

THE GENESIS AND PERSISTENCE OF THE COMMONWEALTH CARIBBEAN SEASONAL AGRICULTURAL WORKERS PROGRAM IN CANADA[©]

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I. INTRODUCTION

Immigration into Canada has traditionally been examined by analyzing the country's labour needs and those immigration laws which facilitate immigration to satisfy these needs. Seldom has migration of labour been viewed as the logical outcome of a historical process or, indeed, the result of a conscious rational policy rooted in the political economy of a country or region. For the most part, writers have analyzed immigration in terms of traditional "push" and "pull" factors with the central focus being on the seemingly existential desire of the immigrant to seek "greener pastures" in the Western world.¹

¹ For instance, see D.I. Marshall, "The History of Caribbean Migration: The case of the West-Indies" (1982) 11 *Caribbean Review* 1 at 6.

This paper attempts a departure from that traditional approach. I argue that the annual migration of thousands of agricultural workers from the Caribbean to work on the farms of Southwestern Ontario has its etiology in the historical experience of the Caribbean. Migration of labour will be examined as a process whereby labour is consciously exported as a rational means of promoting economic development within the sending countries. This recognition is essential to assessing the true nature of the Commonwealth Caribbean Seasonal Agricultural Workers Program.

The theoretical underpinnings of this paper come from Hilbourne A. Watson's, "International Migration and the Political Economy of Underdevelopment: Aspects of the Commonwealth Caribbean Situations."² Watson argues that migration of labour to developed countries is a specific symptom of the "process of accumulation on a world scale."³ This process occurs through the depletion of the resources of lesser developed regions for development of the more advanced regions. The underdevelopment of any particular area, therefore, is a precondition for the development of a more advanced area. Watson notes that:

Our main argument is that this export of labour and the policy that informs it are part of that phenomenon that we call underdevelopment. Even if it is taken for granted that working people ... emigrate from underdeveloped countries in search of better employment and training opportunities, it is still necessary to identify the contextual basis of this emigration. Such an attempt at identification cannot be undertaken in isolation from the developed capitalist countries with which the underdeveloped countries are linked to form the world capitalist system. Hence, under-development and development within international capitalism are two sides of the same coin.⁴

The genesis of the Commonwealth Caribbean Seasonal Workers Program coincides with the incorporation of the Caribbean into what Watson refers to as the "world capitalist system." The paper will commence with the integration of the Caribbean into the

² H.A. Watson, "International Migration and the Political Economy of Underdevelopment: Aspects of the Commonwealth Caribbean Situation" in R.D. Bryce-Laporte & D.M. Mortimer eds, *Caribbean Immigration to the United States* (Washington, D.C.: Smithsonian Institute, Research Institute on Immigration and Ethnic Studies, 1976) at 16-44.

³ *Ibid.* at 18.

⁴ *Ibid.*

system of European mercantilism in the seventeenth and eighteenth centuries. It will then focus on the growth of sugar plantations in the Caribbean, the use of slave labour in production, and the contribution of the plantation to industrial capitalism, then discuss the demise of the plantation and the growth of corporate imperialism in the Caribbean during the twentieth century. Rather than provide a chronological history of the Caribbean it will focus on the reasons for the underdevelopment of the region.

The phenomenon of corporate imperialism or foreign ownership of the means of production and the concomitant expropriation of surplus capital explains the permanently high levels of unemployment in the islands. This creates a reservoir of unemployed or underemployed labour which forces the labourer to accept any form of employment, even under the most onerous conditions. Since these reservoirs of labour represent a potential source of labour unrest, the West-Indian governments are amenable to supporting schemes entailing the export of labour. Migration of labour represents a politically expedient means of avoiding structural reform of the Caribbean economies and the individual governments are inclined to look askance at all but the most egregious abuses of the Caribbean Agricultural Workers Program in Canada.

This historical backdrop provides what Watson refers to as "the contextual basis" of the seasonal migration of Caribbean agricultural labourers to Canada. Lacking any viable alternative livelihood on their islands, the labourers are contracted to work on terms which, not surprisingly, primarily serve the interests of the individual Canadian farmer. The Memorandum of Agreement between the Canadian government and the individual island nations, the Contract of Employment signed by the individual worker, and Canadian immigration law, all combine to create a regulatory scheme which legitimizes the exploitive nature of the Program. I argue that the Program approximates much of the control (although not the brutality) inherent in slave labour but avoids the universal opprobrium attached to that system of labour.

II. INTEGRATION OF THE WEST-INDIES INTO THE WORLD ECONOMY

A. *Genesis of the Sugar Plantation*

Christopher Columbus created the possibilities of overseas expansion for Europe, when he "discovered" the West-Indies in the late fifteenth and early sixteenth centuries. The subsequent colonisation of the islands by the Dutch, British, and Spanish culminated in a distinct shift in European foreign trade policy, "from the search for foreign products – the mainspring of foreign trade policy until the sixteenth century ... to the search for outlets for domestic merchandise."⁵ The colonies were regarded as markets for the goods produced in the metropole and also as the suppliers of raw materials to the European countries. This policy reflected the economic philosophy of mercantilism prevalent in the early days of European colonisation. The rationale for mercantilism, according to an eighteenth century observer, was that "[t]he great benefit resulting from colonies is the cultivation of staple commodities different from those of the mother-country; that, instead of being obliged to purchase them of foreigners at the expense possibly of treasure, they may be had from settlements in exchange for manufactures."⁶

The proponents of mercantilism sought to create economic sinews which would inextricably bind the colonies to the metropole. The profits accruing from the production of agricultural products would rest ultimately, not in the islands, but in the respective European country. Mercantilism represented the economic policy

⁵ W.S. Woytinsky & E.S. Woytinsky, *World Commerce and Governments* (New York: Twentieth Century Fund, 1955) at 9 quoted in A. Gunder Frank, *Dependent Accumulation and Underdevelopment* (New York: Monthly Review Press, 1979) at 14.

⁶ A. Young, *Political Essays Concerning the Present State of the British Empire* (London, 1772) at 274 quoted in R. Sheridan, *The Development of the Plantations to 1750* (Barbados: Caribbean University Press, 1970) at 10.

most convenient to the accumulation of capital within the mercantilist countries during this period.⁷

To enhance this accumulation of capital, law became the handmaiden of the beneficiaries of commercial capitalism. The British Parliament enacted the *Navigation Acts* in 1651 to ensure the smooth passage of profits from the colony to the metropole. Under the *Act*, the colonists could only buy from and sell to designated British merchants and the agricultural products of the colonies could only be transported in British ships.

The production of agricultural products in the Caribbean required the exportation of labour from the metropole to the colony. These working class English immigrants migrated to the Caribbean as indentured servants to cultivate a vast number of cash crops on small to medium size farms. They were contracted to work for periods up to seven years after which they had the option of returning to England or remaining on the island. Indeed, until the "sugar revolution" in the mid-seventeenth century, agricultural production in the Caribbean was largely undertaken by white "indentured servants" from England.

The "sugar revolution" changed all this. The following account of the transformation in Barbados occasioned by the sugar revolution epitomises the change undergone by the whole Caribbean:

In 1645, Barbados, with a total arable acreage of less than 100,000 acres, had 18,300 able bodied white men.... There were only 5,680 Negro slaves. The average holding was less than ten acres in size, and there was one Negro slave to approximately seventeen arable acres. By 1667 the island's eleven thousand small proprietors had dwindled to 745 large plantation owners, the ten-acre holding at 1645 had been displaced by plantations ranging from two hundred to one thousand acres and ... the slaves had increased to ... 82,023.⁸

Jamaica underwent a similar transformation in the eighteenth century while Trinidad experienced the same in the nineteenth.

Sugar production resulted in the widespread importation of African slaves to the Caribbean. This occurred due to the

⁷ E.D. Genovese, *The World the Slaveholders Made* (New York: Vintage Books, 1969) at 25.

⁸ E. Williams, *From Columbus to Castro: The History of the Caribbean, 1492-1969* (London: Andre Deutsch, 1970) at 112.

insufficient supply of indentured labour from England and the relatively short terms of contracts of the indentured servants. Land and capital were useless without the labour to exploit it. Even where an abundant supply of labour was available, that labour had to be compelled to work during the crucial periods of harvest and production of cane sugar. African slaves became, in the hands of European mercantilists, "legally an item of capital equipment only, not a labourer with personal status arising out of contract."⁹

Economic activity revolved around the sugar plantation. In contrast to feudal societies where the lord of the manor derived his authority wholly from custom and tradition, the plantation owner derived his authority exclusively from the economic power he wielded over his slaves.¹⁰ The plantation, unlike the manor, was not a symbol of his status, but the source of his wealth. The imperatives of profit making and a near-inexhaustible supply of slaves conspired to make the sugar plantation a death sentence for the African slave, whose life expectancy was between nine and fifteen years.¹¹

If Caribbean society developed as a capitalist society based on slave production, it also, not surprisingly, developed as a racist society. Racial cleavages were clamped on economic cleavages to create a highly stratified society where economic status correlated with skin colour. This proceeded along lines different from the North American experience since in the Caribbean, there germinated an elaborate network of delicate nuances of "shade" and colour, the legacy of which is still evident in the Caribbean today.¹² Lightness of skin therefore became the measure of one's proximity to the locus of economic wealth and power.

⁹ G.K. Lewis, *Main Currents in Caribbean Thought: The Historical Evolution of Caribbean Society in its Ideological Aspects, 1492-1900* (Baltimore: John Hopkins University Press, 1983) at 6.

¹⁰ *Ibid.*

¹¹ For instance, see O. Patterson, *The Sociology of Slavery: An Analysis of the Origins, Development and Structure of Negro Slave Society in Jamaica* (Rutherford, N. J.: Fairleigh Dickinson University Press, 1969).

¹² Lewis, *supra*, note 9 at 9.

This wealth and power reposed in the hands of the mercantilists and their intermediaries in Britain. As much as 65 percent of the annual income and profit of Jamaica, the largest and most productive British colony, went to residents of Britain and Ireland.¹³ After the initial investment in land, slaves, and machinery, the West-Indies were largely self-financing and the profits were not reinvested but permanently remitted to Europe.¹⁴

B. *Demise of the Slave Plantation Society, 1834*

Monoculture based on slave production of sugar and exclusive access to the West-Indian markets, created the wealth which fuelled the growth of industrial capitalism in England.¹⁵ However, the tenets of industrial capitalism proved to be at odds with that of commercial capitalism, its primogenitor. For instance, the spectacle of a vast number of slaves became an impediment to the free interplay of the market forces of supply and demand in the international economy. The monopoly enjoyed by a few commercial capitalists over the West-Indies trade was antithetical to the interests of the newly emergent industrial capitalists.

The demise of slavery in 1834 cannot be attributed solely to rising market forces in England. The opposition to the slave trade in the late eighteenth century became part of a national political movement with a humanitarian ideology.¹⁶ As this opposition to slavery grew in the early nineteenth century, the interests of the humanitarians and industrialists, insofar as the emancipation of slaves

¹³ R. Sheridan, *An Era of West-Indian Prosperity, 1750-1775* (Barbados: Caribbean University Press, 1970) at 106.

¹⁴ R. Pares, *Merchants and Planters* (Cambridge: Cambridge University Press, 1960) at 50.

¹⁵ Williams, *supra*, note 8 at 210.

¹⁶ S. Drescher, *Econocide: British Slavery in the Era of Abolition* (Pittsburg: University of Pittsburg Press, 1977) at 185-86. See also S. Drescher, *Capitalism and Antislavery: British Mobilization in Comparative Context* (London, New York: MacMillan, 1986) c. 4.

were concerned, coalesced.¹⁷ Both sought to achieve the same goal, albeit for different reasons. The abolition of slavery meant the culmination of the efforts of the abolitionists, but not necessarily that of the industrialists. The free trade assault of the industrialist on the agricultural monopoly in Britain culminated with the repeal of the *Corn Laws* in 1846 and of the *Navigation Acts* in 1849.

C. *The Historical Legacy of Slavery*

The demise of slave labour did not mark the demise of the plantation economy of the region. Instead, the evolution of the Caribbean economy since the early nineteenth century, encompassed a transition from "pure plantation" to "modified plantation" and finally to its present state of "plantation even further modified."¹⁸ The new plantation, however, produces exclusively for an export market unlike the slave plantation which satisfied the consumption needs of both slaves and owners.

The salient features of plantation economy during the slave period and the present remain essentially the same. Foreign ownership of the means of production remains the essential characteristic of both periods. For instance, in 1750, over 50 percent of the property in Jamaica was owned by absentee landowners. By 1850 that figure had risen to 90 percent.¹⁹

Today, these absentee owners are giant transnational or multinational corporations.²⁰ Through these corporations, foreign capital dominates the leading sectors of the region's economy such as banking, tourism, mining, manufacturing, petroleum, and export

¹⁷ *Ibid.*

¹⁸ L. Best quoted in T. Barry *et al.*, *The Other Side of Paradise: Foreign Control in the Caribbean* (New York: Grove Press, 1984) at 4.

¹⁹ Patterson, *supra*, note 11 at 37-38.

²⁰ For instance, see N. Girvan, *Corporate Imperialism: Conflict and Expropriation, Transnational Corporations and Economic Nationalism in the Third World* (New York: Monthly Review Press, 1976) and R. Graham, *The Aluminum Industry and the Third World: Multinational Corporations and Underdevelopment* (London: Zed Press, 1982).

agriculture.²¹ In 1982 the total amount of direct U.S. investment in the English speaking Caribbean amounted to \$29.1 billion or more than four times the GNP of all the former British colonies combined.²²

The extent of foreign investment implies that the workers are divorced from the fruits of their labour. According to Barry *et al.*:

The rate of return from U.S. investment in the Caribbean is substantially higher than in other regions. In 1980, the rate of return in the Caribbean was 30.5 percent, considerably higher than either the international average of 14.3 percent or the Latin American average of 15.8 percent.²³

These profits are paid out to foreign shareholders with little used to benefit the workers or the islands which provided the cheap labour for the multinationals.

The extent of foreign investment and the export of profits does not tell the full story of the foreign ownership of the means of production in the region. In some of the poorer islands such as Dominica and St. Lucia, a single crop, bananas, accounts for about 70 percent of export earnings. Moreover, a British multinational, Geest Industries, purchases the entire banana crop of both islands. And in Grenada and St. Vincent the banana industry employs, directly or indirectly, one half of the working population. Given its monopoly, Geest withholds from the grower as much as 45 percent of the retail market price for bananas.²⁴ The parsimony of the British multinational prompted a British Development Division study, to conclude that "the income left for the small and medium farmers is considerably less than they could earn as manual farm labourers."²⁵ Not surprisingly, the Dominica Agriculture Plan for 1977-1981

²¹ Barry, *supra*, note 18 at 19.

²² *Ibid.* These figures only represent the book value of the investments, not the market value. Furthermore, they exclude investments that are less than five hundred thousand dollars.

²³ *Ibid.*

²⁴ *Ibid.* at 41.

²⁵ British Development Division, *Plan for Restructuring of Winward Islands Banana Industry* (Discussion Paper, December 1981) quoted in Barry, *supra*, note 18 at 41.

concluded that "[i]t is evident that banana is incapable of providing the quality of life consonant with the aspirations of the Dominican people."²⁶ Unfortunately, the realities of monopoly buyer and fluctuating prices for their products on the world market relegate the inhabitants to a precarious way of living.

If Britain imposes a stranglehold on the marketing of the region's agricultural products, then Canada imposes a similar hold, albeit less intense, on the region's banking services. Three of Canada's leading banks, the Royal Bank of Canada, the Bank of Nova Scotia, and the Canadian Imperial Bank of Commerce have, with Barclays of England, dominated Caribbean banking since the early 1900s. In some countries, such as Jamaica, nationalization has tended to curb foreign dominance of the local banking services. On the other islands, Canadian and other foreign banks operate with impunity, and there are virtually no restrictions on the banks' ability to repatriate profits to England or Canada.

These, then, are the salient features of the political economy of the Caribbean. Monoculture during slavery has been replaced by monopoly and foreign ownership. Absentee ownership has given way to corporate imperialism. The imperatives of "rational" cost accounting and efficiency have led to increased mechanization to the general detriment of indigenous labour. Whatever indigenously financed production exists in the islands has been marginal at best or insignificant at worst.

The island economies get very little help from international finance organizations. The International Monetary Fund occasionally imposes "austerity" measures on the island governments, resulting in wage freezes and retrenchment in the public sector. These measures, along with the expatriation of profits, help create an army of unemployed labour in the islands. This unemployment ranges from 26 and 23 percent in Jamaica and Dominica respectively, to 20 and 14 percent in St. Vincent and Grenada respectively.²⁷

²⁶ B. Riviere, "A Special Report on Dominica" *Trinidad and Tobago Review* (March 1979) 13-14.

²⁷ Barry, *supra*, note 18 at x-xi.

D. *Export of Labour*

The stranglehold of foreign domination and the creation of "surplus" labour has therefore necessitated the annual migration of thousands of West-Indians in search of employment. This phenomenon cannot be explained in sociological terms or as the result of a distinct West-Indian personality. Rather, migration results from the underdevelopment of the region.²⁸

Significantly, this outward movement of labour commenced with the active solicitation of labour from labour recruiters worldwide, with the full support of the colonial governments then in power. For instance, the Barbados legislature passed a law in 1873 which sought to assist the "poor and unemployed" to emigrate.²⁹ Other legislatures followed suit and in the process established the pattern of the export of labour in the Caribbean.

The first major exodus occurred between 1885 and 1920, when West-Indian workers migrated to work on the Panama Canal.³⁰ During the same period, over seven thousand Dominicans were recruited to work in the gold fields of Venezuela. In the early twentieth century the United Fruit Company recruited workers to cultivate bananas in Central America, while between 1916 and 1929 about ten thousand West-Indians were recruited to help develop the oil fields of Venezuela. Throughout this period and beyond, West-Indians were exported by their colonial governments to work on sugar plantations in Cuba, the Dominican Republic, and Trinidad and Tobago.³¹

The actual number of workers who emigrated varied with the demands of their potential employer. Economic conditions, including the supply of cheap indigenous labour for the recipient countries, determined the timing of each recruitment drive for West-Indian labour. However, the persistence of the policy of exporting labour

²⁸ Watson, *supra*, note 2 at 27.

²⁹ Marshall, *supra*, note 1 at 6.

³⁰ *Ibid.*

³¹ *Ibid.*

illustrates that the reasons West-Indian workers migrate are permanently rooted in the economies of the islands. These conditions are structural features of the Caribbean economy, and are not simply the result of the ebb and flow of economic conditions within each island and the global economy in general. Migration of labour therefore becomes less an exercise of the workers' freedom of mobility than the inevitable end product of the political economy of the islands.

Consequently, the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada must be placed within the overall context of the political economy of the Caribbean. Its immediate precursor can be found in the H-2 Program in which the U.S. Department of Labour allows Florida cane growers to contract 8,500 West-Indian workers annually to cut cane on sugar plantations.³² The configurations of both Programs may be different but the experience of the migrant workers remains, as I shall argue, essentially the same. As one West-Indian cane-cutter put it:

If the supervisor sees us talking to a white man, we get sent home. We complain about food here, we get sent home. We say we want more money for the cane, we get sent home. Anything we do the supervisor don't like, we get sent home.³³

III. THE TRANSPLANTED PLANTATION

A. *Breadth and Scope of the Caribbean "Guest-Worker" Program*

The program arose out of the general inability to meet the seasonal demand of Southwestern Ontario fruit and vegetable growers, processors, and packers for agricultural workers from domestic sources.³⁴ Canada experienced a substantial decline in agricultural employment, from 858,000 in 1953 to 473,000 in 1974, a

³² H.M. Semler, "Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture" (1983) 1 Yale L. Pol'y Rev. 187 at 203.

³³ Quoted in Barry, *supra*, note 18 at 36.

³⁴ Canada, Research Projects Group, Department of Manpower and Immigration, *Review of Agricultural Manpower Programs* (Ottawa, 19 August 1974) at 15.

45 percent decrease within a twenty year period.³⁵ This drop in the agricultural labour force was not accompanied by a corresponding decline in the number of agricultural farms and their general need for labour. To satisfy a need for seasonal agricultural labour, the federal government inaugurated programs such as mobility grants, summer student programs, and Farm Labour Pools.

However these schemes proved insufficient to address the labour problems experienced by the farmers. Agricultural labour, such as strawberry and apple picking, is arduous work, with very little respite from the hot summers in southwest Ontario. The wages are low and invariably below the provincial minimum wage. Students who would be attracted to the scheme for the hard work, if not the wages, leave sometime in August for classes, at the peak harvest season for most fruit and vegetable crops, fruit processing plants, and flue-cured tobacco.³⁶

The "inflexibility" of UIC and welfare payments, which do not offer incentives to work for short periods in seasonal work, further discourages the local labourer from seeking employment in agriculture.³⁷ As indicated, agricultural wages are very low and since UIC benefits comprise only two-thirds of one's insurable earnings prior to becoming unemployed, the potential worker avoids agricultural labour no doubt in part because of the low unemployment benefit he expects to receive during the off-season.

The Commonwealth Caribbean Seasonal Agricultural Workers Program is a response to the unattractiveness of agricultural work to indigenous labourers in Canada. The Program was seen as a means of supplementing the local labour supply, not displacing it. In July 1966, Canada proposed a scheme to Jamaica at the Commonwealth Caribbean-Canada Conference in which Jamaica undertook to supply workers to Canada. Under this Agreement, 264 Jamaican workers entered Canada in 1966 while in

³⁵ Canada, Strategic Planning and Research Division, Department of Manpower and Immigration, *Non-Immigrant Foreign Workers in Canada - A Preliminary Look* by A. Shingadia (Ottawa, October 1975) at 24.

³⁶ See Table V, *infra* at 277.

³⁷ Shingadia, *supra*, note 35 at 24.

1967 similar agreements with Trinidad and Tobago and Barbados, resulted in 1,077 workers being admitted to Canada.³⁸

TABLE I
No. of Caribbean Seasonal Workers Entering Canada
by Country of Origin and Area of Activity
1966-1973

Country of Origin Area of Activity	1966	1967	1968	1969	1970	1971	1972	1973
Jamaica	264	637	678	747	645	640	780	1473
Trinidad & Tobago	—	218	249	376	327	348	404	825
Barbados	—	222	331	326	307	283	347	750
Total	264	1077	1258	1449	1279	1271	1531	3048
AREA OF ACTIVITY								
Apples	—	—	394	590	454	495	622	769
Other Fruits	—	—	105	202	176	142	136	272
Tobacco	—	—	140	111	106	53	91	502
Fresh Vegetables	—	—	68	66	63	63	80	108
Other Vegetables	—	—	42	45	55	32	67	431
Tobacco & Other Crop	—	—	37	24	11	20	10	—
Nursery Trades	—	—	—	—	—	—	—	167
Mushroom Growers	—	—	—	—	—	—	—	19
Poultry	—	—	—	—	—	—	—	6
Vegetable Canning	—	—	325	301	299	356	388	644
Fruit Canning	—	—	60	30	25	25	31	32
Asparagus	—	—	87	80	90	85	97	98
TOTAL	264	1077	1258	1449	1279	1271	1531	3048

Since then, the scheme has expanded to include virtually every fruit growing activity in southwestern Ontario. From the original 264 workers in 1966, the number of workers brought to Canada grew to 3,048 in 1973, a 1,100 percent increase in the six year period (see Table I³⁹). Apple farming and vegetable canning

³⁸ *Review of Agricultural Manpower Programs, supra*, note 34 at 15.

³⁹ *Ibid.* at 16.

form the most important areas of activity. Increasingly, however, many workers have become involved in tobacco growing and a diverse number of vegetables.

From 1974 to 1985, the scheme grew to encompass 4,646 workers from the Caribbean. In 1976 the countries of the Eastern Caribbean signed similar agreements with the Canadian governments and since then about 4,000 workers from those countries have entered Canada under the program.⁴⁰

From 1974 to 1978 the number of workers who participated in the scheme declined slightly. However, participation increased from 4,384 in 1979 to 5,325 in 1980, or 21 percent. Between 1981 and 1984, there was a slight decrease in participation largely because of governmental action and market conditions. In 1981, and 1984, the Canadian government moved to curtail the program because of allegations that foreign seasonal workers were displacing their indigenous counterparts in the labour market. Formidable lobbying by farmers' organizations such as the Canadian Horticultural Council forced the Federal government to recant.⁴¹ By 1981, 1,071 employers participated in the scheme, an increase of 191 over the preceding year.⁴² The slight decrease in the number of Caribbean labourers between 1981 to 1984 resulted from the demand of tobacco manufacturers to growers to cut tobacco production by 30 percent.⁴³

⁴⁰ See Table II, *infra* at 259.

⁴¹ E. Alexander, *Caribbean Farmworkers in Canada* (M.J., Carleton University, 1985) [unpublished] at 109. Obtained through the kind permission of the author who is a former liaison officer from Dominica, West-Indies and is presently a Diplomatic Officer in the O.E.C.S. (Organization of Eastern Caribbean States) Commission in Ottawa.

⁴² Minister of Employment and Immigration, Release (22 May 1981) 2.

⁴³ Alexander, *supra*, note 41 at 78.

**WORKER ARRIVALS IN CANADA
1976-1985**

<i>Year</i>	<i>Total Worker Arrivals</i>	<i>Jamaica</i>	<i>Trinidad & Tobago</i>	<i>Barbados</i>	<i>Eastern Caribbean</i>
1985	4173	2934	350	549	340
1984	3829	2597	337	532	363
1983	3952	2608	394	553	397
1982	4818	3003	519	754	542
1981	5130	2957	689	859	625
1980	5325	2941	791	952	641
1979	4384	2624	669	716	375
1978	4434	2702	740	692	300
1977	4419	2590	766	744	319
1976	4875	2863	878	824	310
1975	5584	3301	1214	1069	—
1974	5342	2954	1296	1092	—

Despite this the demand for foreign labourers by Canadian farmers continues unabated. In 1987 Canadian farmers hired 6,124 workers.⁴⁵ On 29 September 1987, the former Minister for Agriculture Canada, John Wise, announced that the Program would continue to operate in 1988 and beyond.⁴⁶ Furthermore, the program was made more accessible to farmers by allowing new growers to recruit two offshore workers immediately.⁴⁷ Should there be additional shortfalls in the Canadian labour force, the local farmer can obtain additional workers with minimum bureaucratic obstacles to overcome. The Conservative government recently discarded the quota system used prior to 1987, when there was a

⁴⁴ Adapted from Canada Employment and Immigration Commission quoted in Alexander, *supra*, note 41 at 109.

⁴⁵ See Table IV, *infra* at 274.

⁴⁶ Minister of Employment and Immigration, Release (29 September 1987).

⁴⁷ *Ibid.*

obstacles to overcome. The Conservative government recently discarded the quota system used prior to 1987, when there was a 20 percent limitation on the proportion of offshore workers to native workers on any farm admitted into Canada. The government also signed a new agreement with the Caribbean governments in February 1988 to extend the program for an additional three years.

1. Statutory Framework

Under section 4(1) of the *Immigration Act*,⁴⁸ only Canadian citizens and permanent residents have the right to enter Canada. The foreign agricultural worker therefore needs special authorization to enter Canada to work on the farms of Southwestern Ontario. This authorization is provided for in the *Immigration Act*, and its Regulations.⁴⁹

Section 10(c) of the *Act* provides that every person seeking to enter Canada to work must obtain authorization prior to appearing at a port of entry. Furthermore, Regulation 18(1) states that no person, other than a Canadian citizen or permanent resident, shall engage in or continue in employment without valid employment authorization. Under Regulation 18(2), a person who holds such an authorization can work in Canada only if he or she complies with the terms and conditions specified in the authorization.

Pursuant to Regulation 19(3), a worker who seeks to enter Canada under section 10(c), may apply for an employment authorization at a port of entry. The Immigration Officer will not issue the authorization if, in his or her opinion, employment of the person in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents.⁵⁰ The Officer must consider whether the prospective employer made reasonable efforts to hire Canadians, and whether the wages and working conditions

⁴⁸ *Immigration Act*, S.C. 1976-77, c. 52.

⁴⁹ *Regulations Respecting Admission and Removal from Canada of Persons Who Are Not Canadian Citizens*, SOR/78-172 [hereinafter *Immigration Regulations*].

⁵⁰ *Ibid.*, s. 20(1)(a).

offered are sufficient to attract and retain Canadian citizens or permanent residents.⁵¹ If the employer offers lower wages to the foreign worker than that which would attract Canadian workers, then the application to hire foreign workers would likely be rejected.

The Commonwealth Caribbean Seasonal Agricultural Workers Program, however, is an exception to this process. Pursuant to Regulation 20(5), the Immigration Official lacks this discretionary authority to deny employment authorizations to workers entering Canada, under the Commonwealth Caribbean Seasonal Agricultural Workers Program.

20(5) Notwithstanding paragraph (1)(a) and subsections (3) and (4), an immigration officer may issue an employment authorization to

(b) a person coming to or in Canada to engage in employment pursuant to

- (i) an international agreement between Canada and a foreign country or an arrangement entered into with a foreign country or an arrangement entered into with a foreign country by the Government of Canada or by on behalf of one of the provinces other than arrangements concerning seasonal workers.

Despite this discretionary authority, however, the Immigration Department grants the employment authorizations on request since the public policy issues regarding employment and wages⁵² have already been weighed by the federal government. In this regard, IS 15.10(1)⁵³ provides that:

[f]or a number of reasons, Canada has concluded and will continue to conclude bilateral agreements which involve the movement of foreign personnel to Canada, sometimes to the seeming detriment of some Canadians. These factors are weighed beforehand to ensure that this loss is compensated in other ways. Our duty here is to ensure that the terms of the agreements are respected and that only those workers stipulated in the agreement to gain access to Canada for the part they are to play in the implementation of the agreements.

The workers are repatriated once they have played their part under the Agreement. To facilitate the orderly repatriation of

⁵¹ *Ibid.*, ss 20(3)(a), 20(3)(c).

⁵² *Ibid.*, ss 20(1)(a), 20(3)(a), 20(3)(c).

⁵³ Canada, Employment and Immigration Canada, *Immigration Manual, Selection and Control*, Vol. II, IS 15.10(1).

Caribbean workers after completion of their contracts the Duration of Employment Authorization issued to each worker should be extended by seven days after expiration of the work contract to enable each worker to remain in status while preparing to leave Canada.⁵⁴ Any violation of this contract will be a violation of section 18(2) of the Regulations, and therefore makes the worker liable to be repatriated prior to completion of the contract.

These provisions constitute the complete statutory underpinning of the Caribbean Agricultural Workers Program. The details of the Agreement between Canada and the Caribbean governments are resolved through negotiation and once this Agreement is made, the active recruitment of workers and the contract of employment are determined by the parties. The next section will examine each of these processes.

2. Administrative Structure

The first stage in the administrative process commences with the Memorandum of Understanding between the Canadian Government and the individual Caribbean Governments participating in the Program. The Memorandum declares that the Commonwealth Caribbean Seasonal Agricultural Workers Program symbolizes the close friendship and co-operation between the two countries and the desire that the program continues to be of mutual benefit to both parties.⁵⁵ The Memorandum then states that the operation of the program will be administered pursuant to Operational Guidelines; that each worker will receive "fair and adequate treatment" while in Canada; that they will be employed in the agricultural sector only during those periods determined by Canada; and that both parties will sign an Employment Agreement. The Memorandum concludes with an assertion that it could be amended at any time by both parties and would be effective pursuant to the period stipulated within it.

⁵⁴ *Ibid.* at IS 6.70(5).

⁵⁵ See Appendix I, *infra* at 294.

The Operational Guidelines to the Memorandum provide the substantive provisions of the Memorandum of the Agreement.⁵⁶ Clause 1 of the Guidelines states;

(1) Canada

- (a) will establish directions, in accordance with its laws respecting immigration, limiting the admission to Canada of workers from Jamaica seeking entry to Canada for the purpose of engaging in seasonal employment in the agricultural sector to persons selected by Jamaica who,
 - (i) are at least 18 years of age;
 - (ii) are nationals of Jamaica;
 - (iii) satisfy Canadian immigration laws, and
 - (iv) are parties to an Employment Agreement attached hereto as Annex II.
- (b) shall provide to Jamaica through the Ministry of Labour, adequate notice as to the number of workers required by employers, including named workers as a priority, in order to facilitate the documentation process and enable their arrival by the dates required by the employers;
- (c) will afford assistance to the Jamaican government's Agent(s) to the extent possible in order that their responsibilities can be carried out properly.

The Guidelines place a correlative duty on the Jamaican government to undertake the recruitment of workers who will meet Canadian immigration health requirements and also to provide the Canadian High Commission with the workers' health and medical documents. Finally, the Caribbean governments have to appoint agents in Canada for the purpose of ensuring the smooth functioning of the scheme.

The guidelines ensure that only the ablest workers are selected for the scheme. The fair and equitable considerations mentioned do not apply to include any disabled persons or, indeed, women. Under the Agreement, the individual governments are relegated to the role of recruiting labour on terms set by the Canadian government. Furthermore, priority is given to workers named by the employer and this arrangement gives the individual farmer *de facto* control over the whole program. Seen from this perspective, both governments are merely conduits whereby

⁵⁶ See Appendix II, *infra* at 296.

Canadian farmers can tap the vast supply of labourers in the West-Indies.

The provision for the appointment of officers by the Caribbean Governments in the Operational Guidelines establishes another administrative level to monitor the program. Clause 1(c) of the Guidelines provides that the Canadian government will grant assistance to the Caribbean governments to ensure that the liaison officers perform their functions. Since 1966 Employment and Immigration Canada, Ontario Region, provided office facilities, secretarial support staff, and other services at an annual cost of \$250,000 to the liaison service of participating countries.⁵⁷

In 1987 the Mulroney government withdrew its support of the liaison officers in Canada to reduce its annual deficits. To ensure the persistence of the Caribbean Seasonal Agricultural Workers Program, the Horticultural Industry of Ontario, under the leadership of the Ontario Fruit and Vegetable Growers' Association, sought to provide comparable services by establishing F.A.R.M.S., or the Foreign Agricultural Resource Management Systems. The organization opened its offices in July 1987.

The F.A.R.M.S. organization has been incorporated as a non-profit institute. It is funded exclusively through the imposition of a mandatory user fee of forty-eight dollars, paid by the farmer, for each worker hired under the Program. The Board of Directors of F.A.R.M.S. represent the following commodity groups:

- (1) tender fruit crops
- (2) apples
- (3) vegetables-fresh and process
- (4) tobacco
- (5) greenhouse vegetable, food processors.

The replacement of the federal government's support services by F.A.R.M.S. cannot be attributed simply to the magnanimity of the Horticultural Society. Under the Agreement of Employment

⁵⁷ *Service Package to Employers of Foreign Seasonal Agricultural Workers* (Prepared by F.A.R.M.S. or Foreign Agricultural Resource Management Services, 1370 Dundas Street East, Suite 203, Mississauga, Ontario, January 1988). The following information on F.A.R.M.S. is derived from this package.

between the farmer and worker, the liaison officer plays an important supervisory role in ensuring the smooth functioning of the program. For instance, under clause 2(e)(i), the officer ensures that the farmer complies with the provincial health standards in the area of housing for the worker.⁵⁸ The farmer must give the officer a set of rules and regulations which the farmer expects his workers to observe. The agent must also ensure that the farmer makes the appropriate deductions from the workers' wages, deduct 25 percent of the workers' wages for each payroll period, and that in lieu of non-coverage of the workers by provincial Worker's Compensation legislation, ensure that the farmer provides adequate insurance to cover the worker in case of work-related diseases and injuries.

The Memorandum of Agreement and Contract of Employment therefore provide the liaison officer with duties devised to ensure that the workers are not abused by the farmer. These duties mitigate the dominant position the farmer occupies, in relation to the offshore worker. These duties can be viewed as modifying the contractual arrangement between the farmer and offshore worker. The extent to which these statutory duties mitigate the extreme contractual advantage of the farmer depends upon the independence of the officer.

However, the establishment of F.A.R.M.S. has severely compromised the ability of the liaison officer to supervise the program impartially. The officer's ability to perform the job rests upon the willingness of the farming community to provide the facilities and support staff necessary for the job. Without the support services, the officers would likely be unable to work in Canada, since their respective governments would neither be willing nor able to provide the necessary support for the performance of their duties. The F.A.R.M.S. organization therefore creates the anomalous situation where the very agents appointed by the participating countries to ensure that their nationals enjoy some protection while in Canada depend largely on the persons whom they monitor for the services required to perform their duties.

⁵⁸ See Appendix III, *infra* at 298.

B. *Selection and Recruitment*

The initial step in procuring workers from the Caribbean commences when the local farmer goes to the nearest Canada Employment Centre and informs the officials of the need for such workers.⁵⁹ This request must be a last resort to secure labour to reap the highly perishable crop. In the past, the proportion of foreign workers to total workforce allowed each new farmer did not exceed 20 percent except where that percentage was less than the number employed the year before.⁶⁰ But as already indicated, this restriction has been removed by the federal government.

Once the Canada Employment Centre approves the request for workers, the farmer signs a contract of employment setting out the terms of agreement with the worker. This agreement is a standard form contract and will be examined later. The contract is signed by the liaison officer and then by the worker once he is selected.

These contracts constitute the farmers' specific orders for foreign agricultural workers. The orders are sent to the regional office in Toronto where the work visas for the respective workers are processed.⁶¹ Upon completion, the office communicates the order for workers to the liaison officer who in turn contacts the local Ministry of Labour.

The Minister of Labour puts into effect what amounts to a four-stage screening process. The first stage involves the solicitation of applicants either by public announcements on the local radio station or trips by selection committees into rural areas of the individual countries. Once the initial group is selected the second stage of screening occurs when the police checks the applicants for criminal records. Once cleared, the workers must pass a medical examination. The second and third stages of screening ensure that the worker does not come under the inadmissible classes of persons

⁵⁹ Alexander, *supra*, note 41 at 53.

⁶⁰ Release, *supra*, note 42.

⁶¹ *Immigration Act*, *supra*, note 48, s. 20(5)(b)(i).

in sections 19(1)(a) and 19(1)(c) of the *Immigration Act*. The final stage of screening occurs when, on some islands, workers are screened to determine whether they have any political affinities with the government in power.⁶²

The recruitment of labourers does not always follow this four-stage process. Invariably, employers specifically request workers by name. These workers are selected automatically, subject only to a subsequent criminal conviction or onset of medical problems. Employers request about 60 percent of their Jamaican workers by name,⁶³ and of 389 Trinidadian workers selected in 1987, only about 70 were new migrant workers.⁶⁴ Moreover, liaison officers may make recommendations concerning whether certain workers should return to Canada, or return to their respective countries to help with the recruitment process.

Upon completion of the selection and recruitment process, travel agents acting on behalf of the employer formalise the arrangements whereby the migrant workers travel to Canada. Under the "Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers,"⁶⁵ the employer, under clause 2 of the "Agreement," undertakes:

- (a) To pay in advance the cost of two way transportation of the worker, as between Kingston, Jamaica and Canada by the most economical means;
- (b) To meet the Worker upon arrival in Canada and transport him to his place of employment and, upon termination of his employment, transport him again to the place from which he will leave Canada, all such transportation will be with the prior knowledge and consent of the Government's Agent;

Some farmers in certain geographical areas deal only with one travel agent. For instance, the tobacco farmers in the Simcoe-Delhi-Tillsonburg Area employ the Norfolk Travel Agency in Simcoe; apple growers in Georgian Bay employ Uniglobe

⁶² Alexander, *supra*, note 41 at 58-59.

⁶³ *Ibid.* at 56.

⁶⁴ Interview with Horace Moore, Liaison Officer for Trinidad and Tobago, 203-1370 Dundas St. E., Mississauga, Ontario, L4Y 2C1 (22 January 1988).

⁶⁵ See Appendix III, *infra* at 298.

Georgian Travel of Collingwood; Lyttle Travel of Trenton handles the travel arrangements for many of the vegetable and fruit growers east of Toronto.⁶⁶

Where the worker originates from Jamaica, the farmer bears the full cost of transportation. However, the provisions in clauses 2(a) and (b) are subject to clause 3(g) which provides:

That he shall pay to the employer on account of transportation costs referred to in clause 2(a) by way of regular payroll deduction, the sum of \$1.10 per day beginning on the first full day of employment and the aggregate payment in any event is not to be less than \$50 or greater than \$208.

The farmer therefore recoups much of the cost of transporting the worker to Canada. Where the worker comes from the Eastern Caribbean, he must pay the fare between his island and Jamaica. This payment is deducted from the compulsory savings component (25 percent of the worker's wages) remitted from the employer to the Caribbean government's agent, after the completion of the work period.

C. *The Contract of Employment*⁶⁷

The farmer's dominant bargaining position *vis-à-vis* that of the worker is clearly evident in the contract of employment. The stipulated conditions relate to work, transportation, food and habitation, remuneration, and breach of contract. Those conditions relating to transportation have already been discussed. The remaining set of conditions will be examined in turn.

I. Work

In clause 2(c) of the contract, the employer undertakes to employ the worker for a trial period of fourteen actual working days

⁶⁶ *Service Package*, *supra*, note 57.

⁶⁷ The contract referred to is the *Agreement for the Employment in Canada of Caribbean Seasonal Agricultural Workers*, Appendix III, *infra* at 298. The following clauses referred to are from this *Agreement*.

from the date of the latter's arrival at the farm. The farmer can discharge the worker for any misconduct or refusal to work. The word *misconduct* is not defined and encompasses any action which undermines the farmer's ability to compel labour during the harvest.

In return, the worker undertakes, under clause 3(c), to work and reside at the farm or any other place which the employer designates, subject only to the approval of the liaison officer. Under clause 3(c) the worker agrees to work under the supervision of the farmer and to perform duties assigned to him. Pursuant to clause 3(d) the worker pledges his obedience to the farmer while under clause 3(f) promises not to work for any other person without the approval of the farmer, liaison officer, Canada Employment Centre, and Immigration Commission. This provision effectively removes the worker's freedom of mobility to seek alternative employment.

2. Food and Habitation

The farmer must provide, under clause 2(e), adequate living accommodation, without cost, to the worker. These accommodations must satisfy municipal health and safety standards. In addition, the farmer must provide reasonable and proper meals to the worker during periods of transportation and employment. Clause 3(e) imposes a correlative duty on the worker to maintain his living quarters in the same condition he received it. In the event that he does not, the farmer can deduct the cost of maintaining the quarters "in the appropriate state of cleanliness" from the worker's wages. Pursuant to clause 2(i), the farmer can recover the cost of meals provided to the worker at a daily rate not exceeding five dollars.

3. Remuneration

The substantive provisions pertaining to wages are outlined in clause 2(d):

2(d) To pay the Worker at his place of employment weekly wages in lawful money of Canada at a rate equal to

- (i) the minimum wage for industrial workers provided by law in the province in which the worker is employed;

- (ii) the rate determined from time to time by the Canada Employment and Immigration Commission prevailing wage rate for the type of agricultural work being carried out by the worker in the locality in which the work will be done, or
- (iii) to the rate being paid by the Employer to his regular seasonal work force performing the same type of agricultural work;
- (iv) that the average minimum work week shall be 40 hours,
- (v) that, if circumstances prevent fulfilment of clause 2(d)(iv), the average weekly income paid to the worker over the period of employment is to be not less than an amount equal to a 40 hour week at the hourly minimum rate for industrial workers provided by law in the province, and that where, for any reason whatsoever, no actual work is possible, the worker shall receive a reasonable advance to cover his personal expenses;

Under clause 2, the foreign workers are guaranteed the highest minimum wage in Ontario, whether industrial or agricultural. The minimum industrial wage is \$4.75 an hour while that for agriculture varies according to each crop. For instance, the prevailing agricultural wage for apple picking is \$4.95 per hour while that for tobacco-flue is \$5.45 per hour, or \$54.00 per kiln (see Table III⁶⁸).

It must be noted that the worker receives this hourly agricultural wage above the provincial industrial minimum wage only where he averages a *minimum* forty hours weekly. The contract makes no provision for the payment of overtime wages. In contrast, the *Employment Standards Act*,⁶⁹ which provides that an employee shall not work more than 48 hours weekly, entitles the worker to overtime wages "at an amount not less than one and one-half times the regular rate of the employee."

The non-payment of overtime wages to the foreign worker results in his being paid at a wage significantly less than either the agricultural or industrial minimum wage. For instance, in the case of the apple picker who averages 70 hours weekly, the weekly wage based on the prevailing 1988 agricultural rate, is \$346.50. However, a worker who earns the minimum industrial wage of \$4.75 per hour and who comes under section 25 of the *Employment Standards Act* would receive \$384.75 weekly for a 70-hour work week. Therefore, the foreign agricultural worker would actually be paid less than a

⁶⁸ *Service package, supra*, note 57.

⁶⁹ R.S.O. 1980, c. 137, s. 17.

worker entitled to the provincial minimum wage under the *Employment Standards Act*.

TABLE III
1988 Prevailing Agricultural Wage Rates

<i>Crops</i>	<i>Wage Rates per Hour</i>
Apples	\$4.95
Field Vegetables	4.95
Greenhouse-Vegetables	4.80
Nurseries	5.75
Other Fruit	4.65
Tobacco-Black	6.30
Tobacco-Burley	5.10
Tobacco-Flue	5.45
	54.50 per kiln
Tomatoes-Mechanically Harvested	5.20

Any assessment of the relatively high wages paid to the worker must weigh the fact that through deductions for transportation, food, and housing, the worker bears the brunt of the cost of the Caribbean Seasonal Workers Program. There are other non-contractual charges on the rate of remuneration paid to the worker. All workers who earn more than \$5,000 annually must pay income tax and Canada Pension. Barbados and Jamaica, unlike the other islands, both have agreements with Canada whereby workers who earn less than \$5,000 annually are exempt from paying income tax and Canada Pension.

The *Unemployment Insurance Act*⁷⁰ simultaneously makes the foreign worker eligible to pay insurance premiums, but then disqualifies him from receiving unemployment insurance benefits. The *Act* achieves this since virtually all forms of employment are covered, including that of the foreign seasonal worker. Section 3(1) provides that:

3(1) Insurable employment is employment that is not included in excepted employment and is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise....

Ostensibly, section 3(1) ensures that foreign seasonal workers would be eligible to receive UIC benefits during the off-season. Indeed, Regulation section 43(3) provides that a person employed in farming qualifies for benefits during the off-season from 1 October to 31 March, if he does not work on the farm within that period or alternatively, if he performed minor work which would not have prevented him from seeking alternative employment.

However, section 45(b) of the *Act* disentitles the foreign worker to UIC benefits while absent from Canada. Even if the *Act* did not contain such a provision, the regulatory scheme which tolerates the worker only for the duration of the harvest would ensure that the workers do not receive unemployment benefits. Furthermore, Revenue Canada imposes a heavy burden of proof on the worker to obtain exemptions for dependents and this increases the amount withheld from the worker.

4. Breach of Contract⁷¹

The employer determines the grounds which constitute breach of contract. An act of misconduct, such as a refusal to work,

⁷⁰ R.S.C. 1970-71-72, c. 48, as am. S.C. 1974-75-76, c. 66 and 80.

⁷¹ See Appendix III, *infra* at 298.

for example, may constitute a breach of contract. Under clause 4(a), the employer can terminate the worker for "sufficient reason." The worker has no recourse to a review of any action taken by the employer against him, despite the fact that breach of contract inevitably results in repatriation of the migrant worker.

The repatriation provisions in clause 4(a) reinforce those provisions in the contract which allow the employer to repudiate the contract in the event of worker misconduct. Where a worker was selected by his government, he bears the full cost of his repatriation even though he may have completed 50 percent of the terms of the Agreement. Where the same worker completes less than half of the contract, not only is he required to bear the cost of his repatriation, but pursuant to clause 4(a)(iii), he must reimburse the employer for the actual cost of his fare to Canada, less any payroll deductions which the farmer previously made to recoup transportation costs incurred by hiring the worker. By contrast, where the worker was requested by name, the employer bears the burden of repatriating the worker.

What if personal domestic circumstances in the worker's home country conspire to force him to breach his contract while still executory? If personally requested by name, the employer pays the full cost of repatriation to Kingston, Jamaica. If the worker was selected by his Government, then pursuant to clause 4(b)(ii), the employer pays "the cost of reasonable transportation and subsistence expenses of the worker where he completed 50% or more of the contract." However, if the same worker completed less than half, he bears the full cost of repatriation.⁷²

Any worker repatriated through breach of contract risks being blacklisted with no chance of re-entering the program. The possibility of being blacklisted has not prevented a number of workers from breaching their contracts or being away without leave.⁷³

The peak years for being away without leave or for breach of contract coincided with the peak years of the Program in 1980-81.

⁷² *Ibid.*, clause 4(b)(iii).

⁷³ See Table IV, *infra* at 274.

Since 1980 the percentage of workers who breached their contracts varied from 2.8 percent in 1980 to 1.9 percent in 1984. Corresponding figures for being away without leave are much lower, from 1.2 per cent in 1983 to 2.6 percent in 1980 (see Table IV⁷⁴).

TABLE IV
Reasons for Non-Completion of Contracts by Caribbean Workers
1976-1984

<i>Year</i>	<i>Workers</i>	<i>Breach</i>	<i>AWOL</i>	<i>Domestic</i>	<i>Death</i>
1987	6124	91	210	37	—
1986	N/A	N/A	N/A	N/A	N/A
1985	N/A	N/A	N/A	N/A	N/A
1984	3349	65	63	12	—
1983	3952	79	47	13	3
1982	4818	124	62	14	—
1981	5164	116	97	10	1
1980	5373	151	139	16	1
1979	4446	89	99	26	2
1978	4474	58	42	20	1
1977	4434	76	43	15	—
1976	4874	60	65	14	1

The figures themselves do not provide reasons for the breach of contract or for being away without leave. The discussion in the next section on "Life on the Farm" will attempt to explain this phenomenon. At this point, one can say that the highly regimented life on the farm, the disillusionment in the work performed, and the attractiveness of life outside the farm in Canada combine to explain why workers breached their contracts. Nevertheless, it must be noted that the percentage of workers who either breached their contracts or left the farm without permission is relatively low

⁷⁴ Adapted from Alexander, *supra*, note 41 at 111. 1987 figures received from Mr. Henry Neufeld, Seasonal Worker Program, Employment and Immigration Department, 4900 Yonge Street, Toronto. AWOL means "away without leave."

indicating that notwithstanding the rather onerous contractual obligations, the workers still view the scheme as being beneficial. This, of course, is not surprising given their limited alternatives.

IV. LIFE ON THE FARM

A. *Work Conditions*

Life and work on a farm has been traditionally regarded not so much as hard work but as a peaceful family or communal undertaking. The common perception appears to be that work on the farm encompasses the idle toiling of a simple family, living in a state of relative autarky. In recent years, economic conditions have somewhat tarnished this image and farmers are now generally seen as fighting to retain their farm holdings amidst near insuperable economic odds.

Nevertheless, the old image of the farm as a simple, family-run undertaking persists. That image provides the rationale for the inapplicability of the *Ontario Labour Relations Act*⁷⁵ to farming. Pursuant to section 2 of the *Act*, agricultural workers do not enjoy collective bargaining rights as do their industrial counterparts.

The terms in the employment contract for Caribbean workers indicate that farmers have organized production in a manner which guarantees them the maximum number of hours at the least possible cost. This, in my view, undermines the rationale for the exclusive provisions of the *Ontario Labour Relations Act*. In fact, the actual working conditions of the foreign workers reinforces the case for their inclusion under the *Act*. For instance, Kyle Hall, one-time Chairperson of the Ontario Apple Marketing Commission, explained why for ten years he hired Jamaicans to work on his farm:

⁷⁵ R.S.O. 1980, c. 228.

[T]hey work evenings, Saturday, Sunday. They'll work until midnight. They'll work all the hours you can give them. Canadians come and go.⁷⁶

Hall also noted that his foreign workers average seventy hours weekly. Another apple farmer in Wallaceburg, Ontario, stated that his Caribbean workers averaged thirteen to fifteen hours daily to reap his crop.⁷⁷ Commenting on their work schedule, a former liaison officer in the Program observes:

Talking is about the only type of social life readily available to some of the workers. They have little leisure time, and even those who have use it to make a little more money. The tobacco workers work seven days a week. Fruit and vegetable workers sometimes have to work on Sundays too. The physical labour makes them too tired at the end of the day to do anything but prepare their meals and sleep.⁷⁸

The majority of workers toil in the fields, and are primarily engaged in harvesting. The peak demand periods for foreign migrant labour is from February to November, although the most intense period of activity is August to November, with the harvesting of flue-cured tobacco and processing of fruit (see Table V⁷⁹).

Workers involved in flue-cured tobacco spend the least time in Canada. They work in gangs of six, five of whom pick the leaves manually while the other hangs racks of leaves in the kiln or dryer. On the fruit farms, the workers harvest virtually all the fruit by hand, although a few operate equipment such as tractors, sprayers, or trucks. Some workers operate lift trucks, sterilizers, and cookers in the food processing or canning factories. Others repair machinery. However, only a small minority of workers actually handle any type of machinery.⁸⁰

⁷⁶ I. Peritz, "Valley Orchards: Island in the Sun" *Ottawa Citizen* (19 October 1982) 19. See also C. Belzmen, "Farmers Hire Off-Shore Labour" *The Brampton Guardian* (4 June 1989) 5.

⁷⁷ C. Foster, "Welcome Wears Thin When Crops In" *The Globe and Mail* (2 October 1986) B-1.

⁷⁸ Alexander, *supra*, note 41 at 22. See also L. Tracey, "The Dirt Workers" (May 1989) *Toronto Life* 50 at 75.

⁷⁹ Ontario, Minister of Employment and Immigration, Press Release (22 May 1981).

⁸⁰ Alexander, *supra*, note 41 at 83.

The greenhouse and vegetable crop workers spend the longest period of time in Canada. The greenhouse workers are sometimes retained beyond the expiration of their contract up to mid-November to raise field crops, vegetables, or tender fruit. In addition, tobacco workers, under an arrangement with their employer, transfer to the harvesting of apples after the end of the tobacco harvest.

TABLE V
Crops and Duration of Harvest

<i>Crop</i>	<i>Period of Harvest</i>
Fruit and Vegetable Field Crops	April to November
Vegetable Greenhouse Crops	February to August
Food Processing (Fruits & Vegetables)	August to November
Flue-Cured Tobacco (harvesting)	August to September
Nurseries	April to May
Apiary	April to November

B. *Incidence of Injury*

A foreign worker who is injured during the course of his employment is covered for compensation benefits under the *Worker's Compensation Act*⁸¹ pursuant to sections 1(1)(2) and 3(1) of the *Act*.

1(1)(2) Worker includes a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise.

3(1) Where in any employment, to which this part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the worker and the worker's dependants are entitled to benefits in the manner and to the extent provided under this Act.

⁸¹ R.S.O. 1980, c. 539.

The Workmen's Compensation Board's Policy Manual⁸² further provides that coverage begins when the worker reaches the point of departure in his homeland and remains in effect until his return. It also stipulates that:

While travelling to and from Ontario and while in transit from the Ontario airport to the employer's premises, the worker shall use the authorized means of transportation and follow a direct and uninterrupted route to reach the employer's place of business. *The scope of coverage is broad, recognizing the special circumstances encountered by immigrant farm workers.*

Although adequate coverage of foreign workers exists under the *Act*, the contract of employment actually discourages the reporting of some injuries. For instance, certain occupations, such as repetitively picking tobacco leaves, are highly inductive of bilateral tendonitis while the constant stooping to lift heavy baskets of apples raises the incidence of back injuries. These two injuries arise gradually and not from any traumatic accident. Such injuries seldom are reported by workers to their employers or liaison officers.

This unwillingness to complain about non-traumatic injuries must be attributed to the disincentives inherent in the "guestworker" program. A worker who complains periodically about a sore wrist or bad back would probably be regarded as a malingerer. He runs the risk of not being requested by name after he returns to his country. Furthermore, if he fails to complete his assignment, he faces the daunting task of having to pay for the cost of his repatriation or worse still, the cost of his fare to Canada. From the worker's perspective, strict reticence about disablement injuries represent the best guarantee of re-employment in the program the following year.

Another problem besets the injured worker who suffers a long disability period. The worker may require rehabilitation beyond the period that the contract remains executory. But since the worker is welcome in Canada for only one week after the end of the contract, he might not be able to avail himself of the rehabilitation services of the Board. This otherwise compensable disability may well

⁸² Ontario, Workers' Compensation Board, *Claims Adjudication Branch Procedures Manual*, No. 33-02-32 (emphasis added).

disqualify the worker from the program if he fails the medical test which seasonal workers are periodically subjected to, as a precondition for participation in the program.

C. Housing

Under the standards prepared by the Public Health Branch of the Ministry of Health, buildings which house workers should be at least one hundred feet from any animal shelters.⁸³ The buildings should be habitable with proper ventilation and lighting. What is habitable and proper varies with each farmer. The temperature in each abode must be at least twenty degrees centigrade. Total usable floor space must be at least eighty square feet per person. The farmer must also provide beds, clean sheets, and blankets and must ensure a constant supply of hot and cold water. As already indicated, clause 3(e) of the contract between worker and farmer makes the worker liable for any costs incurred by the employer to clean the workers' quarters.

One of the main complaints by workers relates to the provision of outside toilets for the workers. This practice does not violate the health regulations which impact on housing conditions of the Program and many employers have evinced no intention to provide indoor toilets, despite the inconvenience of having to go outdoors in the winter to make use of them.⁸⁴

Generally, however, it appears that the majority of farmers maintain adequate living conditions for their workers. A report done by the Ministry of Manpower and Immigration entitled *The Seasonal Farm Labour Situation in Southwestern Ontario*⁸⁵ concluded that in strong contrast to housing provided to Mexican workers, the housing provided for Caribbean workers met the standards established by the Ministry of Housing. Indeed, one farmer who

⁸³ Ontario, Ministry of Health, *Guidelines on Accommodation for Migrant Farm Workers* (Toronto, 1982).

⁸⁴ Alexander, *supra*, note 41 at 21.

⁸⁵ Canada, Department of Manpower and Immigration, *The Seasonal Farm Labour Situation in Southwestern Ontario* (Ottawa, 11 August 1973) Appendix.

owned a two hundred acre apple and strawberry farm complained that it cost him forty thousand dollars to build a bunkhouse, which met the minimum standards established by the Ministry of Housing, for his twenty-five Caribbean workers.⁸⁶

The willingness of the farmer to bear this cost indicates that the cost of housing is an investment, not a liability, for the farmer. In the first place, adequate housing provides the farmer with the stamp of approval from the Ministry of Health and continued access to foreign workers. Secondly, fairly decent housing compensates for the long hours which each foreign worker is required to work on the farm. Finally, housing which meets the provincial requirements of health represents one of the most visible facades erected by the farmer to mask the exploitive nature of the program.

D. Recreation

Extracurricular activity by the workers, represents, in the eyes of the employer, a weakening of control over the worker and an unnecessary divergence from the main task of harvesting. Some farmers deprive workers of television sets since addiction to the tube allegedly creates disinterest in work.⁸⁷ Some farmers discourage workers from calling their families in their home countries by expressly prohibiting the use of telephones on the farm or banning them altogether.⁸⁸ Other farmers discourage any interaction with local women since such interaction interferes with productivity.⁸⁹ These coercive measures to ensure maximum productivity from the worker dispel the notion that the worker works long hours simply because he seeks to earn more money. In fact, measures taken by the employer to curb any recreational activity constitute an onerous means of compelling labour from the foreign worker.

⁸⁶ "Foreign Labour is Losing Competitive Advantage" *The Globe and Mail* (20 January 1982) B-17.

⁸⁷ Alexander, *supra*, note 41 at 23.

⁸⁸ *Ibid.* at 39.

⁸⁹ *Ibid.* at 42.

V. ASSESSMENT OF THE GUEST WORKER PROGRAM

A. *Benefits to the Worker*

The high incidence of repeat migrant workers indicates that the workers perceive that the Program benefits themselves. Indeed, for most workers, selection to work abroad grants a short-lived freedom from a harsh reality of unemployment and underemployment on their respective islands. Furthermore, the wages paid to the worker are much higher than what he would have earned within the corresponding period in his home country.

The worker also benefits through the mandatory savings component set out in the contract of employment. Under clause 2(j), the farmer must deduct 25 percent of the worker's wages which is later forwarded to the worker when he returns home. The employment contract therefore ensures that a part of the worker's earnings reaches his home country, although 6 percent of the amount is deducted to cover administrative costs in each island.⁹⁰

The Caribbean countries also appear to benefit from the Program. A liaison officer who helped initiate the Program, argues that it helps the home economy by alleviating the unemployment situation and foreign exchange problems of the islands.⁹¹ A cursory look at the earnings provided in Table VI,⁹² will show that these contentions are not unfounded. Between 1976 and 1984, all the workers in the Program earned more than ninety-six million dollars, a figure representing a significant amount of foreign exchange for the respective Caribbean governments.

However, two factors indicate that these benefits are not as significant as would otherwise be imagined. Instead of investing their earnings in productive activity in their home country, many migrant workers spend their earnings on consumer goods. Thus,

⁹⁰ *Ibid.* Between 1982 and 1987, \$920,981.32 (Cdn) was misappropriated from earnings of Jamaican farm workers retained by the Jamaican National Commercial Bank and used by the local Ministry of Labour. See "Improprieties in Government" *Share* (16 August 1989) 22.

⁹¹ Foster, *supra*, note 77 at B-2.

⁹² See *infra* at 283.

their earnings are not channelled into undertakings which would alleviate their dependency on the Program, but on consumer goods, including TV sets, stereos, and motor cycles, which enriches other more developed countries. Arguably, the satisfaction derived from the ownership of these goods is largely short-term and does nothing to break the iron grip of dependency of the islands on the Program. The following assessment of Caribbean cane cutters in Florida may well apply to Caribbean workers in Canada: "[There is] no evidence that seasonable stateside employment expands agricultural output, or enhances the productive capacity of small farmers in the Caribbean."⁹³

A recent study of the spending habits of Jamaican migrant workers returning from the U.S. concluded that 61 percent of migrants designated building or adding to houses as first use of their U.S. earnings while 50 per cent designated house construction as the first use of their compulsory savings.⁹⁴ Corresponding statistics are not available for Caribbean workers in Canada but it is doubtful that there would be a marked divergence from the findings associated with their counterparts who work in the United States. Thus, any saved earnings are most likely to be used to upgrade immediate living standards, rather than release the migrant worker from continued dependency in the program.

The second factor vitiating the benefits of the scheme to the worker stems from the fact that the manual labour performed imparts very few skills to the worker. Longevity in the scheme assures this worker no seniority rights or employment to a non-manual, supervisory position. All he can expect, even after being requested by name by his employer, is that for the duration of the contract he will be engaged in arduous manual labour on the farm.

⁹³ C.H. Wood & T.L. McCoy, "Migration, Remittances and Development: A Study of Caribbean Canecutters in Florida" (1985) 19 *International Migration Review* 251 at 275.

⁹⁴ D. Griffith, "International Labour Migration and Rural Development: Patterns Among Jamaicans Working Seasonally in the United States" (1983) 19 *Stan. J. Int'l L.* 357 at 366.

TABLE VI
Commonwealth Caribbean Seasonal Agricultural Workers Program
Distribution of Worker Arrivals in Canada and Annual Earnings
1976-1984

Year	<i>Jamaica</i>		<i>Trinidad & Tobago</i>		<i>Barbados</i>		<i>Eastern Caribbean</i>	
	<i>Workers</i>	<i>Earnings</i>	<i>Workers</i>	<i>Earnings</i>	<i>Workers</i>	<i>Earnings</i>	<i>Workers</i>	<i>Earnings</i>
1984	2,597	7,933,380	337	957,873	532	1,775,764	363	1,228,926
1983	2,608	7,600,331	394	1,085,053	553	1,427,900	397	1,075,803
1982	3,003	8,000,000	519	1,180,000	754	1,975,000	542	1,365,000
1981	2,957	7,455,382	689	1,476,220	859	2,115,756	625	1,480,000
1980	2,941	6,935,000	791	1,607,641	952	2,156,092	641	1,253,347
1979	2,624	5,600,495	669	1,351,641	716	1,554,341	375	734,905
1978	2,702	5,279,510	740	1,478,607	692	1,530,315	300	521,865
1977	2,590	4,623,544	766	1,485,346	744	1,447,553	334	577,209
1976	2,863	5,050,737	878	1,658,174	824	1,367,313	309	337,814
TOTAL		58,478,379		12,280,555		15,350,034		8,574,869

B. *Benefits to the Employer*

The Program assures the employer a guaranteed supply of labour during the critical period of harvest of the perishable crop. The contractual arrangement provides the employer with near total control over that segment of labour. Not only that but the deprivation of job mobility under the contractual arrangement literally binds the worker to the farmer employing him. If the employer terminates the worker's contract, the latter becomes deportable immediately and has virtually no recourse for breach of contract blacklisting.

Farmers have traditionally held that the perishable nature of farm products would give a farm workers' union inordinate bargaining leverage in the event of conflict.⁹⁵ Not surprisingly, the Caribbean workers, like their local counterparts in Canada, have no recourse to collective bargaining rights under the *Labour Relations Act*. That deprivation is more egregious in the case of the foreign workers since they do not enjoy the relative freedom to seek alternative employment which local agricultural labourers enjoy.

Farmers also complain that the guarantee of housing and the minimum industrial wage to the foreign worker makes the scheme rather expensive. However the individual farmer circumvents this wage guarantee by contriving to force the workers to labour long hours with no provision for overtime wages. This recoups much of the cost of importing labour and the increased productivity of foreign labour arguably compensates for the cost of housing these workers, which is ostensibly borne by the farmer. Finally, the mere fact the farmers have moved to replace the support staff and services provided by the Federal Government to ensure the viability of the Program reinforces the view that the scheme of importing Caribbean migrant labour is designed primarily to serve the interests of the farmer.

⁹⁵ K. Neilson & I. Christie, "The Agricultural Labourer in Canada: A Legal Point of View" (1975) 2 Dal. L.J. 330 at 342.

VI. THE COMMON LAW AND THE *CHARTER OF RIGHTS AND FREEDOMS*⁹⁶

The common law reinforces the farmer's dominant position in the contractual arrangement with the foreign labourer. In the first place, inadequacy of consideration does not vitiate a contract under contract law and in any case, that doctrine does not apply to a contract of employment. Secondly, the courts have adopted a deferential attitude towards agricultural employment and its exclusion from provincial legislation guaranteeing minimum wages and other rights of the worker.

For instance, in *Re Ontario Mushroom and Learie*⁹⁷ the court held that a mushroom is a vegetable and was therefore exempt from the provincial minimum wage provisions. To make its decision, the court relied primarily on the views of members of the Canadian Horticultural Council and the Canadian Mushroom Growers' Association, or the very constituency whose interests coincided with the exemption of mushrooms from minimum wage legislation. As a result, workers involved in mushroom growing can be paid less than the minimum wage stipulated by statute.

Recent decisions by the Supreme Court of Canada indicate that the foreign worker cannot rely on the equality provisions of the Charter to ameliorate the conditions imposed upon him by the contract of employment. In holding that the *Charter* does not apply to private activity, McIntyre J., in *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery*,⁹⁸ indicated:

It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government.... Action by the executive or administrative branches of government will generally depend upon legislation, that is statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative.

⁹⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁹⁷ (1977), 76 D.L.R. (3d) 431 (Ont. Div. Ct.).

⁹⁸ (1986), [1986] 2 S.C.R. 573 at 598-99, 33 D.L.R. (4th) 174, [1987] 1 W.W.R. 577.

This decision affirmed a similar finding by the Ontario Court of Appeal in *Re Blainey and Ontario Hockey Association*⁹⁹ and more recently in *Re McKinney and Board of Governors of the University of Guelph et al.*¹⁰⁰ It reinforces the common law doctrine of privity of contract and insulates the employer from any challenge to his dominant contractual position *vis-à-vis* the foreign worker.

However, the provisions of the *Ontario Labour Relations Act*¹⁰¹ which deny the agricultural worker the right to receive overtime wages and to exercise collective bargaining rights may be challenged under section 15 of the *Charter*.

Every individual is equal before and under the law and has the right to the equal protection and equal benefit 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.

These provisions *prima facie* violate section 15 since they withhold certain protective rights to a category of workers which are granted to other categories of workers. To the extent that section 15 is *prima facie* violated, then pursuant to section 1, the onus shifts to the party seeking to uphold the respective sections of the *Labour Relations Act* to prove, by a preponderance of evidence, that the deprivation is a reasonable limit imposed by law, which is demonstrably justifiable in a democratic society.¹⁰² This involves a form of proportionality test, the components of which are as follows:

- (1) The measures adapted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations.
- (2) The means should impair as little as possible the freedom in question.
- (3) There must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or

⁹⁹ (1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513.

¹⁰⁰ (1988), 46 D.L.R. (4th) 193 at 209.

¹⁰¹ See *supra*, note 75.

¹⁰² (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter cited to D.L.R.].

freedom, and the objective which has been identified as of "sufficient importance."¹⁰³

Arguably, the preservation of family farms serves a valid legislative function. However, the means chosen to achieve this objective, far from impairing the right or freedom as little as possible, fully deprive foreign workers or indeed, agricultural workers of their respective rights. Even then, the foreign worker would not likely succeed on a section 15 challenge since the withholding of his rights to overtime wages and collective bargaining is the trade-off to ensure the preservation of a traditional way of life.

The recent Supreme Court of Canada decision in *Andrews v. Law Society of British Columbia*¹⁰⁴ arguably offers only limited hope in ameliorating the working conditions of the foreign worker. The court's analysis of section 15¹⁰⁵ as it relates to foreign workers, is significant in two ways.

The first is McIntyre J.'s (with whom Lamer J., Wilson J., Dickson C.J.C., and L'Heureux-Dubé J. ultimately concurred) decision that in assessing the equality provisions under section 15, the "similarly situated test" propounded by the Ontario Court of Appeal is seriously deficient.¹⁰⁶ That test holds that similarly situated people can be similarly treated without any violation of section 15.¹⁰⁷

The Caribbean workers would have had no section 15 remedy under the "similarly situated test" since other foreign workers such as Mennonite farmworkers from Mexico are equally deprived of the right to receive overtime wages or to exercise collective

¹⁰³ *Ibid.* at 226-27.

¹⁰⁴ (1989), [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, [1989] 2 W.W.R. 289 [hereinafter cited to S.C.R.].

¹⁰⁵ For a discussion of the *Andrews* decision, see W. Black & L. Smith, "Canadian Citizenship and the Right to Practice Law: *Andrews v. Law Society of British Columbia*" (1989) 68 Can. B. Rev. 591-615.

¹⁰⁶ *Andrews, supra*, note 104 at 166.

¹⁰⁷ *Ibid.*

bargaining rights.¹⁰⁸ The same conclusion would be reached if it is held that Canadian farmworkers, who are also deprived of collective bargaining rights, are similarly situated as the foreign migrant worker.

The second significant part of the court's decision is the definition of discrimination under section 15 of the *Charter*. According to McIntyre J., discrimination is a distinction, intentional or otherwise, based on personal characteristics of individuals or a group which imposes a burden, or disadvantage, on the individual or group not imposed upon others.¹⁰⁹ However, such distinctions will only constitute discrimination under section 15 where the distinction applies to enumerated grounds in section 15(1)¹¹⁰ or other analogous grounds. Discrete and insular minorities, such as non-citizens, constitute an analogous ground under section 15 of the *Charter*.¹¹¹ Once discrimination is shown under an enumerated or analogous ground, any consideration of reasonableness must be assessed under section 1 of the *Charter*.¹¹²

Assuming that the restrictions on collective bargaining in the *Labour Relations Act* constitute a disadvantage under section 15(1) of the *Charter*, it must then be determined whether farm workers constitute an analogous ground to those enumerated in section 15(1). In *Andrews* LaForest J. cautioned:

[I]t was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society.¹¹³

¹⁰⁸ Tracey, *supra*, note 78 at 50.

¹⁰⁹ *Andrews*, *supra*, note 104 at 174-75.

¹¹⁰ Race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

¹¹¹ *Andrews*, *supra*, note 104 at 183.

¹¹² *Ibid.* at 182.

¹¹³ *Ibid.* at 194.

Furthermore, given the recent decision of the Supreme Court of Canada in *Reference Re Validity of Sections 32 and 34 of the Worker's Compensation Act*,¹¹⁴ it may be very difficult to establish that farmworkers, both Canadian and foreign, constitute an analogous ground for a finding of discrimination under section 15(1) of the *Charter*. The issue in that case was whether a provincial *Workers' Compensation Act* which deprived a worker the right to commence a court action for damages violated section 15 of the *Charter*. The Court concluded that the *Act* did not violate section 15(1) of the *Charter* with LaForest J. concluding for the majority that "the situation of the workers and dependents here is in no way analogous to those listed in s. 15(1), as a majority in *Andrews* stated was required to permit recourse to s. 15(1)."¹¹⁵

The Supreme Court's decision in the *Worker's Compensation Act Reference*, that a distinction based on circumstances of employment is not an analogous ground under section 15, has been followed by other courts. For instance, in *Rural Route Mail Carriers of Canada et al. v. A.G. of Canada*,¹¹⁶ the Federal Court Trial Division held that a statutory prohibition against collective bargaining affecting rural mail carriers does not offend section 15 since employment status is not an analogous ground to those enumerated in section 15. In *Barke v. City of Calgary*¹¹⁷ the Alberta Queen's Bench further held that working conditions of an employee, even where a right of equality is being denied by statute, were not analogous to any of the enumerated grounds in section 15(1) of the *Charter*.

If it is held that farm workers do constitute an analogous ground and further that foreign workers have been discriminated against under section 15, the analysis would then shift to section 1 of the *Charter* for consideration of the reasonableness of such

¹¹⁴ (1989), [1989] 1 S.C.R. 766, 56 D.L.R. (4th) 765 [hereinafter cited to D.L.R.].

¹¹⁵ *Ibid.* at 766.

¹¹⁶ (1989), 16 C.R.D. 475-02. See also *Niemann v. Public Service Commission* (1989), 16 C.R.D. 400-30-01.

¹¹⁷ (1989), 16 C.R.D. 125, 40-06.

discrimination. However, the farmworker would likely be unsuccessful under the reasonableness test of section 1. To that extent the equality enunciated in *Andrews* would not have ameliorated the condition of the foreign worker in Canada.

The foreign worker may yet find statutory protection of his rights to equal treatment in Canada. For instance, section 26 of the *Charter* holds that the equality rights guaranteed in section 15 "shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." Therefore, the existence of any such rights in the Ontario *Human Rights Code*¹¹⁸ affords some protection to the worker.

The restriction that the Caribbean "Guestworker" Program applies only to male workers¹¹⁹ is a prima facie violation of section 3 of the *Human Rights Code*.¹²⁰ Section 3 provides that every person with the legal capacity to contract can do so on equal terms without discrimination based on sex. Section 8 of the *Human Rights Code* holds that "no person shall infringe or do, directly or indirectly, anything that infringes a right under this Part."

The exclusion of women from the Program constitutes discrimination based on sex, under section 3 of the *Act*. Discrimination exists even though the farmers had no intention of discrimination or simply did so for sound economic or business reasons. Once it can be found that the Program affects women differently from men, then a prima facie case of discrimination has been made.¹²¹

Upon this finding, the onus shifts to the farmer to show that he had taken reasonable steps to accommodate the foreign worker as were open to him without undue hardship.¹²² Alternatively, the

¹¹⁸ R.S.O. 1981, c. 53.

¹¹⁹ In 1987 two women were allowed work permits to work alongside their husbands on the farms. *The O.E.C.S. News* (July-August 1988) 4.

¹²⁰ *Supra*, note 118.

¹²¹ *Ontario Human Rights Commission v. Simpsons Sears*, [1985] 2 S.C.R. 536 at 551-52 [hereinafter *Simpson Sears*] and *Blainey*, *supra*, note 98 at 741-42.

¹²² *Simpson Sears*, *supra*, note 103.

farmer bears the responsibility of proving that pursuant to section 23(b), sex "is a reasonable and bona fide qualification" and therefore sexual discrimination in the Program does not violate section 4 of the *Human Rights Code*.

In *Ontario Human Rights Commission et al. v. Borough of Etobicoke*¹²³ the Supreme Court of Canada considered the meaning of the term "reasonable and bona fide qualification." The Court held that:

[i]t must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job, without endangering the employee and the general public.¹²⁴

Quite clearly, the exclusion of women from the Program is not a bona fide qualification under this definition. It reflects an irrational assumption that women cannot perform the strenuous work required under the Program. Women are kept from the Program probably for the added reason that their subjection to onerous work hours would be more reprehensible in the eyes of the public. Whatever the reason, their exclusion is not necessary to assure the efficient and economical performance of the job.

Any legal victory won by the worker through the farmer's inability to demonstrate that reasonable steps to accommodate the worker were taken would be illusory. In the first place, the victory may come after the expiration of the Employment Authorization or when the farmer is no longer under a contractual obligation to employ the worker. Secondly, in selecting workers annually, the farmer does not have to rehire the worker. Finally, the court judgement may well result in the worker being blacklisted and banned from the Program. Therefore, while recourse to the courts might ameliorate conditions in the Program for future workers, such recourse will bring no meaningful remedy to the worker or workers who initiated the action.

The efficacy of the *Human Rights Code* in mitigating some of the more egregious employment practices is questionable for two

¹²³ (1982), [1982] 1 S.C.R. 202; 132 D.L.R. (3d) 14 [hereinafter cited to D.L.R.].

¹²⁴ *Ibid.* at 20.

other reasons. A female worker who seeks to challenge the Program under sections 3 or 4 would have to travel to Canada to file a complaint with the Commission. This, of course, is inconceivable. The Commission can circumvent this problem by initiating a complaint by itself about the discriminatory aspects of the Program.¹²⁵ However, the decision to take this proactive action obviously rests on the political will of the Commission to challenge a government sponsored program for Ontario's small farmers.

Secondly, the Caribbean "Guestworker" Program may well be upheld as a special program under section 13(1) of the *Code*. The section provides that a section 4 right is not infringed by the implementation of a program designed to relieve hardship or economic disadvantage. Under section 13(2), the Commission may inquire into a special program to determine whether it comes under section 13(1). However, pursuant to section 13(5), the Commission lacks this power of inquiry where the special program has been established by the Crown or one of its agencies. Therefore, whatever happens under the Seasonal Workers Program lies beyond the purview of the Ontario *Human Rights Code*.

VII. CONCLUSION

The Caribbean countries that participate in the Commonwealth Caribbean Seasonal Agricultural Workers Program have very little control over the program. The one-sided nature of the employment contract prevents them from ensuring that their workers are adequately protected. Even if they possessed the necessary contractual leverage to protect their workers, the chronic unemployment in the islands, coupled with the revenue which accrue from the program, ensure that the governments turn a blind eye to any exploitation of their workers.

The farmers use the regulatory system set up by the *Immigration Act*, Memorandum of Agreement, and Contract of Employment to recruit a healthy and compliant labour force. Workers who fail to display the necessary enthusiasm are deemed

¹²⁵ *Human Rights Code*, *supra*, note 118, s. 31(5).

unsatisfactory and considered unfit for the program. Once terminated, workers are deemed *out of status* and are liable to be deported. They are then permanently excluded from the program while other more suitable workers stand ready to take their place.

Neither the Canadian *Charter of Rights and Freedoms* or the Ontario *Human Rights Code* can ameliorate the conditions under which the workers are employed. The work provisions appear to violate the equality rights established in the *Charter*. Furthermore, while those work provisions may violate the freedoms guaranteed in the *Human Rights Code*, the imperatives of political expediency ensure that the rights of temporary foreign workers are subordinated to those of the Ontario farmer.

The economic benefits derived from the program explain the workers' willingness to participate in the program. Their continued migration to Canada has often been misconstrued to deny that the program is designed primarily to exploit the readily accessible labour in the Caribbean. For instance, Alexander notes:

[M]ost of the workers have been on the scheme before, and are always anxious to return. It is strange that oppressed people return of their own free will to their oppressors.¹²⁶

But they do return to their oppressors if they have no viable alternative of gaining a livelihood. Therein lies the reason for the persistence of the Caribbean Seasonal Agricultural Workers Program. The workers are prepared to face the highly regulated and regimented life on the farms not because they are unaware of their disadvantaged position *vis-à-vis* that of the farmer, but because non-participation would relegate them to a life of perennial underemployment and marginal living.

¹²⁶ Alexander, *supra*, note 41 at 8.

APPENDIX I

MEMORANDUM OF UNDERSTANDING BETWEEN THE
GOVERNMENT OF CANADA AND THE GOVERNMENT OF
JAMAICA CONCERNING THE COMMONWEALTH
CARIBBEAN SEASONAL AGRICULTURAL WORKERS
PROGRAM.

Desiring to continue to develop the Commonwealth Caribbean Seasonal Agricultural Workers Program for Jamaica which has been in existence since 1966 and which symbolizes the close bonds of friendship, understanding and co-operation existing between them; and

Desiring to ensure that the Program continues to be of mutual benefit to both parties and facilitates the movement of Jamaican Seasonal Agricultural Workers into all areas of Canada where Canada determines that such workers are needed to satisfy the requirements of the Canadian agricultural labour market;

Canada and Jamaica have agreed that the guiding principles underlying the Program will be;

1. (a) that the operation of the program will be administered according to Operational Guidelines, attached as Annex I which will be subject to annual review by both parties and amended as necessary to reflect changes required for the successful administration of the Program and adherence to the principles contained in this Memorandum,
- (b) that workers are to be employed at a premium cost to the employers and are to receive adequate accommodation and fair and equitable treatment while in Canada under the auspices of the Program,
- (c) that workers are to be employed in the Canadian agricultural sector only during those periods determined by Canada to be periods when workers resident in Canada are not available; and
- (d) that each worker and employer will sign an Employment Agreement attached as Annex II outlining the conditions of employment under the Program. The said agreement will be subject to annual review by both parties, and amended if necessary after consultation with interested parties to reflect changes required for the successful administration of the Program and adherence to the principles contained in this Memorandum.

And have further agreed that;

2. This Memorandum of Understanding

- (a) may be amended at any time with the approval in writing of both parties;
- (b) becomes effective on the later of the dates of signature by representatives of both parties and will continue in force unless terminated by either party giving at least six (6) months in writing to the other party; and

- (c) is an intergovernmental administrative arrangement and does not constitute an operational treaty and that any disputes in respect to this Memorandum of Understanding or its attachments will be settled through consultation between both parties.

APPENDIX II

OPERATIONAL GUIDELINES TO THE MEMORANDUM OF
UNDERSTANDING BETWEEN THE GOVERNMENT OF
CANADA AND THE GOVERNMENT OF JAMAICA
CONCERNING THE COMMONWEALTH CARIBBEAN
SEASONAL WORKERS PROGRAM

Furthermore to the Principles contained in the Memorandum of Understanding the parties have agreed that;

1. Canada

- (a) will establish directions, in accordance with its laws respecting immigration, limiting to admission to Canada of workers from Jamaica seeking entry to Canada for the purpose of engaging in seasonal employment in the agricultural sector to persons selected by Jamaica who
 - (i) are at least 18 years of age;
 - (ii) are nationals of Jamaica;
 - (iii) satisfy Canadian immigration laws; and
 - (iv) are parties to an employment Agreement attached here to as Annex II.
- (b) shall provide to Jamaica through the Ministry, adequate notice as to the number of workers required by employers, including named employers as a priority, in order to facilitate the documentation process and enable their arrival by the dates required by the employer;
- (c) will afford assistance to the Jamaican Government's Agent(s) to the extent possible in order that their responsibilities can be carried out properly;
- (d) through the Canadian High Commission in Kingston, will undertake to review the medical reports and other worker documentation, to complete employment authorization for each worker, and to advise Jamaica when all documentation is complete;
- (e) will maintain reception facilities for the workers from Jamaica at the Toronto International Airport or such other airports as may be designated by Canada.

2. Jamaica

- (a) upon receipt of the notice referred to in subclause 1(b) will undertake the recruitment and selection of workers and will notify the Canadian Employment and Immigration Commission and the Canadian High Commission in Kingston of the number of workers, their names and the dates of arrival in Canada;
- (b) will only select for the Program persons who are capable of performing agricultural work and who meet Canadian Immigration health requirements, and will arrange a medical examination including chest x-rays for each worker;

- (c) will undertake to have the worker's medical reports and identity documents delivered to the Canadian High Commission in Kingston in adequate time before the departure of any given worker's flight;
 - (d) will appoint one or more agents in Canada for the purpose of ensuring the smooth functioning of the Program for the mutual benefit of both the employers and the workers, and to perform the duties required of that agent or agents under the employment agreement.
3. All travel arrangements for workers selected for the purposes of the Program
- (a) will provide for the most economical method of air transportation to and from Canada, and will normally be made by an agent of the Canadian employers who will notify the Canada Employment and Immigration Commission of such arrangements; and
 - (b) will be subject to the prior approval of both parties to this Memorandum of Understanding and will be made so as to cause the least inconvenience possible to the workers.
4. (a) Jamaica, through the appropriate authority, will co-operate with other participating Commonwealth Caribbean countries in reaching agreement as to the proportion of the total vacancies that will be allocated to each of the participating Commonwealth Caribbean countries and will notify Canada of any decision in this respect.
- (b) Canada will co-operate to the fullest extent possible under the Program to facilitate the implementation of any decision of which it has been so notified under clause 4(a).
5. The present Operational Guidelines may be reviewed and amended annually through consultation between officials designated by the parties to the Memorandum of Understanding.

APPENDIX III

AGREEMENT FOR THE EMPLOYMENT IN CANADA OF
COMMONWEALTH CARIBBEAN SEASONAL
AGRICULTURAL WORKERS

THE PARTIES AGREE as follows:

2. The Employer further undertakes and agrees:

- (a) To pay in advance the cost of two way transportation of the Worker, as between Kingston, Jamaica and Canada by the most economical means;
- (b) To meet the Worker upon arrival in Canada and transport him to his place of employment and, upon termination of his employment, transport him again to the place from which he will leave Canada, all such transportation will be with the prior knowledge and consent of the Government's Agent;
- (c) To employ the Worker for a trial period of fourteen actual working days from the date of his arrival at the place of employment. The Employer shall not discharge the Worker except for misconduct or refusal to work during that period;
- (d) To pay the Worker at his place of employment weekly wages in lawful money of Canada at a rate equivalent to
 - (i) the minimum wage for industrial workers provided by law in the province in which the Worker is employed;
 - (ii) the rate determined from time to time by the Canada Employment and Immigration Commission to be the prevailing wage rate for the type of agricultural work being carried out by the worker in the locality in which the work will be done; or
 - (iii) to the rate being paid by the Employer to his regular seasonal work force performing the same type of agricultural work;whichever is greatest, provided;
- (iv) that the average minimum work week shall be 40 hours,
- (v) that, if circumstances prevent fulfilment of Clause 2(d)(iv), the average weekly income paid to the Worker over the period of employment is to be not less than the amount equal to a 40 hour week at the hourly minimum rate for industrial workers provided by law in the province, and,
- (vi) that where, for any reason whatsoever, no actual work is possible, the Worker shall receive a reasonable advance to cover his personal expenses,
- (e) To provide for the Worker:

- (i) adequate living accommodation, without cost to the Worker, which satisfies the standards required by the appropriate official of the government authority responsible for health and living conditions in the province where the Worker is employed and meets with the approval of the Government's Agent.
 - (ii) reasonable and proper meals for the Worker during periods of transportation and employment, at a cost to the Worker as agreed to in Clause 2(i).
 - (iii) where the Worker prepares his own meals, cooking utensils, fuel, and facilities without cost to the Worker;
- (f) To give to the Government's Agent a copy of rules and regulations concerning safety, discipline, and care and maintenance of property that the Employer expects his Workers to observe;
 - (g) That the Employer shall not move the Worker to another area or place of employment or to another employer without the prior approval of the Worker, the Government's Agent, and the Canada Employment and Immigration Commission;
 - (h) To complete and deliver to the Government's Agent within seven days of the completion of each payroll period, copies of pay sheets indicating all the deductions in respect of the Worker's wages;
 - (i) To recover the cost of meals provided to the Worker at a rate not to exceed \$5.00 per day;
 - (j) To remit to the Government's Agent 25 per cent of the Worker's wages for each payroll period at the time of delivering the pay sheets as required in Clause (h);
 - (k) To make only those deductions from the Worker's wages as required by Canadian law or permitted under this Agreement;
 - (l) That, in the absence of applicable Provincial law providing for payment of compensation to the Worker for personal injuries received or disease contracted by him as a result of his employment, the Employer shall procure insurance satisfactory to the Government's Agent to provide for such compensation;
 - (m) To provide suitable burial of the Worker if he dies during the continuance of his employment.
3. The Worker further undertakes and agrees:
- (a) To proceed to the place of employment as aforesaid in Canada when and how the Government's Agent shall approve;
 - (b) to work and reside at the place of employment or at such other place as the Employer, with the approval of the Government's Agent, may require;
 - (c) That he shall at all times during the term of employment work under the supervision and direction of the Employer and perform the duties related thereto;

- (d) To obey and comply with all rules set down by the Employer which have been approved by the Government's Agent relating to safety, discipline, and the care and maintenance of property;
- (e) That he
 - (i) shall maintain living quarters furnished to him by the Employer or his Agent in the same condition of cleanliness in which he received them, and
 - (ii) realizes that the Employer may, with the prior approval of the Government's Agent, deduct from his wages the cost of the Employer of maintaining the quarters in the appropriate state of cleanliness should he fail to keep the living quarters in a clean condition;
- (f) That he shall not work for any other person without the prior approval of the Employer, the Government's Agent, and the Canada Employment and Immigration Commission;
- (g) That he shall pay to the Employer on account of transportation cost referred to in Clause 2(a) by way of regular payroll deduction, the sum of \$1.10 per day beginning on the first full day of employment and the aggregate payment in any event is not to be less than \$50.00 or greater than \$208.00.

THE PARTIES further agree:

- 4. (a) That the following completion of the trial period of employment by the Worker, the Employer, after consultation with the Government's Agent, shall be entitled for misconduct or any other sufficient reason to terminate the Worker's employment and cause the Worker to be repatriated; and where
 - (i) the Worker was requested by name by the Employer, the full cost of repatriation to Kingston, Jamaica, shall be paid by the Employer.
 - (ii) the Worker was selected by the Government and 50 per cent or more than the term of the Agreement has been completed, the Worker shall be responsible for the full cost of repatriation.
 - (iii) the Worker was selected by the Government and less than 50 per cent of the term of the Agreement has been completed, the Worker shall be responsible for the full cost of repatriation and shall also reimburse the Employer for the monetary difference between the actual cost of transportation of the Worker to Canada and the amount collected by the Employer under Clause 3(g), actual cost being the net amount paid to the Carrier plus the Travel Agent's Commission at the International Air Transportation Association approved rate:
- (b) That if, in the opinion of the Government's Agent personal domestic circumstances exist in the island of recruitment which make repatriation of the Workers desirable or necessary prior to the expected date of termination of the Agreement, the Government's Agent shall cause the worker to be repatriated, and where,
 - (i) the Worker was requested by name by the Employer, the full cost of repatriation to Kingston, Jamaica, shall be paid by the Employer;

- (ii) the Worker was selected by the Government and 50 per cent or more of the term of the Agreement has been completed, the employer shall pay the cost of reasonable transportation and subsistence expenses of the Worker in respect of his repatriation to Kingston, Jamaica;
 - (iii) the Worker was selected by the Government and less than 50 per cent of the term of the Agreement has been completed, the Worker shall be responsible for the full cost of repatriation.
- (c) That if, prior to the termination of the Agreement, repatriation of the Worker is necessary for medical reasons, the employer shall pay the cost of reasonable transportation and subsistence expenses of the Worker in respect of repatriation to Kingston, Jamaica;
 - (d) Any expenditure incurred by the Government's Agent in repatriating the Worker by reason of his employment being terminated under this Agreement shall be repaid by the Worker to the Government;
 - (e) Any bona fide debt to the Employer voluntarily incurred by the Worker in respect of any matter incidental or relating to his employment hereunder shall be repaid by him to the Employer;
5. For the purpose of securing the recovery of any amount payable by the Worker under Clauses 4(d) and 4(e), the Government shall be entitled to set aside (after payment of such allowances to the Worker's dependents as the Government may approve) all monies remitted to the Government's Agent under Clause 2(j) of this Agreement until an amount representing the cash equivalent of \$100.00 (Canadian currency) has been accumulated, and to retain such amount during the period in which the Worker is employed in Canada and for a period not exceeding six months after the date of his repatriation and subject to any order of a court of competent jurisdiction and to any bankruptcy notice under any law relating to bankruptcy, to apply such amount to the payment of any sum not exceeding the cash equivalent of \$100.00 (Canadian currency) as may be properly payable to the Employer or to the Government in respect of any of the matters referred to in Clauses 4(d) and 4(e) upon demand being made for payment thereof within the respective periods following, that is to say, in the case of any expenditure or debt referred to in Clauses 4(d) and 4(e) within a period of one month from the termination of the Worker's employment, and in any other case, within a period of six months from the date of his repatriation;
6. That all provisions of this Agreement affecting the obligations created;
- (i) between the Worker, the Employer and the Canada Employment and Immigration Commission or the Government's Agent, the Employer and the Canada Employment and Immigration Commission shall be governed by the laws of Canada, and
 - (ii) between the Worker and the Government shall be governed by the laws of Government.

