	Argentina	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
	Malaysia	8431	General Farm Workers	NOC C and D	*	
	Mexico	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions	
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
		Philippines	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*	
		United States	8251	Farmers and Farm Managers	NOC 0, A and B	*	
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*	
			8431	General Farm Workers	NOC C and D	39	
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
		Uzbekistan	8431	General Farm Workers	NOC C and D	*	
		N/A	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
			8431	General Farm Workers	NOC C and D	*	
		Uruguay	Brazil	8251	Farmers and Farm Managers	NOC 0, A and B	*
			Uruguay	8431	General Farm Workers	NOC C and D	*
		Venezuela	Venezuela	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Vietnam	Vietnam	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Zambia	Philippines	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
<b>AB Total</b>						<b>2,509</b>	
British Columbia	Argentina	Argentina	8251	Farmers and Farm Managers	NOC 0, A and B	*	
	Australia	Australia	8251	Farmers and Farm Managers	NOC 0, A and B	*	
	Canada	Australia	8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*	
		Austria	8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*	
		Brazil	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
		Chile	8251	Farmers and Farm Managers	NOC 0, A and B	*	
	Germany		8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
			8255	Landscaping and Grounds Maintenance Contractors and Managers	NOC 0, A and B	*	
			8431	General Farm Workers	NOC C and D	*	
		Guatemala	8431	General Farm Workers	NOC C and D	*	

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions	
		India	8251	Farmers and Farm Managers	NOC 0, A and B	*	
			8431	General Farm Workers	NOC C and D	*	
		Israel	8251	Farmers and Farm Managers	NOC 0, A and B	*	
		Japan	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*	
		Mexico	8252	Agricultural and Related Service Contractors and Managers	NOC 0, A and B	*	
			8431	General Farm Workers	NOC C and D	*	
		Netherlands	8251	Farmers and Farm Managers	NOC 0, A and B	*	
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
		New Zealand	8251	Farmers and Farm Managers	NOC 0, A and B	*	
		Philippines	8431	General Farm Workers	NOC C and D	*	
			8432	Nursery and Greenhouse Workers	NOC C and D	*	
		South Africa	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
		South Korea	8251	Farmers and Farm Managers	NOC 0, A and B	*	
		United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*	
		United States	8431	General Farm Workers	NOC C and D	*	
		N/A	8431	General Farm Workers	NOC C and D	*	
		Chile	Chile	8431	General Farm Workers	NOC C and D	*
		El Salvador	El Salvador	8431	General Farm Workers	NOC C and D	*
		Guatemala	Guatemala	8431	General Farm Workers	NOC C and D	168
				8432	Nursery and Greenhouse Workers	NOC C and D	42
				8611	Harvesting Labourers	NOC C and D	14
			N/A	8431	General Farm Workers	NOC C and D	*
Haiti	Haiti	8431	General Farm Workers	NOC C and D	*		
India	India	8431	General Farm Workers	NOC C and D	59		
		8611	Harvesting Labourers	NOC C and D	20		
		9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*		

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
	South Korea	South Korea	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Mexico	Mexico	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8611	Harvesting Labourers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	New Zealand	Croatia	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		New Zealand	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Nicaragua	Nicaragua	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Philippines	Philippines	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	14
			8432	Nursery and Greenhouse Workers	NOC C and D	50
			8611	Harvesting Labourers	NOC C and D	13
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Saudi Arabia	N/A	8431	General Farm Workers	NOC C and D	*
			8432	Nursery and Greenhouse Workers	NOC C and D	10
			8431	General Farm Workers	NOC C and D	*
	South Africa	South Africa	8251	Farmers and Farm Managers	NOC 0, A and B	*
	South Korea	South Korea	8431	General Farm Workers	NOC C and D	*
	Switzerland	Switzerland	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Thailand	Thailand	8431	General Farm Workers	NOC C and D	*
			8431	General Farm Workers	NOC C and D	*
	Ukraine	Ukraine	8431	General Farm Workers	NOC C and D	*
	United Kingdom	United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
	United States	United States	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8252	Agricultural and Related Service Contractors and Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8255	Landscaping and Grounds Maintenance Contractors and Managers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
	Vietnam	Vietnam	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
<b>BC Total</b>						<b>492</b>
Manitoba	Algeria	Algeria	8431	General Farm Workers	NOC C and D	*
	Barbados	Barbados	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Belarus	8251	Farmers and Farm Managers	NOC 0, A and B	*
		Jamaica	8251	Farmers and Farm Managers	NOC 0, A and B	*
	Canada	Barbados	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Brazil	8254	Nursery and Greenhouse Operators and Managers	NOC 0, A and B	*
		Fiji	8431	General Farm Workers	NOC C and D	*
		Germany	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		India	8431	General Farm Workers	NOC C and D	*
		Mexico	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Pakistan	8431	General Farm Workers	NOC C and D	*
		Philippines	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		Ukraine	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	N/A	8251	Farmers and Farm Managers	NOC 0, A and B	*	
		8431	General Farm Workers	NOC C and D	*	
	Chile	Chile	8251	Farmers and Farm Managers	NOC 0, A and B	*
Russia		8431	General Farm Workers	NOC C and D	*	

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
	China	N/A	8431	General Farm Workers	NOC C and D	*
	Germany	Germany	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	United Kingdom	United Kingdom	8431	General Farm Workers	NOC C and D	*
	Iceland	Iceland	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	India	India	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Ireland	Ireland	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Italy	India	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Jamaica	Jamaica	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	25
		Japan	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Mexico	Mexico	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Netherlands	Netherlands	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Nicaragua	Nicaragua	8251	Farmers and Farm Managers	NOC 0, A and B	32
			8431	General Farm Workers	NOC C and D	20
		N/A	8251	Farmers and Farm Managers	NOC 0, A and B	*
	Pakistan	Pakistan	8431	General Farm Workers	NOC C and D	*
	Philippines	Philippines	8251	Farmers and Farm Managers	NOC 0, A and B	12
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	26
			8431	General Farm Workers	NOC C and D	*
		Pitcairn Island	8431	General Farm Workers	NOC C and D	*
	St. Lucia	St. Lucia	8431	General Farm Workers	NOC C and D	*
	United States	South Africa	8431	General Farm Workers	NOC C and D	*
		United States	8251	Farmers and Farm Managers	NOC 0, A and B	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8431	General Farm Workers	NOC C and D	29
		N/A	8431	General Farm Workers	NOC C and D	*
	Venezuela	Venezuela	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
<b>MB Total</b>						<b>235</b>
New Brunswick	Canada	Germany	8431	General Farm Workers	NOC C and D	*
			8432	Nursery and Greenhouse Workers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		United Kingdom	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Jamaica	8611	Harvesting Labourers	NOC C and D	*
		Mexico	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Romania	8613	Aquaculture and Marine Harvest Labourers	NOC C and D	*	
	Germany	Germany	8432	Nursery and Greenhouse Workers	NOC C and D	*
	Guatemala	Guatemala	8611	Harvesting Labourers	NOC C and D	*
	India	India	8431	General Farm Workers	NOC C and D	*
	Jamaica	Jamaica	8431	General Farm Workers	NOC C and D	*
	Philippines	Philippines	8432	Nursery and Greenhouse Workers	NOC C and D	22
	Romania	Romania	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Ukraine	Ukraine	8431	General Farm Workers	NOC C and D	*
United States	United States	8255	Landscaping and Grounds Maintenance Contractors and Managers	NOC 0, A and B	*	
		9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*	
<b>NB Total</b>						<b>53</b>
Newfoundland and Labrador	Denmark	Denmark	8251	Farmers and Farm Managers	NOC 0, A and B	*
<b>NL Total</b>						<b>*</b>
Northwest Territories	Sweden	Sweden	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
<b>NWT Total</b>						<b>*</b>
Nova Scotia	Barbados	Barbados	8431	General Farm Workers	NOC C and D	*
	Canada	Guatemala	8431	General Farm Workers	NOC C and D	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
		India	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Mexico	8431	General Farm Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	*
	Colombia	Colombia	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Germany	Germany	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Guatemala	Guatemala	8431	General Farm Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	*
	Mexico	Mexico	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8611	Harvesting Labourers	NOC C and D	35
	Nepal	Nepal	8432	Nursery and Greenhouse Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	*
	United States	United States	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8611	Harvesting Labourers	NOC C and D	*
	NS Total					
Ontario	Albania	Albania	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Antigua & Barbuda	Antigua & Barbuda	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Argentina	Argentina	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		N/A	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Austria	Austria	8431	General Farm Workers	NOC C and D	*
	Barbados	Barbados	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Belarus	Belarus	8251	Farmers and Farm Managers	NOC 0, A and B	*
	Belgium	Belgium	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Cambodia	Cambodia	8431	General Farm Workers	NOC C and D	*
	Canada	Antigua & Barbuda	8431	General Farm Workers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Australia	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
		Barbados	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	16
		Brazil	8255	Landscaping and Grounds Maintenance Contractors and Managers	NOC 0, A and B	*
			8611	Harvesting Labourers	NOC C and D	*
		British Indian Ocean Terr	8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
		Burkina-Faso	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8432	Nursery and Greenhouse Workers	NOC C and D	*
		Canada	8431	General Farm Workers	NOC C and D	*
		China	8431	General Farm Workers	NOC C and D	*
		United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8432	Nursery and Greenhouse Workers	NOC C and D	*
		France	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Germany	8254	Nursery and Greenhouse Operators and Managers	NOC 0, A and B	*
		United Kingdom	8251	Farmers and Farm Managers	NOC 0, A and B	*
		Guatemala	8431	General Farm Workers	NOC C and D	*
			8432	Nursery and Greenhouse Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	12
		India	8431	General Farm Workers	NOC C and D	*
		Israel	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Italy	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Jamaica	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8254	Nursery and Greenhouse Operators and Managers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	21
		South Korea	8251	Farmers and Farm Managers	NOC 0, A and B	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8252	Agricultural and Related Service Contractors and Managers	NOC 0, A and B	*
		Mexico	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	10
		Netherlands	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
		Peru	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		Philippines	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Portugal	8254	Nursery and Greenhouse Operators and Managers	NOC 0, A and B	*
			8611	Harvesting Labourers	NOC C and D	*
		South Africa	8251	Farmers and Farm Managers	NOC 0, A and B	*
		St. Lucia	8432	Nursery and Greenhouse Workers	NOC C and D	*
		Thailand	8431	General Farm Workers	NOC C and D	28
			8432	Nursery and Greenhouse Workers	NOC C and D	27
			8611	Harvesting Labourers	NOC C and D	54
		Trinidad and Tobago	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		United States	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Vietnam	8611	Harvesting Labourers	NOC C and D	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
		N/A	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	China	China	8254	Nursery and Greenhouse Operators and Managers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8432	Nursery and Greenhouse Workers	NOC C and D	*
	Colombia	Colombia	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Congo	Congo	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Cuba	Cuba	8431	General Farm Workers	NOC C and D	*
	Czech Republic	Czech Republic	8431	General Farm Workers	NOC C and D	*
	Dominica	Dominica	8431	General Farm Workers	NOC C and D	*
	Dominican Republic	Dominican Republic	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Ecuador	Ecuador	8432	Nursery and Greenhouse Workers	NOC C and D	*
	United Kingdom	United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Ethiopia	Ethiopia	8431	General Farm Workers	NOC C and D	*
	France	France	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Germany	Germany	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		South Korea	8431	General Farm Workers	NOC C and D	*
		Poland	8431	General Farm Workers	NOC C and D	*
	Grenada	Grenada	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Guatemala	Guatemala	8431	General Farm Workers	NOC C and D	36
			8432	Nursery and Greenhouse Workers	NOC C and D	256

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8611	Harvesting Labourers	NOC C and D	19
	India	India	8431	General Farm Workers	NOC C and D	11
			8611	Harvesting Labourers	NOC C and D	*
	Indonesia	Indonesia	8432	Nursery and Greenhouse Workers	NOC C and D	*
	Italy	India	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Italy	8431	General Farm Workers	NOC C and D	*
	Jamaica	Jamaica	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	15
			8431	General Farm Workers	NOC C and D	52
			8432	Nursery and Greenhouse Workers	NOC C and D	21
			8611	Harvesting Labourers	NOC C and D	70
	Japan	Japan	8251	Farmers and Farm Managers	NOC 0, A and B	*
	Mexico	Mexico	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	11
			8432	Nursery and Greenhouse Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Netherlands	Netherlands	8254	Nursery and Greenhouse Operators and Managers	NOC 0, A and B	*
	New Zealand	New Zealand	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Nigeria	Nigeria	8611	Harvesting Labourers	NOC C and D	*
	Oman	India	8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
	Peru	Peru	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	11
		Philippines	8432	Nursery and Greenhouse Workers	NOC C and D	*
	Philippines	Philippines	8251	Farmers and Farm Managers	NOC 0, A and B	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions	
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
			8431	General Farm Workers	NOC C and D	19	
			8432	Nursery and Greenhouse Workers	NOC C and D	81	
			8611	Harvesting Labourers	NOC C and D	57	
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*	
		N/A		8432	Nursery and Greenhouse Workers	NOC C and D	*
		Poland	Poland	8431	General Farm Workers	NOC C and D	*
		Portugal	Portugal	8611	Harvesting Labourers	NOC C and D	*
		Saudi Arabia	Philippines	8432	Nursery and Greenhouse Workers	NOC C and D	*
		St. Vincent / Grenadines	St. Vincent / Grenadines	8432	Nursery and Greenhouse Workers	NOC C and D	*
		Taiwan	Philippines	8432	Nursery and Greenhouse Workers	NOC C and D	*
				8611	Harvesting Labourers	NOC C and D	16
		Thailand	Thailand	8431	General Farm Workers	NOC C and D	563
				8432	Nursery and Greenhouse Workers	NOC C and D	100
				8611	Harvesting Labourers	NOC C and D	92
			N/A	8431	General Farm Workers	NOC C and D	61
		Trinidad and Tobago	Trinidad and Tobago	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
				8432	Nursery and Greenhouse Workers	NOC C and D	*
		Ukraine	Ukraine	8431	General Farm Workers	NOC C and D	*
		United Kingdom	United Kingdom	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
				8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
	United States	United States	8252	Agricultural and Related Service Contractors and Managers	NOC 0, A and B	*	
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
			8431	General Farm Workers	NOC C and D	*	
	Vietnam	Vietnam	8431	General Farm Workers	NOC C and D	60	
<b>ON Total</b>						<b>1,993</b>	
Prince Edward Island	Canada	Denmark	8432	Nursery and Greenhouse Workers	NOC C and D	*	

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions	
	Chile	Chile	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
	Guatemala	Guatemala	8611	Harvesting Labourers	NOC C and D	*	
	Italy	India	8431	General Farm Workers	NOC C and D	*	
<b>PE Total</b>						*	
Quebec	Argentina	Argentina	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
	Belgium	Belgium	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
	Brazil	Brazil	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
	Canada	Armenia		9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Belgium		8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
		United Kingdom		8251	Farmers and Farm Managers	NOC 0, A and B	*
				8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		France		8251	Farmers and Farm Managers	NOC 0, A and B	*
				8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
				8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*	
		Germany		8431	General Farm Workers	NOC C and D	*
		Italy		8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		United Kingdom		8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		United States		9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	N/A		8431	General Farm Workers	NOC C and D	12	
			8611	Harvesting Labourers	NOC C and D	*	
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	15	
	Costa Rica	Costa Rica	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	
		N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
	Cuba	N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*	
	El Salvador	N/A	8431	General Farm Workers	NOC C and D	*	
	France	France	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*	

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8432	Nursery and Greenhouse Workers	NOC C and D	*
		Netherlands	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		N/A	8431	General Farm Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Germany	N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Guatemala	Agalega Island	8611	Harvesting Labourers	NOC C and D	*
		Guatemala	8431	General Farm Workers	NOC C and D	13
			8611	Harvesting Labourers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	14
		N/A	8431	General Farm Workers	NOC C and D	322
			8611	Harvesting Labourers	NOC C and D	3,872
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	49
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	64
	Guernsey	N/A	8611	Harvesting Labourers	NOC C and D	*
	Guinea - Republic of	N/A	8431	General Farm Workers	NOC C and D	*
	Jamaica	N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Kyrgyzstan	Kyrgyzstan	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Mauritius	Mauritius	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	103
		N/A	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	35
	Mexico	Mexico	8431	General Farm Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		N/A	8431	General Farm Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Morocco	N/A	8431	General Farm Workers	NOC C and D	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
	Nicaragua	N/A	8611	Harvesting Labourers	NOC C and D	*
	Philippines	N/A	8431	General Farm Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	21
	Portugal	Portugal	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
		N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	10
	St. Kitts	N/A	8611	Harvesting Labourers	NOC C and D	*
	St. Lucia	St. Lucia	8611	Harvesting Labourers	NOC C and D	*
		N/A	8611	Harvesting Labourers	NOC C and D	*
	Switzerland	N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Taiwan	Philippines	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	10
		N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
	Thailand	(blank)	8431	General Farm Workers	NOC C and D	*
	United Kingdom	United Kingdom	8251	Farmers and Farm Managers	NOC 0, A and B	*
	United States	El Salvador	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Guatemala	8255	Landscaping and Grounds Maintenance Contractors and Managers	NOC 0, A and B	*
	Venezuela	N/A	8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	*
QC Total						4,651
Saskatchewan	Argentina	Argentina	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Australia	Ireland	8431	General Farm Workers	NOC C and D	*
	Belarus	Belarus	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Brazil	Brazil	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Canada	Australia	8251	Farmers and Farm Managers	NOC 0, A and B	*
		Germany	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8252	Agricultural and Related Service Contractors and Managers	NOC 0, A and B	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
		India	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
		Mexico	8431	General Farm Workers	NOC C and D	*
		Nicaragua	8251	Farmers and Farm Managers	NOC 0, A and B	*
		Philippines	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	19
		Trinidad and Tobago	8431	General Farm Workers	NOC C and D	*
		Ukraine	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		United States	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		N/A	8431	General Farm Workers	NOC C and D	*
	China	China	9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	*
	Costa Rica	Costa Rica	8251	Farmers and Farm Managers	NOC 0, A and B	*
	Cuba	Cuba	8431	General Farm Workers	NOC C and D	13
	Czech Republic	Czech Republic	8251	Farmers and Farm Managers	NOC 0, A and B	*
	Denmark	(blank)	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Ecuador	(blank)	8431	General Farm Workers	NOC C and D	*
	Finland	Ukraine	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	France	France	8431	General Farm Workers	NOC C and D	*
	Germany	Germany	8431	General Farm Workers	NOC C and D	*
		N/A	8431	General Farm Workers	NOC C and D	*
	Ireland	United Kingdom	8431	General Farm Workers	NOC C and D	*
		N/A	8431	General Farm Workers	NOC C and D	*
	Italy	India	8431	General Farm Workers	NOC C and D	*
	Mexico	Mexico	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8432	Nursery and Greenhouse Workers	NOC C and D	*
			8612	Landscaping and Grounds Maintenance Labourers	NOC C and D	10
	New Zealand	Philippines	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
	Nicaragua	Nicaragua	8251	Farmers and Farm Managers	NOC 0, A and B	118
			8431	General Farm Workers	NOC C and D	*
	Paraguay	Paraguay	8431	General Farm Workers	NOC C and D	*
	Philippines	Philippines	8251	Farmers and Farm Managers	NOC 0, A and B	18
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			9617	Labourers in Food, Beverage and Tobacco Processing	NOC C and D	11
	Romania	Romania	8251	Farmers and Farm Managers	NOC 0, A and B	*
	Serbia and Montenegro	Serbia and Montenegro	8251	Farmers and Farm Managers	NOC 0, A and B	*
	South Africa	South Africa	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
	Ukraine	Ukraine	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
			8611	Harvesting Labourers	NOC C and D	*
		N/A	8251	Farmers and Farm Managers	NOC 0, A and B	*
	United States	Cuba	8431	General Farm Workers	NOC C and D	*
		Jamaica	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
		Mexico	8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8431	General Farm Workers	NOC C and D	*
		Ukraine	8251	Farmers and Farm Managers	NOC 0, A and B	*
		United States	8251	Farmers and Farm Managers	NOC 0, A and B	*
			8253	Farm Supervisors and Specialized Livestock Workers	NOC 0, A and B	*
			8256	Supervisors, Landscape and Horticulture	NOC 0, A and B	*

Province of employment	Country of residence	Country of citizenship	NOC code	NOC title	Skill Level	Number of positions
			8431	General Farm Workers	NOC C and D	41
<b>SK Total</b>						<b>327</b>
<b>Canada Total</b>						<b>10,335</b>
<p><b>Notes:</b></p> <p>1. Source: <i>Foreign Worker System (FWS)</i>. Data extracted on November 1, 2010.</p> <p>2. The table shows the number of temporary foreign worker positions in agriculture (excluding SAWP) on labour market opinion (LMO) confirmations by province of employment, country of residence and citizenship of foreign worker positions, occupation and skill level, 2009.</p> <p>3. One LMO application may be submitted by an employer for any number of TFW positions.</p> <p>4. Arranged employment opinions (AEO) provided in support of applications for permanent residence are not included.</p> <p>5. The country of residence of the TFW may be recorded in the FWS at the time of processing the LMO application based on information from the employer.</p> <p>6. The country of citizenship of the TFW may be recorded in the FWS at the time of processing the LMO application based on information from the employer, but is not mandatory.</p> <p>7. Employers may participate in SAWP based on intergovernmental agreements with Mexico and certain Caribbean countries, and operates in the following provinces: Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia. Employers may also request TFW positions outside of SAWP for agricultural occupations in any sector/commodity, any skill level and from any country.</p> <p>8. SAWP includes the following NOC codes: 8251, 8431, 8432, 8611, 8612, and 9617. Employers may apply for agricultural positions outside of SAWP under the same NOC codes or under other NOC codes.</p> <p>9. Occupational groups are based on the National Occupational Classification (NOC) 2006. A four-digit NOC code is assigned to each TFW position and entered in the FWS.</p> <p>10. The NOC skill level corresponds to the second digit of the NOC code for all occupations except management occupations (i.e., all NOC codes for management occupations start with a "0"). NOC skill levels 0, A and B occupations require higher levels of formal education and/or training whereas NOC C and D occupations only require lower levels of formal education and/or training. Management occupations are not subject to skill level criteria as they may require a combination of additional factors including experience and expertise. They have been grouped as "Management occupations".</p> <p>11. In order to ensure the protection of personal information, cells containing fewer than 10 cases in a specific category have been suppressed and replaced with the notation "999". Additional cells may also have been suppressed to ensure the confidentiality of data. As a result, components may not sum up to the total indicated.</p> <p>12. The decision to issue a work permit rests with Citizenship and Immigration Canada (CIC). A work permit may not be issued for all TFWs named on an LMO confirmation. In addition, there may be a delay between the date of confirmation and the date on which the TFW obtains a work permit and/or enters Canada.</p> <p>13. The numbers appearing in this table may differ from those reported in previous HRSDC releases. These differences are adjustments to administrative data files as normally occur over time and reflect refinement in methods of calculation for the purpose of increasing accuracy in the way statistical information is presented.</p>						

**Appendix VII – Number of Temporary  
Foreign Worker Positions under the  
SAWP**

Number of temporary foreign worker positions on labour market opinion confirmations under the Seasonal Agricultural Worker Program (SAWP), by province of employment, source country, occupation and skill level, 2009 season.

Province of employment	SAWP source country	NOC code	NOC Title	Skill level	Number of positions	
Alberta	Mexico	8431	General Farm Workers	NOC C & D	379	
		8432	Nursery and Greenhouse Workers	NOC C & D	436	
		8611	Harvesting Labourers	NOC C & D	124	
	Trinidad and Tobago	8431	General Farm Workers	NOC C & D	31	
		8432	Nursery and Greenhouse Workers	NOC C & D	32	
		8611	Harvesting Labourers	NOC C & D	*	
British Columbia	Barbados	8611	Harvesting Labourers	NOC C & D	*	
	Jamaica	8611	Harvesting Labourers	NOC C & D	62	
	Mexico	8431	General Farm Workers	NOC C & D	147	
		8432	Nursery and Greenhouse Workers	NOC C & D	*	
		8611	Harvesting Labourers	NOC C & D	3,190	
	St. Vincent / Grenadines	8611	Harvesting Labourers	NOC C & D	*	
Manitoba	Jamaica	8611	Harvesting Labourers	NOC C & D	11	
	Mexico	8431	General Farm Workers	NOC C & D	*	
		8432	Nursery and Greenhouse Workers	NOC C & D	47	
		8611	Harvesting Labourers	NOC C & D	300	
New Brunswick	Jamaica	8432	Nursery and Greenhouse Workers	NOC C & D	14	
	Mexico	8611	Harvesting Labourers	NOC C & D	*	
		8431	General Farm Workers	NOC C & D	*	
		8611	Harvesting Labourers	NOC C & D	*	
Nova Scotia	Barbados	8431	General Farm Workers	NOC C & D	13	
	Jamaica	8431	General Farm Workers	NOC C & D	281	
		8432	Nursery and Greenhouse Workers	NOC C & D	*	
		8611	Harvesting Labourers	NOC C & D	310	
	Mexico	8431	General Farm Workers	NOC C & D	40	
		8432	Nursery and Greenhouse Workers	NOC C & D	19	
		8611	Harvesting Labourers	NOC C & D	134	
		8431	General Farm Workers	NOC C & D	197	
	Ontario	Barbados	8431	General Farm Workers	NOC C & D	23
			8432	Nursery and Greenhouse Workers	NOC C & D	*
Dominica		8431	General Farm Workers	NOC C & D	106	
		8432	Nursery and Greenhouse Workers	NOC C & D	*	
Grenada		8431	General Farm Workers	NOC C & D	22	
		8432	Nursery and Greenhouse Workers	NOC C & D	*	
Jamaica		8431	General Farm Workers	NOC C & D	5,841	
		8432	Nursery and Greenhouse Workers	NOC C & D	638	
		9617	Labourers in Food, Beverage and Tobacco Processing	NOC C & D	158	
Mexico		8431	General Farm Workers	NOC C & D	6,801	
		8432	Nursery and Greenhouse Workers	NOC C & D	2,441	
		9617	Labourers in Food, Beverage and Tobacco Processing	NOC C & D	140	
Montserrat		8431	General Farm Workers	NOC C & D	*	
St. Kitts		8431	General Farm Workers	NOC C & D	25	
St. Lucia		8431	General Farm Workers	NOC C & D	128	
		8432	Nursery and Greenhouse Workers	NOC C & D	82	
St. Vincent / Grenadines		8431	General Farm Workers	NOC C & D	166	
		8432	Nursery and Greenhouse Workers	NOC C & D	22	
Trinidad and Tobago		8431	General Farm Workers	NOC C & D	1,107	
		8432	Nursery and Greenhouse Workers	NOC C & D	35	
		8431	General Farm Workers	NOC C & D	*	
Prince Edward Island		Mexico	8431	General Farm Workers	NOC C & D	*
			8611	Harvesting Labourers	NOC C & D	143

Province of employment	SAWP source country	NOC code	NOC Title	Skill level	Number of positions
Quebec	Antigua & Barbuda	8611	Harvesting Labourers	NOC C & D	32
		8431	General Farm Workers	NOC C & D	10
	Grenada	8611	Harvesting Labourers	NOC C & D	*
		8611	Harvesting Labourers	NOC C & D	78
	Mexico	8431	General Farm Workers	NOC C & D	10
		8432	Nursery and Greenhouse Workers	NOC C & D	*
	St. Vincent / Grenadines	8611	Harvesting Labourers	NOC C & D	3,141
		8611	Harvesting Labourers	NOC C & D	*
Saskatchewan	Mexico	8431	General Farm Workers	NOC C & D	45
		8432	Nursery and Greenhouse Workers	NOC C & D	79
<b>Canada Total</b>					<b>27,103</b>

**Notes:**

- Source: *Foreign Worker System (FWS)*. Data extracted on November 12, 2010.
- The table shows the number of temporary foreign worker positions on labour market opinion (LMO) confirmations under the Seasonal Agricultural Worker Program (SAWP), by province of employment, source country, occupation and skill level, 2009 season.
- One LMO application may be submitted by an employer for any number of TFW positions.
- Arranged employment opinions (AEO) provided in support of applications for permanent residence are not included.
- SAWP is based on intergovernmental agreements with Mexico and certain Caribbean countries, and operates in the following provinces: Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia. Employers may also request TFW positions outside of SAWP for agricultural occupations in any sector/commodity, any skill level and from any country.
- The SAWP source country is recorded in the FWS at the time of processing the LMO application based on information from the employer.
- SAWP includes the following NOC codes: 8251, 8431, 8432, 8611, 8612, and 9617. Employers may apply for agricultural positions outside of SAWP under the same NOC codes or under other NOC codes.
- SAWP workers must be employed for not less than 240 hours of work within a period of six weeks or less, for a maximum duration of 8 months between January 1st and December 15th. Workers may transfer from one farm to another through prior written approval from HRSDC/Service Canada and the foreign government representative in Canada. In the case of workers who are transferred to another farm following completion of their contract with an employer, no minimum hours of work apply.
- Because SAWP workers may work for more than one employer during the growing season (e.g., transfers), the total number of positions reported in this table does not reflect the actual number of seasonal workers in Canada during that period.
- Occupational groups are based on the National Occupational Classification (NOC) 2006. A four-digit NOC code is assigned to each TFW position and entered in the FWS.
- The NOC skill level corresponds to the second digit of the NOC code for all occupations except management occupations (i.e., all NOC codes for management occupations start with a "0"). NOC skill levels 0, A and B occupations require higher levels of formal education and/or training whereas NOC C and D occupations only require lower levels of formal education and/or training. Management occupations are not subject to skill level criteria as they may require a combination of additional factors including experience and expertise. They have been grouped as "Management occupations".
- In order to ensure the protection of personal information, cells containing fewer than 10 cases in a specific category have been suppressed and replaced with the notation "\*". Additional cells may also have been suppressed to ensure confidentiality of data. As a result, components may not sum up to the total indicated.
- The decision to issue a work permit rests with Citizenship and Immigration Canada (CIC). A work permit may not be issued for all TFW named on an LMO confirmation. In addition, there may be a delay between the date of confirmation and the date on which the TFW obtains a work permit and/or enters Canada.
- The numbers appearing in this table may differ from those reported in previous HRSDC releases. These differences are adjustments to administrative data files as normally occur over time and reflect refinement in methods of calculation for the purpose of increasing accuracy in the way statistical information is presented.

**Appendix VIII – Employment Contract  
for Temporary Foreign Workers (Non-  
SAWP)**

## Employment Contract

### Employer Information

Legal Business Name: \_\_\_\_\_

Employer Last Name: \_\_\_\_\_

Employer First Name: \_\_\_\_\_

Business Address: \_\_\_\_\_

Business Telephone Number: \_\_\_\_\_

Business Fax Number: \_\_\_\_\_

E-mail Address (if applicable): \_\_\_\_\_

### Temporary Foreign Worker Information

Last Name (as written in the passport): \_\_\_\_\_

First Name (as written in the passport): \_\_\_\_\_

Home Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Fax Number: \_\_\_\_\_

E-mail Address (if applicable): \_\_\_\_\_

### The Parties Agree As Follows

#### 1. Duration of Contract

1.1. This contract shall have a duration of \_\_\_\_\_ months from the date the temporary foreign worker assumes his/her functions.

1.2. Both parties agree that this contract is conditional upon the issuance of a valid work permit to the temporary foreign worker by Citizenship and Immigration Canada (CIC) pursuant to the *Immigration and Refugee Protection Regulations* (IRPR), and his/her successful entry to Canada.

#### 2. Job Description

2.1. The temporary foreign worker agrees to carry out the following tasks (provide a detailed description):

3. Work Schedule

3.1. The temporary foreign worker shall work \_\_\_\_\_ hours per week and shall receive \_\_\_\_\_ % more than the regular wages for the hours worked over this limit, where provincial law permits. His/her workday shall begin at \_\_\_\_\_ and end at \_\_\_\_\_ or, if the schedule varies by day, specify: \_\_\_\_\_.

3.2. The temporary foreign worker shall be entitled to \_\_\_\_\_ minutes of break time per day (lunch, coffee breaks, etc.).

3.3. The temporary foreign worker shall be entitled to \_\_\_\_\_ day(s) off per week, on \_\_\_\_\_.

3.4. The temporary foreign worker shall be entitled to \_\_\_\_\_ weeks or \_\_\_\_\_ days of paid vacation, where provincial law permits.

3.5. The temporary foreign worker shall be entitled to \_\_\_\_\_ days of sick leave per year.

4. Wages and Deductions

4.1. The employer agrees to pay the temporary foreign worker, for his/her work, a wage of \$ \_\_\_\_\_ per hour or per piece rate (applicable in British Columbia only as set out in the "Minimum Piece Rates - Hand harvested crops" published in the British Columbia Ministry of Skills Development and Labour for harvesting). These shall be paid at intervals of \_\_\_\_\_.

4.2. The employer agrees to pay all taxes and submit all deductions payable as prescribed by law (including, but not limited to, Employment Insurance, Canadian income tax, and Canada Pension Plan or Quebec Pension Plan premiums).

4.3. The employer shall not recoup from the temporary foreign worker, through payroll deductions or any other means, any costs incurred in recruiting or retaining the temporary foreign worker. This includes, but is not limited to, any amount payable to a third-party representative/recruiter.

4.4. The employer agrees to adjust the temporary foreign worker's wage, as necessary, if there is a change in the provincial minimum wage at any time during the employment.

Transportation Costs (choose between clauses no. 5.1 and 5.2 depending on the situation)

5.1. If the temporary foreign worker is outside Canada, the employer agrees to assume the transportation costs of the temporary foreign worker's round trip travel between his/her country of current residence \_\_\_\_\_ and the location of work in Canada \_\_\_\_\_. It is the employer's obligation and responsibility to pay for the transportation costs and they cannot be passed on to the temporary foreign worker (e.g. the temporary foreign worker must not pay for his/her transportation costs and be reimbursed by the employer at a later date). Under no circumstances are the transportation costs recovered from the temporary foreign worker.

Or

5.2. If the temporary foreign worker is already in Canada, it is the employer's obligation and responsibility to pay for the temporary foreign worker's transportation costs between his/her current Canadian address \_\_\_\_\_ and the employer's location of work in Canada \_\_\_\_\_. The employer shall also pay for one-way transportation back to the temporary foreign worker's country of permanent residence \_\_\_\_\_. It is the employer's obligation and responsibility to pay for the transportation costs and they cannot be passed on to the temporary foreign worker (e.g. the temporary foreign worker must not pay for his/her transportation costs and be reimbursed by the employer at a later date). Under no circumstances are the transportation costs recovered from the temporary foreign worker.

5.3. If there is a termination of employment and the temporary foreign worker is hired by a new employer who has a neutral or positive LMO, the temporary foreign worker shall release the original employer from the obligation of return transportation costs to his/her country of permanent residence. The new employer is responsible for the temporary foreign worker's transportation costs to the new location of work in Canada and back to the temporary foreign worker's country of permanent residence. The employer is obliged to and responsible for paying the transportation costs (e.g. the first employer pays incoming transportation costs and the new employer pays for the return transportation costs to the country of current residence).

Note: A temporary foreign worker who changes jobs must contact CIC to get his/her work permit modified accordingly. An employer who wants to hire a temporary foreign worker who is already in Canada must apply to HRSDC/Service Canada to obtain a new LMO.

#### Accommodations

u. 1. The employer agrees to provide the temporary foreign worker with on-site or off-site accommodation. The employer can recoup the cost of accommodations through payroll deductions as set by HRSDC or less, depending on provincial employment standards. Briefly describe the type of accommodations to be provided to the temporary foreign worker (e.g. bunkhouses, apartment, off-site/on-site rental):

---

The accommodations must be suitable for the temporary foreign worker and annually inspected by a provincial, municipal or private inspector in accordance with the provisions of the policy for National Minimum Standards for Agricultural Accommodations.

The employer will recoup the cost of providing accommodations at an amount of \$ \_\_\_\_\_ per \_\_\_\_\_ (e.g. week, two-week period, month) through payroll deductions from the temporary foreign worker. At any time during employment, the temporary foreign worker may choose to leave the employer-provided housing in favour of private accommodations at no charge from the employer.

#### 7. Health Care Insurance

7.1. The employer agrees to provide health care insurance at no cost to the temporary foreign worker until such time when the worker is eligible for the applicable province's health care insurance.

#### Workplace Safety

o. 1. The employer agrees to register the temporary foreign worker under the relevant provincial government insurance plan (Workers' Compensation). The employer agrees not to deduct money from the wages of the temporary foreign worker for this purpose.

Note: In regions where enrolment in workers' compensation is not mandatory, the employer must provide proof of the temporary foreign worker's enrolment prior to applying for an LMO.

8.2. The employer agrees to respect the provincial health and safety standards in the workplace and will ensure that the temporary foreign worker handling chemicals and/or pesticides has been provided with protective clothing and equipment at no cost to the temporary foreign worker. He/she shall receive the appropriate formal or informal training and supervision where required by law.

#### 9. Notice of Resignation

9.1. Should the temporary foreign worker wish to terminate the present contract, he/she agrees to give the employer a written notice at least one week in advance.

The employer will complete a Record of Employment (ROE) and send it to the temporary foreign worker within five days of the date he/she stops working. It is the temporary foreign worker's responsibility to provide the employer with the address where the ROE should be mailed.

#### 10. Notice of Employment Termination

10.1. The employer must give the temporary foreign worker a written notice before terminating the employment contract if the temporary foreign worker has completed three months of uninterrupted service with the employer and if the contract is not about to expire. This notice shall be provided at least one week in advance.

The employer will complete an ROE and give it to the temporary foreign worker within five days of the date he/she stops working. It is the temporary foreign worker's responsibility to provide the employer with the address where the ROE should be mailed.

11. Contract Subject to Provincial Labour and Employment Legislation and Applicable Collective Agreements  
11.1. The employer must abide by the standards set out in the relevant provincial *Labour Standards Act* and, if applicable, the terms of any collective agreement in place. He/she must abide in particular by these standards and terms with respect to how wages are paid, how overtime is calculated, meal periods, statutory holidays, annual leave, family leave, benefits and course. Any terms of this employment contract which are less favourable to the temporary foreign worker than the standards stipulated in the relevant labour standards act are null and void.

In witness whereof the parties state that they have read and accepted all the terms and conditions stipulated in the present contract.

**Employer**

Signed at (location): \_\_\_\_\_

Employer's name: \_\_\_\_\_

Employer's signature: \_\_\_\_\_

Date : \_\_\_\_\_

**Temporary foreign worker**

Signed at (location): \_\_\_\_\_

Temporary Foreign worker's name (as written in the passport): \_\_\_\_\_

Temporary Foreign worker's signature: \_\_\_\_\_

Date : \_\_\_\_\_

# **Appendix IX – Pay Sheet for Mexican SAWP Workers**



# **Appendix X – Floralia Agreement**

**Appendix "A"**

**COLLECTIVE AGREEMENT**

**BETWEEN:**

**Floralia Plant Growers Ltd.  
(the "Employer")**

**-and-**

**UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL  
UNION, Local 1518**

**(the "Union")**



**Expiry: September 22, 2012**

**PREAMBLE:**

WHEREAS the Employer and the Union desire to cooperate in establishing and maintaining conditions which will promote a harmonious relationship between the Employer and the employees covered by this Agreement, to provide methods for fair and amicable resolution of disputes which may arise between them and promote efficiency and improved operations.

NOW, THEREFORE, THE UNION AND THE EMPLOYER MUTUALLY AGREE AS FOLLOWS:

**ARTICLE 1: UNION RECOGNITION**

- 1.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees of the Employer in the province of British Columbia save and except office workers and supervisors and as excluded by the *Labour Relations Code*.
- 1.02 The term 'employee' in this Collective Agreement applies to all persons in the bargaining unit, and include foreign workers. 'Foreign workers' refers to employees hired under programs listed in Article 4.01.
- 1.03 No employee shall be discharged or discriminated against for lawful Union activities, or performing services on a Union committee outside working hours or for reporting to the Union the violation of any provisions of this Agreement.

**ARTICLE 2: MANAGEMENT RIGHTS**

- 2.01 The Union recognizes that the Employer retains all the rights, powers and authority in management except those specifically abridged, delegated, granted to others or modified by this Agreement. Without restricting the foregoing, the Employer has the sole and exclusive right to plan, direct and control operations; to determine crop selection and production needs and methods, to determine the number of employees required from time to time, lay off or repatriation as applicable, services to be performed, and the methods, procedure, and equipment; to maintain order, discipline and efficiency; to direct its work force; to hire, transfer, demote, promote, assign and reassign jobs or duties; to discipline, including

suspend or discharge for just and sufficient cause; to discontinue any crop or method of production; and to make and alter from time to time reasonable rules and regulations not inconsistent with the terms of this Agreement.

- 2.02 The foregoing management rights shall not be deemed to exclude other functions not specifically covered by this Agreement. The management, therefore, retains all rights not otherwise specifically covered by this Agreement.
- 2.03 In administering this Agreement, the parties agree to act fairly, reasonably and in good faith in a manner consistent with the Agreement as a whole.

### ARTICLE 3: UNION SECURITY

- 3.01 (a) Each employee in the bargaining unit shall have an amount equal to the current Union dues, fees or assessments as directed by the Union, deducted by the Employer from each pay. The Union shall supply the Employer with dues authorization forms. The Employer must distribute the dues authorization forms to the employees. Such dues shall be forwarded to the Union monthly, not later than the fifteenth (15) day of the month following the month in which such a deduction is made, together with a list of the names and Social Insurance Numbers of employees (as soon as available) from whom deductions have been made and the amounts of such deductions.
- (b) When the farm is operational and employees working, the Employer shall provide the Union with the list in (a) above, and include a list of employees whose employment has been terminated.
- 3.02 The Union shall notify the Employer in writing of any changes in the amount of dues at least one (1) month prior to the end of the pay period in which the deductions are to be made.
- 3.03 The Union shall indemnify and save harmless the Employer, its agents and/or employees acting on behalf of the Employer, from any and all claims, demands, actions or causes of action arising from, or in any way connected with the collection and remittance of such dues.
- 3.04 The Employer shall advise a Union Steward of the hire of new employees on the first day of work for such employees. The Steward shall have up to fifteen (15) minutes, at a time and place mutually agreed between the Steward and the Employer, in order to

acquaint new employees with information about the terms and conditions of employment contained in the Collective Agreement and the Union Representation. Where more than one employee start work on the same day, then the Steward shall address those employees as a group within the same fifteen (15) minutes.

- 3.05 When an Income Tax (T-4) slip is made available, it shall indicate the amount of dues paid to the Union by the employee in the previous year.
- 3.06 As of the date of ratification, and as a condition of employment, all employees in the bargaining unit shall sign a union membership application. This process shall be the Union's responsibility. If a foreign worker refuses to sign a union membership application, the Employer will submit a transfer request to the applicable consulate. The Union will receive a copy of the transfer request. Until a replacement worker is found that employee shall remain employed by the Employer but without recall or seniority rights under this Collective Agreement.

#### ARTICLE 4: FOREIGN SEASONAL AGRICULTURAL WORKERS

- 4.01 The SAWP agreement is attached to this Collective Agreement as an "Addendum". Should the Employer wish to examine any new Government Foreign Worker Program (other than SAWP), the Employer and the Union will meet to discuss the program and to negotiate, if necessary, any changes that may be required.
- 4.02 Where the SAWP Program determines that there are insufficient Canadian citizens or residents available to perform seasonal agricultural work, the Employer may apply for such number of Foreign Workers as are deemed necessary by the Employer, in its sole discretion, pursuant to the terms of the SAWP Program.
- 4.03 Foreign workers shall be engaged for a period up to but not exceeding eight (8) months in duration, Between January 1 and December 15 of each year (hereinafter referred to as a "season").

#### ARTICLE 5: PROBATIONARY PERIOD

- 5.01 All new employees shall be subject to a probationary period of five (5) months from the first day worked. Foreign Workers who have completed the probationary period with the Employer in a prior season(s) shall not be subject to another probationary period. During the probationary period, the Employer may, at its sole discretion, discipline or discharge any probationary employee and

said employee shall have no recourse to the Grievance and Arbitration sections of this Agreement.

**ARTICLE 6: UNION STEWARDS, REPRESENTATIVES & COMMITTEES**

- 6.01 (a) The Union shall have the right to appoint one (1) Steward and one (1) alternate steward, from employees within the bargaining unit who have been employed with the Employer for a minimum of 2 months.
- (b) The Union shall notify the Employer in writing of the name of each Steward and where applicable each Committee member, before management shall be required to recognize any person so appointed.
- (c) The Union acknowledges that the Stewards have regular duties to perform for the Employer. The Steward shall, with the consent of his supervisor, be permitted to leave their regular duties for a reasonable length of time without loss of pay to function as a steward as provided in the collective agreement for the prompt handling of necessary Union business, and such consent from the supervisor shall not be unreasonably withheld. When returning to regular duties the steward shall first report to his supervisor.

Wherever possible, stewards will conduct Union business during meal or rest periods, or prior to or after their scheduled shifts.

- 6.02 The Negotiating Committee shall consist of a representative of the Union and not more than two (2) bargaining unit employees chosen by the Union. Such employees shall be provided with leave of absence without pay upon reasonable advance notice to the Employer of not less than one (1) week.

**ARTICLE 7: SENIORITY**

- 7.01 Principles of seniority are applicable to hiring, layoff and recall. Upon completion of the probationary period, seniority shall be calculated based on accumulated hours worked, whether in the current season or a previous season for all employees. The Employer will maintain one seniority list and will identify employees as either foreign or domestic on that list. In keeping with Human Resources and Development Canada and Service Canada requirements, the residency/citizenship of domestic employees will take precedence over the seniority of Foreign Workers in issues of obtaining and maintaining employment. Seniority for piece work shall be calculated for hours actually worked. Subject to the

provisions of this Article below, seniority of foreign workers in prior seasons shall be maintained, notwithstanding termination of employment at the end of a season pursuant to the SAWP Program. Foreign workers' seniority shall begin to accumulate from the previous seniority amount upon the first day worked in the next season. Where a foreign worker is transferred to the Employer from another farm, pursuant to the terms of the SAWP Program, the foreign worker's prior service with another farm shall not be considered for the purposes of this Article.

- 7.02 Seniority shall be considered broken and employment terminated if an employee:
- (a) is duly discharged by the Employer and not reinstated through the Grievance and/or Arbitration procedure of this Agreement;
  - (b) voluntarily quits or resigns;
  - (c) is absent from work without a written leave of absence for three (3) working days or more, unless a reason is given by the employee satisfactory to the Employer;
  - (d) has been laid off continuously for a period of twelve (12) months, or is recalled from layoff and does not report to work within three (3) working days, unless a reason is given by the employee satisfactory to the Employer; or in the case of foreign workers, does not return on the flight arrangements made on their behalf.
  - (e) fails to return to work on the completion of an authorized leave of absence, unless a reason is given by the employee satisfactory to the Employer.
- 7.03 Within thirty (30) calendar days of ratification, and in January and July of each year, the Employer shall provide a seniority list, which includes seniority, whether a Foreign Worker, and full time or part time status. When the farm is operational and bargaining unit employees are working on the farm, the seniority list shall be posted outside the office (which shall be supplied by the Employer) and also faxed to the Union.

**ARTICLE 8 NO DISCRIMINATION OR HARASSMENT**

- 8.01 The parties agree that there shall be no discrimination against an employee's membership or participation in the Union, or in matters

covered by this Agreement on the basis of any applicable characteristic set out in *The Human Rights Code*.

- 8.02 The Union and the Employer agree to cooperate with each other in providing a workplace which shall be free of harassment by either the Employer or employees and in preventing and eliminating of harassment.

**ARTICLE 9: ACCESS**

- 9.01 The Union must inform the Employer at the commencement of the general employment period each year of the name of its designated representative for the Employer. Subject to the terms of this Article, such duly authorized representative of the Union shall be entitled, when the farm is operational and bargaining unit employees working, to visit the Employer's operations at 2191 Interprovincial highway, Abbotsford, BC, and, with the Employer's permission, all other areas to which bargaining unit employees normally have access for the purpose of observing working conditions, and for the purpose of interviewing and communicating with the employees on duty.
- 9.02 The union representative shall notify by fax or phone, the General Manager or, in his or her absence, another designated representative of management, wherever possible in non-urgent situations at least twenty-four (24) hours prior to any visit to the Employer's premises.
- 9.03 When visiting the Employer's premises to communicate with employees on duty, the Union Representative shall come equipped with durable plastic pants and rubber boots and shall park at the Employer's parking lot. The union representative shall then present him/herself to the General Manager or, in his or her absence, another designated representative of management who is on duty at the time of the visit and shall accompany such representative while on Employer property. The union representative will then be advised of directions to the bargaining unit employees, as well as the method of allowable transport (which is subject to weather and soil conditions).
- 9.04 All interviews and communications between the union representative and bargaining unit employees shall be:
- a) carried on, if possible, in private in a place within the Employer's premises designated by management; and
  - b) held, whenever possible, during the meal period or rest periods.

However, when this is not practical,

- i. held during the employees' working hours. Time taken for such interview shall be limited to five (5) minutes and, with the approval of management, such interview may be longer than five (5) minutes (though not to exceed 30 minutes) but time taken in excess of five (5) minutes shall not be on the Employer's time; and
  - ii. held at such time as shall minimize interference with the Employer's operation.
- 9.05 When on the Employer's premises, the full-time union representative shall observe all reasonable policies governing the Employer's operation, including, without in any way limiting the foregoing, restrictions respecting the use of vehicles on the Employer's premises, clothing and abide by all health and safety requirements. No such policies shall prohibit, prevent or unduly interfere with in any way the full-time union representative's rights that are provided for in this Article.

#### ARTICLE 10: HOURS OF WORK , OVERTIME AND WORK BREAKS

- 10.01 (a) The average minimum work week is expected to be forty (40) hours, with regard to weather and crop conditions. When weather, market and crop conditions are feasible for farm work, all workers shall receive as a minimum of forty (40) hours of work per week unless permanently laid-off in accordance with the lay-off procedures contained in this agreement. The Employer may request, and the employee may agree to work hours in excess of eight (8) hours per day or forty (40) hours in a week. All hours worked shall be paid by the Employer at applicable hourly or piece-work wage rates, as set out in Schedule "A" of this agreement or in this Article.
- 10.02 The Employer shall ensure that each employee shall, upon request, be able to take at least one (1) day off in each week.
- 10.03 (a) Each employee's daily shift shall include one uninterrupted thirty (30) minute lunch break without pay and two uninterrupted fifteen (15) minute breaks without pay at approximately the mid-point of each half shift. Lunch breaks shall be taken at the half way part of their shift. One break shall be taken during the first half of the employee's daily shift and the other break shall be taken during the second half of the employee's daily shift.

- (b) Notwithstanding the above, employees who work beyond ten (10) hours in a day shall receive an additional fifteen (15) minute unpaid break.

**ARTICLE 11: MEDICAL FITNESS**

- 11.01 The Employer reserves the right to require a medical examination and/or medical certificate report as proof of the employee's fitness to return to work or to determine the approximate length of illness. An employee who is required to provide a certificate will be made aware of such requirement prior to the employee's return to duty.
- 11.02 The Employer may require an employee to undergo a physical examination, and/or psychiatric examination, and/or psychological assessment by a duly qualified medical, psychiatric or psychological practitioner acceptable to the Employer. The cost of such an examination shall be paid by the Employer.
- 11.03 The medical, psychiatric or psychological practitioner conducting the examination shall complete such forms or provide such information as required by the Employer, relating to issues including the employee's medical condition, fitness or ability to work and any limitation of work duties due to a medical condition.

**ARTICLE 12: DISCIPLINARY ACTION**

- 12.01 At any meeting in which the Employer imposes discipline, excepting an oral reprimand, the employee may opt to have a Steward present.
- 12.02 A Steward and the Union representative will be notified as soon as possible in the event of a dismissal of an employee.

**ARTICLE 13: GRIEVANCE PROCEDURE**

- 13.01 A "grievance" shall mean a complaint in writing concerning the interpretation, application, administration or alleged violation of this Agreement. All grievances and written communication under this Article and Article 14 (Arbitration) shall be issued to the Employer in English. For the purposes of this Article and Article 14 (Arbitration), "days" do not include weekends or general holidays recognized by this Agreement.

- 13.02 The grievor may elect to be accompanied and/or represented by a Steward or a Local 1518 Union Representative, if one is immediately available, at any step of the grievance procedure.
- 13.03 **Discussion Stage:**  
Within three (3) days of the event giving rise to a grievance, the grievor(s) shall attempt to resolve the dispute through discussions with the General Manager or designate. The Employer may ask the employee to invite someone of the employee's choice to translate on their behalf.
- 13.04 **Step One:**  
If the dispute is not resolved at the discussion stage, the grievor and/or Union Representative may, within three (3) days of the event giving rise to a grievance, submit the grievance in writing to the General Manager or designate who shall reply in writing within three (3) days of receipt of the written grievance. Such grievances shall contain the articles that are alleged to be violated.
- 13.05 **Step Two:**  
If the grievance is not resolved satisfactorily at Step One, the grievor and/or Union Representative may, within three (3) days of the date of the reply in Step One, submit a request in writing to the General Manager or designate for a meeting. The General Manager or designate shall hold a meeting within a further three (3) days to discuss the grievance with the grievor and/or the Union Representative before giving a decision on the grievance. The General Manager or designate shall issue a written decision within three (3) days after the meeting at Step Two.
- 13.06 **Referral to Arbitration**  
If a satisfactory settlement is not reached at Step Two, then either party may, within three (3) days of the written decision at Step Two, provide written notification to the other party that the grievance will be referred to arbitration.
- 13.07 (a) **Termination Grievances**  
In the event that an employee is discharged, then the grievance must be filed at Step Two, within three (3) days of the Union

receiving the notice of the discharge. All other steps in the grievance procedure shall be observed.

(b) **Policy Grievances**

Either party may file a grievance concerning the general application or interpretation of the Agreement, which grievance shall be submitted at Step One citing the articles alleged to be violated. For all grievances pursuant to Article 13.07(b), the number of days listed in this grievance procedure for submission of grievances or referral to further steps shall be ten (10) days, instead of three (3) days.

- 13.08 The time limits fixed in the grievance procedure may be extended by the mutual written consent of the parties.
- 13.09 Failure to comply with any of the time limits specified in this Article shall result in the grievance being deemed abandoned, forfeiting all rights of recourse for that grievance. In the event of a failure to reply to a grievance within the prescribed time limits, the grievance may proceed to the next step in the grievance procedure.

**ARTICLE 14: ARBITRATION**

14.01 Where a grievance has been referred to arbitration pursuant to Article 13 (Grievance Procedure), the grievance shall be submitted to a single Arbitrator who shall be selected by mutual agreement between the parties. In the event that the parties are unable to agree on a mutually acceptable Arbitrator within five (5) days of the official request, either party may request the appointment of an Arbitrator by the Minister of Labour through the provisions contained under *The British Columbia Labour Relations Code*.

14.02 (a) Where a foreign worker is terminated, and subject to repatriation, then a grievance application for expedited arbitration shall be processed forthwith by the union or Employer notwithstanding the steps contained in this section within twenty- four (24) hours of that decision after the union is notified. An Arbitrator must be available and willing to convene a hearing within five (5) days of the request for appointment under *The British Columbia Labour Relations Code*. In such circumstances, the hearing must be completed within ten (10) days of the first day of hearing, and the Arbitrator shall issue an award within five (5) days of the completion of the hearing.

(b) Unless it is alleged that a Foreign Worker has been discharged for causing physical harm to any person or uttering threats or physical violence against any person, such worker shall be allowed to

continue to reside on the premises of the Employer until the final disposition of his/her grievance in accordance with the provisions in Article 14.02 (a) above on the condition that the employee continue to observe all the rules of the residence.

- 14.03 The Arbitrator shall not have the power to add to, subtract or modify or alter in any way the provisions of the Agreement.
- 14.04 The Arbitrator shall hear and determine the grievance and shall issue a decision, which decision shall be final and binding and enforceable upon the parties, and upon any employee affected by it.
- 14.05 Except where specifically limited in this Agreement, the Arbitrator has all the powers and remedial authority granted under *The British Columbia Labour Relations Code*.
- 14.06 Unless the parties agree otherwise, it is understood that arbitration hearings shall not be public hearings.
- 14.07 The parties shall share equally the fees and expenses of the Arbitrator. All other fees and expenses for a party's witnesses and other costs that party incurs related to the arbitration shall be the responsibility of that party.

#### ARTICLE 15: LEAVES OF ABSENCE

- 15.01 Upon a written request from the Union or an employee, the Employer may, at its sole discretion, grant a leave of absence without pay for personal reasons, separate from any leave pursuant to the Collective Agreement or *The Employment Standards Act* for the Province of British Columbia.

#### 15.02 Union Leave

- (a) The Employer shall grant a leave of absence without pay for up to one (1) employee for Union business, on condition that such leave is requested in writing not less than two (2) weeks in advance, and the absence does not interfere with normal operations or the SAWP agreement.
- (b) The Employer will continue to pay wages and contribute to applicable benefits for employees on Union leave, and the Union will reimburse the Employer for the full amount of wages and

benefit cost. This will be calculated on the average pay from the previous two (2) pay periods.

15.03 An employee who is summoned for jury duty, or who receives a summons or subpoena to appear as a witness at a Court proceeding other than a Court proceeding occasioned by an employee's private affairs, shall be granted a leave of absence without pay for the required period of absence.

15.04 **Special Circumstance Leave**

Employees shall be entitled to the following leaves of absence without pay, unless otherwise specified:

- a) Bereavement leave five (5) days unpaid for deaths that occur in the employee's immediate family
- b) Compassionate leave eight (8) weeks
- c) Reservist leave when needed for service
- d) Maternity leave seventeen (17) weeks
- e) Parental leave thirty-seven (37) weeks
- f) Family leave three (3) days

15.05 The Employer will provide a leave for up to fourteen (14) days to Foreign Workers requesting to return to their home country (at the employee's expense) because of a death in their immediate family. Such leave is inclusive of the five (5) days bereavement days referred to in Section 15.04 (a) above. The term 'immediate' family means: mother, father, wife, husband, children (including step-children), sister, brother, grandchildren, grandparents. SAWP employees who fail to return from their bereavement leave shall be deemed terminated unless a bona fide reason acceptable to the Employer has been established by the employee.

**ARTICLE 16: HEALTH HAZARDS - SAFETY CONDITIONS**

16.01 The Employer and Union agree to maintain working conditions, which are conducive to the safety and health of all workers and to take reasonable steps to correct any conditions that are detrimental to the safety and health of any workers.

- 16.02 The Employer and the Union shall establish a Workplace Health and Safety / Labour Management Committee to enhance the ability of employees and management to resolve concerns, as follows:
- (a) The committee will be established within two (2) weeks of the ratification date of this collective agreement.  
  
The committee will consist of one (1) Steward and one (1) management appointee.  
  
A Union representative may attend meetings of the committee.  
  
The committee shall not have the power to bind the Union or the Employer regarding any decision or conclusion or recommendation arising from the committee discussions.
  - (b) The committee will meet quarterly while the farm is operational (provided this is not in violation of the Work Safe BC rules and regulations).
  - (c) All meetings shall be held during regular working hours with no loss of pay for committee members attending the meeting.

#### ARTICLE 17: TECHNOLOGICAL CHANGE

- 17.01 For purposes of this Agreement, technological change means a combination of all three (3) of:
- (a) the introduction of equipment or material into the Employer's operations of a different nature and kind than that previously used in the Employer's operations; and
  - (b) a change in the manner in which work is carried on that is directly related to the introduction of that equipment or material; and
  - (c) is likely to affect the security of employment of at least one half (1/2) of the employees in the bargaining unit at the time of the change.
- 17.02 Where the Employer intends to introduce technological change, the following procedure will be followed:
- (a) the Employer will provide the Union with as much notice as possible prior to the date the change is to be effective, or as much

notice as reasonably practicable if circumstances do not permit earlier notice;

- (b) during this period, the parties will meet to discuss the implementation of the technological change and how it will affect bargaining unit employees;
- (c) where the Employer decides that retraining is to be provided, it shall be provided during the employees' normal working hours where possible; and
- (d) At the request of either party the Labour Management Committee will facilitate the implementation of the technological change in a manner consistent with this Article.

17.03 The notice mentioned in Article 17.02 shall include the following:

- (a) The nature of the change;
- (b) The date on which the Employer proposes to effect the change; and
- (c) The approximate number of employees whose job security is likely to be affected by the change.

#### ARTICLE 18: VACANCIES

##### 18.01 New Classification

- (a) In the event that the Employer establishes a new job classification, the Union shall receive a copy of the job description and accompanying wage.
- (b) Unless the Union objects in writing within thirty (30) calendar days following such notification, the classification and salary range (wage proposal) shall become established and form part of Schedule "A" (WAGES) attached to this Agreement.
- (c) If the Union files written objection, then the parties shall attempt to reach agreement as to an appropriate salary range (wage proposal).
- (d) Failing agreement, the matter may be referred to arbitration in accordance with Article 14 (Arbitration).

**ARTICLE 19: STRIKES AND LOCKOUTS**

- 19.01 The Union and Employer agree that, during the life of this Agreement, there shall be no strike by employees and the Employer agrees that there will be no lockout of employees. The terms "strike" and "lockout" shall be as defined in *The British Columbia Labour Relations Code*.

**ARTICLE 20: LAYOFF AND RECALL**

- 20.01 "Layoff" means the temporary or permanent reduction in the workforce due to lack of work, economic reasons or operational changes. Foreign workers may also be laid off if there is insufficient work available to complete a term of employment in a season under the SAWP Program. The Union shall be notified of all layoffs on the same day that employees are notified.
- 20.02 In the event of a permanent lay-off (a lay-off of more than 7 consecutive days), notice or pay in lieu shall be in accordance with *The Employment Standards Act* for the Province of British Columbia.
- 20.03 In the event of a layoff, the following procedure will be followed, subject to senior employees having the ability and availability to perform the remaining work:
- (a) volunteers shall be solicited by placing notice on the Employer's bulletin board outside the main office door and on the Union's bulletin board; employees will have 48 hours to respond and the method of selection shall be first come, first served; then;
  - (b) foreign workers in reverse order of seniority; then;
  - (c) part-time domestic employees in reverse order of seniority; then
  - (d) full-time domestic employees in reverse order of seniority.
- 20.04 Employees shall be recalled in the order of seniority, subject to having the ability and availability to perform the work.
- 20.05 The procedure for recalls shall be as follows:
- (a) To be eligible for recall, all domestic employees must file their names and current address with the Employer within ten (10) calendar days of receiving the notice of layoff and it shall be the

responsibility of the employee to keep the Employer informed in writing of the employee's current address and telephone number. An employee who does not file his or her name for recall within ten (10) calendar days of receiving notice of layoff shall be deemed to have chosen to be laid off and waived any seniority and recall rights under this Agreement unless a satisfactory reason is given.

- (b) Domestic employees shall be notified of recall by phone. If the Employer's first call does not result in speaking directly with the employee or a return call is not received from the employee within twenty-four (24) hours, then the Employer shall advise the employee by registered mail. An employee who declines recall shall be considered to have been permanently laid off for the remainder of the season.
- (c) To be eligible for recall all foreign workers (i.e. SAWP workers) have the responsibility to advise the Employer if they intend to return the following season. They must inform the Employer of this intention either during the current season or within thirty (30) days of layoff notice and provide all contact information if it has changed from the current season.
- (d) The Employer shall submit, as per the terms of any Foreign Worker agreement (i.e. the SAWP agreement), to Human Resources and Skills Development Canada a recall request list. The list is to be in order of seniority (subject to ability and availability) of SAWP employees requesting return employment. The Union shall receive a copy of all requests. Where a substitution is made beyond the control of the Employer, the Employer will not be held to be in violation of the Agreement. If a requested employee is substituted in this manner, the Employer shall resubmit the missing named workers on subsequent recalls unless the Employer receives confirmation or information of termination as otherwise set out in this Agreement. An employee who declines recall shall be considered to have been permanently laid off for the remainder of the season.

#### ARTICLE 21: VACATION

- 21.01 The Employer shall pay to all employees a vacation allowance of four percent (4%) of their gross wages that the employee earned in each year or term of employment. After three consecutive years, vacation allowance shall increase to six percent (6%). Such payment shall be made as follows:

- a) to foreign workers, with the last cheque at the end of a season or their actual return date (whichever is sooner); and
- b) to other employees, prior to commencing vacation leave or on the last payroll before January 1<sup>st</sup>

21.02 For the purposes of this Article, vacation pay shall be calculated based on the employee's seniority date.

21.03 Employees shall be entitled to the following vacation leave:

Up to three (3) weeks vacation each year after one (1) year of seniority. This leave is unpaid other than the vacation allowance referenced in 21.01.

21.04 Vacation leave shall be taken by all employees entitled to it between the months of December and February, inclusive, at specific times agreed to by the parties, unless special permission is granted otherwise. Where conflicts arise as to the scheduling of vacation, all reasonable methods of resolving the dispute shall be undertaken. If no resolution can be found, preference for vacation dates shall be made by seniority.

#### ARTICLE 23: WAGES AND CLASSIFICATIONS

23.01 Classifications and the wage rates are set out in Schedule "A" and form part of this Agreement.

23.02 All wages shall be paid in full on a bi-weekly basis.

#### ARTICLE 24: GENERAL

24.01 The Employer will provide space for a bulletin board below the private office window in the main building at 2191 Interprovincial Highway, Abbotsford, BC, to post notices of Union activities. The bulletin board will be provided at the Union's expense. All notices must be submitted to the Employer for approval before posting, excepting notices of Union meetings.

#### ARTICLE 25: STORAGE FOR RETURNING EMPLOYEES

- 25.01 The Employer shall provide to each Foreign Worker storage facilities so that employees who intend to return the following season can store overalls, rain coat, rubber boots, jacket and a bike. The employee has the responsibility to label all property with their name. The storage is provided at the employee's own risk. The Employer does not take responsibility for lost or stolen property.

**ARTICLE 26: DURATION**

- 26.01 This Agreement shall become effective September 22, 2009 and shall continue in effect up to and including September 22, 2012 and thereafter from year to year. Bargaining for the renewal agreement shall commence November 2012.
- 26.02 During the period required to negotiate a revision of this Agreement, the provisions of this Agreement shall remain in full force and effect unless:
- (a) The Union declares a strike provided that it gives the Employer fourteen (14) days written notice of a strike at a time after it is in a legal strike position; or
  - (b) The Employer declares a lockout, provided that it gives the Union fourteen (14) days written notice of a lockout at a time after it is in a legal lockout position.

Schedule "A" – Wages

- A1. All employees shall receive the applicable "prevailing rate" determined by Human Resources and Social Development Canada (i.e. SAWP), plus additional payments as follows:
1. Effective March 2010, ten (10) cents per hour for all hours worked;
  2. Effective March 2011, an additional ten (10) cents per hour for all hours worked; and
  3. Effective March 2012, an additional twelve (12) cents per hour for all hours worked.
- A2. For any reason if SAWP is discontinued by the Government or if as part of a prevailing industry trend at the time, the Employer's participation in SAWP ceases then wage rate for new hires from that point will be the minimum wage under the *Employment Standards Act* plus the applicable wage increases set out in A1. Existing employees will maintain wages at the prevailing SAWP rate at the time plus any increases as per Article A1 until a new wage schedule under a renewed agreement is negotiated.

- A3. The Employer may offer and pay a piece-work rate to employees for certain work, as determined by the Employer, provided that employees shall be paid not less than the applicable hourly rate in A1 for the time worked at the piece-work rate.
- A4. All time spent during transportation from work area to another shall be considered time worked. This does not include transportation time in the morning prior to the commencement of the shift or return upon conclusion on the shift.

# **Appendix XI – Sidhu & Sons Agreement**

**APPENDIX "A"**

**COLLECTIVE AGREEMENT**

**BETWEEN:**

**SIDHU & SONS NURSERY LTD.**

**(the "Employer")**

**-and-**

**UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL  
UNION, LOCAL 1518**

**(the "Union")**

**Duration of Agreement: November 3, 2010 – November 3, 2013**

**CONTENTS:**

PREAMBLE: ..... 1  
ARTICLE 1: UNION RECOGNITION ..... 1  
ARTICLE 2: MANAGEMENT RIGHTS ..... 1  
ARTICLE 3: UNION SECURITY ..... 2  
ARTICLE 4: FOREIGN SEASONAL AGRICULTURAL WORKERS ..... 3  
ARTICLE 5: PROBATIONARY PERIOD ..... 3  
ARTICLE 6: UNION STEWARDS, REPRESENTATIVES & COMMITTEES ..... 4  
ARTICLE 7: SENIORITY ..... 5  
ARTICLE 8: NO DISCRIMINATION OR HARASSMENT ..... 6  
ARTICLE 9: HOURS OF WORK AND WORK BREAKS ..... 6  
ARTICLE 10: MEDICAL FITNESS ..... 7  
ARTICLE 11: DISCIPLINARY ACTION ..... 7  
ARTICLE 12: GRIEVANCE PROCEDURE ..... 8  
ARTICLE 13: ARBITRATION ..... 9  
ARTICLE 14: LEAVES OF ABSENCE ..... 10  
ARTICLE 15: SAFETY ..... 11  
ARTICLE 16: LAYOFF AND RECALL ..... 11  
ARTICLE 17: VACATION PAY ..... 12  
ARTICLE 18: WAGES ..... 13  
ARTICLE 19: STORAGE ..... 13  
ARTICLE 20: TERM ..... 13  
ARTICLE 21: STRIKES AND LOCKOUTS ..... 14  
SCHEDULE "A" – WAGES ..... 15

**PREAMBLE:****WHEREAS:**

- (a) the Governments of Canada and certain foreign countries have established the Seasonal Agricultural Worker Program (the "SAWP Program") for the hiring of temporary support when Canadians or permanent residents are not available;
- (b) the hiring of SAWP Employees is on a seasonal basis pursuant to the SAWP Program;
- (c) the Union's certification is for SAWP Employees employed by the Employer and limited to those matters that do not impact on work jurisdiction;
- (d) this Agreement is not intended to conflict with the terms of the SAWP Agreements. Where the terms of this Agreement conflict with the terms of the SAWP Agreements, the terms of the SAWP Agreements will govern; and
- (f) the Employer and the Union desire to cooperate in establishing and maintaining conditions which will promote a harmonious relationship between the Employer and the SAWP Employees covered by this Agreement, and to provide methods for the fair and amicable resolution of disputes.

**NOW THEREFORE THE UNION AND THE EMPLOYER MUTUALLY AGREE AS FOLLOWS:**

**ARTICLE 1: UNION RECOGNITION**

- 1.01 The Employer recognizes the Union as the bargaining agent certified pursuant to the *Labour Relations Code* for all SAWP Employees hired by the Employer each year.
- 1.02 In this Agreement "SAWP Employee" means an employee hired by the Employer pursuant to the SAWP Program.

**ARTICLE 2: MANAGEMENT RIGHTS**

- 2.01 The Union recognizes that the Employer retains all the rights, powers and authority in management except those specifically

abridged, delegated, granted to others or modified by this Agreement. Without restricting the foregoing, the Employer has the sole and exclusive right to: plan, direct and control operations; determine production needs and methods; determine the number of SAWP Employees required from time to time, the length of employment, the timing of repatriation and services to be performed; maintain order, discipline and efficiency; direct its work force; hire, transfer, demote, promote, assign and reassign jobs or duties; discipline, including suspend or discharge for just and reasonable cause; and, make and alter from time to time rules and regulations not inconsistent with the terms of this Agreement.

- 2.02 The foregoing management rights shall not be deemed to exclude other rights not specifically covered by this Agreement. The Employer, therefore, retains all rights not otherwise specifically covered by this Agreement.

### ARTICLE 3: UNION SECURITY

- 3.01 Each SAWP Employee in the bargaining unit shall have an amount equal to the current Union dues, fees or assessments as directed by the Union, deducted by the Employer from each pay cheque. The Union shall supply the Employer with dues authorization forms in the form required by the *Labour Relations Code*, and in English and Spanish. The Employer must distribute the dues authorization forms to the SAWP Employees. Such dues shall be forwarded to the Union monthly, not later than the fifteenth (15th) day of the month following the month in which such a deduction is made, together with a list of the names of the SAWP Employees from whom deductions have been made and the amounts of such deductions.
- 3.02 The Union shall notify the Employer in writing of any changes in the amount of dues at least one (1) month prior to the end of the pay period in which the deductions are to be made.
- 3.03 The Union shall indemnify and save harmless the Employer, its agents and/or employees acting on behalf of the Employer, from any and all claims, demands, actions or causes of action arising from, or in any way connected with the collection and remittance of such dues.
- 3.04 The Employer shall advise the Union of the hire of new SAWP Employees within three (3) business days of hire.

- 3.05 When an Income Tax (T4) slip is made available, it shall indicate the amount of dues paid to the Union by the SAWP Employee in the previous year.
- 3.06 All SAWP Employees shall maintain membership in the Union. If a SAWP Employee refuses to sign a Union membership application, the SAWP Employee may remain employed by the Employer but without rehire or seniority rights under this Agreement.

**ARTICLE 4: FOREIGN SEASONAL AGRICULTURAL WORKERS**

- 4.01 The Union and the Employer recognize that the Employer and the SAWP Employees are subject to separate agreements (the "SAWP Agreements") entered into through Human Resources and Skills Development Canada ("HRSDC" or "Service Canada") for employment in British Columbia.
- 4.02 The SAWP Agreements do not form part of this Agreement. Any disputes regarding the terms of the SAWP Agreements will not be subject to the Grievance Procedure or Arbitration under Articles 12 and 13 of this Agreement.
- 4.03 This Agreement is not intended to conflict with the terms of the SAWP Agreements. Where the terms of this Agreement conflict with the terms of the SAWP Agreements, the terms of the SAWP Agreements will govern.
- 4.04 The Employer may, in its sole discretion, apply each year for such number of SAWP Employees as are deemed necessary by the Employer, pursuant to the terms of the SAWP Program.
- 4.05 SAWP Employees may be hired for a period as determined by the Employer of up to but not exceeding eight (8) months in duration, between January 1 and December 15 of each year (hereinafter referred to as a "season").

**ARTICLE 5: PROBATIONARY PERIOD**

- 5.01 All new SAWP Employees shall be subject to a probationary period of five (5) months in the same season. The probationary period begins from the first day worked. SAWP Employees who have successfully completed the probationary period with the Employer in the prior season shall not be subject to another probationary period except where the SAWP Employee is not on the list of names submitted by the Employer when applying for employees pursuant to the SAWP Program. During the probationary period,

the Employer may, in its sole discretion, discipline or discharge any probationary SAWP Employee and such SAWP Employee shall have no recourse to the Grievance Procedure or Arbitration under Articles 12 and 13 of this Agreement.

- 5.02 All SAWP Employees who worked in the 2010 season are deemed to have successfully passed probation.

**ARTICLE 6: UNION STEWARDS, REPRESENTATIVES AND COMMITTEES**

- 6.01 (a) The Union shall have the right to elect or appoint one (1) steward and one (1) alternate steward (the "Stewards") from the SAWP Employees within the bargaining unit who have completed their probationary period.
- (b) The Union shall notify the Employer in writing of the names of each Steward before the Employer shall be required to recognize any person so appointed.
- (c) The Union acknowledges that the Stewards have regular duties to perform for the Employer. The Steward shall, with the consent of his or her supervisor, be permitted to leave their regular duties for no longer than fifteen (15) minutes excluding travel time for handling urgent grievances without loss of pay. Such consent from the supervisor shall not be unreasonably withheld. Urgent grievances shall mean those grievances involving a disciplinary suspension or termination of employment for just cause. The Steward will be required to make his or her own travel arrangements. When returning to regular duties, the Steward shall first report to his or her supervisor.
- (d) For the purposes of the administration of this Agreement, the working language shall be English.
- 6.02 (a) The Union may establish a committee for the purpose of negotiating a renewal to this Agreement which may consist of a representative of the Union and not more than two (2) SAWP Employees chosen or elected by the Union. Such SAWP Employees shall be provided with leave of absence of up seven (7) days in a season without pay upon reasonable advance notice to the Employer of not less than one (1) week to negotiate a renewal of this Agreement providing the absence will not negatively affect the Employer's ability to meet its operational needs and fulfill its obligations under the SAWP Agreements. Any additional leave of absence will be by agreement of the parties and such agreement will not be unreasonably withheld.

- 6.03 The Union shall inform the Employer at the start of the season of the name of its designated representative for the Employer (the "Union Representative").
- 6.04 The Employer must permit representatives authorized by the Union to have unsupervised and unrestricted access to the doors of the staff housing units for the purposes of contacting SAWP Employees at their housing units to conduct Union business, subject to the following:
- (a) No more than two authorized representatives of the Union may approach and knock at a particular housing unit at one time. Resident SAWP Employees have the freedom to permit or not permit Union representatives into their housing units.
  - (b) Authorized representatives of the Union may attend the staff housing units between 6:30 p.m. and 10:00 p.m., Monday to Friday, except when invited by SAWP Employee residents to visit their housing units at other times.

#### ARTICLE 7: SENIORITY

- 7.01 Upon completion of the SAWP Employee's probationary period, his or her seniority shall be calculated based on accumulated hours worked, whether in the current season or prior seasons. Subject to the provisions of this Article below, seniority of SAWP Employees in prior seasons shall be maintained, notwithstanding repatriation at the end of a season pursuant to the SAWP Program. SAWP Employees' seniority shall begin to accumulate from the previous seniority amount upon the first day worked in the next season. Where a SAWP Employee is transferred to the Employer from another farm pursuant to the terms of the SAWP Program, the SAWP Employee's prior service with another farm shall not be considered for the purposes of seniority and this Article.
- 7.02 Seniority shall be considered broken and the SAWP Employee will lose all seniority and have no rights under Article 16, and the SAWP Employee's employment will be terminated, if the SAWP Employee:

- (a) is duly discharged by the Employer and not reinstated through the Grievance Procedure and/or Arbitration under this Agreement;
- (b) voluntarily quits or resigns;
- (c) is absent from work without prior written approval from the Employer unless a reason is given by the SAWP Employee satisfactory to the Employer;
- (d) has not worked for the Employer for a period of eight (8) months; or
- (e) fails to return to work on the completion of an authorized leave of absence, unless a reason is given by the SAWP Employee satisfactory to the Employer.

7.03 Within thirty (30) calendar days of the signing of this Agreement, and once each year between May 25 and June 5, the Employer shall provide a list of the SAWP Employees working for the Employer to the Union in order of seniority.

**ARTICLE 8: NO DISCRIMINATION OR HARASSMENT**

8.01 The parties agree that there shall be no discrimination against a SAWP Employee due to membership or participation in the Union. The Employer will comply with the *Human Rights Code*.

**ARTICLE 9 : HOURS OF WORK AND WORK BREAKS**

9.01 (a) The average minimum work week is expected to be forty (40) hours, with regard to weather and crop conditions. When weather, market and crop conditions are feasible for farm work, all workers shall receive a minimum of forty (40) hours of work per week. The Employer may request, and the SAWP Employee may agree to work hours in excess of eight (8) hours per day or forty (40) hours in a week. All hours worked shall be paid by the Employer at applicable hourly wage rates, as set out in Schedule "A" of this Agreement.

- 9.02 The Employer will designate the day off taken in each week.
- 9.03 (a) Each SAWP Employee's work day lasting more than four (4) hours shall include one (1) thirty (30) minute lunch break without pay, and two (2) fifteen (15) minute breaks with pay. Lunch breaks shall be taken at mid-day. One break shall be taken during the first half of the work day and the other break shall be taken during the second half of the work day.
- (b) Notwithstanding the above, SAWP Employees who work beyond ten (10) hours in a day shall receive an additional fifteen (15) minute paid break.
- 9.04 When daily start times are changed, the Employer will notify SAWP Employees as far in advance of the change as possible.

#### ARTICLE 10: MEDICAL FITNESS

- 10.01 The Employer reserves the right to require a SAWP Employee to undergo a medical examination and obtain a medical certificate from a medical practitioner as proof of the SAWP Employee's fitness to work or to return to work or to determine the approximate length of illness. A SAWP Employee who is required to provide a certificate will be made aware of such requirement prior to the SAWP Employee's return to duty.
- 10.02 The SAWP Employee will, when requested, have the medical practitioner conducting the examination complete such forms or provide such information as is reasonably required by the Employer, relating to issues including the SAWP Employee's medical condition, fitness or ability to work and any limitation of work duties due to a medical condition. The Employer will pay the cost of completing forms not paid by applicable insurance where such forms are requested by the Employer.

#### ARTICLE 11: DISCIPLINARY ACTION

- 11.01 At any meeting in which the Employer imposes discipline, excluding an oral reprimand, the SAWP Employee may request to have a Steward present so long as the Steward is immediately available.
- 11.02 A Steward and the Union will be notified as soon as possible in the event of the termination for just cause of a SAWP Employee.

**ARTICLE 12: GRIEVANCE PROCEDURE**

- 12.01 A "grievance" shall mean a complaint in writing concerning the interpretation, application, operation or alleged violation of this Agreement. All grievances and written communication under this Article and Article 13 (Arbitration) shall be issued to the Employer in English. For the purposes of this Article and Article 13 (Arbitration), "days" do not include weekends or general holidays.
- 12.02 The grievor may elect to be accompanied and/or represented by a Steward or a Union Representative, if one is immediately available, at any step of the grievance procedure.
- 12.03 **Discussion Stage**  
 Within three (3) days of the event giving rise to a grievance, the grievor(s) shall attempt to resolve the dispute through discussions with the General Manager or designate.
- 12.04 **Step One**  
 If the dispute is not resolved at the discussion stage, the grievor and/or Union Representative may, within three (3) days of the event giving rise to a grievance, submit the grievance in writing to the General Manager or designate who shall reply in writing within three (3) days of receipt of the written grievance. Such grievances shall contain the articles that are alleged to be violated.
- 12.05 **Step Two**  
 If the grievance is not resolved satisfactorily at Step One, the grievor and/or Union Representative may, within three (3) days of the date of the reply in Step One, submit a request in writing to the General Manager or designate for a meeting. The General Manager or designate shall hold a meeting within a further three (3) days to discuss the grievance with the grievor and/or the Union Representative before giving a decision on the grievance. The General Manager or designate shall issue a written decision within three (3) days after the meeting at Step Two.
- 12.06 **Referral to Arbitration**  
 If a satisfactory settlement is not reached at Step Two, then either party may, within three (3) days of the written decision at Step Two, provide written notification to the other party that the grievance will be referred to arbitration.

- 12.07 **Termination Grievances**  
 in the event that a SAWP Employee is discharged, then the grievance must be filed at Step Two, within three (3) days of the Union receiving notice of the discharge. All other steps in the grievance procedure shall be observed.
- 12.08 The time limits fixed in the grievance procedure may be extended by the mutual written consent of the parties.
- 12.09 Failure to comply with any of the time limits specified in this Article shall result in the grievance being deemed abandoned, forfeiting all rights of recourse for that grievance. In the event of a failure to reply to a grievance within the prescribed time limits, the grievance may proceed to the next step in the grievance procedure.

#### **ARTICLE 13: ARBITRATION**

- 13.01 Where a grievance has been referred to arbitration pursuant to Article 12 (Grievance Procedure) of this Agreement, the grievance shall be submitted to a single Arbitrator who shall be selected by mutual agreement between the parties. In the event that the parties are unable to agree on a mutually acceptable Arbitrator within five (5) days of the official request, either party may request the appointment of an Arbitrator by the Minister of Labour through the provisions contained in the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244.
- 13.02 (a) Where a grievance challenges the termination of the employment of a SAWP Employee for just cause, and the SAWP Employee is subject to repatriation, then a grievance application for expedited arbitration shall be processed forthwith by the Union or Employer notwithstanding the steps contained in this Article within twenty-four (24) hours of that decision. An Arbitrator must be available and willing to convene a hearing within five (5) days of the request for appointment under the British Columbia *Labour Relations Code*. In such circumstances, the hearing must be completed within ten (10) days of the first day of hearing, and the Arbitrator shall issue an award within five (5) days of the completion of the hearing.
- (b) For the purposes only of an expedited arbitration under Article 13.02(a) above, unless it is alleged that a SAWP Employee has been discharged for causing physical harm to any person or uttering threats or physical violence against any person, such SAWP Employee shall be allowed to continue to reside on the premises of the Employer until the final disposition of his or her grievance in accordance with the provisions in Article 13.02(a)

above on the condition that the SAWP Employee continues to observe all the rules of the residence. In the event that a SAWP Employee is disruptive while residing on the premises awaiting the disposition of their grievance, the Employer is under no further obligation to continue with this arrangement.

- 13.03 The Arbitrator shall not have the power to add to, subtract or modify or alter in any way the provisions of the Agreement.
- 13.04 The Arbitrator shall hear and determine the grievance and shall issue a decision, which decision shall be final and binding and enforceable upon the parties, and upon any SAWP Employee affected by it.
- 13.05 Except where specifically limited in this Agreement, the Arbitrator has all the powers and remedial authority granted under the British Columbia *Labour Relations Code*.
- 13.06 Unless the parties agree otherwise, it is understood that arbitration hearings shall not be public hearings.
- 13.07 The parties shall share equally the fees and expenses of the Arbitrator. All other fees and expenses for a party's witnesses and other costs that party incurs related to the arbitration shall be the responsibility of that party.

#### ARTICLE 14: LEAVES OF ABSENCE

- 14.01 Upon a written request from the Union or a SAWP Employee, the Employer may, in its sole discretion, grant a leave of absence without pay for personal reasons, separate from any leave pursuant to this Agreement or the *Employment Standards Act*, R.S.B.C. 1996, c. 113 for the Province of British Columbia.
- 14.02 The Employer shall grant an unpaid leave of absence to one or both of the Stewards for Union business for up to two (2) days in a season, on condition that such leave is requested in writing not less than two (2) weeks in advance, and the absence does not interfere with normal operations.
- 14.03 A SAWP Employee who receives a summons or subpoena to appear as a witness at a Court proceeding shall be granted a leave of absence without pay for the required period of absence.
- 14.04 The Employer will provide an unpaid leave of absence for up to fourteen (14) days to a SAWP Employee requesting to return to

their country of origin (at the SAWP Employee's expense) because of a death in their immediate family (as defined in the *Employment Standards Act*, R.S.B.C. 1996, c. 113). SAWP Employees who fail to return from such bereavement leave shall be deemed terminated unless a *bona fide* reason acceptable to the Employer has been established by the SAWP Employee.

**ARTICLE 15: SAFETY**

- 15.01 A SAWP Employee handling chemicals and/or pesticides will be provided, at the Employer's expense, with adequate protective clothing and such formal or informal training and supervision as is reasonably required to ensure the health and safety of the SAWP Employee.
- 15.02 A SAWP Employee who is injured during the course of employment must report the injury immediately to the Employer.

**ARTICLE 16: LAYOFF AND RECALL**

- 16.01 "Layoff" for the purposes of this Agreement means the cessation of employment during the season. The Employer may layoff SAWP Employees at any time during a season if there is insufficient work available to complete a term of employment in a season under the SAWP Program, for economic reasons or due to operational changes. The Union shall be notified of all layoffs on the same day that SAWP Employee(s) are notified.
- 16.02 Except in cases of termination for just cause, the Employer will notify SAWP Employees at least five (5) days in advance of their last day of employment.
- 16.03 The Employer may solicit and will try to accommodate volunteers for repatriation in a layoff situation. However the selection of the order of SAWP Employees for layoff will be determined solely by the Employer so long as the layoff occurs within two (2) weeks of the expected completion of the period of employment under their SAWP Agreement. Otherwise, SAWP Employees will be laid off in reverse order of seniority.
- 16.04 For purposes of certainty, the parties to this Agreement recognize that the Employer will be entitled to lay off SAWP Employees before the Employer's other farm workers.

- 16.05 The employment of a SAWP Employee with the Employer is terminated during or upon completion of a season at the time of repatriation under the SAWP Program or the transfer of the SAWP Employee to another farm.
- 16.06 "Recall" for the purposes of this Agreement means the process by which the Employer requests by name certain SAWP Employees for rehire in a subsequent season through HRSDC in accordance with the terms of the SAWP Program and as provided for in Article 16.
- 16.07 The Union and the Employer acknowledge that the Employer does not have ultimate control over the selection of SAWP Employees to be employed in any season due to the operation of the SAWP Program. However, where the Employer requests employees through the SAWP Program for an upcoming season, then such SAWP Employees who have successfully completed the probationary period will be requested in order of seniority provided they are able and available to attend in Canada pursuant to the SAWP Program for the entire period of employment requested by the Employer. The Union will receive a copy of the request list submitted by the Employer to HRSDC.
- 16.08 Where a substitution is made beyond the control of the Employer, the Employer will not be held to be in violation of this Agreement. If a requested SAWP Employee is substituted in this manner, the Employer shall resubmit the missing named worker(s) on subsequent recalls occurring within the following ninety (90) days.
- 16.09 To be eligible for recall, each SAWP Employee must inform the Employer if they want to return to work in the following season, either during the current season or within thirty (30) days of repatriation, and provide all personal contact information to the Employer if it has changed from the current season.

#### **ARTICLE 17: VACATION PAY**

- 17.01 The Employer shall pay to all SAWP Employees vacation pay of four percent (4%) of the gross wages that the SAWP Employee earns in each year or season of employment. Such payment shall be made bi-weekly.
- After four consecutive seasons, vacation allowance shall increase to six percent (6%). The additional two percent (2%) payment shall be made on the last pay cheque of the season.

- 17.02 For the purposes of this Article, vacation pay shall be calculated based on the SAWP Employee's seniority date.
- 17.03 All SAWP Employees that worked in the 2010 season will have their previous seasons credited for the purposes of calculating vacation pay entitlement.

**ARTICLE 18: WAGES**

- 18.01 Wage rates are set out in Schedule "A" and form part of this Agreement.
- 18.03 All time spent during transportation from one work area to another shall be considered time worked. This does not include transportation time in the morning prior to the commencement of the shift or returning upon conclusion of the shift which will not be considered time worked.
- 18.04 All wages shall be paid in full on a bi-weekly basis.

**ARTICLE 19: STORAGE**

- 19.01 The Employer shall provide an area where SAWP Employees who intend to return the following season may leave such personal property as overalls, rain coat, rubber boots, jacket or a bike. The SAWP Employee has the responsibility to label all property with their name. The space is provided at the SAWP Employee's own risk. The Employer does not take responsibility for damaged, lost or stolen property.

**ARTICLE 20: TERM**

- 20.01 This Agreement shall become effective November 3, 2010 and shall continue in effect up to and including November 3, 2013 and thereafter from year to year, subject to the right of either party to this Agreement to give notice in writing by June 30, 2013, or June 30 in any year thereafter, to require the other party to this Agreement to commence collective bargaining.

- 20.02 During the period required to negotiate a revision of this Agreement, the provisions of this Agreement shall remain in full force and effect unless:
- (a) the Union declares a strike provided that it gives the Employer seven (7) days written notice of a strike at a time after it is in a legal strike position; or
  - (b) the Employer declares a lockout, provided that it gives the Union seven (7) days written notice of a lockout at a time after it is in a legal lockout position.

**ARTICLE 21: STRIKES AND LOCKOUTS**

21.01 The Union and Employer agree that during the term of this Agreement there shall be no strike by the SAWP Employees and the Employer will not lockout the SAWP Employees. The terms "strike" and "lockout" shall be as defined in the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244.

This Agreement entered into on the 3rd day of November, 2010.

For the Employer  
"GURDEV SIDHU"

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For the Union  
"GLENN TOOMBS"

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SCHEDULE "A" – WAGES

- A1. All SAWP Employees shall receive at least the applicable minimum hourly wage rate for SAWP Employees employed in British Columbia as determined each year by Human Resources and Skills Development Canada \*, plus additional payments as follows:

2011 \$0.10  
2012 \$0.10  
2013 \$0.12

\*For reference, the minimum average hourly wage rate in 2010 was \$9.14.

# **Appendix XII – Mexican Seasonal Agricultural Workers Direction**

DEPARTMENT OF MANPOWER AND IMMIGRATION  
MINISTÈRE DE LA MAIN-D'ŒUVRE ET DE L'IMMIGRATION

MEXICAN SEASONAL AGRICULTURAL  
WORKERS DIRECTION

DIRECTIVES CONCERNANT LES TRAVAILLEURS  
AGRICOLÉS SAISONNIERS DU MEXIQUE

June 17, 1974

17 juin 1974

Pursuant to the authority vested in me by paragraph 7(1)(i) of the Immigration Act, I do hereby make the following direction respecting the conditions for the admission of Mexican seasonal agricultural workers in accordance with the Memorandum of Understanding between the Government of Canada and the Government of Mexico concerning the admission to Canada of such workers, June 17, 1974.

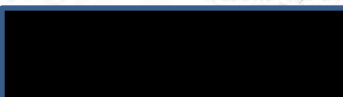
Conformément aux pouvoirs que me confère l'article 7(1)(i) de la Loi sur l'immigration, je donne, par les présentes, les directives suivantes concernant les conditions relatives à l'admission au Canada des travailleurs agricoles saisonniers du Mexique, en conformité du Protocole signé le 17 juin 1974 par le Gouvernement du Canada et le Gouvernement du Mexique concernant l'admission au Canada de ces travailleurs.

1. This instrument may be cited as the Mexican Seasonal Agricultural Workers Direction June 17, 1974.

1. Le présent document officiel peut être cité sous le titre de "Directives concernant les travailleurs agricoles saisonniers du Mexique", le 17 juin 1974.

2. It is hereby directed that persons seeking to come into Canada under the terms and conditions of the Memorandum of Understanding between the Government of Canada and the Government of Mexico concerning the admission to Canada of Mexican Seasonal Agricultural Workers, signed by both parties on June 17, 1974, shall not be allowed to enter Canada unless they are at least 18 years of age and are parties to a contract of employment in the form attached to the said Memorandum of Understanding.

2. Il est, par les présentes, ordonné que les personnes qui cherchent à entrer au Canada en vertu des clauses du Protocole établi entre le Gouvernement du Canada et le Gouvernement du Mexique concernant l'admission au Canada de travailleurs agricoles saisonniers du Mexique, Protocole que les deux parties ont signé le 17 juin 1974, ne seront pas autorisées à entrer au Canada, à moins d'avoir au moins 18 ans et d'être parties à un contrat d'emploi dans la forme du document joint audit Protocole.



Minister : Le Ministre

Dated at Ottawa  
his 3rd day of September 1974.

Fait à Ottawa  
ce 3ième jour de Septembre 1974.

**Appendix XIII – SAWP Employment  
Agreement for Commonwealth  
Caribbean Seasonal Agricultural  
Workers**



### AGREEMENT FOR THE EMPLOYMENT IN CANADA OF COMMONWEALTH CARIBBEAN SEASONAL AGRICULTURAL WORKERS – 2011

THIS AGREEMENT made on the \_\_\_\_\_  
 between \_\_\_\_\_  
 (called throughout "the EMPLOYER")  
 and \_\_\_\_\_  
 (called throughout "the WORKER")  
 and \_\_\_\_\_  
 having been duly authorized by the GOVERNMENT of \_\_\_\_\_  
 (hereinafter referred to as "the GOVERNMENT")  
 to act on its behalf (called throughout "the GOVERNMENT AGENT")

WHEREAS the EMPLOYER, the GOVERNMENT, the GOVERNMENT OF CANADA and the WORKER desire that the WORKER shall be beneficially employed in Canada in agricultural employment of a seasonal nature.

The PARTIES agree as follows:

The particulars in respect of the WORKER are as follows:

WORKER'S Identity Card No.: \_\_\_\_\_

WORKER'S address in Canada: \_\_\_\_\_

#### I SCOPE AND PERIOD OF EMPLOYMENT

The PARTIES agree as follows:

1. The EMPLOYER will employ the WORKER assigned to him by the GOVERNMENT AGENT as approved by HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA (HRSDC), clearance order and the WORKER will serve the EMPLOYER at the place of employment subject to the terms and conditions herein mentioned provided, however, that such period of seasonal employment be not longer than eight (8) months nor less than 240 hours in a time of six (6) weeks or less unless HRSDC has agreed that an emergency situation exists, in which case the PARTIES agree that the minimum period of employment shall be not less than a term of 180 hours. The EMPLOYER shall respect the duration of the employment agreement signed with the WORKER(S) and their return to the country of origin by no later than December 15th with the exception of extraordinary circumstances (e.g. medical emergencies).
2. The EMPLOYER agrees to employ the WORKER assigned to him from the date the WORKER arrives in Canada until \_\_\_\_\_ or until the completion of the work for which he is hired or assigned which ever comes sooner.
3. The EMPLOYER shall give the un-named WORKER a trial period of fourteen actual working days from the date of his arrival at the place of employment. The EMPLOYER shall not discharge the WORKER except for misconduct or refusal to work during that trial period.
4. The EMPLOYER shall provide the WORKER and the GOVERNMENT AGENT, with a copy of rules and regulations of conduct, safety, discipline and care and maintenance of property as the WORKER may be required to observe.

## II LODGING MEALS AND REST PERIODS

The EMPLOYER agrees to:

1. Provide adequate clean living accommodation to the WORKER, without cost. Such accommodation must meet with the annual approval of the appropriate government authority responsible for health and living conditions in the province where the WORKER is employed. The accommodation must also meet with the approval of the GOVERNMENT AGENT.
2. Provide reasonable and proper meals for the WORKER during periods of transportation and employment, at a cost to the WORKER as agreed in Clause IV-2 and, where the WORKER elects to prepare his own meals, to furnish cooking utensils, fuel, and facilities without cost to the WORKER.
3. Provide after 5 consecutive hours of employment a meal break of at least 30 minutes and to provide two rest periods of 10 minutes duration one such period to be mid morning and the other mid afternoon.
4. For each six consecutive days of work, the WORKER will be entitled to one day of rest, but where the urgency to finish farm work can not be delayed, the Employer may request the WORKER'S consent to postpone that day until a mutually agreeable date.

## III PAYMENT OF WAGES

The EMPLOYER agrees:

1. To pay the WORKER at his place of employment weekly wages in lawful money of Canada at a rate equal to the following, whichever is greatest:
  - i) the wage for agricultural WORKERS provided by law in the province in which the WORKER is employed; or
  - ii) the rate determined annually by HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA to be the prevailing wage rate for the type of agricultural work being carried out by the WORKER in the province in which the work will be done; or
  - iii) the rate being paid by the EMPLOYER to his regular seasonal work force performing the same type of agricultural work;
2. That the average minimum work week shall be 40 hours; and
  - i) that, if circumstances prevent fulfillment of Clause III - 2 above, the average weekly income paid to the WORKER over the period of employment is to be not less than an amount equal to a 40 hour week at the hourly rate for agricultural WORKERS provided by law in the province; and
  - ii) that where, for any reason whatsoever, no actual work is possible, the WORKER, shall receive a reasonable advance to cover his personal expenses.
3. That a recognition payment of \$4.00 per week to a maximum of \$128.00 will be paid to WORKERS with 5 or more consecutive years of employment with the same EMPLOYER, payable at the completion of the contract and not subject to the 25% remittance to the GOVERNMENT AGENT.
4. To allow HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA or its designate access to all information and records necessary to ensure contract compliance.

The GOVERNMENT AGENT and both PARTIES agree:

That in the event the EMPLOYER is unable to locate the WORKER because of the absence or death of the WORKER, the EMPLOYER shall pay any monies owing to the WORKER to the GOVERNMENT AGENT and the WORKER or WORKER'S lawful heirs shall have no further recourse against the EMPLOYER for any such monies paid to the GOVERNMENT AGENT.

01-2011

#### IV DEDUCTIONS FROM WAGES

The WORKER agrees that the EMPLOYER:

1. Shall remit to the GOVERNMENT AGENT 25% of the WORKER'S wages for each payroll period at the time of delivering the pay sheets as required by clause (VI). The WORKER further understands that pursuant to the supplementary agreement between the WORKER and his/her government that a specified percentage of the 25% remittance to the GOVERNMENT AGENT shall be retained by the GOVERNMENT to defray administrative costs associated with the delivery of the program.
2. May deduct from the WORKER'S wages, a sum not to exceed \$7.00 per day for the cost of meals provided to the WORKER.
3. May deduct from the WORKER'S wage an amount to reflect utility costs in relation to the employment of the WORKER in the provinces of Alberta, Manitoba, Ontario, New Brunswick, Prince Edward Island and Saskatchewan\* only. The amount of the deduction is to be 2.16 Canadian dollars per working day and to be adjusted annually on a year over year basis beginning January 1, 2012, by a percentage consistent with the variation in SAWP wages as per Section III, Subsection (1) of the Agreement. A working day for the purpose of this deduction is to be such that a WORKER completes a minimum of four (4) hours of work in a given day. Deductions withheld under this provision are to be made for the current pay period only.
 

\* In Saskatchewan, workers employed by greenhouses and nurseries are exempt from this deduction.
4. Will make deductions from the wages payable to the WORKER only for the following:
  - i) those EMPLOYER deductions required to be made under law;
  - ii) all other deductions as required pursuant to this agreement.

#### V INSURANCE FOR OCCUPATIONAL & NON-OCCUPATIONAL INJURY AND DISEASE

The EMPLOYER agrees:

1. To comply with all laws, regulations and by-laws respecting conditions set by competent authority and, in addition, in the absence of any laws providing for payment of compensation to WORKERS for personal injuries received or disease contracted as a result of the employment, shall obtain insurance acceptable to the GOVERNMENT AGENT to provide for such compensation to the WORKER.
2. To report to the GOVERNMENT AGENT within 48 hours, all injuries sustained by the WORKER which require medical attention.

#### VI MAINTENANCE OF WORK RECORDS AND STATEMENT OF EARNINGS

The EMPLOYER agrees to:

1. Complete and deliver to the GOVERNMENT AGENT within seven days of the completion of each payroll period, copies of pay sheets indicating all the deductions in respect of the WORKER'S wages.
2. Provide to the WORKER a clear statement of earnings and deductions with each pay.

#### VII TRAVEL AND RECEPTION ARRANGEMENTS

The EMPLOYER agrees to:

1. Pay to the appointed travel agent the cost of two-way air transportation of the WORKER, as between Kingston, Jamaica, and Canada by the most economical means as expressed in the Memorandum of Understanding.

2. Make arrangements to meet or have his agent meet and transport the WORKER from his point of arrival in Canada to his place of employment and, upon termination of his employment to transport the WORKER to his place of departure from Canada, and all such transportation will be with the prior knowledge and consent of the GOVERNMENT AGENT.

The WORKER agrees to:

3. Pay to the EMPLOYER on account of transportation costs referred to in Clause VII(1) by way of regular payroll deduction, the sum of \$4.20 per working day beginning on the first full day of employment and the aggregate payment in any event is not to be greater than \$505.00.

The PARTIES agree:

4. That the EMPLOYER, on behalf of the WORKER, will advance the Work Permit Fees and will be reimbursed by the GOVERNMENT AGENT 30 days after the WORKER'S arrival in Canada provided the EMPLOYER submits payrolls.
5. Where a federal/provincial agreement on the selection of foreign worker exists with associated cost recovery fees, the cost of such provincial fees (e.g. Quebec acceptance certificate - CAQ) will be reimbursed to the EMPLOYER by the WORKER either through weekly deduction or from his final pay cheque by his election. Where a government agency reimburses an employer the latter shall not make any deductions from wages or other payment due to the worker.
6. In the event that at the time of flight departure a named WORKER is unavailable to travel the EMPLOYER agrees to accept a substitute WORKER and the Supply Country shall maintain an adequate supply of pool WORKERS to assure that there shall be a WORKER on that departing flight.

#### VIII OBLIGATIONS OF THE EMPLOYER

The EMPLOYER agrees:

1. That the WORKER shall not be moved to another area or place of employment or transferred or loaned to another EMPLOYER without the consent of the WORKER and the prior approval in writing of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA and the GOVERNMENT AGENT.

The EMPLOYER agrees and acknowledges:

2. That the WORKERS approved under the Seasonal Agricultural Worker Program are authorized by their work permit only to perform agricultural labour for the EMPLOYER to whom they are assigned.
3. That any person who knowingly induces or aids a foreign WORKER, without the authorization of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, to perform work for another person or to perform non-agricultural work, is liable on conviction to a penalty up to \$50,000 or two years imprisonment or both. Immigration Act and Refugee Protection Act S. 124(1) and 125.
4. That if it is determined by the GOVERNMENT AGENT, after consultation with HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, that the EMPLOYER has not satisfied his obligations under this agreement, the agreement will be rescinded by the GOVERNMENT AGENT on behalf of the WORKER, and if alternative agricultural employment cannot be arranged through HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA for the WORKER in that area of Canada, the EMPLOYER shall be responsible for the full costs of repatriation of WORKER as between Kingston, Jamaica and Canada; and if the term of employment as specified in Clause I - 1., is not completed and employment is terminated under Clause VIII - 4., the WORKER shall receive from the EMPLOYER a payment to ensure that the total wages paid to the WORKER is not less than that which the WORKER would have received if the minimum period of employment had been completed.
5. That WORKERS handling chemicals and/or pesticides are to be provided with protective clothing at no cost to the WORKER, receive appropriate formal and informal training and supervision where required by law.

6. That according to the approved guidelines in the province where the worker is employed the EMPLOYER shall take the WORKER to obtain health coverage in a timely manner, according to the provincial regulations.

#### IX OBLIGATIONS OF THE WORKER

The WORKER agrees:

1. To proceed to the place of employment as aforesaid in Canada when and how the GOVERNMENT AGENT shall approve.
2. To work and reside at the place of employment or at such other place as the EMPLOYER, with the approval of the GOVERNMENT AGENT, may require.
3. To work at all times during the term of employment under the supervision and direction of the EMPLOYER and to perform the duties of the job requested of him efficiently.
4. To obey and comply with all rules set down by the EMPLOYER and approved by the GOVERNMENT AGENT relating to the safety, discipline, and the care and maintenance of property.
5. That he:
  - i) shall maintain living quarters furnished to him by the EMPLOYER or his agent in the same state of cleanliness in which he received them; and
  - ii) realizes that the EMPLOYER may, with the approval of the GOVERNMENT AGENT, deduct from the WORKER'S wages the assessed cost if any to the EMPLOYER to maintain the quarters in the appropriate state of cleanliness.
6. That he shall not work for any other person without the approval of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, the GOVERNMENT AGENT and the EMPLOYER.
7. To return promptly to the place of recruitment upon completion of the authorized work period.

#### X PREMATURE REPATRIATION

The PARTIES agree:

1. That following completion of the trial period of employment by the WORKER, the EMPLOYER, after consultation with the GOVERNMENT AGENT, shall be entitled for non-compliance, refusal to work, or any other sufficient reason, to terminate the WORKER'S employment hereunder and so cause the WORKER to be repatriated; where
  - i) the WORKER was requested by name by the EMPLOYER, the full cost of repatriation shall be paid by the EMPLOYER;
  - ii) the WORKER was selected by the GOVERNMENT and 50% or more of the term of the Agreement has been completed, the WORKER shall be responsible for the full cost of repatriation;
  - iii) the WORKER was selected by the GOVERNMENT and less than 50% of the term of the Agreement has been completed, the WORKER shall be responsible for the full cost of repatriation and shall also reimburse the EMPLOYER for the monetary difference between the actual cost of transportation of the WORKER to Canada and the amount collected by the EMPLOYER under Clause VII 3., actual cost being the net amount paid to the Carrier plus the Travel Agent's Commission at the International Air Transportation Association Approved Rate;
2. That if, in the opinion of the GOVERNMENT AGENT, in consultation with the EMPLOYER, personal domestic circumstances exist in the island of recruitment which make repatriation of the WORKER desirable or necessary prior to the expected date of termination of the Agreement, the GOVERNMENT AGENT shall cause the WORKER to be repatriated, and where,
  - i) the WORKER was requested by name by the EMPLOYER, the full cost of repatriation to Kingston, Jamaica, shall be paid by the EMPLOYER;

01-2011

- ii) the WORKER was selected by the GOVERNMENT and 50% or more of the term of the Agreement has been completed, the EMPLOYER shall pay 25% of the cost of reasonable transportation and subsistence expenses of the WORKER in respect of his repatriation to Kingston, Jamaica;
  - iii) the WORKER was selected by the GOVERNMENT and less than 50% of the term of the Agreement has been completed, the WORKER shall be responsible for the full cost of repatriation.
3. Where the WORKER has to be repatriated due to medical reasons which are verified by a Canadian doctor, the EMPLOYER shall pay the cost of reasonable transportation and subsistence expenses except in instances where repatriation is necessary due to a physical or medical condition which was present prior to the WORKER'S departure in which case the WORKER will pay the full cost of repatriation.

#### XI FINANCIAL UNDERTAKINGS

The PARTIES further agree:

1. That any bona fide debt to the EMPLOYER voluntarily incurred by the WORKER in respect of any matter incidental or relating to his employment hereunder shall be repaid by him to the EMPLOYER.
2. For the purpose of securing the recovery of any amount payable by the WORKER under this contract, the GOVERNMENT shall be entitled to set aside all monies remitted to the GOVERNMENT AGENT under this Agreement until an amount representing the cash equivalent of \$200.00 (Canadian currency) has been accumulated, and to retain such amount during the period in which the WORKER is employed in Canada and for a period not exceeding six months after the date of his repatriation. Subject to any order of a court of competent jurisdiction and to bankruptcy notice under any law relating to bankruptcy, the GOVERNMENT shall apply such amount to the payment of any sum not exceeding the cash equivalent of \$200.00 (Canadian currency) as may be properly payable to the EMPLOYER or to the GOVERNMENT in respect of any matters referred to in this Agreement upon demand being made for payment thereof.
3. That any expenditure incurred by the GOVERNMENT AGENT in repatriating the WORKER by reason of his employment being terminated under this Agreement shall be repaid by the WORKER to the GOVERNMENT.

#### XII GOVERNING LAWS

1. All provisions of this Agreement affecting the obligations created:
  - i) between the WORKER, the EMPLOYER and HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA or the GOVERNMENT AGENT, the EMPLOYER and HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA shall be governed by the laws of Canada, and of the province in which the WORKER is employed; and
  - ii) between the WORKER and the GOVERNMENT, shall be governed by the laws of the sending country;
2. The French and English versions of this contract have equal force.

#### XIII MISCELLANEOUS

1. If the WORKER dies during the period of employment, the EMPLOYER shall notify the GOVERNMENT AGENT and upon receipt of instructions from the GOVERNMENT AGENT either, provide standard burial or alternatively make a contribution towards the body's repatriation in the amount equal to what the burial cost would have been.
2. The WORKER agrees that the following personal information held by the Federal government of Canada and the government of the Province in which the work is performed may be released to the GOVERNMENT AGENT, the WORKER'S EMPLOYER, to the Foreign Agricultural Resource Management Service or to the Fondation des entreprises en recrutement de main-d'oeuvre agricole étrangère:
  - (i) information held under the Employment Insurance Act, (including the WORKER'S Social Insurance Number); and

01-2011

- (ii) any health insurance number, social service or accident compensation related information, including any unique alpha-numerical identifier used by any province.
- 3. In the event of a fire, the EMPLOYER, the GOVERNMENT AGENT and the WORKER, will bear the replacement cost of the worker's personal property up to a maximum of \$650.00 each.
- 4. This contract may be executed in any number of counterparts, in the language of the signatory's choice, with the same effect as if all PARTIES signed the same document. All counterparts shall be construed together and shall constitute one and the same contract.
- 5. The PARTIES agree that no term or condition of this agreement shall be superseded, suspended, modified or otherwise amended, in any way, without the express written permission of the GOVERNMENT OF CANADA, the GOVERNMENT AGENT, the EMPLOYER and the WORKER.

In witness whereof the PARTIES state they have either read or had explained to them and agreed with all the terms and conditions stipulated in the present contract.

DATE: \_\_\_\_\_

NAME OF EMPLOYER: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CORPORATE NAME: \_\_\_\_\_

TELEPHONE: \_\_\_\_\_ FAX NO.: \_\_\_\_\_

PLACE OF EMPLOYMENT OF  
WORKER IF DIFFERENT FROM ABOVE: \_\_\_\_\_

EMPLOYER'S SIGNATURE: \_\_\_\_\_

WITNESS: \_\_\_\_\_

NAME OF WORKER: \_\_\_\_\_

WORKER'S SIGNATURE: \_\_\_\_\_

WITNESS: \_\_\_\_\_

GOVERNMENT AGENT'S SIGNATURE: \_\_\_\_\_

To enhance readability, the masculine gender is used to refer to both men and women.

**Appendix XIV – SAWP Employment  
Agreement for Commonwealth  
Caribbean Seasonal Agricultural  
Workers (British Columbia)**



AGREEMENT FOR THE EMPLOYMENT IN CANADA OF COMMONWEALTH CARIBBEAN SEASONAL AGRICULTURAL WORKERS IN BRITISH COLUMBIA - 2011

THIS AGREEMENT made on the \_\_\_\_\_ (yyyy-mm-dd)

between \_\_\_\_\_ (called throughout "the EMPLOYER")

and \_\_\_\_\_ (called throughout "the WORKER")

and \_\_\_\_\_ having been duly authorized by the GOVERNMENT of \_\_\_\_\_ (hereinafter referred to as "The GOVERNMENT")

to act on its behalf (called throughout "the GOVERNMENT AGENT")

WHEREAS the EMPLOYER, the GOVERNMENT, the GOVERNMENT OF CANADA and the WORKER desire that the WORKER shall be beneficially employed in Canada in agricultural employment of a seasonal nature.

The PARTIES agree as follows:

The particulars in respect of the WORKER are as follows:

WORKER'S Identity Card No.: \_\_\_\_\_

WORKER'S address in Canada: \_\_\_\_\_

I SCOPE AND PERIOD OF EMPLOYMENT

The PARTIES agree as follows:

- 1. The EMPLOYER will employ the WORKER assigned to him by the GOVERNMENT AGENT as approved by HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA (HRSDC), clearance order and the WORKER will serve the EMPLOYER at the place of employment subject to the terms and conditions herein mentioned provided, however, that such period of seasonal employment be not longer than eight (8) months nor less than 240 hours in a time of six (6) weeks or less unless HRSDC has agreed that an emergency situation exists, in which case the PARTIES agree that the minimum period of employment shall be not less than a term of 160 hours. The EMPLOYER shall respect the duration of the employment agreement signed with the WORKER(S) and their return to the country of origin by no later than December 15th with the exception of extraordinary circumstances (e.g. medical emergencies).
2. The EMPLOYER agrees to employ the WORKER assigned to him from the date the WORKER arrives in Canada until \_\_\_\_\_ or until the completion of the work for which he is hired or assigned which ever comes sooner.
3. The EMPLOYER shall give the un-named WORKER a trial period of fourteen actual working days from the date of his arrival at the place of employment. The EMPLOYER shall not discharge the WORKER except for misconduct or refusal to work during that trial period.
4. The EMPLOYER shall provide the WORKER and the GOVERNMENT AGENT, with a copy of rules and regulations of conduct, safety, discipline and care and maintenance of property as the WORKER may be required to observe.

II LODGING MEALS AND REST PERIODS

The WORKER agrees to:

- 1. Pay the EMPLOYER costs related to accommodation by way of regular payroll deduction the sum of \$4.20 per working day beginning on the first day of full employment. The total amount paid for accommodation during the WORKER'S stay in Canada is not to exceed \$505.00.

The EMPLOYER agrees to:

- 2. i) Provide adequate clean living accommodation to the WORKER. Such accommodation must meet with the annual approval of the appropriate government authority responsible for health and living conditions in the province where the WORKER is employed. The accommodation must also meet with the approval of the GOVERNMENT AGENT; or

- ii) Ensure that reasonable and suitable accommodation is affordably available for the WORKER in the community. If the worker's accommodation is not on the farm the employer will pay any costs for transporting the worker to the worksite.
- 3. Provide reasonable and proper meals for the WORKER during periods of transportation and employment, at a cost to the WORKER as agreed in Clause IV-2 and, where the WORKER elects to prepare his own meals, to furnish cooking utensils, fuel, and facilities without cost to the WORKER.
- 4. Provide after 5 consecutive hours of employment a meal break of at least 30 minutes and to provide two rest periods of 10 minutes duration one such period to be mid morning and the other mid afternoon.
- 5. For each six consecutive days of work, the WORKER will be entitled to one day of rest, but where the urgency to finish farm work can not be delayed, the EMPLOYER may request the WORKER'S consent to postpone that day until a mutually agreeable date.

### III PAYMENT OF WAGES

The EMPLOYER agrees:

- 1. To pay the WORKER at his place of employment weekly wages in lawful money of Canada at a rate equal to the following, whichever is greatest:
  - i) the wage for agricultural WORKERS provided by law in the province in which the WORKER is employed; or
  - ii) the rate determined annually by HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA to be the prevailing wage rate for the type of agricultural work being carried out by the WORKER in the province in which the work will be done; or
  - iii) the rate being paid by the EMPLOYER to his regular seasonal work force performing the same type of agricultural work;
- 2. That the average minimum work week shall be 40 hours; and
  - i) that, if circumstances prevent fulfilment of Clause III - 2 above, the average weekly income paid to the WORKER over the period of employment is to be not less than an amount equal to a 40 hour week at the hourly rate for agricultural WORKERS provided by law in the province; and
  - ii) that where, for any reason whatsoever, no actual work is possible, the WORKER, shall receive a reasonable advance to cover his personal expenses.
- 3. That a recognition payment of \$4.00 per week to a maximum of \$128.00 will be paid to WORKERS with 5 or more consecutive years of employment with the same EMPLOYER, payable at the completion of the contract and not subject to the 25% remittance to the GOVERNMENT AGENT.
- 4. To allow HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA or its designate access to all information and records necessary to ensure contract compliance.

The GOVERNMENT AGENT and both PARTIES agree:

That in the event the EMPLOYER is unable to locate the WORKER because of the absence or death of the WORKER, the EMPLOYER shall pay any monies owing to the WORKER to the GOVERNMENT AGENT and the WORKER or WORKER'S lawful heirs shall have no further recourse against the EMPLOYER for any such monies paid to the GOVERNMENT AGENT.

### IV DEDUCTIONS FROM WAGES

The WORKER agrees that the EMPLOYER:

- 1. Shall remit to the GOVERNMENT AGENT 25% of the WORKER'S wages for each payroll period at the time of delivering the pay sheets as required by clause (VI). The WORKER further understands that pursuant to the supplementary agreement between the WORKER and his/her government that a specified percentage of the 25% remittance to the GOVERNMENT AGENT shall be retained by the GOVERNMENT to defray administrative costs associated with the delivery of the program.
- 2. May deduct from the WORKER'S wages, a sum not to exceed \$7.00 per day for the cost of meals provided to the WORKER.
- 3. Will make deductions from the wages payable to the WORKER only for the following:
  - i) those EMPLOYER deductions required to be made under law;
  - ii) all other deductions as required pursuant to this agreement.

## V INSURANCE FOR OCCUPATIONAL & NON-OCCUPATIONAL INJURY AND DISEASE

The EMPLOYER agrees:

1. To comply with all laws, regulations and by-laws respecting conditions set by competent authority and, in addition, in the absence of any laws providing for payment of compensation to WORKERS for personal injuries received or disease contracted as a result of the employment, shall obtain insurance acceptable to the GOVERNMENT AGENT to provide for such compensation to the WORKER.
2. To report to the GOVERNMENT AGENT within 48 hours, all injuries sustained by the WORKER which require medical attention.

## VI MAINTENANCE OF WORK RECORDS AND STATEMENT OF EARNINGS

The EMPLOYER agrees to:

1. Complete and deliver to the GOVERNMENT AGENT within seven days of the completion of each payroll period, copies of pay sheets indicating all the deductions in respect of the WORKER'S wages.
2. Provide to the WORKER a clear statement of earnings and deductions with each pay.

## VII TRAVEL AND RECEPTION ARRANGEMENTS

The EMPLOYER agrees to:

1. Pay to the appointed travel agent the cost of two-way air transportation of the WORKER, as between Kingston, Jamaica, and Canada by the most economical means as expressed in the Memorandum of Understanding.  
  
The EMPLOYER is responsible for the cost two-way airfare for the WORKER, regardless of any early termination of the contract, whether by EMPLOYER or WORKER, and for any reason except for as required under Clause X PREMATURE REPATRIATION.  
  
Notwithstanding the foregoing, where the WORKER becomes a transfer worker, the transfer employer is responsible for the return airfare of the WORKER.
2. Make arrangements to meet or have his agent meet and transport the WORKER from his point of arrival in Canada to his place of employment and, upon termination of his employment to transport the WORKER to his place of departure from Canada, and all such transportation will be with the prior knowledge and consent of the GOVERNMENT AGENT.

The PARTIES agree:

3. That the EMPLOYER, on behalf of the WORKER, will advance the Work Permit Fees and will be reimbursed by the GOVERNMENT AGENT 30 days after the WORKER'S arrival in Canada provided the EMPLOYER submits payrolls.
4. In the event that at the time of flight departure a named WORKER is unavailable to travel the EMPLOYER agrees to accept a substitute WORKER and the Supply Country shall maintain an adequate supply of pool WORKERS to assure that there shall be a WORKER on that departing flight.

## VIII OBLIGATIONS OF THE EMPLOYER

The EMPLOYER agrees:

1. That the WORKER shall not be moved to another area or place of employment or transferred or loaned to another EMPLOYER without the consent of the WORKER and the prior approval in writing of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA and the GOVERNMENT AGENT.

The EMPLOYER agrees and acknowledges:

2. That the WORKERS approved under the Seasonal Agricultural Worker Program are authorized by their work permit only to perform agricultural labour for the EMPLOYER to whom they are assigned.
3. That any person who knowingly induces or aids a foreign WORKER, without the authorization of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, to perform work for another person or to perform non-agricultural work, is liable on conviction to a penalty up to \$50,000 or two years imprisonment or both, Immigration Act and Refugee Protection Act S. 124(1) and 125.
4. That if it is determined by the GOVERNMENT AGENT, after consultation with HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, that the EMPLOYER has not satisfied his obligations under this agreement, the agreement will be rescinded by the GOVERNMENT AGENT on behalf of the WORKER, and if alternative agricultural employment cannot be arranged through HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA for the WORKER in that area of Canada, the EMPLOYER shall be responsible for

01-2011

the full costs of repatriation of WORKER as between Kingston, Jamaica and Canada; and if the term of employment as specified in Clause I - 1. is not completed and employment is terminated under Clause VIII - 4., the WORKER shall receive from the EMPLOYER a payment to ensure that the total wages paid to the WORKER is not less than that which the WORKER would have received if the minimum period of employment had been completed.

5. That WORKERS handling chemicals and/or pesticides are to be provided with protective clothing at no cost to the WORKER, receive appropriate formal and informal training and supervision where required by law.
6. That according to the approved guidelines in the province where the worker is employed the EMPLOYER shall take the WORKER to obtain health coverage in a timely manner, according to the provincial regulations.

#### IX OBLIGATIONS OF THE WORKER

The WORKER agrees:

1. To proceed to the place of employment as aforesaid in Canada when and how the GOVERNMENT AGENT shall approve.
2. To work and reside at the place of employment or at such other place as the EMPLOYER, with the approval of the GOVERNMENT AGENT, may require.
3. To work at all times during the term of employment under the supervision and direction of the EMPLOYER and to perform the duties of the job requested of him efficiently.
4. To obey and comply with all rules set down by the EMPLOYER and approved by the GOVERNMENT AGENT relating to the safety, discipline, and the care and maintenance of property.
5. That he shall maintain living quarters furnished to him by the EMPLOYER or his agent in the same state of cleanliness in which he received them.
6. That he shall not work for any other person without the approval of HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, the GOVERNMENT AGENT and the EMPLOYER; and
7. To return promptly to the place of recruitment upon completion of the authorized work period.

#### X PREMATURE REPATRIATION

The PARTIES agree:

1. That if the WORKER has to be repatriated due to medical reasons, which are verified by a Canadian doctor, the EMPLOYER shall pay the cost of reasonable transportation and subsistence expenses, except in instances where repatriation is necessary due to a physical or medical condition that was present prior to the WORKER'S departure in which case the Government of the worker's source country will pay the full cost of repatriation.
2. That if it is determined by the GOVERNMENT AGENT, after consultation with HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, that the EMPLOYER has not satisfied his obligations under this agreement, the agreement will be rescinded by the GOVERNMENT AGENT on behalf of the WORKER, and if alternative agricultural employment cannot be arranged through HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA for the WORKER in that area of Canada, the EMPLOYER shall be responsible for the full costs of repatriation of WORKER to Kingston, Jamaica; and if the term of employment as specified in Clause I - 2. is not completed and employment is terminated under Clause X - 2., the WORKER shall receive from the EMPLOYER a payment to ensure that the total wages paid to the WORKER is not less than that which the WORKER would have received if the minimum period of employment had been completed.
3. That if a transferred WORKER is not suitable to perform the duties assigned by the receiving EMPLOYER within the seven days trial period, the EMPLOYER shall return the WORKER to the previous EMPLOYER and that EMPLOYER will be responsible for the repatriation cost of the WORKER.

#### XI FINANCIAL UNDERTAKINGS

The PARTIES further agree:

1. That any bona fide debt to the EMPLOYER voluntarily incurred by the WORKER in respect of any matter incidental or relating to his employment hereunder shall be repaid by him to the EMPLOYER.
2. For the purpose of securing the recovery of any amount payable by the WORKER under this contract, the GOVERNMENT shall be entitled to set aside all monies remitted to the GOVERNMENT AGENT under this Agreement until an amount representing the cash equivalent of \$200.00 (Canadian currency) has been accumulated, and to retain such amount during the period in which the WORKER is employed in Canada and for a period not exceeding six months after the date of his repatriation. Subject to any order of a court of competent jurisdiction and to bankruptcy notice under any law relating to bankruptcy, the GOVERNMENT shall apply such amount to the payment of any sum not exceeding the cash equivalent of \$200.00 (Canadian

01-2011

currency) as may be properly payable to the EMPLOYER or to the GOVERNMENT in respect of any matters referred to in this Agreement upon demand being made for payment thereof.

3. That any expenditure incurred by the GOVERNMENT AGENT in repatriating the WORKER by reason of his employment being terminated under this Agreement shall be repaid by the WORKER to the GOVERNMENT.

### XII GOVERNING LAWS

1. All provisions of this Agreement affecting the obligations created:
  - i) between the WORKER, the EMPLOYER and HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA or the GOVERNMENT AGENT, the EMPLOYER and HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA shall be governed by the laws of Canada, and of the province in which the WORKER is employed; and
  - ii) between the WORKER and the GOVERNMENT, shall be governed by the laws of the sending country;
2. The French and English versions of this contract have equal force.

### III MISCELLANEOUS

1. If the WORKER dies during the period of employment, the EMPLOYER shall notify the GOVERNMENT AGENT and upon receipt of instructions from the GOVERNMENT AGENT either, provide standard burial or alternatively make a contribution towards the body's repatriation in the amount equal to what the burial cost would have been.
2. The WORKER agrees that the following personal information held by the Federal government of Canada and the government of the Province in which the work is performed may be released to the GOVERNMENT AGENT, the WORKER'S EMPLOYER, or to the WESTERN AGRICULTURE LABOUR INITIATIVE (WALI).
  - i) information held under the Employment Insurance Act, (including the WORKER'S Social Insurance Number); and
  - ii) any health insurance number, social service or accident compensation related information, including any unique alpha-numerical identifier used by any province.
3. In the event of a fire, the EMPLOYER, the GOVERNMENT AGENT and the WORKER, will bear the replacement cost of the worker's personal property up to a maximum of \$650.00 each.
4. This contract may be executed in any number of counterparts, in the language of the signatory's choice, with the same effect as if all PARTIES signed the same document. All counterparts shall be construed together and shall constitute one and the same contract.
5. The PARTIES agree that no term or condition of this agreement shall be superseded, suspended, modified or otherwise amended, in any way, without the express written permission of the GOVERNMENT OF CANADA, the GOVERNMENT AGENT, the EMPLOYER and the WORKER.

In witness whereof the PARTIES state they have either read or had explained to them and agreed with all the terms and conditions stipulated in the present contract.

DATE: \_\_\_\_\_

NAME OF EMPLOYER: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CORPORATE NAME: \_\_\_\_\_

ACCOUNT NUMBER FOR "WORKER'S COMPENSATION BOARD OF BC" : \_\_\_\_\_

TELEPHONE: \_\_\_\_\_ FAX NO.: \_\_\_\_\_

PLACE OF EMPLOYMENT OF WORKER  
(IF DIFFERENT FROM ABOVE): \_\_\_\_\_

EMPLOYER'S SIGNATURE: \_\_\_\_\_

WITNESS: \_\_\_\_\_

NAME OF WORKER: \_\_\_\_\_

WORKER'S SIGNATURE: \_\_\_\_\_

WITNESS: \_\_\_\_\_

GOVERNMENT AGENT'S SIGNATURE: \_\_\_\_\_

To enhance readability, the masculine gender is used to refer to both men and women.

# **Appendix XV – Interview Guide**

# Interview Guide

There are 13 interviews/telephone conversations or electronic mail conversations referenced in this thesis. The author did not formally audio or video recorded any of these interviews or conversations; rather, she took her own notes for future reference.

The 13 interviews/conversations occurred as follows:

➤ **there were 4 face-to-face interviews:**

(1) interview with a representative of the **Mexican Embassy in Ottawa**; (1) interview with two **Canadian officials from Human Resources and Skills Development Canada (HRSDC)**. All these interviews were open in scope since the author did not have a particular questionnaire to follow; instead, she asked open questions about the structure, management and possible benefits of the program (Mexican Embassy official and Canadian HRSDC officials). A particular question for the Mexican Embassy representative inquired why the workers have been excluded during negotiations (between Mexico and the employers) of the employment agreement as well as other issues relating to their working conditions.

(1) Interview with **two representatives of the Agricultural Workers Alliance (AWA) from Leamington, Ontario** and (1) interview with **one representative of the AWA from St. Remi, Quebec**. The author also asked open questions about their experience working directly with SAWP workers. As follow up questions, the author asked representatives from AWA (St. Remi and Leamington) if there were any major concerns that they had observed or that were raised by the workers regarding health and safety standards and employment standards, particularly hours of work.

The initial contact with these sources started when the author called or e-mailed the corresponding offices and requested interviews (this was also the case with the representative from the Mexican Embassy in Ottawa and representatives from HRSDC).

➤ **there were 4 telephone interviews:**

(2) interviews with the **Mexican consul in Leamington, Ontario**; (1) telephone interview with the **National Representative of the United Food and Commercial Workers union (UFCW)**; and (1) interview with a **representative of Babkirk Tax Preparation from Leamington, Ontario**. The first interview with the Mexican consul was to gather general information about the management of the program as well as any other information regarding the consulate's dealings with the workers, i.e., complaints from workers, complaints from employers, role of the consulate, etc. The second interview was more targeted to follow up on the information gathered during the first interview. For example the author asked what the consulate would do if it found an employer to be abusive with the workers or if the employer breached any provision in the employment agreement. Also, the author wanted to follow up on whether the consulate had statistics as to how many workers were injured, what was Mexico's view on the right to form unions in Ontario, and how much in remittances they send home each season. The author first contacted the consulate through electronic correspondence. The consul kindly agreed to an actual telephone interview.

Regarding the interview with the **National Union Representative**, the author simply found his telephone number in the UFCW web site and contacted him. The author introduced herself and explained that she was a doctoral student conducting research. The purpose of the interview was to find particular information on the Employment

Insurance claims by SAWP workers. Particularly, the author inquired whether the UFCW proceeded with a *Charter* challenge based on s. 15 for discriminating migrant workers by excluding them from receiving regular benefits pursuant to the *Employment Insurance Act*. The union representative generously answered all of the author's questions and provided further information for reference.

As for the interview with the **representative from Babkirk Tax Preparation**, the author found her contact information on line and proceeded to call her. The aim of the interview was to corroborate whether this tax preparation provider charged Mexican SAWP workers for its services and, if that was the case, how much were the fees for services rendered. The author explained that she was a doctoral student conducting research on Mexican workers and wanted to corroborate information, which was first provided by the Mexican consul and the representatives from the AWA. The tax preparation provider did not wish to corroborate said information and refused to provide any other information.

➤ **there are 5 electronic mail conversations**

The author contacted via electronic mail officials from **Service Canada, HRSDC** and **Citizenship and Immigration Canada (CIC)** to request specific information regarding SAWP workers. As well, the author contacted the **Director of Communications from UFCW local 1518 in British Columbia**. Most of these sources' contact information is available on line or through each of the organization's web sites.

The author contacted **Service Canada** to request information on SAWP workers premature repatriations in Ontario.

On the other hand, the purpose for contacting a **Senior Researcher from HRSDC** was to request information on the number of SAWP workers and non-SAWP workers (see appendices VII & VIII).

As well, the author contacted **Citizenship and Immigration Canada** to request information on the number of SAWP Mexican workers per year and province (see appendix V).

The reason for contacting **UFCW local 1518 in British Columbia** was to request information on the two existing collective agreements for SAWP workers (see appendices X & XI). A second electronic conversation was to inquire information about the number of workers covered by the two agreements; whether only SAWP workers were covered; revenues of the participating farms; and if any other farms had a collective bargaining agreement.

As with all the other interviews, the author explained that she was a doctoral student researching the SAWP and its participants. All these government officials and union representatives were very helpful and generously answered her requests.