

YOU SURE KNOW HOW TO PICK 'EM: HUMAN RIGHTS AND MIGRANT FARM WORKERS IN CANADA

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*"Just pick the damn apples and tobacco and stop dreaming. And while you're at it. . . keep out of sight so nobody won't bloody well notice. . . , so everybody's conscience can rest at night. For if you can't do the job, can't help to keep flying into our face and reminding us of what we choose to ignore, we'll get somebody else who will. Good help might be hard to get, but it's always available at the right price."*¹

Largely overlooked by the media, government studies, and academic scholarship, the situation of foreign agricultural workers in Canada nevertheless persists as a quiet reminder of this country's failure to live up to its commitment of respecting human rights. Every year persons are flown in from Mexico and the Caribbean under a federal program, given temporary employment visas, and flown back at the end of their work terms. This paper will examine the conditions of their stay here in Canada, as dictated by Canadian immigration law and policy. The analysis will run the existing scheme in Canada through three filters: first, a potential argument under section 15 of the *Canadian Charter of Rights and Freedoms* (hereinafter "Charter") will be reviewed. Second, regional remedies under the *North American Agreement on Labor Cooperation* ("NAALC") will be scrutinized. Third, Canada's present system will be examined against the backdrop of international rights, with emphasis on the *United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ("Convention"). It is hoped that, by contrasting the current domestic system for migrant workers with the available protections under domestic, regional, and international instruments, it will become apparent that Canada has been remiss in ensuring that foreign farm workers' rights are fully protected while they toil on Canadian farms. If positive reform and increased public attention are not brought to bear upon this long-neglected issue, the result will be the continued existence of an invisible plantation system, driven mainly by the profit motive and facilitated by a policy of discrimination, exploitation, and a pick-and-choose approach to human rights.

1. CECIL FOSTER, *SLAMMIN' TAR* 415 (1998).

BACKGROUND: THE SEASONAL AGRICULTURAL WORKER (SAW) PROGRAM

a. *Structure and Administration of the SAW Program*

Before launching into the analysis, the present scheme for temporary foreign migrant workers will be roughly outlined. In Canada, responsibility for what is called the Non-Immigrant Employment Authorization Program ("NIEAP") is shared between two federal government departments: Human Resources Development Canada ("HRDC") and Citizenship and Immigration Canada ("CIC"). Basically, the NIEAP covers visitors who have been granted work permits and are not counted as immigrants – meaning that they can only legally stay in Canada for the duration of the employment authorization.² Operated under the rubric of the NIEAP regulations are two programs: the Live-In Caregiver Program ("LCP")³ and, the program that is the primary focus of this paper, the Commonwealth Caribbean and Mexican Seasonal Agricultural Worker Program ("SAW").⁴ The general principles and purposes of the SAW are set out in the bilateral agreements, called Memoranda of Understanding ("MOU"), between Canada and the sending country; the Operational Guidelines to the MOU set out the obligations of the party countries (e.g. recruitment, travel documentation); and the details of the program (the work term, wage rate and deductions, lodging, meals, grounds for termination, etc.) are outlined in a standard agreement or contract of employment, established in an Annex to the MOU.

The SAW was created in the late 1960's to serve a common need:⁵ to provide a labor force that would perform work traditionally viewed as unattractive by native-born Canadians – the care and harvesting of fruits, vegetables, and tobacco.⁶ In this way hopeful non-Canadians perform much of the grunt work of Canada. This labor market strategy is implemented via a complex structure overlapping Canadian and foreign borders. Under Immigration Regulation section 10(a), an immigration officer can issue a work visa to persons who are engaged to work pursuant to a bilateral international

2. See Nandita Sharma, *The True North Strong and Unfree: Capitalist Restructuring and Non-Immigrant Employment in Canada, 1973-1993* at 1 (1995) (unpublished M.A. Thesis, Simon Fraser University).

3. The LCP is a program whereby women are recruited from foreign countries (particularly the Philippines) to perform live-in domestic work in Canada. The program allows participants to apply for permanent resident status after two years of domestic work, without having to meet the usual immigration selection criteria. See Milly Morton, *The Legal Position of Migrant Workers in Canada*, 14 I.M.R. (No. 1) 10 (1999).

4. See generally Morton, *supra* note 3.

5. See generally Morton, *supra* note 3.

6. See Irving André, *The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada*, 28 OSGOODE HALL L.J. 243, at 255-57 (1990). The Caribbean Seasonal Agricultural Workers Program [hereinafter SAW] came into existence in 1966. See *id.* The Mexican Seasonal Agricultural Workers Program was signed in 1995. See Memorandum of Understanding Between the Government of Canada and the Government of the United Mexican States Concerning the Mexican Seasonal Agricultural Workers Program, Apr. 5, 1995, Can.-Mex. [hereinafter Mexican MOU].

agreement, such as the agreements that form the basis for the SAW.⁷ The SAW is most directly administered by two levels: liaison officers, appointed by the governments of the sending countries, and the support staff as provided by Foreign Agricultural Resource Management Systems (F.A.R.M.S.), a non-profit body funded via user fees paid by farmers. Liaison officers are key in selecting and recruiting workers in the sending countries, and monitoring the implementation of the SAW program within Canada.⁸

b. *Procedures and Purposes of the SAW*

Under the SAW, a farmer can approach HRDC and ask to hire foreign seasonal workers. HRDC will normally approve this request, as long as the farmer can prove that they have tried to hire Canadians for the position, or that the request for foreign workers is a last resort to harvest a highly perishable crop.⁹ Farmers can also request workers by name. Once HRDC approves these requests, CIC issues the work visas, and the farmer signs the standard agreement of employment, which will also be signed by the liaison officer and by the selected workers.¹⁰ As per the Operational Guidelines, the Ministry of Labor in the sending countries are responsible for selecting and recruiting those workers who have not been requested by name, then subjecting all of the workers to criminal and medical screenings, to ensure that they do not fall within the inadmissibility classes in section 19 of the Canadian *Immigration Act*.¹¹ Transportation of the worker to Canada is paid for by the farmer, but can be recouped via deductions from the workers' wages.¹² Once the work term specified in the contract of employment elapses, the visa issued by CIC also expires, and the worker is repatriated.¹³

At this point, it is worthy to note that, in contrast to the Live-In Caregiver Program, workers under the SAW do not gain the right to apply for permanent residence after having put in several years of work in the program.¹⁴ Therefore, there is no possibility of "upward mobility" in the SAW program – persons who enter as foreign workers remain and leave as *foreign workers*.¹⁵ Indeed, a specific clause in the agreement of employment states that an obligation of the worker is to "return promptly. . . upon completion of his/her authorized work period."¹⁶

7. Immigration Act, C.R.C., ch. 940, § 10(a) (1978) (Can.).

8. See André, *supra* note 6, at 264-65.

9. See generally Mexican MOU, *supra* note 6.

10. See *id.*

11. Immigration Act, R.S.C., Ch. 52, § 19 (1985) (Can.).

12. Mexican MOU, *supra* note 6, at Employment Agreement § VII.

13. See André, *supra* note 6, at 266-68; see also *id.* app. I.

14. Mexican MOU, *supra* note 6, at § IX(6).

15. See André, *supra* note 6, at 282. According to André, "[l]ongevity in the scheme assures this worker no seniority rights or employment to a non-manual, supervisory position." *Id.*

16. Mexican MOU, *supra* note 6, at Employment Agreement, § IX(6).

Given the emphasis on the temporary nature of the SAW work visa, it can be inferred that Canada's purpose behind the SAW mixes labor and immigration policies. In terms of labor policy, workers are brought into Canada under the SAW to fill a demand in the labor market – clearly, farmers would not continue to use the SAW unless they needed a type of labor they could not find in Canada. However, the intersection with immigration policy is also apparent. As has been observed, the SAW is even more effective than the skilled worker “points system” in shaping its foreign labor supply, since many of the persons who work and live in Canada for years under the SAW would not qualify under the points system, despite the fact that their labor is valued and needed in Canada. The only way to obtain this kind of work without having to grant citizenship status to agricultural laborers is to set up a sort of perpetual rotation system¹⁷ – workers come in, workers leave when no longer needed, workers return the following year, and so on. Overall, therefore, the SAW provides an opportunity for Canada to fill a void in the domestic labor force with low-income workers, “whom Canada does not straightforwardly want as immigrants.”¹⁸

c. *Conditions of Work under the SAW*

In 1998, approximately 13,000 workers underwent the SAW process,¹⁹ most of them young males who entered Canada without dependents.²⁰ As little hard data exists in academic or government studies on this subject, one usually is forced to speculate as to the experiences of these 13,000 workers.²¹ However, much can be inferred from the terms set out in the agreement of employment. On its face, the agreement provides adequate coverage of some key minimum rights. It contains terms whereby the employing farmer must provide adequate and free lodging to the worker,²² which satisfies municipal health and safety standards. The farmer must also provide meals,²³ either free or at low cost via wage deductions; and must pay the worker the highest

17. See Lloyd T. Wong, *Canada's Guestworkers: Some Comparisons of Temporary Workers in Europe and North America*, 18 I.M.R. (No.1) 85, 87 (1984) (explaining the “bonded rotational system,” whereby seasonal agricultural workers are continuously moved through a system in which they have no rights but many obligations).

18. Morton, *supra* note 3.

19. *Id.*

20. See Wong, *supra* note 17, at 88. For a precise breakdown of the migrant population in 1981, see *id.* at 89.

21. It is interesting to compare the wealth of academic scholarship on domestic foreign workers and the LCP, with the lack of corresponding study on the situation of foreign farm workers. See generally NOT ONE OF THE FAMILY: DOMESTIC WORKERS IN CANADA (A. B. Bakan & Stansulis eds., 1997); J.W. Petraykayn, *The Uneasy Landing of Mary Poppins: Landing Requirements of Live-In Caregivers*, 6 IMM. & CIT. 1, 1 (July 1994). This disparity is not easily explainable – the lack of attention paid to foreign farm workers may be due to their isolation in rural regions, in contrast to the more visible presence of live-in caregivers in more urban areas.

22. Mexican MOU, *supra* note 6, at Employment Agreement § II(1).

23. Mexican MOU, *supra* note 6, at Employment Agreement § II(2).

minimum wage available in the province,²⁴ as long as the average work week is forty hours.²⁵ The Mexican agreement states that the normal workday is not to exceed eight hours, and out of every six days, the worker must have one day off for rest.²⁶

Despite the apparent coverage of basic rights, serious absences exist even on the surface of the SAW agreements, and further problems exist in the gap between theory and practice. These defects will be discussed at length in the remainder of the paper, in the process of contrasting the SAW with protections under key human rights instruments; however the major deficiencies will be briefly touched upon here. Although the Mexican agreement specifies the length of an average workday and a required day of rest each week,²⁷ it may be unique in this sense – the agreement for the Caribbean version of the SAW contains no such clause. As well, even the Mexican agreement contains a qualification, stating that “where urgent”, the farmer can ask for more hours of work per day and can withhold the day off.²⁸ No provisions are contained in the agreements for overtime pay arrangements, and anecdotal evidence suggests that farmers view the SAW as advantageous precisely because the laborers work overtime. For example, Kyle Hall, one time Chairperson of the Ontario Apple Marketing Commission, explained “that his foreign workers average seventy hours weekly.”²⁹ Another apple farmer in Wallaceburg, Ontario, stated that his Caribbean workers average thirteen to fifteen hours daily to reap his crop.³⁰ In addition, nothing in the employment contract deals with the right to family reunification – workers cannot bring along dependents just for the limited duration of the work term.³¹ Finally, workers are required to live at the place of employment, unless otherwise agreed upon, and cannot work for any other employer, thereby seriously diminishing the worker’s negotiation powers and mobility rights.³² These restrictions on their rights are striking especially when pitted against the fact that temporary agricultural workers contribute to the Canada Pension Plan, pay income tax, and are not covered under workers’ compensation plans.³³

Related to the worker’s negotiation position *vis-à-vis* the farmer, it is worthy to note that the employment agreements do not discuss unionization,

24. Mexican MOU, *supra* note 6, at Employment Agreement § III(1)(i).

25. See André, *supra* note 6, at 269-70. See generally *id.* app. III, Caribbean SAW, 2(d); Mexican MOU, *supra* note 6, at Employment Agreement, §§ II & III.

26. Mexican MOU, *supra* note 6, at Employment Agreement §§ I(2)-(3).

27. *Id.*

28. *Id.* at § I(2).

29. André, *supra* note 6, at 276 (citing Cecil Foster, *Welcome Wears Thin When Crops In*, THE GLOBE AND MAIL, Oct. 6, 1986, at B1).

30. *Id.*

31. See generally, Mexican MOU, *supra* note 6, at Employment Agreement.

32. See André, *supra* note 6, at 284; see also *id.* app. III, Caribbean SAW, 3(f); Mexican MOU, *supra* note 6, at Employment Agreement, §§ IX(4)-(5).

33. Affidavit of Judy Fudge in *Dunmore v. Ontario*, [1997] 37 O.R.3d 287 (Ont. Ct. Gen. Div.) (Fudge Aff. Para. 66)[hereinafter Affidavit of Judy Fudge].

or the right to collective bargaining.³⁴ This position of vulnerability is exacerbated by language, cultural, and geographical barriers – since many workers live out on the remote farms, few workers have access to legal authorities or social services that would possibly help them with their complaints. Also, not being citizens, foreign workers do not have access to political processes to challenge their exclusion from basic employment rights and protections.³⁵ Even if the lone worker chooses to complain to the liaison officer, several disincentives exist. One is that the liaison officer often does not have the support staff to go out to the farms and thoroughly investigate claims. As the non-profit organization F.A.R.M.S. is responsible for providing the support staff, and is funded only by the payments of farmers, the availability of support staff is reliant upon the willingness of the farming community to supervise its own practices regarding migrant workers. Without the farming community to provide facilities and support staff, the liaison officer's ability to perform her supervisory role is severely compromised.³⁶

Another disincentive for a worker to launch a complaint is the threat of premature repatriation. Grounds for termination center mainly on a breach of contract which can include medical conditions, a refusal to work, or non-compliance. The agreements do not give any guidelines or solid sense as to the definition of these grounds for dismissal, leaving broad discretion for the employing farmer.³⁷ Once a worker is terminated, he is repatriated before the end of his work term to his home country. Insult is heaped onto injury — if the worker has completed half or more than half of his work term, and was part of the general recruitment process (e.g. was not requested by name by the farmer), he personally bears the costs for his return trip.³⁸

Finally, and more informally, many workers are discouraged from complaining because of the possibility of being “blacklisted”³⁹ – kept out of the SAW for the rest of their lives by a grudging employer or liaison officer. As many of the persons who participate in the SAW come from situations where unemployment rates are astronomical, being permanently kept out of the SAW is often a risk no one is willing to take, even if it means agreeing to work seventy hours a week seven days a week, hiding an injury from an employer, or putting up with sub-standard living conditions.

This thumbnail sketch of the SAW highlights the lack of support and protection for foreign migrant workers in Canada. Although these workers may often have chosen the SAW over unemployment, it is likely that few realized how cold and how distant, how unwelcoming the receiving country

34. See generally, Mexican MOU, *supra* note 6, at Employment Agreement.

35. *Id.* at para. 68.

36. See André, *supra* note 6, at 265.

37. See *id.*, Caribbean SAW, 4(a)(explaining that an employer can terminate the employment if the employer has “sufficient reason”).

38. See André, *supra* note 6, at 272-73, 278 (graph); see also *id.*, Caribbean SAW, 4(b)(iii); Mexican MOU, *supra* note 6, at Employment Agreement, § X(1)(iii).

39. André, *supra* note 6, at 273.

actually is. Placed in a vulnerable bargaining position, told where to live and who to take orders from, and unceremoniously turned out of the country the day their work visa expires, the participants in SAW may be substantially less grateful about having been hand-picked for the experience.⁴⁰

A HUMAN RIGHTS ANALYSIS OF THE SAW PROGRAM

I. *Charter Section 15: Equality Rights - situating migrant farm workers in the equality debate*

A caveat must be set out at the beginning of this portion of the paper. This section is not meant to present a thorough constitutional analysis of the situation of foreign agricultural workers – for instance, the legal test for Section 15 will not be set out here in any but the most general sense. Unlike the other more globally focused and detailed areas of the paper, this section is only intended to highlight the mere possibility of a Section 15 argument, and describe some of the general directions this challenge may take, given recent jurisprudence. Thus, while there may be much that can be written on this point, the author wishes only to give the broad strokes of such an argument, and leave the expansion of this argument to future legal facta, should such a challenge ever be brought in a Canadian court.⁴¹

The seeds of a Section 15 challenge can be seen in the *obiter dicta* of Judge Sharpe, an Ontario Court (General Division) judge, in the recently decided case of *Dunmore v. Ontario*.⁴² *Dunmore* is not exactly on point, because it dealt with the challenge made by *citizen* agricultural workers in Ontario, who are excluded from Ontario's *Labor Relations and Employment Statute Law Amendment Act*.⁴³ However, even while dismissing the farm workers' application, Judge Sharpe for the Court appeared to delicately critique the exclusion of all farm laborers from Ontario's labor relations regime.⁴⁴ Judge Sharpe observed that the justification for the exclusion of farm workers from the labor relations regime are "unclear" and that the only two reasons seem to be "the seasonal nature of farming, the perishable nature of the product" and

40. This is not to say that participants are entirely ungrateful – workers under the SAW and their home countries benefit financially to some degree, but overall the employing farmers and the Canadian government emerge as the big winners. See generally André, *supra* note 6, at 281-84 (explaining that a worker receives a higher wage for that particular period than would be received in the home country and that the worker could benefit from the mandatory savings programs that some employers have).

41. The author also does not wish to speculate in this paper as to how such an argument would fare if it passed the Section 15 stage of analysis and moved on to the Section 1 "reasonable limits" analysis. The author's opinion is that, given Section 1 case law, the results of a section 1 analysis would depend to a great extent on the political "temperature" of the deciding bench.

42. [1997] 37 O.R.3d 287 (Ont. Ct. Gen. Div.), *aff'd* [1999] O.J. No.1104 (Ont. C.A.). Leave to appeal the Ont. C.A. decision to the Supreme Court of Canada has been recently granted. Interview with Stan Raper, Canadian Coordinator for United Farm Workers of America, AFL-CIO (Apr. 21, 2000).

43. See *id.*

44. See *id.*

the idea that "most farms are owned and operated by family units"⁴⁵ . . . There is a perception. . . that a collective bargaining regime would be incompatible with the effective operation of the family farm."⁴⁶ The fairy tale relied upon here is that of the big bad union giant pitted against Ma and Pa Jones and their tiny apple orchard. This image is used to exclude farm workers in Ontario from the benefits of employment standards around work hours, minimum wage, overtime, public holiday and paid vacation entitlements.⁴⁷ The deference of the Ontario legislature and courts towards this notion persists despite the anachronism of the small family farm in modern times,⁴⁸ and the indications that agricultural workers are among Canada's "most economically exploited and politically neutralized individuals."⁴⁹ Currently, all provinces except for Alberta and Ontario have abandoned the "small family farm" idea and have allowed agricultural workers the same rights as other laborers.⁵⁰

The exclusion of all farm workers from Ontario's labor relations regime and the traditional deference to the farmers in the province of Ontario is significant. Ontario is home to a large percentage of Canada's farming industry and therefore its policies have a powerful effect on migrant farm workers in Canada.⁵¹ Thus, the type of sentiment dominant in the Ontario farming community and the Ontario legislature impacts upon the implementation and monitoring of the SAW. It is also key to note that the MOUs contain clauses to the effect that workers under the SAW are to receive "treatment equal to that received by Canadian workers performing the same type of agricultural work, in accordance with Canadian laws."⁵² In addition, the agreements of employment also usually contain a term around work hours, stating that "the EMPLOYER may request of the WORKER. . . to extend his. . . hours. . . [S]uch requests shall be in accordance with the. . . spirit of this program, giving the same rights to Mexican workers as given to Canadian workers."⁵³ Given these generous statements, it is positively ironic to realize that in practice, what is being guaranteed to Mexican and Caribbean farm workers who end up in Ontario is equality to Ontario farm workers, which is the equality of having no rights at all, with no room to maneuver nor negotiate wages and work hours.

The central conundrum of a Section 15 argument in this context lies precisely here: migrant farm workers under the SAW are on the surface being

45. *Dunmore*, 37 O.R.3d at 292.

46. *Id.*

47. Affidavit of Judy Fudge, *supra* note 33, at para. 10.

48. *Id.* para. 19.

49. *Dunmore*, 37 O.R.3d at 293 (quoting unspecified "evidence affidavit").

50. *See id.*

51. *See* Ian Robinson, *The NAFTA Labor Accord in Canada: Experience, Prospects, and Alternatives*, 10 CONN. J. INT'L L. 475, 479-80 (1995) [hereinafter *Labor Accord in Canada*].

52. Mexican MOU, *supra* note 6, § I(b).

53. *Id.* at Employment Agreement, at § I(2).

treated on par with their Ontario counterparts – neither group has rights. However, all farm workers are treated unequally in comparison to other workers in other industries in Ontario – the other workers having rights under Ontario’s labor relations regime. Yet, despite this inequality, the deference to the “small family farm” and the heft of the farming community’s political influence means that it is likely that all agricultural workers will continue to be excluded from labor rights. It would indeed be difficult to argue that foreign farm workers are somehow entitled to such rights as collective bargaining, when even citizen farm workers, who actually have status in Canada, have consistently been denied such rights by the courts and the legislature.⁵⁴

In *Dunmore*, the no-win situation for all farm workers appeared to be reinforced, when the court dismissed the Section 15 challenge made by citizen farm workers against their exclusion from labor rights.⁵⁵ Judge Sharpe rejected the Section 15 application, because the farm workers’ claim failed to meet the Section 15 test as set out in Supreme Court jurisprudence, namely that the denial of a legal benefit be based on an “enumerated or analogous ground” in Section 15 of the *Charter*.⁵⁶ Although occupational status is not an enumerated ground, analogous grounds can be identified via the sharing of a personal characteristic among a disadvantaged group. While recognizing that agricultural workers are indeed a disadvantaged group, Judge Sharpe also stated that they are a “disparate and heterogeneous group”⁵⁷ who are not linked by any personal characteristic.⁵⁸ Herein lies the potential for a challenge by foreign migrant workers. As Judge Sharpe noted, unlike citizen agricultural workers, foreign seasonal workers brought in under the SAW “may be identifiable by race and the status of non-citizen,” race being an enumerated ground in Section 15 and non-citizenship having been established as an analogous ground in earlier Supreme Court jurisprudence.⁵⁹

Thus, even while citizen farm workers have been found to have no Section 15 claim, migrant farm workers who are brought in under the SAW may have a Section 15 claim, because this government program has the effect of targeting persons for their race or nationality, and their status of being a non-citizen. The distinction drawn on the status of being a non-citizen is fairly apparent – the terms of employment set out in the SAW specifically seek to ensure that the workers remain non-citizens. As well, the distinction that the SAW draws upon race cannot be denied – the racial aspect is an effect of the SAW, even if it was not an original purpose. Indeed, racist policies may

54. *Dunmore*, 37 O.R.3d at 293 (quoting unspecified “evidence affidavit”).

55. *Id.* at 302.

56. *Id.* at 302.

57. *Id.* at 308.

58. *Id.* at 307-08.

59. *Id.* at 309.

even have been an original motivation behind the creation of the SAW, stemming from

...[c]oncerns that Caribbean workers would not be able to adapt to Canada, as well as fears that a large influx of Black workers. . . would change the demographic complexion of [Ontario], resulted in their exclusion as seasonal workers. . . As a 1966 memo of the Assistant Deputy Minister of Immigration outlined, "it should be mentioned here that one of the policy factors was a concern over the long range wisdom of a substantial increase in Negro immigration to Canada. . . ." ⁶⁰

Thus, it can be seen that race-based discrimination played a role in the original design of the SAW program. Although the CIC would now probably deny that racism is a policy factor behind the SAW, racism is nonetheless present in a systematic fashion. The particular labor market strategy represented by the SAW — that of importing workers to do generally unattractive work for a discrete period of time, and then repatriating the workers — has the result of constructing Mexico and Caribbean countries as "nations of servants", creating a "racialised and inter-national hierarchy of states", ⁶¹ or a transnational dark-skinned underclass welcome to do menial work but not welcome as immigrants. Indeed, the SAW creates a modern version of "transplanted plantations" ⁶² in rural farming regions in Canada — reminiscent of pre-civil war era slavery in the United States.

As *Dunmore* observed, there is not much of a difficulty under Section 15 in concluding that the SAW draws a distinction on enumerated and analogous grounds. Rather, the main hurdle lies in arguing that there is indeed Section 15 discrimination in the denial of a legal benefit. The question is how foreign farm workers can be discriminated against when courts have consistently held that denial of benefits to citizen farm workers does not constitute Section 15 discrimination. The answer to this paradox could possibly run as follows: while the exclusion of citizen agricultural workers from the collective bargaining regime in Ontario does not satisfy the Section 15 threshold, the even *greater* absences in the SAW program arguably go much further in terms of a denial of a benefit. Although citizen farm workers do not have the same collective bargaining rights as other workers, they do have the right to seek alternative employment if their present employment is unsatisfactory. SAW participants are explicitly denied such an option in their contracts of employment; their only "alternative" to unsatisfactory employment is to go home (and in some cases, pay their own way home). Citizen farm workers

60. Affidavit of Judy Fudge, *supra* note 33, at para. 58.

61. Jan Jindy Pettman, *Globalisation and the Gendered Politics of Citizenship*, in *WOMEN, CITIZENSHIP AND DIFFERENCE* 207, 214 (Nira Yuval-Davis and Pnina Werbner eds., 1999).

62. André, *supra* note 6, at 255 (referring to the Caribbean SAW migrant worker population as such).

also have easier access to social services and legal recourse for violations of their rights than the average Mexican or Caribbean seasonal farm worker, who is discouraged from accessing such services by language and cultural barriers, and the threat of premature repatriation.

Overall therefore, the victimization of all farm laborers is apparent to the average person – all workers, including farm workers, should have basic rights, and the continued exclusion of farm workers from Ontario's labor relations regime will hopefully one day be struck down as a discriminatory practice.⁶³ However, even in the context of the general victimization of all farm workers, the victimization of SAW farm laborers is peculiarly unique to the design of the program – the SAW acts as a vehicle whereby local Canadian farmers can recruit persons who are made much more vulnerable than the citizen worker due to their position as an alien and a member of a legally created underclass in Canada. Although the courts may not be prepared to conclude that the situation around farm workers constitutes a Section 15 violation, they may at one point in the future be inclined to: first, identify the distinctions that the SAW draws around the lines of race and the status of non-citizenship; second, acknowledge the results that the SAW has in the sense of exacerbating the discrimination an already disadvantaged group experiences; and finally, hold the distinctions and the discriminatory results to overall constitute a violation of the migrant farm worker's right to equality under the *Charter*.

As a postscript to this section of the analysis it must be admitted that, at present, there may not be a robust argument under Section 15 for migrant farm workers – and yet, by beginning a dialogue that links the Section 15 equality debate with the issue of foreign agricultural laborers, already much is being achieved. Rather than continue the silence on the plight of migrant farm workers, there is value in terms of building a political constituency supporting migrant workers – and this constituency can be slowly built up by placing the topic of temporary foreign farm labor squarely within the *Charter* equality discourse.

II. NAALC: linking labor to trade – a rallying point for basic labor principles

When the *North American Free Trade Agreement* (“NAFTA”) was being negotiated between Presidents Bush, Salinas, and Prime Minister Mulroney in 1992, it was conspicuously silent on the role of international labor rights.⁶⁴

63. As has been previously stated, the decision against the farm workers in *Dunmore* will be going to the Supreme Court for a final decision. See *supra* note 42. The future Supreme Court decision will have great implications as precedent for farm workers' rights and status.

64. See North American Agreement on Labor Cooperation, Annex 5: Public Comments, <http://www.naalc.org/english/publications/review.htm> (last visited Apr. 22, 2000) [hereinafter *Public Comments of the AFL-CIO*].

This tri-national instrument provided an extensive set of rules and procedures concerning international trade, and the movement across borders of business professionals and investors.⁶⁵ However, no mention was made of the rights of the many unskilled workers who moved between Mexico, the U.S., and Canada; no procedures were set up to facilitate and monitor the movement of this group of non-professional laborers; and no recognition was made of the linkage between international trade and the international labor that fuels this trade at the ground level.⁶⁶ Opponents of NAFTA argued that a tri-national trade agreement that made no mention of worker rights would encourage U.S. and Canadian firms to send jobs to Mexico, to take advantage of that country's lower wages and lax enforcement of labor standards.⁶⁷ Therefore, in 1993 negotiations went underway to establish a Labor Side Agreement that would fill this gap in NAFTA. In 1994, when NAFTA went into effect, NAALC also came into force.⁶⁸

In terms of the present discussion, although NAALC applies only to the Mexican temporary farm workers (since the Caribbean countries are not part of NAFTA or NAALC), it forms a valuable precedent for any future labor agreements. What will be examined here are the essential problems with NAALC, and how, if future agreements are to address the rights of seasonal agricultural migrant workers, they can learn from the flaws of NAALC. The Labor Side Agreement can be critiqued from three angles. First, the negotiations leading up to NAALC were rife with the tension between international standards and protectionist notions, and the end result represents too much deference to national sovereignty. Second, NAALC was constructed so that its application to all agricultural workers in Canada could be avoided via legal loopholes. Third, even if NAALC were to apply to agricultural laborers in Canada, it has a lengthy and toothless enforcement process. Thus, it is doubtful that, as NAALC currently stands, migrant farm workers can find much hope for protection of their substantive human rights.

The first flaw of NAALC is in its prioritizing: it places national sovereignty and independence of each government over an overall regional or North American responsibility of respecting internationally recognized worker rights. This responsibility is increased when one recognizes that the U.S. and Canada in particular are receiving countries for a great deal of foreign migrant work, and thus the conditions of work in North America are of the

65. There are four categories of persons whose movements are facilitated by NAFTA: business visitors, traders, intra-company transferees, and certain professionals. Ellen G. Yost, *NAFTA – Temporary Entry Provisions – Immigration Dimensions*, 22 CAN.-U.S. L.J. 211, 213 (1996).

66. See generally *Public Comments of the AFL-CIO*, *supra* note 64.

67. See, e.g., Laura Okin Pomeroy, Note, *The Labor Side Agreement under the NAFTA: Analysis of Its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated With Developing Countries*, 29 GEO. WASH. J. INT'L. L. & ECON. 769, 773 (1996).

68. See Jorge F. Perez-Lopez, *The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects*, 10 CONN. J. INT'L L. 427, 449-50 (1995).

utmost importance. Thus, NAALC's original and laudable intention was to "improve working conditions and living standards in the United States, Mexico, and Canada as the NAFTA promotes more trade and closer economic ties among the three countries."⁶⁹ This purpose appears to be somewhat reflected in the final document of NAALC.⁷⁰ Unlike NAFTA, NAALC expressly makes the connection between international trade and the role of labor rights standards. The preamble to NAALC states that the party countries are hereby "ACKNOWLEDGING that protecting basic workers' rights will encourage firms to adopt high-productivity competitive strategies; [and] RESOLVED to promote, in accordance with their respective laws, high-skill, high-productivity economic development in North America by. . . fostering investment with due regard for the importance of labor laws and principles."⁷¹ Further, NAALC sets out in an Annex basic labor principles, including the right to bargain collectively, minimum employment standards (such as the right to overtime pay), and the protection of migrant workers.⁷²

However, despite these optimistic declarations, the most basic flaw in NAALC is that it contains no promise on adherence to internationally recognized minimum worker rights.⁷³ At odds with its stated purpose of ensuring that NAFTA trade develops in accordance with humane labor principles, NAALC contains qualifications that substantially weaken its impact as a document on the protection of workers, including migrant workers.⁷⁴ The reason for this watering down of a commitment to humane labor standards can be traced to the negotiations of NAALC, where two camps resisted a strong agreement on international worker rights. The business community argued that international standards were already incorporated in International Labor Organization ("ILO") conventions, and that since the US has not ratified most of these conventions, NAALC should not be used to indirectly apply ILO standards to the US.⁷⁵ This argument fails to address why it is that the U.S. does not ratify international documents affirming the basic human rights of workers; indeed, it uses the failure to commit to human rights as an excuse for a weak regional stance on the same subject. The second camp against a strong Labor Side Agreement consisted of members of the Mexican government, who were primarily concerned with

69. *Id.* at 450.

70. NAFTA Supplemental Agreements, North American Agreement on Labor Cooperation between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993. [hereinafter *Selections*].

71. *See generally Selections*, *supra* note 70.

72. *See id.*, at Annex 1: Labor Principles.

73. *See Labor Accord in Canada*, *supra* note 36, at 484. *See generally Public Comments of AFL-CIO*, *supra* note 64.

74. *See generally Selections*, *supra* note 70.

75. *See id.*

the violation of national sovereignty if labor standards imposed by a regional instrument overrode domestic labor standards.⁷⁶

The opponents of NAALC appear to have succeeded in some measure. The text of NAALC continually emphasizes the independence of each government, and appears to demand nothing substantial from the party states other than a mere nod to internationally affirmed labor principles. For instance, the preamble has the parties "AFFIRMING their continuing respect for each Party's constitution and law."⁷⁷ Under the "Obligations" component, NAALC continues to emphasize "full respect for each Party's constitution [and] the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations."⁷⁸ Admittedly, this is tempered with a statement immediately following that "each Party shall ensure that its labor laws and regulations provide for high labor standards. . . and shall continue to strive to improve those standards in that light."⁷⁹ However, given the stress placed upon national sovereignty, this statement has more of the impact of a plea rather than a command. Finally, the labor principles outlined in Annex I of NAALC are again not meant to be anything more than "guiding principles that the Parties are committed to promote, *subject to each Party's domestic law*."⁸⁰ These basic principles "do not establish common minimum standards for their domestic law."⁸¹ Even under the principle of protection of migrant workers, allegiance is paid to the "right" of each government to determine its own labor standards.⁸² Echoing the MOU with Mexico and Caribbean countries, the obligation of a NAALC country regarding migrant workers consists of merely "[p]roviding migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions."⁸³ As noted in the previous section of this paper, this statement rings hollow when there are little or no existing domestic protections for citizen workers – and the right to equality provides only that everyone is denied basic civil and political rights.

Although the principle of sovereignty and national self-determination is one established in international relations, it is questionable as to whether this principle can have such significance in an age of increasingly fluid borders, with respect to both trade and the mobility of persons. As has been observed,

76. See Pomeroy, *supra* note 67, at 776. Also note that although Canada had initially pushed for stronger labor provisions in NAFTA, once talk about NAALC began, "the American demand for side-deals in these areas exposed Ottawa's real lack of appetite for any such thing." Ian Robinson, NORTH AMERICAN TRADE AS IF DEMOCRACY MATTERED: WHAT'S WRONG WITH NAFTA AND WHAT ARE THE ALTERNATIVES? 37 (Ottawa: Canadian Centre for Policy Alternatives 1993) [hereinafter *NAFTA and Alternatives*].

77. *Selections*, *supra* note 70, at Preamble.

78. *Id.*

79. *Id.* at Part 2: Obligations, art. 2.

80. *Id.* at Annex I: Labor Principles (emphasis added).

81. *Id.* at Annex I: Labor Principles.

82. *Id.* at Annex I: Labor Principles, principle 11.

83. *Id.*

"[i]t is increasingly difficult to demarcate boundaries between the international and the national . . . Almost nothing is simply 'doemstic' anymore: globalization impacts individuals as well as states."⁸⁴ Given the changes in ways of thinking and acting around trade and labor, it seems closed minded to emphasize sovereignty over the priority of respecting basic and internationally recognized rights of workers. As it stands, NAALC appears to be a throwback to an earlier mode of thought, especially given its frail statements on labor principles and its "silence. . . on upward harmonization of labor laws"⁸⁵ across the North American region. The NAALC is a negative example of how future labor agreements should be negotiated to protect the rights of migrant workers.

The deficiencies of NAALC are even more apparent when one turns to the application of NAALC in Canada. Under Annex 46 of NAALC, entitled "Extent of Obligations", "Canada shall set out in a declaration a list of any provinces for which Canada is to be bound *in respect of matters within their jurisdiction*."⁸⁶ If provinces are not included in this declaration, they are not bound, and NAALC applies only to the portion of the workforce that falls under the federal jurisdiction of Canada.⁸⁷ Like many other industries, agricultural labor falls under provincial jurisdiction.⁸⁸ Thus, both citizen and foreign agricultural workers have not even a chance of protection under this regional instrument, and Canada is provided with a convenient escape from the substance of NAALC. At the moment, the federalist aspect in Annex 46 means that NAALC applies only to those labor sectors under federal jurisdiction, which represents between ten to fifteen percent of the overall Canadian workforce.⁸⁹ Thus, eighty-five to ninety percent of workers in Canada, including foreign migrant workers, do not fall within even the minimal protection of NAALC.

The only way that the provinces can be caught under the enforcement procedures of NAALC is if two things come to pass. First, provincial governments representing a minimum of thirty-five percent of the overall Canadian labor force must opt into NAALC – basically, the provinces have to agree to let themselves be bound by the Labor Side Agreement.⁹⁰ To date, no provinces have opted in. The second requirement is that, where a specific industry is concerned, fifty-five percent of the workers in this industry must be employed in provinces that have opted in.⁹¹ The problem in satisfying this requirement is that most major industries (including the agricultural industry) are concentrated in Ontario and British Columbia. The result is that, even if

84. Pettman, *supra* note 61, at 209.

85. *Public Comments of the AFL-CIO*, *supra* note 64.

86. *Selections*, *supra* note 63, Annex 46: Extent of Obligations (emphasis added).

87. *See id.*

88. *See Labor Accord in Canada*, *supra* note 51, at 476.

89. *See id.*

90. *See Selections*, *supra* note 70, at Annex 46: Extent of Obligations.

91. *See id.*

all the other provinces opted into NAALC, thus satisfying the first condition, the second condition would not be met as long as Ontario and British Columbia refused to also opt in, and key industries would continue to fall outside of the scope of NAALC.⁹² The prognosis for farm workers in general, and migrant farm workers in particular, being able to effectively assert some sort of protection or rights under NAALC is bleak, given the impracticable legal requirements for implementation under Annex 46.

The third point of criticism concerns the ineffectual enforcement procedures set out in NAALC. Again representing a loss in the battle against absolutist notions of national sovereignty, the Labor Side Agreement sets up a number of bodies to monitor the state of labor standards in each party country; the end result is that theory has little bearing on practice. NAALC establishes a tri-national Commission for Labor Cooperation ("Commission"), that consists of a Ministerial Council ("Council"), to meet at least once a year and to promote intergovernmental consultations and other co-operative activities, and a Secretariat to provide technical support to the Council and perform research on labor issues.⁹³ The Labor Side Agreement also creates room for each country to set up its own National Administrative Office (NAO), a federal office that would be a domestic contact for the other countries and would be involved in tri-national activities concerning labor.⁹⁴ Each NAO would also be able to receive communications or complaints from the public on labor problems in other countries.⁹⁵ The complaints procedure under NAALC is thus the primary method by which labor standards are enforced. Note however that a complaint can only allege that a country is failing to uphold its own labor laws.⁹⁶ Therefore, there must exist domestic labor standards first; no complaint can be brought on the basis that the country is violating one of the basic labor principles set out, for instance, in Annex I of NAALC. Thus, migrant farm workers in Canada are out of luck for two reasons: one, as discussed earlier, *all* farm workers in Ontario (the centre of the agricultural industry) are not covered by domestic labor relations law; and two, the entire agricultural industry falls within provincial jurisdiction, and thus is not covered by NAALC anyway. Migrant farm workers are thus effectively shut out of the enforcement procedure of NAALC.

However, even if these substantial barriers were removed, and migrant farm workers or organizations on their behalf *could* make a complaint under NAALC, the flaws of the complaints process are crippling. In practice, the procedure is quite lengthy,⁹⁷ and the remedies provided by the procedure are

92. See *id.* at 478-79.

93. See Perez-Lopez, *supra* note 68, at 454.

94. See *id.* at 455.

95. See *id.* at 455-56.

96. See Pomeroy, *supra* note 67, at 777.

97. See *Labor Accord in Canada*, *supra* note 51, at 485.

ineffective and available only for certain complaints.⁹⁸ The complaints procedure of NAALC runs as follows: the government of a state party, individuals, and NGOs can make claims under NAALC, to either the US, Mexico, or Canada NAO, accusing a failure by one of the other countries in enforcement of its domestic labor standards. Once the NAO received the complaint, it has broad discretion to decide whether this alleged violation should be investigated or not. An NAO may decide not to pursue a complaint if it believes that the matter has already come to the notice of the particular country, and is being sufficiently dealt with by the government or courts of that country. If the NAO decides to investigate the claim, it notifies the other parties and the Secretariat. If the NAO reviews the complaint and decides there is no violation of NAALC, the decision is final and cannot be appealed by the complainant. The most that can be done in terms of an appeal is to convince one of the country governments to request consultations at the Council level. If the NAO finds a violation, more consultations at the Council ensue.⁹⁹

The Council consultations are intended to determine the remedies for the violation. Remedies consist of monetary sanctions¹⁰⁰ and are available only where a country has been found to “continuously violate its labor laws with regard to the minimum wage, child-labor laws, or occupational and safety hazard standards.”¹⁰¹ Therefore, an isolated incident violating a country’s domestic laws does not call for a remedy, nor do any violations of the other basic labor principles listed in Annex I of NAALC. If a complaint was brought concerning violations of the labor principle of protecting migrant worker rights or the principle of collective bargaining, even if the complaints process was open to agricultural workers, little would be forthcoming in terms of monetary remedies. The most that would be available to a finding of a violation of this principle would be the issuance by the Council of non-binding recommendations for improvement.¹⁰²

Overall, therefore, the Labor Side Agreement, while filling an abyss present in NAFTA, has limited practical value in terms of protecting labor rights generally, and almost no practical value at all regarding the protection of the rights of migrant farm workers. The fingerprints of absolutist sovereignty are all over NAALC, preventing it from making a strong statement about a North American commitment to internationally recognized minimum worker rights. In the context of Canadian implementation, the federalist loophole in NAALC results in NAALC being

98. See Pomeroy, *supra* note 67, at 784 (explaining that monetary penalties are rarely imposed).

99. See *id.* at 782.

100. Trade sanctions were strongly opposed by members of both the Mexican and Canadian governments. See *id.* at 776.

101. *Id.* at 777. Note that if a country is found to continuously violate its labor laws in these areas, the matter can be sent by the Council to an arbitration panel, which has the power to impose a fine of no more than twenty million dollars. See *id.* at 783.

102. See *id.* at 782.

inapplicable to the majority of the Canadian workforce, including foreign agricultural workers. Finally, even if these loopholes were to be sewn up, and NAALC could apply to the plight of foreign farm workers in Canada, the enforcement and complaints procedure is long, complex, and ineffective in terms of securing meaningful remedies for the violation of basic worker rights.

However, while NAALC has its shortcomings, it still has a strong consensus-building capacity – as noted by other authors, NAALC, “by its very existence, embodies the principle that what happens to labor rights. . . is an important and legitimate concern of Canadians.”¹⁰³ In addition, NAALC and the kind of cooperative activities and consultations it provides can serve as a mechanism by which NGOs can raise public awareness and voice their concerns about the lack of protection of migrant farm workers: “Without [NAALC], labor movements can criticize their governments, but with it, they can go to their NAOs and demand that the government do something about it.”¹⁰⁴ It may be that, in the long run, NAALC could “set in motion a political dynamic that will eventually result in a stronger North American social dimension.”¹⁰⁵ Already complaints have been submitted under NAALC concerning the protection of migrant worker rights, and although no substantial remedies are available, at least the issue is on the regional agenda.¹⁰⁶ Thus, although NAALC may not be a strong regional instrument in terms of regulating and fully monitoring the situation of worker rights, and the situation of migrant farm workers specifically, it has worth as a starting point for strengthening support around the core of basic rights to which all workers are entitled.

III. *The U.N. Convention: foreign worker rights are human rights*

When the U.N. Migrant Workers Convention was finalized and opened up for ratification in 1990,¹⁰⁷ it was the product of a ten year drafting process. Despite the arduous journey the Convention took to reach a final product

103. *Labor Accord in Canada*, *supra* note 51, at 490.

104. *Id.*

105. *NAFTA and Alternatives*, *supra* note 76, at 43.

106. A few communications submitted in 1998 touch on migrant worker rights: the Yale Law School Workers' Rights Project, along with a number of other groups, submitted communications to the Canadian NAO (#98-2) and to the Mexican NAO (#9804) alleging that an MOU between the U.S. Immigration and Naturalization Service and the U.S. Department of Labor (“DOL”) deterred migrant workers from reporting violations of U.S. minimum employment standards laws. In response, a new SAW was created. Two other relevant cases were submitted to the Mexican NAO, one alleging systemic problems with U.S. labor law in relation to migrant workers in the apple-picking industry (#9802) and the other alleging failure of the U.S. government to ensure equal protection of migrant workers (#9803). See Commission for Labor Cooperation, *1998 Annual Report: Cooperative Consultations and Evaluations Public Communications* <http://www.naalc.org/english/publications/1998report4.htm> (last visited Apr. 22, 2000).

107. Clarence Dias, *Human Rights of Migrant Workers: A House is not a Home*, 14 I.M.R. (No.1) 13 (1999).

stage, ten years *after* it was released, only twelve countries have signed and ratified the Convention.¹⁰⁸ In order to come into force, twenty countries must ratify the Convention.¹⁰⁹ In the meantime, the Convention waits in limbo, and migrant workers do not gain the benefit of this international instrument. This section of the paper hopes to do three things: first, it will present a brief history and overview of the content of the Convention. Second, this section will assess the potential utility of the Convention for seasonal migrant farm workers in Canada, if the Convention was to come into force. Finally, this paper will briefly review and critique the objections of the Canadian government to signing and ratifying the Convention.

The Convention represents international consensus on a set of principles – this consensus was by no means easily reached. During a ten year drafting process, beginning on December 17, 1979, and ending with the finalization of the Convention on December 18, 1990, the Working Group on the Convention was open to all member states of the U.N.¹¹⁰ The open-ended aspect of the Working Group meant that many interested states could contribute to the drafting of the Convention. The records of the process reveal that four loose groupings of member states emerged, each group representing different sets of interests pertaining to migrant worker rights.

The first was the “Eastern group”, consisting of the former USSR and its allies.¹¹¹ The primary goal of this socialist grouping was to ensure that the Convention would not just focus on labor rights, but would also emphasize that worker rights are *human* rights. The Eastern group hoped to achieve this in the Convention by using similar language to that in already established international human rights documents.¹¹² Another informal alliance was the “MESCA” group, made up of Mediterranean and Scandinavian countries, such as Finland, Sweden, Italy, and Greece.¹¹³ MESCA desired the Convention to be a strongly universal document with actual legal utility – something that was not always present in other human rights documents.¹¹⁴ There was also the “Group 77”, consisting of several “sending” countries, such as Barbados and Mexico.¹¹⁵ Not surprisingly, the primary focus of this alliance was to promote the interests and protect the rights of their citizens working in

108. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res 45/158, 55th Sess., Agenda Item 12, U.N. Doc. A/RES/45/158 (1991) [hereinafter *MWC*].

109. Tom Clark, *Why it Makes Sense for Canada to Reconsider Ratifying the Migrant Workers Convention*, 14 I.M.R. (No.1) 11 (1999).

110. Juhania Lonnroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 I.M.R. (No. 4) 711, 713 (1991).

111. *See id.* at 731.

112. *See id.* at 732.

113. *See id.* at 731.

114. *See id.* at 733.

115. *See id.* at 731.

other countries.¹¹⁶ The fourth delegation represented the Western states that are typically on the receiving end of the foreign worker flow, such as the U.S., Australia, Germany, Canada, and Japan.¹¹⁷ Again, not surprisingly, the Western group expressed concerns about some of the socioeconomic rights that NGOs were claiming should be granted to migrant workers.¹¹⁸ It is interesting to note that, although Canada did situate itself among the Western or developed country grouping, it did not play a prominent role in the negotiations. The usual response of Canada to the migrant worker issue is to claim that there are no migrant worker issues in Canada; or if there are, they are very few.¹¹⁹ Therefore, Canada's participation in the drafting of the Convention was minor, especially compared to the contributions made by its neighbour, the United States.¹²⁰

This brief review of the history behind the Convention indicates how much of a triumph it is that the Convention came into being at all, especially given that the Working Group for the Convention had to negotiate through a sea of conflicting interests. The triumph is, however, diminished by the fact that despite the work put into drafting a Convention seemingly acceptable to the various groups, the consensus did not extend to the point where the Convention has acquired enough ratifications to come into force. The sense of loss and waste is further deepened when one examines the content of the rights outlined in the Convention. The Convention's value is immense. For the first time countries are given a definition of "migrant worker" – the Convention broadly states that a migrant worker is "a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national."¹²¹ It also specifically defines "seasonal worker" as one "whose work by its character is dependent on seasonal conditions and is performed only during part of the year."¹²² Thus the Convention has worth in its identification of a particular group of persons who have rights to be protected.

In terms of the rights to which this group is entitled, the Convention repeats a great deal of the human rights contained in other international instruments such as the Universal Declaration of Human Rights and the

116. See *id.* at 732 ("sending" countries are co-sponsors of the first draft text).

117. See *id.* at 731.

118. See *id.* at 733-34.

119. See Clark, *supra* note 109, at 11. For additional information, see the Memorandum of the Department of Foreign Affairs on the Legal Implications of the Migrant Workers Convention (1997) [hereinafter *Department of Foreign Affairs Memorandum*], in which the Canadian Government begins by stating "Canada is neither a great provider nor employer of migrant workers." However, eventually, the Government acknowledges that there do exist migrant worker groups in Canada, and the existence of these groups means that "Canada cannot say that the subject matter of the Convention is not relevant in the Canadian context." *Id.*

120. Lonnroth, *supra* note 110, at 734.

121. MWC, *supra* note 108, art. 2.1.

122. *Id.* art. 2.2(6).

United Nations Convention on Civil and Political Rights.¹²³ For instance, under the Convention, migrant workers are guaranteed fundamental freedoms, due process rights, the right to life, equal treatment with nationals, mobility rights, and protection against torture and forced labor.¹²⁴ Also key is the emphasis of the Convention on the rights of the family members of migrant workers – the Convention recognizes the right to family reunification and contains several articles concerning the socioeconomic rights that should be made available in employing states to migrant workers and their families. Specifically, migrant workers are entitled to equality with nationals for access to educational, career, and social services.¹²⁵ Workers also enjoy equal treatment regarding protection against dismissal and access to alternative employment in the event of termination of work.¹²⁶

In terms of the enforcement of all of these rights, the Convention proposes to establish a Committee on the Protection of the Rights of Migrant Workers and Members of Their Families. States parties to the Convention would be requested to submit reports to the Committee evaluating their adherence to the Convention and their implementation of Convention provisions.¹²⁷ The Committee would review the States Parties reports and issue comments. The Committee would also be empowered to receive and consider communications or complaints submitted by States Parties, alleging that another State Party has violated a provision of the Convention. A State Party can also make a declaration under the Convention stating that it recognizes the competence of the Committee to receive and consider communications launched by individuals against that particular State Party.¹²⁸ The Convention, therefore, is not simply a statement of rights; it goes farther in that it proposes a body to ensure that these rights do not remain abstract.

The Convention is thus quite impressive in the range of rights applied to migrant workers, and in its proposed establishment of a Committee to monitor the implementation of the Convention. However, the usefulness and impact of the Convention in Canada's context must be examined. Under international law, Canada would not be legally bound to obey the Convention unless it directly incorporated the Convention into its domestic legislation. At

123. *See id.* arts. 12-13 (freedom of thought, conscience religion, right to express opinions), arts. 16-22 (due process rights, protection against arbitrary expulsion), art. 9 (right to life), arts. 25-28 (equality regarding work conditions, social security, and emergency health care), art. 39 (mobility rights: right to choose where one wishes to reside), arts. 10-11 (prohibition against cruel or degrading treatment or punishment, and slavery/forced labor).

124. *See id.*

125. *See id.* art. 43.

126. *See id.* arts. 43-45 (equal access to educational, vocational, and social services), art. 54 (equality of treatment in protection against dismissal, and access to alternate employment if terminated).

127. *See id.* arts. 72-74.

128. *See id.* at Part VII: Application of the Convention.

present Canada has signed a number of United Nations conventions,¹²⁹ but since it has only incorporated some provisions of the *1951 Convention Relating to the Status of Refugees*¹³⁰ into its domestic law, it can violate any of these Conventions and not suffer any penalties save for the damage to its reputation for being a champion of human rights. Therefore, it must be admitted that even if the Convention were to acquire twenty ratifications and come into force, Canada could ignore the provisions of the Convention and any recommendations made by the Committee, and continue to treat migrant farm workers in exactly the same manner as before the Convention gained force. However, despite the limitations of international law, there are several positive influences that the Convention could have on the situation of migrant farm workers in Canada.

The first major benefit of the Convention is that it would supplement Canada's present piecemeal approach to migrant farm workers. The description of the SAW in an earlier section of this paper reveals that Canada's scheme for migrant farm workers certainly does not provide the breadth of basic rights offered by the Convention. Although Canada guarantees certain socioeconomic rights to the migrant farm worker (lodging, meals, minimum wage), it takes a pick-and-choose approach to the rights of farm workers, leaving substantial gaps that could be covered by the Convention. For instance, no mention of family reunification is made, despite the fact that workers may spend substantial periods of time living and working in Canada, and family reunification is an expressed objective of the Canadian *Immigration Act*. The SAW also does not have any provisions regarding unionization, fundamental freedoms, and equal access to various services (educational, social, etc.) offered to nationals.¹³¹ As well, the SAW itself may violate the Convention principle of equality, because it targets nationals of particular countries and gives them little room to maneuver in Canada, in terms of their basic rights – under the SAW, migrant farm workers are afraid to press for the enforcement of the standard employment contract and enforcement of their basic rights as human beings because they don't want to risk losing their job and thus their only reason for legally remaining in Canada.

As noted previously, the vulnerable situation of these workers is exacerbated because: (1) their employment contracts limit their mobility rights by specifically forbidding them to seek alternate employment; (2) directing where they must live; (3) giving the employing farmer great discretion in terms of deciding what constitutes as grounds for termination and premature

129. Examples of UN Conventions that Canada has signed and ratified but not incorporated into domestic legislation: *Covenant on Civil and Political Rights*, *Covenant on Economic, Social, and Cultural Rights*, *Convention on the Elimination of All Forms of Discrimination Against Women*, *Convention on the Elimination of All Forms of Racial Discrimination*, *Convention Against Torture*, and the *Convention on the Rights of the Child*.

130. *Convention Relating to the Status of Refugees* of 28 July 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

131. See generally, Mexican MOU, *supra* note 6.

repatriation; (4) workers are given little avenue for appeal and investigation of their complaints, and; (5) giving workers little realistic access to social services. As can be seen, if the Convention were to come into force, Canada's rather skeletal system for foreign seasonal agricultural workers would be supplemented by this comprehensive guide to the rights of migrant workers; as well, the courts in Canada would also have the Convention to use as an interpretive tool evaluating Canadian labor standards. The Convention may urge Canada towards new directions in its treatment of migrant farm workers.

However, in order to persuade the Canadian government to effect positive reform in this area, the topic first has to be put on the agenda of the legislators. Therefore, a second benefit of the Convention is that the Convention, like NAALC, can serve as a vehicle by which a national and international political constituency supporting migrant workers can be gradually built up, by bringing the plight of migrant workers to the attention of those who shape policy. At present the overall obscurity of the SAW Program is cause for suspicion. Given that the SAW numbers are not even included in the government's official annual immigration statistics, and it is generally a challenge to obtain much solid information on the SAW,¹³² it is currently very difficult for interested members of the public and NGOs to act as a watchdog for the rights of migrant farm workers. Even though the Convention has not yet been put into force, it is worthy to note that already interest groups such as the Canada-Asia Working Group and the Global Campaign for Ratification of the Convention on the Rights of Migrants are campaigning for the protection of migrant workers in Canada and for the ratification of the Convention by Canada and by other Western countries. NGOs are beginning to play an increasingly prominent role in terms of collecting hard data on programs like the SAW and the Live-In Caregiver Program, lobbying politicians, establishing outreach programs such as language classes for migrant farm workers, and collecting anecdotal evidence from the migrant workers themselves to create case studies.¹³³

Thus, even *before* the Convention has come into force, an international system of organizations concerned about the invisible victimization of migrant farm workers and migrant workers in general is beginning to give a

132. See Sharma, *supra* note 2, at 3.

133. CAWG is presently engaged in gathering data on the experiences of migrant farm workers in Canada, to create a case study. Besides CAWG and the Global Campaign, other organizations doing work on the rights of migrant workers include Frontier College (which offers language classes and other outreach programs for migrant farm workers: Interview with Daisy Francis, April 2000), December 18 (an online network for promoting and protecting the rights of migrant workers), the AFL-CIO, Human Rights Watch, the Inter-American Institute of Human Rights, the International Commission of Jurists, the International Confederation of Free Trade Unions, the International Labor Organization, the International Migrants Rights Watch Committee, the International Organization for Migration, the Office of the UN High Commissioner for Human Rights, the Migrants Forum in Asia, and the World Council of Churches. See *The Global Campaign for Ratification of the Convention on the Rights of Migrants* <http://www.migrantsrights.org> (last modified Aug. 29, 2000).

voice to the vulnerable. It is likely that the Convention, once it came into force, would be even more valuable as an instrument around which individuals and NGOs could rally, and ensure that migrant farm workers are informed of their rights and given the tools to enforce them. If the Committee critiqued Canada under the reporting or communications procedures, interest groups could face the legislature armed with the recommendations of this international monitoring body. It is also important to note that under the reporting process of the Committee, NGOs would be invited to put their input into the report, and assess how Canada succeeds or fails in programs like the SAW. Therefore, similar to NAALC, the Convention puts a number of basic principles around the rights of migrant workers into one spot, and can thus serve as a starting point for concerned citizens in Canada to confront and critique their government's skimpy approach to this issue.

A third and final benefit of the Convention is the explicit connection made between human rights and migrant worker rights. The Convention is not merely a rehashing or repetition of other international instruments. Rather, the significance of the Convention lies in the fact that it is directing the eye of the international community to the issue of migrant workers and clearly declaring that migrant workers are not simply economic units, but also human beings with human rights. Therefore, even if the Convention never comes into force, it has at the very least symbolic significance in that it signals a new way of thinking about migration: a recognition that the flow of trade and the flow of labor are intertwined with the flow of persons and thus their attached rights as well.

Of course, all of these suggested results are only considered beneficial from a particular perspective – that of the migrant farm worker in Canada. The Canadian government, however, would not necessarily view the above in the same light, and this may explain the government's silence about migrant farm workers, and its reluctance to sign and ratify the Convention. The benefits proposed by this paper could be precisely why the government refuses to ratify the Convention – *because* the Convention would confirm that there are substantial gaps in the coverage of migrant farm workers by Canada's existing system, *because* the Convention if ratified would provide another pressure point for lobbyists, *because* the Convention specifically links human rights with migrant workers and would suggest that this sort of approach should be adopted by a country like Canada, which has a strong reputation in the international community for upholding human rights.

However, the Canadian government has chosen to articulate its resistance to the Convention in another fashion. In a memorandum released by the Department of Foreign Affairs in 1996, the government claims that the Convention is fraught with drafting ambiguities.¹³⁴ One example cited is that

134. See *Department of Foreign Affairs Memorandum*, *supra* note 119.

the Convention requests that, when a migrant worker is deprived of his liberty, the State Party “pay attention” to the problems this deprivation may cause for the family of this worker.¹³⁵ The legal opinion complains that “pay attention to the problem” does not provide a clear indication of what is required of the State in this situation.¹³⁶ The legal opinion also lists as a “matter of specific concern” the fact that if the Convention comes into force, under the reporting and communications procedures, “any deficiencies in Canada’s performance may therefore become the subject of public discussion at an international level.”¹³⁷ The legal opinion goes on to say that although Canada has included the principle of family reunification as an objective of its immigration policy, this statement extends only to permanent residents and citizens – not to migrant workers.¹³⁸ Finally, Canada objects to an article of the Convention that asks that State Parties “give priority” to seasonal workers who have been employed in the State for “a significant period of time” and now wish to seek admission to the State.¹³⁹ The government argues that persons gain admission to Canada by showing that they can contribute to the Canadian economy through their skills or financial resources – since workers under the SAW have not proven that they can contribute through finances or skills, they should not get priority under the immigration scheme. Although other reasons were stated for Canada’s resistance to the Convention, these objections form the bulk of the refusal.¹⁴⁰

Upon a closer examination of these reasons, it can be observed that the government is unwilling to alter its present scheme for seasonal migrant agricultural workers, and that, after all, its reasons for resistance, though articulated in a different manner, can be boiled down to a fear of exposing gaps in the SAW, a fear that lobby groups will take up the Convention in its campaign for migrant worker rights, and a fear that Canada will have to reform its present system. In terms of the drafting ambiguities, if the Convention had requested that the State perform a particular action when a migrant worker is deprived of liberty, then Canada would probably have complained that this was a violation of national sovereignty – if the migrant worker has been deprived of his liberty within Canadian borders, then it would seem that domestic law should cover what should happen to the worker’s family. It is thus odd that Canada would *complain* about this ambiguity – one would think that Canada would be grateful for this sort of open-ended statement that would allow Canada leeway in deciding how to deal with this particular issue.

135. *Id.* at § 17.

136. *Id.*

137. *Id.* at § 13.

138. *Id.* at § 20.

139. *Id.* at § 20.

140. See generally, *Department of Foreign Affairs Memorandum*, *supra* note 119.

The objection that ratification of the Convention would bring Canada's failures to the attention of the international community is even stranger. The *point* of the Convention is to apply such scrutiny to the States Parties. Canada is also not unfamiliar with international attention to its failures – as noted previously, it has signed and ratified other U.N. conventions, and is subject to a number of U.N. reporting and communications procedures to other U.N. Committees. By using fear of public exposure as an excuse to not sign on to the Convention, Canada shows that it is not truly committed to a policy of respecting human rights – rather, it pays lip service and worried about being forced to make good on its promises. A similar retort can be made regarding the objection that Canada should not have to extend its family reunification principle to migrant workers. Although Canada has emphasized this principle in its domestic immigration legislation, and has signed on to other international conventions that affirm that the family is a fundamental unit that should be protected,¹⁴¹ it does not wish to genuinely commit to family reunification as a universal human right to which everyone, including migrant workers, is entitled. Again, the government seems to resist the Convention because of its worry that its own hypocrisy about human rights will be brought to the light of day.

A final major concern about the Convention was that Canada would have to let seasonal agricultural workers jump the queue in a sense, by giving them “priority” in admission under the independent skilled worker applications, without the workers having proved themselves useful to Canada either financially or through skills. There are several weaknesses present in this argument. First, Canada already gives priority to another form of temporary migrant worker – namely, those persons who come in under the Live-In Caregiver Program and are permitted the privilege of applying for permanent residence after three years of employment in Canada as a live-in domestic.¹⁴² As the LCP is run under the Non-Immigrant Employment Authorization regulations, just like the SAW, there seems to be no good reason why participants in the SAW could not, after a certain specified amount of time living and working in Canada, also get some sort of improved chance at admission into Canada as an immigrant.

Another problem with this particular argument is that it reveals the classist bias against the type of work that seasonal agricultural workers perform. It is indeed likely that if a migrant farm worker applied under the independent or skilled worker mode of immigration, and was subjected to the points system, he would not get the number of points necessary for admission. The points system does not, for instance, give value to the kind of work that these

141. Examples include Article 10 of the International Covenant on Economic, Social, and Cultural Rights and the Convention on the Rights of the Child, throughout which family reunification runs as a theme.

142. See Morton, *supra* note 3.

workers perform – typically low-wage and perceived as being low-skill as well.¹⁴³ However, the fact that a migrant farm worker would not get enough points does not mean that he cannot make a contribution as an immigrant to Canada – rather, it exposes the systemic bias inherent in the Canadian system against certain “classes” and arguably against certain races who are pigeon-holed by programs such as the LCP and SAW into jobs perceived as being lower class.

If the SAW runs year after year, and indeed was brought into existence because sufficient numbers of Canadians were not available to do this kind of work, then the Mexicans and Caribbeans employed in the SAW clearly possess skills that contribute to the Canadian economy and are not to be found among the native-born population. Even more simply: if the SAW continues to recruit and employ foreigners to work in Canada, then there is a demand in the Canadian labor market for agricultural work that is not met by the domestic workforce. Therefore, if the points system does not recognize the value of this kind of work or acknowledge this simple inference, this does not mean that migrant farm workers are unskilled and not needed in Canada. Rather, it points to a flaw in Canada’s immigration policy and reveals deeper problems around how Canada is guiding its immigration system according to biases around class and race.

Overall, the inactive status of the Convention is a disappointment, given the amount of work it took to achieve a final consensus on the content and enforcement of those rights. In Canada, the Convention could potentially be valuable to the SAW context because it can act as a guiding influence in the direction of positive reform, pointing out the areas in the SAW that need to be improved. The Convention is also significant because it can help to bring the situation of migrant farm workers in Canada to the public eye, and build up a constituency to support migrant workers. Lastly, ratification of the Convention is key as it indicates that Canada is beginning to think about labor in relation to human rights issues. In terms of why Canada does not ratify the Convention, it has been seen that Canada’s objections do not represent legitimate concerns – rather they are expressions of insecurity and a fear of inconvenience. Canada does not want to ratify the Convention because to do so would be to highlight the holes and hypocrisies in the present Canadian system regarding migrant farm workers and bring it to the attention of the global community.

Conclusion: Hopes for the Next Harvest

“[T]hat is all they are – agricultural workers, people who pick tobacco and apples and pears and tomatoes, people good for paying taxes too. Who

143. *Immigration Act*, C.R.C., Ch. 940, § 11 (1978) (Can.).

*wants more of these people in this country, when they can get them for ten months a year and then send them packing when the season [is] over?"*¹⁴⁴

This paper has outlined the present system in Canada for temporary foreign agricultural workers, as represented by the Seasonal Agricultural Workers Program, and highlighted the significant gaps that exist in the SAW in terms of guaranteeing protection of the basic rights of migrant workers. These gaps were underscored by placing the issue of migrant agricultural workers within the broader context of a *Charter* Section 15 equality argument. A review of the Labor Side Agreement to NAFTA also situated migrant farm worker issues within the context of regionally affirmed labor principles, and reviewed the enforcement possibilities under the Agreement. Finally, the presently inactive U.N. Migrant Workers Convention was studied for its potential uses in terms of reform of Canada's flawed system for migrant farm workers, and in terms of its broader utility as a tool for international campaigns on migrant worker rights.

As a final note, under each head of analysis, it was concluded that not much hope exists for reforms ultimately leading to solid and enforceable laws regulating the treatment of migrant farm workers in Canada. Indeed, even if such legislation were to be put into effect in Canada, they may not have had such a positive impact on the lives of migrant farm workers after all. The incentive for the continued use of the SAW is that farmers feel they can get cheaper labor than that available in Canada. The countries involved in the bilateral agreements also benefit – more of their citizens are kept from unemployment and return home with Canadian dollars to contribute to the foreign consumer economy and to the support of their families. Laws that were too zealous in their regulation of the SAW may cause a lag in requests made for workers under this Program. Thus, those who campaign for tougher laws may unintentionally be inflicting a harm on migrant farm workers who feel that, despite all the hardships, they do benefit from their participation in the SAW.

This, of course, does not justify the present situation in the SAW continuing *as is*. Rather, given the near-impossibility of achieving substantive laws anyway, at either the domestic, regional, or international levels, and given also the fact that the SAW *does* provide some benefits and the incentive for continuing the SAW should not be wholly removed via too much regulation, it would be better overall for both the migrant worker and the farmer if rights were monitored not by law, but by policy. This means that the most valuable and least harmful work in this area can be done by non-governmental organizations, who would carry out the much-needed function of informing the typically invisible population of migrant farm workers of their rights and ensuring that they are able to meaningfully enjoy these rights. Some of the

144. FOSTER, *supra* note 1, at 344.

work that is being done has already been mentioned in this paper but bears repeating – the non-government sector can foster a forum for migrant farm workers by collecting case studies, doing more research, encouraging the establishment of outreach programs, pushing the government to take a more comprehensive approach to the human rights of migrant workers, and campaigning for the worldwide ratification of an international instrument on migrant worker rights. Basically, at the moment, almost no one talks about this issue. What is needed most urgently then, is someone to talk about it, to bring a critical eye to the system under which Canada welcomes apple-pickers from Mexico and tobacco-growers from Barbados. Without such attention, Canada can continue to pick and choose its migrant farm workers, use them up, and throw the husks away.

