

Mexican migrant farm workers in Canada.  
The evolution of temporary worker programs.

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## ABSTRACT

The transformation of the temporary migration model between Canada and Mexico is characterized by an increased participation of the private sector and a gradual retreat of the State's involvement in the management of the labour flows. A comparative analysis between the Canadian Seasonal Agricultural Workers Program (SAWP) and the Temporary Foreign Workers Program allows us to establish a list of recommendable practices for the development of future programs of temporary migration.

Until now, the flow of unskilled workers between Mexico and Canada has taken legal, state-managed and socially legitimized paths of migration. This paper pretends to facilitate the development of good practices in migration and labour policy. Although the Canadian foreign farm workers programs might seem desirable in comparison with the American experience, we should not forget the important democratic deficit and the risk of exploitation, abuse and discrimination provoked by deficient governmental regulation

## INTRODUCTION

The Canadian system of temporary migration has been considered at international level like a model of legal, ordered and respectful labour flows that respond to the needs of both countries. The success of the Seasonal Agricultural Workers Program was based on the fortunate coincidence of a structural shortage of agricultural manpower in the Canadian market and an oversupply of farm workers in Mexico. The active collaboration of both governments, consecrated in the Memorandum of understanding signed in 1974, contributed to create a legal frame that tried to respond to considerations of health, security and respect of the fundamental rights of the

workers, always considering the needs of the Canadian employers. For years, literature on the subject ignored or diminished the challenges and difficulties faced by migrant workers during their stay in Canada. It was not but until the last decade that investigators, mainly Canadian, documented and denounced the phenomenon of “captive manpower” (“unfree labour”) like fundamental element of the success of the labour and migratory policy of the Canadian government, shaped by the type of relations that it established with the national agribusiness. A critical analysis of the SAWP, combined with outreach and documentation of the living experience of the workers, reveals situations of abuse, exploitation and violation of fundamental rights, characterized by the impossibility of migrant farm workers to negotiate their workforce in a free market. Since the creation of the Temporary Foreign Workers Program in 2002, we have witnessed new dynamics in the management of migratory flows that seems to be oriented towards a fragmentation and privatization of the migration channels, and an important diminution of the role of the Canadian State in the regulation of these channels. This strategy responds to intern dynamics mainly, dynamics over which the Mexican State has little or no incidence. It is in this sense that we wish to analyze the deficiencies of both programs, as well as the challenges that the new direction of Canadian immigration and labour policies present from a labour and human rights perspective.

## I. The Seasonal Agricultural Workers Program

The Seasonal Agricultural Workers Program was created in 1966 to respond to the increasing demand of manpower in the Canadian agricultural sector. The agreement, signed originally with certain countries of the Caribbean, was used in 1974 like model to create the Mexico-Canada Memorandum of understanding. The access to the program is reserved to employers of the following sectors: fruits and vegetables of the field, greenhouse flowers and vegetables, tobacco, nurseries and orchards. The entrance of the workers is authorized by virtue of aligns 10c) of the Immigration Act of 1978, and its corresponding regulation. It establishes the dispositions that deal with the entrance in the country of individuals that are neither citizen nor permanent residents. The Ministries of Citizenship and Immigration Canada (CIC) and Human Resources and Skills Development Canada (HRSDC) simultaneously administer this program. Article 20 of the Regulation authorizes the entrance of workers in compliance with the concluded international agreements between Canada and one or more countries. The agreements are made official in the protocols that include administrative and operational directives on one hand, and a contract signed jointly by the worker and the employer on the other. The operative managed is assured by non profit organizations run and financed entirely by the employers, coordinated according to their needs at provincial level. We found WALI for the Canadian west, FARMS for Ontario and FERME for Quebec, New Scotland and the Prince Edward Island.

To qualify for a temporary work permit under the SAWP, the applicant must be of legal age, satisfy the Canadian laws in the matter of immigration (mainly in the questions of health and security) and sign the work contract. The established wage must correspond to highest of the three following ones: the provincial minimum wage, the wage established by HRSDC or the wage paid to Canadians for the same work. The workers are distributed in 8 provinces, but Ontario, Quebec and British Columbia concentrate the majority. The minimum period of employment is of 6 weeks and the maximum of 8 months, during which the worker has the guarantee of at least 240 paid working hours. The employer must shelter the workers and make sure that they are enrolled in a regime of medical insurance. This regime is free in Quebec and Ontario; in the other provinces, the worker assumes his cost. In case of

work-related accident or illness, the worker is protected by the provincial regime of work related accidents to which all employers must be enrolled. The employer and the worker assume to equal parts the cost of the aerial transport between Mexico and Canada. Finally, the worker can return to Canada the following year as long as “he is named” by the employer. The majority of the workers enter this category, whereas the rest of the free places are assigned by the Mexican STPS. This program gives priority of inscription to married men, between 18 and 45 years old, from rural areas and with experience as farm workers. The proceedings of selection and inscription in the program take place through the offices of the Servicio Estatal de Empleo (State Employment Service) that depends on the Coordinacion General de Empleo (General Employment Coordination), agency of the Secretaria del Trabajo y Prevision Social (STPS, Ministry of Labour). This agency is in charge of selecting, recruiting workers. Once accepted, the STPS presents the temporary work application to the Canadian Embassy in Mexico and makes sure that medical results are transmitted to the Canadian authorities. If the workers satisfy the requirements in terms of health and security imposed by the Canadian regulation, they receive an authorization to reside temporarily in Canada. The temporary visitor visa, linked to the work permit, is conditioned to the fact that the worker stays at the employer’s property. The work permit authorizes the worker to perform agricultural functions solely with the employer designated in its contract. The stay in Canada is allowed as long as the work relation is valid under the contract.

A superficial analysis of the Program might lead us to think that the structure of the contract effectively protects the interests of the workers. However, the system allows for systematic abuse and violation of the contract itself. For example, despite the program policy about wages, it is common that migrant workers receive less than Canadians. Provincial legislation regarding maximum working hours in the agricultural sector does not exist, and even if the contract imposes a maximum number of days and hours it is rarely respected. The workers do not receive overtime payment. Access to the health system in case of illness or work related accident is very difficult. Also, the workers contribute to the social security system with a 2% of their wage, but their temporary stay in Canada makes them inadmissible to claim benefits.

Access to the tribunals is also blocked by the workers temporary status in Canada. The regulation mechanisms created by the SAWP rely on the liaison consular agents capacity to verify workers conditions, but do not take into consideration the absence of financial and human resources of Consulates, and thus fail to guarantee the program's principles.

## II. Temporary Foreign Workers Program – Low skilled workers

The Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D) -official term to designate what commonly we called the Temporary Foreign Workers Program, or TFW- was created in 2002 and modified in 2007 and 2008. Its creation meant a deep change in the constitution of the force of Canadian work, as well as in the migratory structure of the country. Between 2002 and 2008, the number of workers who entered Canada within this program grew 148%, jumping from 101 259 to 251 235. In 2007, for the first time in history, and mainly because of the TFWP, Canada received more temporary workers than new permanent residents (Nakache, 2010). The TFW allows Canadian employers to temporarily engage foreign workers for the uses classified in categories C and D of the national Classification of professions. The maximum duration of the work permit for these workers is of 2 years. The employer assumes the totality of the airplane ticket, but he is not responsible for the lodging. The wage of the workers is not established by HRSDC, nevertheless, it must respect the general conditions of the program: not to be inferior to the provincial minimum wage nor to the wage of the Canadian workers who occupy the same job. The employers who wish to contract a worker within the pilot project of the TFW must obtain an authorization, named Labour Market Opinion (LMO), from HRSDC. The LMO request includes the work contract, approved by the HRSDC so that the CIC can issue a work permit. Nevertheless, the provincial and federal authorities do not participate in the negotiation of the contract nor are part of him.

The administrative and regulating structure of the TFW is not new: it goes back to 1973. Nevertheless, in its origin it was directed to satisfy the demand of highly skilled workers, like academics, managers and engineers. In this sense, the little or null regulation that entails was adequate for workers with greater labour mobility, education and capacity to negotiate their working conditions. The TFW, unlike the SAWP, do not impose international agreements or treaties: it is a visa system that can be used by any individual as long as he demonstrates that hiring foreigners does not affect national employment. The contract between Canadian employers and foreign workers is a private contract that must be in compliance with Canadian provincial and

federal law. Nevertheless, once the signed, each part is responsible to make its case before Canadian courts.

The development of the TFWP to low skilled sectors responded to the increasing demand of employers who wished to accede to the same type of programs that benefitted to organizations like FARMS, FERME or WALI. In 2000, the federal government proposed a series of consultations in diverse regions of the country to evaluate the reach of the enterprise demands. After a period in 2002 in which the manpower shortage was particularly acute, the liberal government of Paul Martin created through new TFWP. Although the program was not designed exclusively for low skilled workers, it was in this sector in which the demand was concentrated. With the Conservative government of Stephen Harper, new controversial sectors were added to the low skilled list, and the budget granted to the TFW was significantly increased -50,5 billions of Canadian dollars in the 2007 – to help CIC offices accelerate the treatment of work permits.

Unions, nongovernmental organizations, academic and confessional groups indicate that low skilled workers face obstacles if not *de jure*, at least *de facto* to exert their rights. These obstacles are closely related to their null labour mobility, the impossibility to integrate the society in a permanent way and the difficult access to the institutions in charge to protect them. The cultural, linguistic and administrative barriers they face turn them into second-class citizens, situation that can only benefit employers. Thus, even if the cases of serious exploitation and abuse are not the majority, recent studies of the government of Alberta indicate that 75% of the companies that employ temporary workers violate provincial regulation (Cotter 2010). The element that worsens the vulnerability of the temporary low skilled workers is the absence of direct regulation and involvement of Canadian and foreign governments. For example, consular staff is not directly responsible to investigate working and living conditions of TFW, and no institutional structure is charged to follow up with their complaints. The Canadian government has the obligation to protect the labour rights of the temporary workers, but labour issues are of provincial jurisdiction and there has been no initiative to promote a harmonized system of migrant workers protection. Access to administrative courts is virtually impossible for a worker who does not know legal the resources available, and even though the

resource is exerted, if the labour relation has ended, the worker must leave Canada and that puts an end to the complaint.

A last element to consider is capacity of employers to negotiate working conditions at international level. Although the contract must comply with provincial regulation, the diversity of labour legislations of each province seems to make difficult the task of the federal government to make sure that each contract is legal. For example, the federal government authorized a contract for Guatemalan farm workers in Quebec that included a 45\$ deduction for housing when the provincial legislation imposed a maximum of 20\$. In spite of the denunciations of the workers and union organizations like UFCW, almost 2 years passed before the contract was reviewed. Even then, workers were never reimbursed, nor the employers were sanctioned for this.

### III. The transformation of Canadian immigration policy.

We should keep in mind that the development of temporary migration programs has more to do with Canadian labour policy than immigration policy. The evolution of programs has always answered to the pressure of organized employers, insisting on the “historic shortage” of manpower in Canada. Temporary work programs are in this sense a prolonged short-term answer to the incapacity of Canadian government to create effective mechanisms to attract manpower in low skilled sectors, including the creation of proper legislation in terms of wages, safety and working conditions.

Under this perspective, we can conclude that the TFWP has completely delegated this responsibility on the private sector. The development of programs of temporary migration can be explained as the coordinate response of the federal government to the increasing demand, from the agricultural sector, for flexible, cheap and available manpower. The creation of the SAWP is enshrined in a long tradition of interventionist policies of provincial and federal governments regarding the agricultural labour market. By means of the constitution of diverse agricultural associations, between the 19<sup>th</sup> and the 20<sup>th</sup> century, the employers managed to impose their necessity of manpower as a national interest issue. Ever since, the Canadian fields have benefitted from a captive, flexible and precarious manpower thanks to the participation of the federal government, that “facilitated” British orphans, Japanese and German prisoners, Canadian convicts, etcetera.

All these examples belong to a wider strategy of regulation of the labour market to benefit the Canadian industry by means of the recruitment and the retention of manpower. The SAWP and the TFW belong to this tradition of unfree labour. Pentland (Pentland, 1959) describes unfree labour as “relations of production in which labour power is acquired and retained through the use of extra-economic coercion, or in which labour is constituted as part of the private property of another”.

In this case, the incapacity of the workers to negotiate its conditions of work, and the obligation to work for a single employer would be product of the State exercise of extra economic coercion. This, from a critical perspective, is equivalent to say that the State “recognizes explicitly that the operation of the mechanisms of market for the allocation and labour distribution of forces is ineffective” (Satzewich 1989, P. 90).

The administration and regulation of the temporary work programs were not always in the hands of the private industry. In fact, until the conservative government of Mulroney, the control of the program depended from HRSDC Budget cuts at federal level implied in the case the privatization of the management of the temporary migratory flow. In spite of it, the federal institutions continued acting in close collaboration with the private initiative to satisfy their needs.

The guaranteed access to a theoretically inexhaustible source of workers facilitated for the last 40 years the growth of the farms, impelling a greater investment. It is so, that regions with high concentrations of migrant manpower inversed the agricultural balance and became net exporters to the United States. The number of migrant workers within the Canadian agricultural sector rose to 22,000 in 2009. This number represents 9,4% of paid workers dedicated to the harvest at full time and 8,1% of the employees of nurseries and greenhouses. Almost 1 employee on 10 in the sector was in temporary Canada of way, either through the SAWP or of the TFW. This proportion is still more significant if we consider that the total number of temporary workers exponentially increases: its proportion grew 60% between 1996 and 2006 (Thomas, 2010).

The SAWP level of success is measured by the fact that it “palliates the deficiencies of the market of Canadian work “(Greenhill, 2000). Its legitimacy is guaranteed by 3 elements. First of all, it assures the return from the workers to Mexico, explained partly by the theoretical guarantee to recover the same position the following year, but because the workers are in isolate countryside, and that the absence of other members of their community make difficult their integration. In these terms, it limits the capacity of the workers to abandon the agricultural sector to look for better working conditions. Secondly, the program assures its legitimacy by offering solely work permits in the agricultural sector, a historical DDD job. Another key of the success of the Program is that it simultaneously considers the needs of the agricultural sector to accede to the global market of employment - and therefore of the role of the government as promoter of the economy- and the protection of the domestic jobs, consecrated role of the modern State-nation. (Gordon, 2000). In this sense, the control of the migratory flows is a solution to control the labour market, as it insures the

access to flexible manpower that assures profitability to enterprise marginally competitive (Taran 2003, p14) or considered like such.

Now, the TFWP copies all the “advantages” of the SAWP, without offering in counterpart an suitable regulation of protection for the workers. We know and we have mentioned the deficiencies of the SAWP, but the total absence of regulation of the new program increases the vulnerability of the workers. The discreet character of the Program contributes to this situation (Nakache 2010, p4), leaving the issue out of the radar of the public debate in Canada as well as in Mexico.

#### IV. Mexican migration policy in the wake of a new Canadian labour dynamic.

The creation of new bilateral instruments to coordinate the flow of manpower between Mexico and Canada seems to be discarded. The general direction of the Canadian migratory policy goes towards an increasing privatization of the management of programs of the temporary workers. The SAWP model, characterized by the existence of exclusive bilateral agreements, is discarded.

Within the Canadian context, although some initiatives at provincial level exist – for example, of the creation of support centres for migrant workers in Alberta, or the imposition of a registry for agencies of foreign recruitment in Manitoba-, these are not coordinated and respond to contradictory dynamics. The battle for migrant workers rights faces, firstly, the lack of political will of the federal government, who maintains the legitimacy of the program invoking the needs of agribusiness, and secondly, Canadian federalism in which, indeed, the provinces have exclusive power over the majority of the conditions that affect migrant workers, even though the mentioned temporary programs of migration are administered solely by the federal government. The slight declination of the SAWP and the creation of the TFWP seem to open new job opportunities for Mexican workers in sectors other than the agriculture. Several observers have commented the possibility of acceding to positions that are better remunerated in sectors like the construction, the hotel industry, and health services. However, the available positions for Mexicans in Canada stagnated and declined in the last years. This can be explained to a large extent by the appearance of the TFWP in the agricultural sector. In the case of Ontario, Quebec and British Columbia, workers of Guatemalan origin are entering the agricultural sector, displacing Mexican manpower. It is not surprising that the employers are moving towards a greater use of the TFWP: the smaller level of regulation and the less demanding contractual conditions, make the election obvious.

Unlike the SAWP, the TFWP does not offer to workers a pre-established institutional channel that eliminates the necessity to pass through employment and placement agencies. The same agencies face capital obstacles to identify sectors where manpower is scarce. This model is quite similar to some American programs due to the fact that migrant workers leave the country without any register of when, where

and in what conditions they will work. In case of abuse and exploitation, the defence before the courts of these workers is almost impossible.

Meanwhile, the associations of employers look for support of foreign governments to accede to the global market of the employment. Although the Mexican federal government has almost no margin to negotiate, let's say, the access to permanent residence of its workers, enough it is limited, it can take advantage of the interest the employers to regulate basic contractual conditions (wages, housing and safety conditions in the workplace). To leave this type of negotiation into the hands of employment agencies that compete in a logic of race to the bottom means, first, to lose the opportunity to regulate this migration, and secondly, to fail to take advantage of the possibility of creating migratory, labour policies, of coherent health and social security.

In this sense, we based our recommendations not only in existing the federal and state legislation, but in the increasing number of state-level experiences of international participation in matters of migration, considering that this is a propitious time for the development of governmental structures that respond to the exigencies of migrants in the matter of working conditions, qualification, health, labour and human rights.

The absence of an institutionalized channel of migration is an important risk for the worker who can be victim of fraud or exploitation. The fact that the recruiting companies in Mexico and Canada can work in a relatively open and confusing legal context facilitates the existence of legal gray zones, a traditional characteristic of triangular labour relations. The presence of third parties adds another complexity level the transnational character of the contracts, and thus the number of foreseeable "systemic failures" increases exponentially.

Now, concerning the elaboration of migratory policies at federal and state level, we considered that both levels of government have not only a responsibility, but also an urgent interest in regulating and legislating the incipient private channels of migration towards Canada. The slow evolution of the Canadian provincial legislation in the matter of foreign employment agencies does not have to be used as an argument to evade governmental responsibilities of both levels of government. This urgency is

explained first of all as the need for coherence in the evolution of the legal frame of human rights at national and international level, but also by considerations of internal policies in matters of health, qualification, social security and work. The temporary character of the programs of labour migration to Canada must force the authorities to take part to regulate not only the exit of its nationals, but to plan their possible return.

The Ley Federal del Trabajo (Federal Law of the Work) contemplates in articles 25 and 28 a general legal frame for migration and labour. The obligation for the foreign employer to register themselves in the country and to put the contracts under the evaluation of the Juntas de Conciliación y Arbitraje (Boards of Conciliation and Arbitration), as well as to provide a guarantee to the fulfilment of every obligation, is a condition difficult to impose when a third party is involved. We have the challenge to create a legislation that not only mentions general principles of migrant workers rights, but also creates institutional mechanisms meet their needs before, during and after their stay in Canada. This includes in first term a more active participation of the Mexican federal government, framed within the dispositions of the Ley Federal del Trabajo.

This participation could evolve towards a debate between state and federal governments to create a mechanism, within the structure of the Servicio Nacional de Empleo (SNE), which could do be in charge of the recruiting, training, placement and defence of the worker. This structure has the advantage of imposing little or null modification of the present legislation, since the Ley Federal del Trabajo includes dispositions regulating the role for the SNE within a structure of collaboration with other Secretariats and dependencies. The analysis of pertinent articles allows to imagine a migratory and labour policy with the emphasis put in the proper training of the workers, the *direct or indirect* promotion of the employment, and the celebration of agreements in the matter of employment, between the *federal federation and the states*.

The perfect example to illustrate the legal and administrative capacity of the Mexican authorities to manage this flow is the SAWP. The management of the program by the SNE is based on articles 537, 538 and 539, fraction I, sections d), e), f), g) and h) of the Ley Federal del Trabajo. Within this legal context, its main functions are to recruit

the workers, to create a register of manpower available in coordination with the Servicios Estatales de Empleo (SEE) and to carry out the proceedings to obtain work permits. In the same spirit, the SNE coordinates with the labour flow with employers and it makes sure that the conditions of the contract have been respected. The model eliminates the intermediaries, and thus diminishes the risks of fraud and exploitation. Also, it eliminates the expenses that the workers must incur to participate in this type of programs. A deeper analysis of this instrument points to article 539, paragraph II, concerning the placement of workers. Section a) contemplates the channelling of the workers towards employers. Section d) allows to contemplate the creation of an inter-institutional mechanism charged to regulate the placement of the nationals abroad, in coordination with the respective administrative units of other concerned ministries (Secretarías de Gobernación, Patrimonio y Fomento Industrial; Comercio, y Relaciones Exteriores).

To facilitate this could be interpreted as a tacit recognition of the failure of the Mexican employment policies. Nevertheless, national and international experts on migration agree that if state intervention cannot stop the flow by themselves, at least the can contribute to diminish the vulnerability of migrant workers.

An alternative proposal, that considers the delicate political context and dynamic between federal government and the state governments, is to develop strategies of close regulation of the migratory movements that do not force the federal government to be involved in the recruitment and placement of workers. This alternative could be base in the participation of non-profit organizations, ideally social organizations with experience in the matter of migration, which could act in close relationship with the state and federal governments and develop structures to recruit, place and defend migrants. An organism thus constituted would have under its responsibility to receive and channel workers complaints to the proper agency. In this case, the availability of the federal government stops being an obstacle: each state government has the faculty to create its own mechanisms of regulation.

The participation of the Mexican states in the management of migratory flows, and the development of legislations, organisms and instruments of regulation evolves of irregular way. A new dynamic seems to emerge, where state-level governments become actors in the international scene in the matter of migration, developing

privileged links with other countries, states, provinces and even civil or union organizations. In matters of recruitment, as it's the case of the Estado de Mexico- or human rights protection, as it's the case for Mexico City-, state-level governments participate in a dynamic of reconstruction of Mexican federalism, assuming that the social costs of the migration fall within their competition. New legislation regarding the role and importance of state agencies charged with migration in Tlaxcala and Puebla are other examples of the same phenomenon.

Once again, the governments will have to take responsibility for the development of a coherent policy for this issue. Thus, regarding health issues, the state governments will have to make that some type of regime protects workers and their families. In the matter of training, the states should try to develop agreements with academic institutions that will offer proper job training, or to even carry out certification programs for experienced low skilled workers. To develop placement strategies, the governments could strengthen agreements with Canadian provinces or associations of employers, who should have social partners involved to make sure labour and human rights are respected.

This type of structure presents a unique opportunity to support the individual initiative of each worker and to create synergies between migrants and their government. A last consideration to this analysis must be added. The responsibility of the development of each migrant community cannot be unloaded on the citizens. The participation of both levels of government would have to be directed towards the support of the nationals abroad, eliminating as far as possible the costs of the displacement of the worker and providing adapted attention for him and its family in accordance with to the effective legislation. The Philippine model of state regulation of the migration, in which the worker is recruited by the government, but assumes the costs of its own migration, and it even becomes the main investor of an agency of governmental use, is far from being an ideal model of participation of the State. Both models proposed in this work retake the critics done to the PTAT. The participation of both governments, the standardization of contracts and the elimination of private employment agencies are all an important piece of an ensemble of good practices proven for the last 35 years.

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