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Advancing the Rights of Non-Citizens in Canada: A Human Rights Approach to Migrant Rights

Tanya Basok* & Emily Carasco**

ABSTRACT

Focusing on seasonal agricultural migrant workers in Canada, this article illustrates how local migrant rights activists have utilized different judicial fora to claim rights for non-citizen migrant workers under the international human rights framework. The article underscores the role of litigation by activists who, citing international norms and conventions, claim that protections provided by domestic constitutional provisions and labor laws should be extended to non-citizen migrants. The importance of judges' willingness to recognize the international law framework is also underscored. This article contributes to human rights studies by emphasizing the transformative role of judicial agency in the fight for the extension of human rights protections.

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated.¹

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1. *Andrews v. Law Soc'y of B.C.*, [1989] 1 S.C.R. 143, 152 (Can.)

I. INTRODUCTION

In the last decade, international migration has been undergoing a global transformation. Once settled as permanent residents, more and more migrants are now admitted on a temporary employment visa. By conservative estimates “[s]ince 2000 the temporary migration of foreign workers into the high income countries . . . has been growing at about 4 to 5 percent a year.”² For policy makers in these countries, it is much more attractive to allow migrants to enter on temporary visas than to admit them into the country as permanent residents. Manolo Abella identifies several reasons for the growing popularity of temporary migration. First, temporary migration is preferred by policy makers because it permits “greater flexibility in the labour market.” Second, temporary migration schemes are presumed to be more acceptable to an electorate threatened by the increasing settlement of permanent immigrants who cannot be easily integrated.³ Third, policy makers hope that legal recruitment of temporary workers will dry up the pool of undocumented migrants smuggled over the borders by unscrupulous recruiters. And fourth, policy makers expect that temporary migrants are more likely to remit their earnings to their home countries than permanent settlers.⁴

Like elsewhere in the world, the temporary migration trend has been noticeable in Canada where the number of migrants admitted under the temporary workers program has been growing over the last few years. According to the law firm Campbell Cohen,

In 2006 . . . the total population of temporary foreign workers in Canada was nearly 171,000, a 122 percent increase over the past ten years. The 2007 Canadian federal budget allocated \$50.5 million over two years to the [Temporary Foreign Worker] Program, aiming to more efficiently respond to regional labour and skill shortages and reduce processing times for applications. . . . In Alberta, demand for foreign workers has increased by 400 percent between May 2006 and May 2007. In December 2006, Alberta was home to 22,392 temporary foreign workers—outnumbering the 20,717 immigrants admitted as Permanent Residents in 2006.⁵

Furthermore, on 14 March 2008, the Canadian federal government proposed changes to the *Immigration and Refugee Protection Act* (IRPA).⁶ Critics of

2. Manolo Abella, *Policies and Best Practices for Management of Temporary Migration* 8 (Int’l Symposium on Int’l Migration & Dev., Contributing Paper No. 3, 2006), available at http://www.un.org/esa/population/migration/turin/Symposium_Turin_files/P03_SYMP_Abella.pdf.

3. *Id.* at 1.

4. See *id.* at 3–4 (discussing remittances and migration).

5. Campbell Cohen, *Temporary Foreign Workers in Canada on the Increase*, available at <http://www.canadavisa.com/temporary-foreign-workers-in-canada-on-the-increase.html>.

6. CIC News, *Latest Updates on Amendments to Canada’s Immigration Act*, Apr. 2008, available at <http://www.cicnews.com/2008/04/latest-update-amendments-canadas-immigration-act-04648.html>.

the proposed amendments point out that these changes place limits on the processing of immigrants under the humanitarian and compassionate category and thus further support the current policy shift towards labor migration under temporary visa arrangements.⁷

Given the shift towards temporary migration programs throughout the globe, it is imperative to address the issue of non-resident migrants' access to legal protections and social rights. Migrants admitted as residents are automatically protected by most laws that apply to citizens, although in practice, of course, visible minority immigrants in Canada, particularly women, often experience discriminatory and abusive treatment.⁸ Due to the precariousness of their status, temporary migrants, who are also often visible minorities, are even more likely than resident immigrants to experience various forms of exclusion and abuse.⁹ When non-citizens experience such abuses, what legal protections are available to them?¹⁰

International human rights treaties, by virtue of their universality, grant rights to migrants in few situations. However, unless migrants themselves or their advocates explicitly claim these rights, the rights are likely to be ignored by policy makers and employers. The importance of agency in human rights, as well as in citizenship rights, has been well recognized by scholars who point out that both citizenship and human rights must be claimed and negotiated by individuals or collectives to be effective.¹¹ Yet, there is an added layer of complexity in the application of human rights to non-citizens. While all migrants by virtue of their humanity are covered by universal human rights, international law does not make it clear which state (or supra-state organization) is responsible for ensuring that these rights are respected. As Lisa Alfredson observes, "The reality of noncitizens' situation

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7. Canadian Council for Refugees, 10 Reasons to be Concerned about Proposed Amendments to Immigration and Refugee Protection Act (IRPA) in Bill C-50, Apr. 2008, available at www.telegdi.org/documents/APR262008-10reasonstobebconcernedaboutC50-CanadianCouncilforRefugees.pdf.
 8. See HIMANI BANNERJI, THE DARK SIDE OF THE NATION: ESSAYS ON MULTICULTURALISM, NATIONALISM AND GENDER (2000); HABIBA ZAMAN, BREAKING THE IRON WALL: DECOMMODIFICATION AND IMMIGRANT WOMEN'S LABOR IN CANADA (2006); Monica Boyd & Deanna Pikkov, *Finding a Place in Stratified Structures: Migrant Women in North America*, in NEW PERSPECTIVES ON GENDER AND MIGRATION: LIVELIHOOD, RIGHTS AND ENTITLEMENTS 19 (Nicola Piper ed., 2008).
 9. NANDITA SHARMA, HOME ECONOMICS: NATIONALISM AND THE MAKING OF 'MIGRANT WORKERS' IN CANADA (2006); ALBERTA FED'N OF LABOUR, TEMPORARY FOREIGN WORKERS: ALBERTA'S DISPOSABLE WORKFORCE (2007), available at <http://www.afl.org/upload/AFLTFW.pdf>.
 10. Not all resident migrants have a legal citizenship status. However, in this article, the term "non-citizen" is used to discuss migrants found in irregular condition. Legally admitted resident migrants without a legal citizenship status are not included in this discussion because they do have access to most legal protections available to the host country's citizens.
 11. See generally Engin F. Isin, *Introduction: Democracy, Citizenship and the City*, in DEMOCRACY, CITIZENSHIP AND THE GLOBAL CITY 1 (Engin F. Isin ed., 2000); David Jacobson & Galya Benarieh Ruffer, *Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy*, 25 HUM. RTS. Q. 74 (2003); JEAN GRUGEL & NICOLA PIPER, CRITICAL PERSPECTIVES ON GLOBAL GOVERNANCE: RIGHTS AND REGULATION IN GOVERNING REGIMES (2007).

epitomizes the fundamental paradox of human rights: human rights are meant to transcend states, while relying precisely on states, which typically care only for their citizens, for implementation."¹² And therefore, she notes, "It is one thing for states to be pressured to better protect their own citizens and quite another for states to take on the task of protecting individuals not considered national members."¹³ The degree to which this responsibility lies with migrant-receiving states is subject to interpretation. Thus, it is important to ask not only who makes human rights claims for migrants and how these claims are framed, but also who hears these claims and how willing those who receive the claims are to accept them.

This article addresses these questions by focusing on seasonal agricultural migrant workers in Canada. Due to the vulnerability of their status, unfamiliarity with the legal framework, and linguistic barriers, migrants themselves are often not in the position to claim rights. In this context, the role of migrant rights activists in labor and human rights organizations is essential.¹⁴ This article illustrates how local migrant rights activists have utilized different judicial fora to make claims that the international human rights framework guarantees certain labor and social rights to seasonal agricultural migrant workers. It emphasizes the importance of litigation and the crucial role of particular judges who were willing to accept the claim that, in line with international norms and conventions, protections provided by domestic constitutional provisions and labor laws should be extended to non-citizen migrants. This article contributes to human rights studies by emphasizing the transformative role of judicial agency in the fight for the extension of human rights protections.¹⁵ Unlike much of the scholarship in the field of human rights that focuses on the role of transnational actors in the promotion of human rights, this article places emphasis on local actors—particularly trade unions—and their ability to extend international human rights protections to those generally left outside of its framework. Recent Canadian judicial decisions have produced fruitful results in this regard.

II. FROM CITIZENSHIP TO HUMAN RIGHTS?

There are two extant frameworks for claiming rights: citizenship and human rights. Citizenship is generally understood as a legal and social status which confers rights, defines responsibilities, prescribes collectively shared identity,

12. LISA S. ALFREDSON, *CREATING HUMAN RIGHTS: HOW NONCITIZENS MADE SEX PERSECUTION MATTER TO THE WORLD* 238–39 (2009).

13. *Id.* at 238.

14. See Tanya Basok, *Counter-hegemonic Human Rights Discourses and Migrant Rights Activism in the US and Canada*, 50 *INT'L J. COMP. SOC.* 183 (2009).

15. For other works examining the role of judicial agency in human rights claims, see Jacobson & Ruffer, *supra* note 11; JEFFREY DAVIS, *JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS* (2008).

and bestows political membership through the exercise of democratic rights.¹⁶ Initially conceptualized as a form of protection for individuals against the arbitrariness of the state, particularly in relation to private property, notions of citizenship rights have been expanded to include political and social rights.¹⁷

International law does not prescribe grounds upon which citizenship is granted¹⁸ and, until recently, did not prescribe the treatment that states should accord to non-citizens. State sovereignty carries with it the power to bestow citizenship according to whatever terms the state deems appropriate. Once acquired, citizenship within a state generally carries with it certain rights, privileges, and responsibilities.

The notions of human rights are rooted in the same philosophical principles as citizenship rights.¹⁹ Yet, the human rights tradition, institutionalized through the UN Universal Declaration of Human Rights (UDHR) in 1948, disassociates rights from membership in a bounded community by making rights universal.²⁰ Thus, this framework extends rights to non-citizens, such as labor migrants, refugees, and asylum seekers.²¹ From very early times, customary rules of international human rights law have been utilized to protect the rights of non-citizens within the territory of a state other than their national state.²² The foundational premise of international human rights law is the notion that all persons, by virtue of being human, have fundamental rights.²³ Therefore, it can be argued that international human rights law places states under an obligation to guarantee both citizens and non-citizens equal enjoyment of their civil, political, and economic rights as recognized under international law and incorporated in international human rights instruments.

The vast majority of fundamental human rights are inscribed in six treaties: International Convention on the Elimination of All Forms of Racial

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16. Seyla Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times*, 11 CITIZENSHIP STUD. 19, 19 (2007).
 17. T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS (1950); Engin F. Isin, *Who Is the New Citizen? Towards a Genealogy*, 1 CITIZENSHIP STUD. 115 (1997); GARY TEEPLE, THE RIDDLE OF HUMAN RIGHTS (2005).
 18. Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (6 Apr).
 19. Tanya Basok, Suzan Ilcan & Jeff Noonan, *Citizenship, Human Rights, and Social Justice*, 10 CITIZENSHIP STUD. 267 (2006).
 20. TEEPLE, *supra* note 17, at 16–20.
 21. See, e.g., SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS (2004); DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS (2008); Arthur C. Helton, *Protecting the World's Exiles: The Human Rights of Non-Citizens*, 22 HUM. RTS. Q. 280 (2000).
 22. C. F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1967).
 23. The 1948 Universal Declaration of Human Rights was the first international instrument to clearly articulate this concept. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 2, U.N. Doc. A/RES/3/217A (1948) [hereinafter UDHR].

Discrimination (CERD)²⁴; International Covenant on Civil and Political Rights (ICCPR)²⁵; International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁶; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁷; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²⁸; and the Convention on the Rights of the Child (CRC).²⁹ By virtue of their universality, the rights inscribed in these international treaties apply to migrants. The International Labour Organization's (ILO) 1998 adoption of the Declaration of Fundamental Principles and Rights at Work³⁰ further emphasizes the universality of the rights contained in the above mentioned human rights treaties. However, the human rights treaties do not explicitly outline which state, the state from which the migrants come or the state to which the migrants go, is to assume the responsibility to guarantee that the migrants enjoy the universally defined rights.

By contrast, other international conventions specifically define the rights of migrants in host countries. Migrants' labor rights were first articulated in two ILO conventions: Convention Concerning Migration for Employment³¹ and the Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.³² These documents set principles of non-discrimination for legally admitted migrant workers in such areas as guarantees of security of employment, the

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24. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., 660 U.N.T.S. 195 (*entered into force* 4 Jan. 1969), *reprinted in* 5 I.L.M. 352 (1966).
 25. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).
 26. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR].
 27. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (*entered into force* 3 Sept. 1981).
 28. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., U.N. Doc. A/39/51 (1985), 1465 U.N.T.S. 85 (*entered into force* 26 June 1987).
 29. Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (*entered into force* 2 Sept. 1990).
 30. ILO Declaration of Fundamental Principles and Rights at Work, *adopted* 19 June 1998, 266 U.N.T.S. 3.
 31. Convention Concerning Migration for Employment (Revised) (ILO No. 97), *adopted* 1 July 1949, 120 U.N.T.S. 70 (*entered into force* 22 Jan. 1952).
 32. Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No. 143), *adopted* 24 June 1975, 1120 U.N.T.S. 324 (*entered into force* 9 Dec. 1978).

provision of alternative employment, relief work, and retraining. However, very few migrant-receiving countries have ratified these conventions.³³

Shortly after the Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers was adopted, a working group was established to draft a UN convention on migrants' rights. Moreover, in December 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Convention on Migrants' Rights) was adopted.³⁴ The Convention on Migrants' Rights draws on the principles enshrined in the UDHR and the six UN human rights treaties mentioned above.³⁵ In contrast to the six treaties, the Convention on Migrants' Rights explicitly spells out migrants' rights in host countries. Legally admitted migrants are afforded the same rights and protections as national workers under this Convention. The Convention also addresses those circumstances that are unique to migrants. For instance, "it grants migrant workers rights directly against their employers as well as against the state, and makes the unauthorized confiscation of passports and identity documents a criminal offence."³⁶ However, a significant limitation of this Convention at the present time is that no major migrant receiving countries have signed it.

Several researchers have pointed out that in practice, human rights principles have made it possible to extend certain rights and protections to non-citizens; others point out that this process is uneven and selective. Jean Cohen, for instance, contends that "human rights discourses are now a pervasive feature of global public culture. Their effectiveness goes well beyond moralistic exhortation: they constitute an international symbolic order, a political-cultural framework, and an institutional set of norms and rules for the global system that orients and constrains states."³⁷ In her seminal work on migrants in Europe, Yasemin Soysal contends that national citizenship is losing ground to a more universal model of membership rooted in

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33. The Convention Concerning Migration for Employment is ratified by forty-nine countries, including Israel, the UK, New Zealand, fifteen European countries, and some countries that have recently become migrant-receiving countries, such as Venezuela and Ecuador, <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C97>. The Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers is ratified by twenty-three countries, including such European countries as Italy, Norway, Sweden, and Portugal, and the remaining countries are migrant-sending, available at <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C143>.
 34. Antoine Pécoud & Paul de Guchteneire, *Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights*, 24 WINDSOR Y.B. ACCESS JUST. 241, 246 (2006).
 35. GLOBAL COMMISSION ON INTERNATIONAL MIGRATION, *MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION* 54–56 (2005).
 36. *Id.* at 56.
 37. Jean L. Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos*, 14 INT'L SOC. 245, 260 (1999).

universal notions of human rights. Examining a population's access to such social services as education, health insurance, welfare, and unemployment benefits, she suggests that social, civic, and even some political rights that used to be granted solely to a country's nationals are now extended to that country's foreign population. Thus, we are witnessing a transition from national to post-national citizenship.³⁸ Similarly, other researchers assert that there no longer exists a sharp distinction between the rights enjoyed by citizens and the rights enjoyed by non-citizens.³⁹ In fact, some researchers point out that some countries have even extended voting rights to resident non-citizens.⁴⁰ Rogers Brubaker acknowledges that "the marginal advantages conferred by citizenship over and above those conferred by the status of long-term foreign resident are of modest import," pointing out that "[f]rom the point of view of the immigrants concerned, citizenship status as such does not decisively shape life chances."⁴¹

Other individuals are skeptical of the ability of human rights norms to protect the rights of non-citizens. They call attention to the fact that migrants' access to rights varies across the globe and with respect to the type of migrant;⁴² and in some cases, migrants' rights have actually deteriorated as states take away certain benefits that they had previously granted to migrants.⁴³ Seyla Benhabib recognizes that the extension of rights to some migrants has been accompanied by new forms of exclusions and that some groups (e.g., asylum seekers and refugees) have not benefited from international human rights protections.⁴⁴

In recognizing variations in the application of international norms to non-citizens, human rights should be viewed as a process through which rights are claimed, negotiated, and consequently rejected or accepted. Numerous human rights scholars have emphasized the important role of

38. YASEMIN NUHOĞLU SOYAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994).

39. See, e.g., Zig Layton-Henry, *Citizenship or Denizenship for Migrant Workers?*, in *THE POLITICAL RIGHTS OF MIGRANT WORKERS IN WESTERN EUROPE* 186 (Zig Layton-Henry ed., 1990); DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* (1996); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996); Irene Bloemraad, *Citizenship and Immigration: A Current Review*, 1 J. INT'L MIGRATION & INTEGRATION 9 (2000); Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms?*, *supra* note 16; Aihwa Ong, *Mutations in Citizenship*, 23 THEORY CULTURE & SOC'Y 499 (2006); NEW PERSPECTIVES ON GENDER AND MIGRATION, *supra* note 8.

40. Layton-Henry, *supra* note 39, at 190–91; SASSEN, *supra* note 39, at 102.

41. ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 181 (1992).

42. Daiva Stasiulis & Abigail B. Bakan, *Negotiating Citizenship: The Case of Foreign Domestic Workers in Canada*, 57 FEMINIST REV. 112 (1997).

43. Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity*, 11 CITIZENSHIP STUD. 37, 42 (2007).

44. Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms?*, *supra* note 16, at 20.

social actors in this process.⁴⁵ Most among them have explored the role of transnational human rights activists who, in collaboration with local activists, international organizations, and state actors, have forced governments guilty of human rights violations to adopt international norms and extend them to disadvantaged groups. Thomas Risse and Kathryn Sikkink, in particular, have highlighted the importance of two processes through which nation-states are socialized into adopting international human rights principles. The first one refers to the instrumental adaptation to pressures from domestic and international actors. This type applies to the situations in which governments accused of human rights violations “pursue exogenously defined and primarily instrumental or material interests and change their behavior in order to reach their goals . . . without necessarily believing in the validity of the norms.”⁴⁶ The second type of socialization occurs “through moral discourse” and “emphasizes processes of communication, argumentation, and persuasion.”⁴⁷ Risse and Sikkink have pointed out that domestic and transnational actors use a mix of instrumental and argumentative rationalities to impact the human rights performances of specific states. According to Risse and Sikkink, “socialization processes start when actors adapt their behavior in accordance with the norm for initially instrumental reasons. . . . The more they ‘talk the talk,’ however, the more they entangle themselves in a moral discourse which they cannot escape in the long run.”⁴⁸ They further propose a five-stage “spiral model” to explain how nation-states engaged in human rights violations adopt change, including repression and activation of opposition, denial of human rights abuses, tactical concessions, “prescriptive status,” and finally, rule-consistent behavior.⁴⁹

This article parts from the extant body of scholarship on human rights-related processes in two ways. First, it examines the negotiation of rights for a disadvantaged group of individuals whose “right to have rights”⁵⁰ is in question. The issue that is debated in the case of non-citizens is whether (and

45. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); ALFREDSON, *supra* note 12; Clifford Bob, “*Dalit Rights are Human Rights*”: *Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue*, 29 HUM. RTS. Q. 167 (2007); Susan D. Burgerman, *Mobilizing Principles: The Role of Transnational Activists in Promoting Human Rights Principles*, 20 HUM. RTS. Q. 905 (1998); Alejandro Anaya Muñoz, *Transnational and Domestic Processes in the Definition of Human Rights Policies in Mexico*, 31 HUM. RTS. Q. 35 (2009); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

46. Thomas Risse & Kathryn Sikkink, *The Socialization of Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS, *supra* note 45, at 12.

47. *Id.* at 13.

48. *Id.* at 16.

49. *Id.* at 17–35.

50. This phrase, first used by Hannah Arendt, has become a frequently-used phrase in the human rights world. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1958).

to what degree) host countries are obligated to guarantee universal rights to migrants. Second, unlike most human rights scholarship that examines the role of transnational advocacy networks, this article focuses on the role of local actors and how they interpret and “translate” international human rights law into acceptable practices.⁵¹ This article illustrates how a national labor union has invoked international legal principles to bring about the extension of national legal protections and guarantees to non-citizens.

This article specifically examines the process through which rights are claimed for seasonal agricultural migrant workers in Canada. Migrant rights advocates—including labor unions and grassroots organizations—have used diverse public fora (such as press conferences, electronic and printed media, and public awareness campaigns) to engage in what Benhabib calls “democratic iterations”⁵² to claim rights for groups of people that nation-states do not recognize as members of their political community. Yet, it is through the use of litigation that one labor organization—the United Food and Commercial Workers—has engendered major policy changes. Thus, this article highlights the transformative role of litigation in human rights struggles. In emphasizing the importance of litigation, we draw attention not only to the way claims are framed by rights advocates, but also to the crucial role played by judges presiding over hearings who interpret these claims.

III. CITIZENSHIP AND HUMAN RIGHTS IN CANADA

Canada is signatory to numerous international instruments, but the following instruments have direct implications for the rights of migrant workers: UDHR, ICCPR, ICESCR, CERD, and various ILO treaties. The dualist system followed in Canada means that treaties ratified by Canada are not self-executing. In other words, unless the terms of treaties are incorporated into domestic law, they are not binding on Canadian courts. For many complex reasons, the most important human rights instruments, such as the ICCPR and the ICESCR, ratified by Canada have not been incorporated into domestic legislation.⁵³ However, although the terms of these treaties are not directly

51. See SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

52. Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms*, *supra* note 16, at 31. Benhabib describes such “democratic iterations” as “complex processes of public argument, deliberation, and exchange through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions, as well as in the associations of civil society.” *Id.*

53. Elizabeth Eid, *Interaction Between International Law and Domestic Human Rights Law: A Canadian Perspective* (Sino Canadian Int’l Conf. on the Ratification & Implementation of Hum. Rts. Covenants Paper, 2001), available at <http://www.icclr.law.ubc.ca/Publications/Reports/E-Eid.PDF>.

binding on Canadian courts, they can and have been invoked in cases where similar provisions in the Canadian Charter of Rights and Freedoms (Canadian Charter or Charter)⁵⁴ exist; they have also been utilized as interpretive aids to provisions in the Canadian Charter.

In an early Charter case, *Alberta Union of Provincial Employees v. Attorney General of Alberta*, the former Chief Justice Dickson stated, "[T]hough I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions."⁵⁵ Later, in *Slaight Communications Inc. v. Davidson*, the Supreme Court of Canada reinforced this approach, making two important points that provide hope for the potential use of international human rights treaty law in this area: (1) there is a presumption that Canada's international human rights obligations form part of Charter rights as they set the minimum standard under which the Charter should be interpreted, and (2) the presumption applies to international human rights that are part of customary law or to those that arise under a treaty to which Canada is a party.⁵⁶

IV. GOVERNANCE OF THE SEASONAL AGRICULTURAL WORKERS PROGRAM

For the most part, Canada's citizenship rights are found in the Canadian Charter of Rights and Freedoms.⁵⁷ Citizenship rights include the right to leave and enter Canada at any time, the right to live wherever one chooses within Canada, the right to free association, and the right to be treated equally under the law. In Canada, as in many other countries, non-citizens do not enjoy the same rights as citizens. The Charter does not directly address the status or rights of non-citizens. While, in theory, all persons in Canada are entitled to those Charter rights that are not explicitly restricted to citizens,⁵⁸ in reality, non-citizens do not enjoy equality with citizens before the law, for instance, in relation to working conditions.

Canadians have demonstrated a growing interest in the ability of international human rights treaty law as well as domestic law, such as the

54. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (U.K.), as reprinted in R.S.C No. 44 [hereinafter Charter].

55. *Alberta Union of Provincial Employees v. Att'y Gen. of Alberta*, [1987] 1 S.C.R. 313, 349–50. (Can.).

56. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056–57 (Can.).

57. See Charter, *supra* note 54.

58. *Singh v. Minister of Employment & Immigration*, [1985] 1 S.C.R. 177, ¶ 81 (Can.).

Charter, to protect the rights of non-citizens in Canada and, in particular, to protect the rights of seasonal agricultural migrant workers.⁵⁹ Currently, there are somewhere between 18,000 to 20,000 migrant workers who are in Canada with temporary worker visas but whose workplace situation, both legally and socially, is extremely precarious.⁶⁰

The Canadian Seasonal Agricultural Workers Program (CSAWP) facilitates the entry into Canada of workers from Mexico, Guatemala, and the Caribbean in response to the needs of the agricultural industry for low-skilled, inexpensive labor. CSAWP has existed since 1966. The program operates in conjunction with Human Resources and Social Development Canada (HRSDC), the Department of Labour, Service Canada, the Department of Citizenship and Immigration (CIC), and the governments of the states sending the migrant workers. A non-profit organization, the Foreign Agricultural Resource Management Service (F.A.R.M.S) "facilitate[s] and coordinate[s] the processing of requests for foreign seasonal agricultural workers."⁶¹

The program is administered through the Memorandum of Understanding (MOU) and the annexed Operational Guidelines and Employment Agreements between the employer and the worker. The legal status of the MOU is described explicitly as an "intergovernmental administrative arrangement," and as such, it does not constitute an international treaty.⁶² According to Veena Verma, while the signatories of the instrument have characterized it as not legally binding, the MOU and the Canadian government's administration of the MOU may be reviewed under administrative law and the Charter of Rights and Freedoms.⁶³

The administrative requirements of the CSAWP are in compliance with the ILO Conventions and UN Convention in many respects, some of which are highlighted by Verma: (1) the recruitment, placement, and administration of migrant workers are managed by the government through intergovernmental arrangement and operational guidelines; (2) the government supervises the system of contracts between the employers and migrant workers; (3) the

59. Migrant workers are defined as individuals who are "engaged in a remunerated activity in a State of which [they are] not a national." International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted* 18 Dec. 1990, G.A. Res. 45/158, U.N. GAOR, 45th Sess., art. 2(1), U.N. Doc. A/RES/45/158 (1990) (*entered into force* 1 July 2003).

60. UNITED FOOD AND COMMERCIAL WORKERS CANADA (UFCW CANADA), *THE STATUS OF MIGRANT FARM WORKERS IN CANADA 6 (2006–2007)*, available at <http://www.ufcw.ca/Theme/UFCW/files/PDF2007/StatusReportEN2007.pdf>.

61. Foreign Agricultural Regional Management Service, "What Is F.A.R.M.S." available at <http://www.farmsontario.ca/farms.htm>.

62. Veena Verma, *The North-South Inst.*, *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*, at viii (2003), available at http://www.nsi-ins.ca/english/pdf/csawp_verma_final_report.pdf.

63. *Id.*

government requires that the contract of employment includes conditions of employment and is delivered to the migrant worker prior to commencement of employment; and (4) the employment laws that apply to Canadian workers also apply to migrant workers with respect to wages, accommodation, social security, and employment taxes.⁶⁴ In fact, seasonal agricultural workers are covered by provincial employment standards and health and safety acts (where applicable), pay into and are eligible to receive Canada Pension, and, in many provinces, are covered by the provincial health insurance plans. In sum, the regulatory framework related to the administration of the program in many ways complies with international norms pertaining to temporary workers.

Until recently, seasonal agricultural workers in Ontario had been excluded from a number of significant labor and employment related statutes that benefited other Ontario workers, particularly the rights to bargain collectively and strike.⁶⁵ Although the CSAWP program is a federal program, legislation that pertains to workers, such as employment standards and occupational health and safety, falls within provincial jurisdiction. Within this context, the enforcement of employment rights is generally lacking. Violations of the rights of migrant workers participating in CSAWP are well documented.⁶⁶ These exclusions and violations have made it necessary for migrant rights advocates and for migrants themselves to seek other solutions, such as appealing to international human rights norms, principles, and institutions to support their claims with the required moral weight.

V. MIGRANT RIGHTS ACTIVISM AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Canadian trade unions and grassroots organizations advocating on behalf of seasonal workers have relied on international human rights instruments to frame their claims for better protection of migrants' rights. The United Food and Commercial Workers union (UFCW), for instance, has framed its advocacy for the rights of migrant workers by referencing the UDHR, particularly its guarantees that everyone should have access to effective remedies by national tribunals for acts violating fundamental rights and that everyone

64. *Id.* at 86–87.

65. *Id.*

66. See Basok, *Counter-hegemonic Human Rights Discourses and Migrant Rights Activism in the US and Canada*, *supra* note 14; Verma, *supra* note 62; Sharryn J. Aiken, *From Slavery to Expulsion: Racism, Canadian Immigration Law, and the Unfulfilled Promise of Modern Constitutionalism*, in *INTERROGATING RACE AND RACISM* 55 (Vijay Agnew ed., 2007); Kerry L. Preibisch, *Local Produce, Foreign Labor: Labor Mobility Programs and Global Trade Competitiveness in Canada*, 72 *RURAL SOC.* 418 (2007).

is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. Citing Articles 8 and 10 of the UDHR that "call for the most basic level of fairness by stating everyone has the right to a fair and public hearing," UFCW charges that "CSAWP provides not a glimmer of this basic human right within its policies and procedures."⁶⁷ Advocating for the right of all agricultural workers, migrant and national, to protection under provincial health and safety acts, UFCW cites two international human rights documents: Article 7 of the UDHR, which states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection" under the law,⁶⁸ and Article 7 of the ICESCR, which declares that states party to the present Covenant recognize the right of everyone to safe and healthy working conditions.⁶⁹

In its report to the UN Committee on Economic, Social and Cultural Rights on Canada's compliance with the ICESCR, the Canadian Council for Refugees, a non-profit organization, also expressed concern for migrant workers in Canada, particularly the denial of the rights to family reunification and collective bargaining to seasonal agricultural workers. The Canadian Council for Refugees claims that the following ICESCR articles are violated: Article 8.1(a), which guarantees to all the right "to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests," and Article 10.1, which states that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."⁷⁰

Justicia for Migrant Workers is another grassroots organization, located in Toronto, Ontario, and Vancouver, British Columbia, that is concerned about the rights of seasonal workers in Canada. This organization has also framed its advocacy for migrants' rights by referencing international human rights norms. For instance, the Vancouver Justicia for Migrant Workers has issued the following statement about migrant workers:

The reality is that farm workers . . . endure the abysmal wages, living and working conditions of Canadian farms because they have to, and because the agricultural industry demands it. That these conditions persist in a supposedly rich country such as Canada is a continuing outrage and source of national shame . . . [Farm workers] are entitled to every single human right, and all the dignity and respect,

67. UFCW CANADA, *THE STATUS OF MIGRANT FARM WORKERS IN CANADA 20* (2004), available at <http://www.ufcw.ca/Theme/UFCW/files/AgWorkersReport2004ENG.pdf>.

68. UDHR *supra* note 23, art. 7.

69. ICESCR, *supra* note 26, art. 7.

70. CANADIAN COUNCIL FOR REFUGEES, *NON-CITIZENS IN CANADA: EQUALLY HUMAN, EQUALLY ENTITLED TO RIGHTS 2* (2006), available at <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/CCR-background.pdf>.

in the highest current universal human and labor rights standards, including the U.N. Convention on the Rights of Migrant Workers (even if the Canadian government, in defiance of the global consensus, refuses to sign it).⁷¹

However, these efforts to use print and electronic media to frame the rights of migrant workers as international human rights, while important, have not been sufficient to produce significant policy changes.⁷² By and large, policy makers are not swayed by arguments articulated by migrant rights activists. Important changes have come as a result of litigation pursued on behalf of foreign workers by UFCW. UFCW was successful in effecting change for migrant workers because their claims found support among certain judges who recognized the importance of using international law to help define Canada's obligations to non-citizens.

VI. CANADIAN COURTS AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Despite overall awareness in Canada of the hardships seasonal agricultural workers face, individual workers have not made many attempts to resolve these hardships through the courts. Language barriers, fear of retribution on the part of the employers, ignorance of the law and the Canadian legal system, as well as modest financial resources have all contributed to the lack of attempts by migrants themselves to use the Charter or international human rights law.

Legal Aid Ontario does provide basic assistance and rudimentary advice to seasonal workers, but the helpful advice has not led to extensive protection for the workers.⁷³ Even the Justice Department of Canada conceded that the financial costs for legal aid clinics have been fairly low with regard to representing migrant workers.⁷⁴ In observing the impact of Ontario legislation

71. *Justicia for Migrant Workers B.C.*, available at <http://www.justicia4migrantworkers.org/bc/news.html>.

72. At the March 2008 Policy-Research Seminar on Temporary Migration, James Sutherland, a Human Resources and Social Development Canada (HRSDC) official, acknowledged criticisms launched by various labor and grassroots organizations against temporary foreign workers programs. He stated that even though HRSDC does not have regulatory authority to monitor employee compliance with program requirements, HRSDC was developing mechanisms to ensure that temporary foreign workers had the same rights and protections as Canadian workers. James Sutherland, Human Resources and Social Development Canada, Speech at the Policy-Research Seminar on Temporary Migration (Mar. 12, 2008); see also *Should I Stay or Should I Go? A Policy-Research Seminar on Temporary Migration*, available at http://canada.metropolis.net/policy/priority/migration_seminar/MigrationAgenda_e.htm. However, it is not clear what specific measures have been taken to develop such mechanisms.

73. Legal Aid Ontario, Business Plan 2006–2007 (on file with author).

74. DEP'T OF JUSTICE CANADA, IMMIGRATION AND REFUGEE LEGAL AID COST DRIVERS: FINAL REPORT 32 (2002), available at http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la17-rr03_aj17/rr03_la17.pdf.

that excluded migrant workers from the Labour Relations Act in the case *Dunmore v. Ontario*, the Supreme Court made this interesting comment regarding the difficulties encountered by this group:

It is hard to imagine a more discouraging legislative provision than s. 3(b) of the *LRA*. The evidence is that the ability of agricultural workers to associate is only as great as their access to legal protection, and such protection exists neither in statutory nor constitutional form. Moreover, agricultural workers already possess a limited sense of entitlement as a result of their exclusion from other protective legislation related to employment standards and occupational health and safety.⁷⁵

While individual migrant workers have not used the legal system to challenge discriminatory and abusive practices, UFCW used litigation to argue that human rights inscribed in international treaties have been denied to migrant workers and that the Canadian Charter of Rights should be extended to temporary migrants. During the last ten years, a number of Canadian court decisions involving constitutional challenges have highlighted the utility of international human rights in the context of protecting the interests of migrant workers in Canadian courts.

In support of their claims, advocates for the equal treatment of migrant workers in Canada look to section 15 of the Canadian Charter, which promotes equality, prohibits discrimination under the law, and applies to all persons in Canada. It states in part: "Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."⁷⁶ Litigants have invoked section 15 on behalf of Ontario migrant workers in challenges to Ontario legislation that excludes agricultural workers from the right to join unions⁷⁷ and from the protections found in the Occupational Health and Safety Act.⁷⁸ In another instance, the UFCW won standing to represent migrant workers in a challenge of the applicability of the Employment Insurance Act to migrant agricultural workers on the grounds that CSAWP workers are effectively unable to collect some of

75. *Dunmore v. Ontario* (Att'y Gen.), [2001] 3 S.C.R. 1016, 2001 SCC 94, ¶ 45 (Can.)

76. See Charter, *supra* note 54.

77. *Dunmore*, [2001] 3 S.C.R. 1016; see also Verma, *supra* note 62, at 111.

78. Some months after the UFCW filed a Charter challenge of the OHSAs exclusion of migrant workers citing violation of section 15 of the Canadian Charter, the Ontario Government announced that the OHSAs would cover farming operations. Migrant workers are now entitled to refuse to do work that is unsafe, they must receive safety training, and be informed of potential workplace hazards in certain situations. Media Release, UFCW, UFCW Canada Wins Health and Safety Protection for Agricultural Workers (30 June 2005), available at <http://www.ufcw.ca/Default.aspx?SectionId=af80f8cf-ddd2-4b12-9f41-641ea94d4fa4&LanguageId=1&ItemId=0aa4e20d-ec55-4bcd-a956-e03787c7fe99>.

the benefits available under the Act.⁷⁹ In all three of these cases, litigants invoked international human rights treaties that provide for equal protection of the law without discrimination in order to reinforce their argument that section 15 of the Canadian Charter should apply to migrant workers. The notion that international human rights law requires equality of treatment between citizens and non-citizens has been reinforced by the UN Human Rights Committee. In referring to the provisions of the ICCPR that promote equality and non-discrimination,⁸⁰ the Human Rights Committee has clearly stated that these rights must be guaranteed without discrimination between citizens and aliens.⁸¹ The Human Rights Committee, which monitors the implementation of the ICCPR, has also stated that almost all rights protected by the ICCPR must be guaranteed without discrimination between citizens and non-citizens.⁸² As outlined below, the above-mentioned judicial decisions clearly gave serious consideration to the legal significance of these and other provisions of international human rights treaties.

The UFCW's challenge to the provisions of the 1995 Ontario Labour Relations Act that prevents agricultural workers from establishing, joining, and participating in the lawful activities of a trade union went all the way to the Supreme Court of Canada.⁸³ According to the plaintiffs, this exclusion constituted a violation of the workers' Charter rights to freedom of association and equality.⁸⁴ In concluding that the exclusion of a group from the protection to form a trade union not only implicates the group's "dignity" interest, but also its basic right to freedom of association, the Supreme Court of Canada relied on a number of international human rights instruments: the ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize; ILO Convention (No. 11) concerning the Rights of

79. Ruling on Rule 21 Motion at ¶ 120 (2005 CanLII 47783), *Fraser v. Canada* (Att'y General), [2008] 92 O.R.3d 481, 2008 ONCA 760 (03-CV-257806 CM2).

80. ICCPR, *supra* note 25, art. 2(1) states:

Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Art. 26 states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour . . . national or social origin . . . or other status.

81. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *THE RIGHTS OF NON-CITIZENS* 7–8 (2006).

82. *The Position of Aliens Under the Covenant*, General Comment No. 15, adopted 11 Apr. 1986 U.N. GAOR, Hum. Rts. Comm., 27th Sess., ¶¶ 1–2, reprinted in U.N. Doc. HRI/GEN/1/Rev.9 (2008) at 189.

83. *Dunmore v. Ontario* (Att'y Gen.), [2001] 3 S.C.R. 1016, 2001 SCC 94 (Can.)

84. *Id.* ¶ 1.

Association and Combination of Agricultural Workers; and ILO Convention (No. 141) concerning Organizations of Rural Workers and their Role in Economic and Social Development. The Court found that all three instruments provide the normative foundation for prohibiting any form of discrimination in the protection of trade union freedoms. The Court recited appellants' arguments that the scope of section 2 of the Charter should be interpreted widely and that the right to organize a union was not solely to bargain collectively, but also to provide "empowerment and participation in both the workplace and society at large."⁸⁵ The majority decision of the Supreme Court ruled that, under the Charter, the government had a positive duty to enact legislation providing protection that would ensure that agricultural workers could meaningfully exercise their right to organize pursuant to section 2(d) of the Charter, which guarantees freedom of association. The Court suspended its declaration of the invalidity of the Labour Relations Act for eighteen months to allow the Ontario government to enact a law consistent with the court's ruling. In considering the section 15 equality argument, Justice L'Heureux-Dube did not make reference to international instruments, but she did note that agricultural workers "are among the most economically exploited and politically neutralized individuals in our society."⁸⁶

Ultimately, however, the victory for the migrant workers was a limited one. The Ontario government passed the Agricultural Employees Protection Act (AEPA) permitting migrant workers to "form associations" but not to unionize, and it amended the Labour Relations Act to exclude agricultural employees from the application of the Act. In 2003, the UFCW Canada launched a challenge to the validity of the Agricultural Employees Protection Act. The applicants took the position that section 3(b.1) of the Labour Relations Act and the Agricultural Employees Protection Act as a whole violated the right of agricultural workers to freedom of association under section 2(d) of the Charter because the legislation was under inclusive in a manner that substantially impeded the exercise of freedom of association. Furthermore, it argued that the legislation orchestrated, encouraged, and sustained violations of the right to freedom of association for agricultural workers. In 2006, Justice Fairley, in a decision that failed to consider any international human rights law, concluded that there was no violation of either section 2 or section 15 of the Charter.

In 2008, the Ontario Court of Appeal ruled that Ontario's AEPA violated their Charter rights to collectively bargain because it failed to provide protections for the exercise of that right.⁸⁷ This decision was undoubtedly

85. *Dunmore*, [2001] 3 S.C.R. 1016, ¶ 12.

86. *Id.* ¶ 168 (L'Heureux-Dubé J., concurring) (quoting D. M. BEATTY, PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE 89 (1987)).

87. *Fraser v. Ontario* (Att'y Gen.), [2008] 92 O.R.3d 481, 2008 ONCA 760, ¶ 11 (Can.).

influenced by the 2007 Supreme Court ruling in *Health Services v. British Columbia* that held that the right to collective bargaining is protected by the Charter. As described below, this groundbreaking decision has significant ramifications for utilization of a human rights framework in protecting the rights of migrant workers. The Ontario Government's appeal of the 2008 decision was heard by the Supreme Court of Canada in December of 2009. A decision from Canada's highest court on the subject of agricultural workers right to unionize is expected some time in the spring.

The UFCW's legal challenge and lobbying efforts to end the exclusion of Ontario migrant farm workers from the Occupational Health and Safety Act (OHSA) resulted in a successful outcome without the case having to go to trial. UFCW regarded the exclusion as especially reprehensible given the dangers inherent in farm work, the tenuous job security of migrant workers, and the reports of the poor quality of medical care that they receive while in Canada.⁸⁸ Individuals have argued that substandard and differential levels of workplace safety for migrant workers find support from some of Canada's population because migrant workers are non-citizens and non-white persons from southern countries.⁸⁹ In this situation, the Ontario government responded to the court challenge by amending the legislation; and since June 2006, OHSA has been extended to farming operations with paid workers, including migrant workers.⁹⁰

The third legal action, initiated by the UFCW's Canadian Director, Michael Fraser, in 2003, argued for the exclusion of seasonal agricultural workers from mandatory employment insurance deductions. CSAWP workers are required to pay employment insurance premiums but are effectively unable to collect some of the benefits available under the Act. The UFCW alleged that this situation constituted differential treatment between citizens and non-citizens and amounted to prohibited discrimination under section 15 of the Charter. The government attempted to have the lawsuit struck down on the ground that the Director of the UFCW and the UFCW were not entitled to public interest standing. In dismissing the government's argument, the Superior Court made a number of important statements regarding the Charter and its relationship to non-citizens and to international human rights law.⁹¹ In analyzing the applicability of section 15 to the UFCW claim, the court discussed the four grounds upon which the UFCW alleged differential treatment: national origin, citizenship, immigration status, and status as a foreign migrant agricultural worker. Status as a foreign migrant worker

88. Verma, *supra* note 62, at 71.

89. SHARMA, *supra* note 9.

90. THE NORTH SOUTH INST., MIGRANT WORKERS IN CANADA: A REVIEW OF THE CANADIAN SEASONAL AGRICULTURAL WORKERS PROGRAM 10 (2006), available at http://www.nsi-ins.ca/english/pdf/MigrantWorkers_Eng_Web.pdf.

91. Ruling on Rule 21 Motion, *supra* note 79.

is not one of the enumerated grounds for non-discrimination in section 15 of the Charter, but the court considered the use of analogous grounds to provide for non-discrimination of foreign migrant workers.⁹² In discussing this, the court had occasion to comment on the role of international law in the interpretation of the Charter:

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.⁹³

In rendering its decision regarding standing in the employment insurance case, the Court also engaged in a discussion about the legal significance of the International Convention on the Rights of Migrant Workers,⁹⁴ an ambitious attempt to encompass an extensive array of rights for migrant workers and their families, which Canada has not ratified. The Court noted that the Convention is only the seventh major multilateral treaty joining treaties concerning women, children, and racial discrimination. It noted, as well that equality and anti-discrimination are central to these other developments in international human rights law and that these documents are similar, in many respects, to both the Charter and section 15 itself. The Court stated, "Put another way, the ICRMW can be said to be evidence of an emerging global consensus."⁹⁵ The Court concluded that the UFCW did have standing to represent the migrant workers; the Court has not yet issued a decision on the substantive merits of the case.

The Supreme Court's 2007 ground breaking decision in *Health Services v. British Columbia*⁹⁶ paved the way for the positive outcome of the UFCW's challenge appeal before the Ontario Court of Appeal in 2008.⁹⁷ The decision also provided hope for the ongoing utilization of human rights law in the interpretation of migrant workers rights. The case involved a challenge to British Columbia legislation that effectively invalidated existing collective

92. *Id.* ¶¶ 79–83.

93. *Id.* ¶ 80 (quoting *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 348–49 (Can.) (Dickson C.J.C., dissenting). Additional Information in Response to Supplemental Questions of the Human Rights Committee on the Occasion of its Review of Canada's Fifth Report on the International Covenant on Civil and Political Rights: October 17 and 18, 2005, available at <http://www.pch.gc.ca/pgm/pdp-hrp/docs/reponses-responses/info-eng.cfm#a1>).

94. Ruling on Rule 21 Motion, *supra* note 79, ¶¶ 79–83; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 59.

95. Ruling on Rule 21 Motion, *supra* note 79, ¶ 82.

96. *Health Servs. & Support-Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27.

97. *Fraser v. Ontario (Att'y Gen.)*, [2008] 92 O.R.3d 481, 2008 ONCA 760, ¶ 11 (Can.).

agreements and precluded collective bargaining on specific issues for migrant workers. Again, litigants fighting for migrant rights explained that the new legislation violated the guarantees in section 2 (freedom of association) and section 15 (equality and non-discrimination) of the Charter. The Supreme Court overturned its own, earlier decisions,⁹⁸ where it had held that the guarantee of freedom of association did not extend to collective bargaining. It upheld the protection of the right to the process of collective bargaining,⁹⁹ explaining that the Court's own earlier jurisprudence in this area could no longer stand; that those decisions limiting the right to collective bargaining are inconsistent with Canada's history regarding collective bargaining;¹⁰⁰ and finally, that collective bargaining is an integral component of freedom of association in international law,¹⁰¹ which may inform the interpretation of Charter guarantees. In discussing this third basis concerning international law, the Court concluded that international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining as part of freedom of association and that the Charter should recognize at least the same level of protection as found in these conventions. The Court took notice of three international instruments that Canada has acceded to and ratified and that, according to the Court, reflect principles that Canada embraces: ICESCR, ICCPR, and ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize. The Court pointed out that the interpretation of these Conventions supports the proposition that there is a right to collective bargaining in international law and suggests that such a right should be recognized in the Canadian context under the Charter.

Health Services did not just widen the thin edge of the wedge created by *Dunmore*. It had a significant impact on the UFCW's appeal of the 2006 decision regarding the challenge to the Agricultural Employees Protection Act that excluded agricultural workers from the Labour Relations Act. In November 2008, the Ontario Court of Appeal in *Fraser* stated that "[i]n light of . . . the change in the legal landscape," it would "conclude that the AEPA substantially impairs the capacity of agricultural workers to meaningfully exercise their right to bargain collectively."¹⁰² Following *Dunmore* and *Health Services*, the Court of Appeal found that the activities of organizing and collective bargaining are associational activities protected by section 2(d) of the Charter and that, although the AEPA did not on its face prohibit agricultural workers from collective bargaining, the provisions of the legisla-

98. *Health Servs. & Support-Facilities Subsector Bargaining Ass'n*, [2007] 2 S.C.R. 391, ¶ 36.

99. *Id.* ¶ 66.

100. *Id.* ¶¶ 63–68.

101. *Id.* ¶¶ 78–79.

102. *Fraser*, [2008] 92 O.R.3d 481, ¶ 11.

tion failed to enable agricultural workers to exercise their right to bargain collectively in a meaningful way. In particular, the Court noted that meaningful collective bargaining required a statutory duty to bargain in good faith, statutory recognition of the principles of exclusivity and majoritarianism, and a statutory mechanism for resolving bargaining impasses and disputes regarding collective agreements.¹⁰³ Furthermore, in discussing the significance of good faith in collective bargaining, the Court cited an ILO description of the concept that had earlier been quoted twice in *Health Services*.¹⁰⁴

Judicial recognition of the right to collective bargaining as a right that is constitutionally protected and not based solely on a statutory regime has tremendous, positive implications for the quest for the recognition of human rights for non-citizens. International human rights law was invoked by UFCW in all of the judicial challenges, and while there was no direct reference to the impact of ILO and other treaties, there is evidence that they played a role. This judicial trend towards acknowledging and applying international human rights norms is consistent with Canada's international commitments and will be a powerful aid in assisting migrant workers to claim their fundamental rights. While Canadian judges may, as they pertain to some areas of the law, continue to be reluctant to employ treaty provisions that have not yet explicitly been entered into domestic law, the judges may find it difficult to continue to defend such an attitude in relation to human rights law.

Ratification of international human rights instruments implies acceptance of the concept that all human beings, regardless of their citizenship status, are entitled to certain fundamental human rights. That places the Canadian government in the position of ensuring that the Charter provisions are consistent with international human rights norms to which Canada has subscribed and are applied to all persons within Canada. This approach rejects the idea that legally defined citizens are entitled to a different set of human rights than persons who do not satisfy a narrowly defined concept of citizenship. Fortunately, recent Canadian decisions involving non-citizens appear to ignore notions of citizenship in the application of fundamental human rights. In the 2002 decision, *Baker v. Canada (Minister of Citizenship & Immigration)*,¹⁰⁵ which dealt with a non-Canadian mother of Canadian children who was subject to a removal order, the Court, in considering the best interests of the children involved, looked to international human rights instruments that Canada had ratified for assistance in the interpretation of a section of the Immigration and Refugee Protection Act. In a 2002 decision, *Suresh v. Canada (Minister of Citizenship & Immigration)*,¹⁰⁶ the Supreme

103. *Id.* ¶ 80.

104. *Id.* ¶ 84.

105. *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (Can.).

106. *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (Can.).

Court explained its view of the connection between human rights law and the Constitution:

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is . . . with the principles of fundamental justice. We look to international law as evidence of these principles.¹⁰⁷

The Court's recent approach to using international human rights instruments in interpreting Canada's domestic law bodes well for the protection of fundamental human rights for migrant workers.

VII. CONCLUSION

The importance of agency in the advancement of human rights, both geographically (to new countries) and substantively (to new subjects), is now well recognized. Due to tireless efforts of various community groups that were linked through transnational support networks and supported by international organizations and, at times, state actors, more individuals in more regions have been able to enjoy protections under the international law. Much scholarship in the field of human rights has documented how pressure from transnational advocacy networks has forced states accused of human rights violations to change their policies. Yet, less scholarly work has focused on the role of domestic rights groups and their efforts to bring national laws and protections in line with international standards in situations where the "right to have rights" has been challenged. This is the central issue explored in this article. This article has also highlighted the importance of judicial agency in the pursuit of justice.

The article asserts that although the obligations of states receiving migrants, vis-à-vis the migrants, are not clearly articulated in the six international treaties that have been widely accepted, by virtue of their universality, these treaties can in fact be extended to non-citizens. However, these rights have to be claimed in order to be effective. Because migrants in irregular conditions are often too vulnerable to claim their own rights, the agency of migrant rights advocates is crucially important. As this article illustrates in the case of agricultural seasonal migrant workers in Canada, various migrant rights groups have used a variety of public fora to placate the situation of these migrants and demand their protection under Canadian law. However, only through the use of litigation were these activists able to effect change. Furthermore, claims made by Canadian migrant rights activists have been suc-

107. *Id.* ¶ 60.

cessful because certain judges have recognized international treaties ratified by Canada as a normative framework for the treatment of non-citizens and have ruled that the rights and protections guaranteed to Canadian citizens be extended to migrant workers.

In reality, the working and living conditions of migrant workers employed in Canada through CSAWP have improved. Because of the aforementioned legal challenges, agricultural workers in Ontario are now covered by the Health and Safety Act and may soon enjoy the right to bargain collectively and strike. UFCW and other grassroots organizations have set up networks of workers' support centers to assist migrant workers claim workers' compensation and pension, receive health care, receive paid parental leave, and access other services and protections to which they are entitled.¹⁰⁸ Yet, despite these improvements, the fundamental problems associated with this labor importation program have not been addressed.

Temporary migration poses a conundrum from the point of view of human rights. The underlying principle for temporary migration programs is the match between the employers' demands for labor in specific sectors and specific jobs and the ability of these programs to supply such labor. In the context of CSAWP, employers are required to submit requests for workers eight weeks before the work starts, and once approved, requests for workers are matched with applications from the migrant-sending countries, such as Mexico, Guatemala, Jamaica, Barbados, and other Caribbean countries participating in the program.¹⁰⁹ Workers are contracted to work for specific employers whose applications have been approved; this arrangement effectively precludes labor mobility. Yet, the lack of employment mobility for workers grants enormous power to employers to exert pressure on the workers and deny them their rights. In addition, the lack of mobility makes it difficult for the workers to challenge their employers and claim rights to which they are entitled.

While employers do not always comply with the administrative requirements of CSAWP, workers are generally too afraid of reprisals to claim their legal rights. The main problem is that workers' mobility is restricted and that employers have excessive control over the workers' current and future labor contracts. The need to secure approval from current employers for any future contracts makes workers acquiescent. When injured, many migrant workers do not claim workers' compensation even though they are covered by Workers Safety Insurance. When sick, many migrant workers do not seek time off to visit a doctor. When asked to work seven days a week, many

108. UFCW CANADA, *THE STATUS OF MIGRANT FARM WORKERS IN CANADA, 2006–2007*, *supra* note 60.

109. Human Resources and Skills Development Canada, *Temporary Foreign Worker Program*, available at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/sawp.shtml.

migrant workers do not dare to refuse the request, even though they are legally entitled to one day of rest per week. When asked to apply pesticides, many migrant workers do not demand training or protective clothing, even though they are entitled to both. When the housing conditions are substandard, many migrant workers are too afraid to ask for improvements. Those who dare to assert their rights risk being deported or black-listed.¹¹⁰

Unless this power imbalance between workers and employers associated with temporary migration programs is addressed, there is little hope that, in practice, workers will enjoy significant improvements in their working and living conditions, despite the existence of international migrant rights' standards and improvements in the national legal protections. A right to mobility is a fundamental human right, and without it, any temporary migration program is seriously flawed. Hopefully, in the near future, Canadian labor organizations will use international human rights law to challenge this aspect of the temporary workers' programs, thus, once again, demonstrating the vital importance of judicial agency in the advancement of human rights.

110. TANYA BASOK, *TORTILLAS AND TOMATOES: TRANSMIGRANT MEXICAN HARVESTERS IN CANADA* 111–12 (2002).